DIVERGENT DEVELOPMENT OF THE COMMON LAW IN JURISDICTIONS WHICH RETAIN APPEALS TO THE PRIVY COUNCIL*

In *Australian Consolidated Press* v. *Uren,* a 1970 decision on appeal from Australia, the Privy Council acknowledged that there was scope for divergent development of the common law in different jurisdictions. Statements of the Privy Council in several cases in the 1980s indicate that the Privy Council may have developed a more negative attitude toward divergent development of the common law, at least in those jurisdictions which have retained appeals to the Privy Council. In this article the author discusses the development of the common law in each of the jurisdictions which has given rise to one of the decisions of the Privy Council containing statements on divergent development of the common law — Australia, Malaysia, Hong Kong and New Zealand. He then summarises his conclusions on the most important factors determining the scope for divergent development. Finally, he discusses the implications of the above analysis to the situation in Singapore.

I. INTRODUCTION

A. Uniformity of the Common Law During the Colonial Period

As British sovereignty and control was extended to its overseas colonies and dominions, it was usually provided that the law of England was to be the basic law of the territory. In settled colonies the introduction of English law was usually accomplished by application of the general principles of the common law on the reception of English Law. In other colonies or protectorates the introduction of English law was usually accomplished by a legislative provision in an English Act of Parliament, in an instrument of the Royal Prerogative, or in an ordinance passed by the local legislative authority. Such legislative provisions usually provided that the laws of England on a particular date, such as the date of the formation of the colony, were to apply, subject to local legislation and subject to such qualifications as local circumstances in the territory or its inhabitants render necessary.[1]

Local courts of judicature were established in the colonies to administer law and justice. It was generally provided, however, that the Judicial Committee of the Privy Council was to serve as the final appellate court for the territory. It was the Privy Council which served to establish uniformity in the common law in the various jurisdictions in the colonial empire. Since it was the highest court in the hierarchy of courts, for each jurisdiction, its decisions were binding on the local courts under the principle *of stare decisis.*

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1 See generally, *Halsbury's Laws,* Vol. 6, Commonwealth and Dependencies, paras. 1194–1199; Roberts-Wray, *Commonwealth and Colonial Law* (1966); J. E. Cote, "The Reception of English Law", 15 Alberta L. R. 29 (1977).

Although the House of Lords was not part of the hierarchy of courts in any jurisdiction outside of England and Scotland, the courts in the jurisdictions which took appeals to the Privy Council generally considered themselves bound to follow judgments of the House of Lords on matters governed by the common law. The attitude of the English courts during this period on the authority of decisions of the House of Lords can be seen from the following statement of Viscount Dunedin in *Robins* v. *National Trust Co. Ltd.,* a 1927 decision of the Privy Council on appeal from the Supreme Court of Ontario:

> "[W]hen an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. *It is otherwise if the authority in England is the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court which is bound by English law is bound to follow it.* Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board."[2]

The end of World War II marked the beginning of the move toward self-government and independence in most of the former British colonies. Some former colonies received independence rapidly. In others the move for self-government was more gradual. In most cases, however, the English legal system based upon the common law remained as the basic law. In many jurisdictions the Judicial Committee of the Privy Council continued to serve as the final appellate tribunal, even after independence was achieved.

It was the English common law as finally declared by the House of Lords (and sometimes the Privy Council) which served as the common foundation for the legal systems in these jurisdictions. If a jurisdiction were to end appeals to the Privy Council after achieving independence, its highest courts were likely to gradually develop the common law along divergent lines.

The more interesting question for consideration is how the common law would develop in those jurisdictions which retained appeals to the Privy Council. Would they continue to accept that there was one common law and that the House of Lords was the final authority on the common law not only for England but also for their jurisdiction? Or would they assert their independence from the House of Lords and attempt to develop the common law in their jurisdiction to meet the particular needs and circumstances of their society? Would the Privy Council attempt to play its traditional role of unifying the common law in the colonies, or would it accept that divergent development was possible?

B. Statements of the Privy Council on Divergent Development

The starting point for discussing the question of divergent development of the common law is *Australian Consolidated Press* v. *Uren*[3], a 1967 judgment of the Privy Council on appeal from the High Court of

[2] [1927] All. E. R. Rep. 73 at p. 76. Emphasis added.
[3] [1969] 1 A.C. 590 (P.C.).

Australia. In that case the Privy Council recognised that the common law could develop in different directions in different jurisdictions. It upheld the judgments of the High Court of Australia in the case at hand and in *Uren* v. *John Fairfax & Sons Pty. Ltd.*,[4] in which the High Court had refused to follow the decision of the House of Lords in *Rookes* v. *Barnard*.[5]

Statements in Privy Council decisions after *Australian Consolidated Press* seem to have narrowed the scope for divergent development of the common law in jurisdictions which retain appeals to the Privy Council. Statements in two decisions on appeal from Hong Kong (*de Lasala* v. *de Lasala*[6] and *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd. and Ors.*[7]) and one decision on appeal from New Zealand (*Hart* v. *O'Connor*[8]) seem to imply that courts in jurisdictions which retain appeals to the Privy Council must follow decisions of the House of Lords in areas governed by the common law unless there are local circumstances peculiar to that jurisdiction which make the judgment of the House of Lords unsuitable. However, in a decision on appeal from the Federal Court of Malaysia *(Jamil bin Harun* v. *Yang Kamsiah*[9]*),* the Privy Council seemed to adopt a very different approach, and grant much greater scope for the courts in Malaysia to not follow modern decisions of the House of Lords. Doubts have therefore been raised as to the freedom of the highest appellate courts in jurisdictions which retain appeals to the Privy Council to choose to depart from decisions of the House of Lords and develop the common law in their jurisdiction along divergent lines.

C. Analysing the Statements of the Privy Council

In this article I will analyse the statements of the Privy Council in the above cases and attempt to come to some conclusions on the scope for divergent development of the common law in jurisdictions which retain appeals to the Privy Council. I will contend that the statements of the Privy Council in those cases cannot be taken out of context but must be analysed in light of certain factors, some of which are not expressly discussed in the judgments. The factors which I consider to be the most important are:

(1) legislative provisions on the application of English law;
(2) the attitude of the judiciary towards the authority of judgments of the House of Lords and the development of the common law in their jurisdiction;
(3) whether it is accepted that English law applies in the case at hand; and
(4) the area or field of law involved in the dispute.

4 (1965–66) 117 C.L.R. 118.
5 [1964] A.C. 1129(H. L.).
6 [1980] A.C. 546 (P.C.).
7 [1985] 3 W.L.R. 317(P.C).
8 [1985] 3 W.L.R. 214 (P.C).
9 [1984] 2 W.L.R. 668 (P.C.).

D. Organisation of this article

To analyse the cases in the manner I have described above, I have organised this article along jurisdictional lines. I will first discuss the development of the common law in each of the jurisdictions which has given rise to one of the decisions of the Privy Council containing statements on divergent development of the common law — Australia (Part II), Malaysia (Part III), Hong Kong (Part IV) and New Zealand (Part V). For each jurisdiction I will examine how English law was received, including the legislative provisions on the application of English common law. I will also examine the attitude of the judiciary in the jurisdiction if it appears to have been an important factor. I will then analyse the relevant judgment or judgments of the Privy Council from that jurisdiction in light of these factors. In Part VII will attempt to summarise my conclusions on the most important factors determining the scope for divergent development in jurisdictions which retain appeals to the Privy Council. Finally, in Part VIII will discuss the implications of the above analysis to the situation in Singapore.

II. THE DEVELOPMENT OF THE COMMON LAW IN AUSTRALIA AND THE JUDGMENT OF THE PRIVY COUNCIL *IN AUSTRALIAN CONSOLIDATED PRESS* v. *UREN*

A. The Reception of English Law in Australia

English law was received as the basic law of the Australian states because they were treated as "settled colonies" for the purposes of applying British constitutional principles concerning the reception of English law. The Australian Courts Act 1828[10] was passed by the British Parliament to clear up doubts as to whether New South Wales should be treated as a settled colony. Section 24 of the Act provided "That all Laws and Statutes in force within the realm of England at the time of the passing of this Act… shall be applied in the Administration of Justice in the Courts in New South Wales and Van Diemen's Land [Tasmania] respectively …" 1828 was also the year of reception of English law in Victoria and Queensland. South Australia and Western Australia were treated as "settled colonies"; the dates of reception in the two states were 1836 and 1829 respectively.[11]

Since English law, including the common law, was received in Australia as of particular dates, it was up to the courts to determine the authority of English decisions. In applying English case law on matters of common law and equity the Australian courts apparently did not attempt to give any importance to the date of reception. Nor did they give much importance to the local circumstances exceptions. Instead, they placed great weight on the precedent making authority of decisions of the higher English Courts. The uniformity between the English and local decisions on common law questions was aided by the fact that appeals were taken from all of the Australian courts to the Privy Council.[12]

[10] 9 Geo. IV, c. 83.

[11] Alex. C. Castles, "The Reception and Status of English Law in Australia", 2 Adelaide L. Rev. 1–4 (1963).

[12] *Ibid,* at p. 6.

Until the 1960's the Australian courts had agreed that they should follow decisions of the House of Lords on questions of common law. Being the highest appellate court in England, it was the final authority on the common law.[13]

B. The Move for Divergent Development in Australia

In the 1960s the Australian High Court adopted a new approach to decisions of the House of Lords. It began with the following statement by Dixon C.J. in 1963 in *Parker* v. *The Queen:*[14]

> "Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think we cannot adhere to that view or policy. There are propositions laid down in that judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept...I am authorised by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph."

In *Skelton* v. *Collins*[15] the High Court of Australia again reviewed its policy with respect to the treatment of decisions of the House of Lords. The members of the court agreed that although judgments of the House of Lords should be very highly persuasive, the High Court could refuse to follow a decision of the House of Lords if it was convinced it as wrong.[16] Windeyer J. also stated that although judgments of the House of Lords would normally be followed, not all judgments and all statements in their speeches were equally acceptable. When decisions were reached only with reference to English decisions and to the social and economic conditions in England, they were less persuasive when conditions were not the same in Australia.[17]

In *Uren* v. *John Fairfax & Sons Pty. Ltd.*[18] the High Court refused to follow the decision of the House of Lords in *Rookes* v. *Barnard*[19] on exemplary damages. One of the major reasons given by the court for their refusal to follow *Rookes* v. *Barnard* was that following it would involve a radical departure from what was regarded as established law in Australia on punitive damages. The High Court was also concerned that the line was drawn in England without taking into account the development of the law in Australia.[20] Finally, several members of the High Court questioned whether the decision in *Rookes* v. *Barnard was* consistent with the existing law in England on punitive damages. This conscious decision by the High Court to refuse to follow the decision of the House of Lords was reviewed by the Privy Council in *Australian Consolidated Press* v. *Uren.*

13 *Webb* v. *Outrim(\961)* 4 C.L.R. 356; *Piro* v. *Foster & Co. Ltd.* (1943) 68 C.L.R. 313.
14 (1963) 111 C.L.R. 610 at pp. 632–633.
15 (1965–1966) 115 C.L.R. 94.
16 *Ibid;* Owen J. at 139; with whom Taylor J. agreed at p. 122; Windeyer at p. 135.
17 *Ibid,* at p. 135.
18 (1965–66) 117 C.L.R. 118.
19 [1964] A.C. 1129.
20 *Uren* v. *Fairfax, supra* note 18 at p. 138.

When the High Court declared in the above cases that it would no longer be bound by decisions of the House of Lords, it does not appear to have considered the legislative provisions regarding the application of English law. The legislation provided that "the law of England" was received as of a particular date. One could infer that the High Court did not believe that the legislative provisions required it to consider itself bound to follow modern decisions of the House of Lords. Rather, the High Court appears to have approached the authority of decisions of the House of Lords from the point of view of principles of *stare decisis,* reasoning that since the House of Lords was not part of the hierarchy of courts of Australia, its decisions could not be considered as technically binding on the High Court.

The High Court of Australia has since become the final authority to determine what is the common law of Australia. Although it still pays the highest respect to decisions of the House of Lords, it has assumed the responsibility to develop the common law to meet the needs and conditions of Australia.[21]

C. Austalian Consolidated Press v. Uren

In *Australian Consolidated Press* v. *Uren*[22] the Privy Council accepted the refusal of the High Court of Australia to follow the decision of the House of Lords in *Rookes* v. *Barnard.* In the following passages delivered by Lord Morris of Borth-Y-Gest, the Privy Council acknowledged that divergent development of the law was permissible, at least in certain circumstances:

> *"There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others.* In trade between countries and nations the sphere where common acceptance of view is desirable may be wide .... *But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling.* Furthermore a decision on such a question as to whether there may be a punitive element in an assessment of damages for libel must be much affected by the fact, if fact it be, that in a particular country the law is well settled.[23] ... The issue that faced the High Court in the present case was whether the law as it had been settled in Australia

[21] After Australia passed legislation ending appeals to the Privy Council from the High Court, [Privy Council (Limitation of Appeals) Act 1968, 1973 and Privy Council (Appeals from the High Court) Act, 1975] the High Court ceased to be bound by decisions of the Privy Council, and became the final court of appeal as to the principles of common law applicable throughout Australia. For a statement of this position, see *Viro* v. *R.* (1978) 18 A.L.R. 257. The attitude of the High Court of Australia towards the development of the common law after it became the final court of appeal in Australia was summarised by former Chief Justice Barwick in *Cullen* v. *Trappell* (1980) 29 A.L.R. 1 at pp. 3–4 and in *R. v. O'Connor* (1980) 29 A.L.R. 449 at pp. 453–454.

[22] [1969] 1 A.C. 590(P.C.).

[23] *Ibid,* at p. 641. Emphasis added.

> should be changed. *Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide* whether the decision in *Rookes* v. *Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.. ,"[24]

D. Analysis of Australian Consolidated Press

The language in this quotation is vague enough to cast some doubt on the actual extent to which the Privy Council agreed that divergent development would be permitted. Lord Morris gave weight to at least three factors. First, the law of punitive damages in Australia prior to *Rookes* v. *Barnard* was well settled in a matter inconsistent with that declared by the House of Lords in *Rookes* v. *Barnard.* Second, Lord Morris seemed to place great weight on the "sphere of law". It was not an area of law like international trade where there may be a special need for uniformity with English law, but an area of tort law where it is the function of the courts to define the limits as a matter of "policy". Also, it was implied that the local courts would have a similar discretion to develop the law on divergent lines if the matter in question had been one "which may considerably be of domestic or internal significance". Third, the law of Australia had not developed by processes of faulty reasoning, nor had it been founded upon misconceptions.

The Privy Council had finally acknowledged that there was no longer a single uniform common law. The door was open for the highest appellate courts in jurisdictions in the Commonwealth to free themselves from the fetters of the House of Lords and develop the common law in their jurisdiction to meet the particular needs and circumstances of their society. However, the exact scope for divergent development by the courts in other jurisdictions was not clear from the statement. Would the decision of the Privy Council have been the same had the law on punitive damages in Australia not been settled? In an area of law which is determined by judicial policy, like duty of care in negligence, would it be possible to depart from a decision of the House of Lords, not because of local circumstances, but because a decision from another jurisdiction was preferred as a matter of policy?

Australian Consolidated Press was an easy case for the Privy Council to allow a departure from a decision of the House of Lords. It was easy because the area of law involved was one: (1) where the law in Australia was well settled; (2) where the law was determined by judicial policy; (3) where the judicial policy in the area could be linked to the local circumstances in Australia; and (4) where there was no need for the law in Australia to be uniform with that in England.

[24] *Ibid,* at p. 644. Emphasis added.

In my opinion the decision in *Australian Consolidated Press* must also be read in light of the fact that the High Court had recently asserted its independence from the House of Lords in *Parker* v. *The Queen*[25] and had made a conscious decision to refuse to follow *Rookes* v. *Barnard.* Given the attitude of the High Court, and the fact that it was a highly respected court, it would have been difficult for the Privy Council to have stated that the House of Lords was the final authority on the common law not only for England but for all jurisdictions which had received it as its basic law.

III. The Development of the Common Law in Malaysia and the Judgment of the Privy Counsel *in Jamil v. Yang Kamsiah*

A. The Reception of English Common Law in Malaysia[26]

The situation with respect to the applicability of English law in the unfederated and Federated Malay States prior to 1956 was quite unclear. This was because the British method of establishing influence and control in the Malay States on the peninsula of Malaya was less direct than in the Straits Settlements. Because the Malay States were British protectorates and not colonies or territories over which the British had sovereignty, English law was not applicable in the Malay States under the general principles governing the reception of English law. Although the Federated Malay States was established in 1895, no provision formally receiving English law was enacted until 1937. Under the Civil Law Enactment of 1937, the common law of England and the rules of equity administered in 1937 were declared to be in force in the Federated Malay States. This provision was eventually extended throughout the Malay peninsula.

B. Section 3 of the Civil Law Act[27]

The applicable legislative provision in Malaysia is section 3 of the Civil Law Ordinance 1956 (Rev. 1972).[28] It provides that the courts shall apply *the common law of England and the rules of equity as administered in England on a particular date.* The applicable dates are 7th April 1956 for west Malaysia (formerly Federation of Malaya), 12th December 1949 for Sarawak and 1st December 1951 for Sabah.

C. Lee Kee Chong v. Empat

Section 3 of the Civil Law Act was previously interpreted by the Privy Council in *Lee Kee Chong* v. *Empat Nombor Ekor (N.S.) Sdn. & Ors.*[29]

25 *Supra* note 14.

26 See generally G.W. Bartholomew, *The Commercial Law of Malaysia* (1965); L.A. Sheridan, Ed., *Malaya, Singapore and The Borneo Territories: The Development of their Laws and Constitutions* (1961); Wu Min An, *An Introduction to the Malaysian Legal System* (3rd ed., 1982).

27 On section 3 of the Civil Law Act, see generally, Ahmad Ibrahim, "Privy Council Decisions on Wakaf: Are they binding in Malaysia?" [1971] 2 M.L.J. vii; J. Chia, "The Reception of English Law under Sections 3 and 5 of the Civil Law Act 1956 (Revised 1972)", 1 J.M.C.L. 42–47 (1974); Bartholomew, *Ibid,* at pp. 105–198; Sheridan, *Ibid,* at pp. 18–19.

28 Laws of Malaysia, Act 67 (1972).

29 [1976] 2 M.L.J. 93.

The issue in that case concerned the valuation of shares. In the course of his judgment Lord Russell of Killowen made the following statement:

> "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 the 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.* For present purposes it appears that the Civil Law Ordinance 1956, section 3, adopted English law as administered on its effective date, so that any subsequent march in English authority is not embodied."[30]

It is clearly implied from this statement that decisions of the House of Lords after 1956 were not binding on the Malaysian courts but would be of only persuasive authority.

D. Jamil v. Yang Kamsiah

Jamil bin Harun v. *Yang Kamsiah,*[31] a decision of the Privy Council on appeal from the Federal Court of Malaysia, was a case relating to the assessment of damages in a personal injury action. In deciding the issue relating to the assessment of damages the Federal Court had followed the 1980 decision of the House of Lords in *Lim Poh Choo* v. *Camden and Islington Area Health Authority.*[32] Appellant's counsel argued that the Federal Court had erred in law in following the English authorities because it was prevented from doing so by section 3 of the Civil Law Act. The judgment of their Lordships was delivered by Lord Scarman, who summarised the authority of English decisions in Malaysia in the following paragraph:

> "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 not further than 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 modern English authority should be accepted. *On appeal the Judicial Committee would ordinarily accept the view of the Federal Court as to the persuasiveness of modern English case law in the circumstances of the States of Malaysia, unless it could be demonstrated that the Federal Court had overlooked or misconstrued some statutory provision or had committed some error of legal principle recognised and accepted in Malaysia.*[33]

E. Analysis of Jamil v. Yang Kamsiah

Lord Scarman seems to have recognised that the Malaysian courts have a wide measure of discretion to develop the common law in

[30] *Ibid,* at p. 95.
[31] [1984] 2 W.L.R. 668(P.C.).
[32] [1980] A.C. 174(H.L.).
[33] *Supra* note 31 at p. 672. Emphasis added.

divergent directions from that of England. Modern English authorities are regarded as only persuasive, and it is up to the Malaysian courts to decide if it is desirable to choose to follow them. Lord Scarman states that the only circumstance in which the Privy Council would interfere with a decision of the Malaysian courts would be when it has committed some doctrinal error. The error could be that it had overlooked or misconstrued a statutory provision or had committed some error of legal principle recognised and accepted in Malaysia. However, since English judges are not always consistent or clear on what they mean by a "legal principle", the exact scope of the review by the Privy Council under this language is not clear.

In the above statement from *Jamil* v. *Yang Kamsiah* the Privy Council seems to give the courts of Malaysia more latitude to depart from modern English decisions than it gave to the High Court of Australia under the standards established in *Australian Consolidated Press.* As will be seen later, the statement in *Jamil* also seems to be irreconcilable with the statements of the Privy Council with regard to the authority of English decisions in Hong Kong and New Zealand.

How can one explain the seemingly different attitude of the Privy Council with respect to the authority of modern English decisions in Malaysia? In my opinion it can only be understood if it is read in light of the wording of section 3 of the Civil Law Act and the previous decision of the Privy Council in *Lee Kee Chong.* Admittedly, Lord Scarman did not mention either section 3 or *Lee Kee Chong* in the decision. But I would argue that the members of the Privy Council must have had them in mind. The statement of Lord Scarman is consistent with the position of the Privy Council in *Lee Kee Chong* on the effect of section 3 on the authority of modern English decisions in Malaysia. The statement in *Jamil* makes it clear that the effect of section 3 is that developments in English law after 1956 do not in themselves form part of the law of Malaysia, but that this does not prevent the Malaysian courts from following post-1956 English decisions should they choose to do so.

If my analysis is correct, the Malaysian situation shows that legislative provisions on the application of English law can be a decisive factor in determining the scope for divergent development of the common law. The conclusion can be drawn that *if the legislative provision is drafted to provide that the common law as administered in England on a particular date is to be applied, the local courts will be free to not follow decisions of the House of Lords after that date.*

IV. The Development of the Common Law in Hong Kong and the Judgments of the Privy Council in *De Lasala* and *Tai Hing Cotton Mill*

A. The Reception of English Law in Hong Kong

Legislation governing the reception of English law was first enacted in Hong Kong in 1873. Section 5 of the Supreme Court Ordinance 1873[34] provided that such of the "laws of England" as existed on the 5th day of April, 1843, shall be in force in the Colony, subject to the usual ex-

[34] No. 12 of 1873.

ceptions. The section did not have any separate provision for the "common law and rules of equity", but had only a general provision importing the "laws of England" as of a particular date. Like most jurisdictions, Hong Kong courts continued to apply modern English decisions in areas governed by the common law.[35]

The provision in Hong Kong was similar to that in Australia (and as we shall see later, New Zealand). If my analysis of the Australian situation is correct, the Hong Kong Court of Appeal could have asserted its independence from decisions of the House of Lords in the same manner as the Australian High Court. Under this legislation it arguably was up to the Hong Kong courts to determine the authority of decisions of the House of Lords in areas governed by the common law.

B. Section 3 of the Application of English Law Ordinance

The Application of English Law Ordinance 1966, as amended in 1971,[36] provides in section 3 that "the common law[37] and rules of equity shall be in force in Hong Kong", subject to several exceptions. The Application of English Law Ordinance was enacted to simplify the position on the application of English law, particularly statute law, as it had become a tedious and prolonged exercise to discover what the laws of England in 1843 were.[38]

Although the modern ordinance may not have intended to alter the situation with respect to the authority of English decisions in areas governed by the common law, it may have done so. The ordinance provides that the common law of England shall apply, subject to the local circumstances qualification. Since it contains no cut-off date like section 3 of the Civil Law Act of Malaysia, it could be interpreted to provide for the "continuing reception" of recent decisions of the English courts on matters governed by the common law. If so interpreted, the Hong Kong courts would have less freedom to choose to depart from decisions of the House of Lords. They could not depart unless they determined that the English law in the case at hand was not suitable due to local circumstances in Hong Kong or its inhabitants.[39]

The Hong Kong Court of Appeal does not appear to have made any statements which indicate that it feels it necessary or desirable to depart from modern English decisions and develop a common law which is more suitable to the needs and circumstances of its inhabitants. This may be due to the wording of the Application of English Law Ordinance. Or it may be due to the fact that Hong Kong is still a colony served primarily by English judges. Or the judges may feel that following modern English decisions on the common law promotes certainty, predictability and justice. In any case, the members of the

[35] Peter Wesley-Smith, "Pre-1843 Acts in Hong Kong", 14 Hong Kong L.J. 142 at p. 143.

[36] Cap. 88, Laws of Hong Kong, 1971 ed.

[37] Under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1 Laws of Hong Kong 1982 Ed.), "common law" means the common law of England.

[38] Wesley-Smith, *supra* note 36.

[39] This interpretation of the Application of English Laws Ordinance has not been accepted by academics in Hong Kong. See Peter Wesley-Smith, "The Effect of *de Lasala* in Hong Kong" (1986) 28 Mal. L.R. 50.

Court of Appeal have clearly not made statements similar to those made by the members of the Australian High Court. Nevertheless, the authority of English decisions in Hong Kong was discussed by the Privy Council in two cases.

C. de Lasala v. de Lasala

de Lasala v. *de Lasala,*[40] a decision of the Privy Council on appeal from Hong Kong, concerned the question of whether the Court of Appeal of Hong Kong could refuse to follow a decision of the House of Lords on the interpretation of "recent common legislation" in the area of family law. However, the judgment of Lord Diplock also contains *obiter dicta* on the authority of decisions of the House of Lords on matters governed by the common law:

> *"Robins v. National Trust Co.* [1927] A.C. 515 involved a question that was governed by the common law of England as received in Ontario in 1792. It has become generally accepted at the present day that the common law is not unchanging but develops to meet the changing circumstances and patterns of the society in which it is applied. In *Australian Consolidated Press Ltd.* v. *Uren* [1969] 1 A.C. 590 it was accepted by this Board that the common law as to the right to punitive damages for tort had of recent years developed in different ways in England and in New South Wales and that neither Australian courts themselves nor this Board sitting on an appeal from an Australian court were bound by the decision of the House of Lords in *Rookes* v. *Barnard* [1964] A.C. 1129 which limited the categories of cases in which punitive damages could be awarded in England. So too in Hong Kong, where the reception of the common law and rules of equity is expressed to be "so far as they are applicable to the circumstances of Hong Kong or its inhabitants" and "subject to such modifications as such circumstances may require", *a decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of the Application of English Law Ordinance is not ipso facto binding on a Hong Kong court although its persuasive authority must be very great, since the Judicial Committee of the Privy Council, whose decisions on appeals from Hong Kong are binding on all Hong Kong courts, shares with the Appellate Committee of the House of Lords a common membership. 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."*[41]

D. Analysis of de Lasala

It is interesting to note that Lord Diplock quoted *Australian Consolidated Press* v. *Uren* in this statement for the proposition that the common law develops to meet the changing circumstances and

[40] [1980] A.C. 546 (P.C.).
[41] *Ibid,* at pp. 557–558. Emphasis added.

patterns of the society in which it is applied, and for the proposition that the Privy Council sitting on an appeal from another jurisdiction is strictly speaking not bound by a decision of the House of Lords. However, he then states that although not *ipso facto* binding, the persuasive authority of decisions of the House of Lords is very great. So great is their persuasive authority that the Privy Council is not likely to diverge from a decision of the House of Lords unless such divergence is in a field of law where the local circumstances make it inappropriate for the common law to develop along the same lines. The major reason he gives in support of this conclusion is the common membership between the House of Lords and Privy Council.

In this statement Lord Diplock seems to recognise a much narrower scope for divergent development than did Lord Morris in *Australian Consolidated Press,* where it was recognised that divergent development was possible in areas where the law was determined by the judges as a matter of policy, or in other matters of local significance. For example, what if the issue of punitive damages in tort were to arise in Hong Kong, and the law in the colony on the subject was not settled? Could the Hong Kong Court of Appeal follow the Australian courts rather than *Rookes* v. *Barnard*? Would this be a "field of law in which the circumstances of the colony or its inhabitants make it *inappropriate* that the common law should have developed on the same lines in Hong Kong as in England"? It may be a field in which there is no special need for uniformity, and a field which is largely determined as a matter of policy by the judges, but do the local circumstances make it "inappropriate" that English law be followed? In reality the Australian authorities and the English authorities may both be equally appropriate to the circumstances of Hong Kong and its inhabitants. As I read *Australian Consolidated Press,* the Hong Kong Court of Appeal may have the discretion to make a choice. It appears more doubtful under the statement in *de Lasala,* although the court could attempt to justify its decision to follow the Australian law by asserting that the circumstances in Hong Kong are more similar to the circumstances in Australia than the circumstances in England.

An important question is whether the statement is intended to be applicable to all jurisdictions which retain appeals to the Privy Council, or whether it can be limited to the situation in Hong Kong. To limit it to the situation in Hong Kong, one would have to argue that it must be read in light of the terms of the Hong Kong Application of English Law Ordinance. If so, the statement arguably could be limited to jurisdictions like Hong Kong where the legislation provides for the continuing application of the common law of England without any cut-off date. In support of this argument it can be pointed out that Lord Diplock not only quoted the relevant language from the Ordinance, but that he expressly qualified his statement on the authority of House of Lords decisions by referring to "a decision of the House of Lords on a matter which is governed by the common law by virtue of the Application of English Law Ordinance". On the other hand, he failed to make clear if the language of the Ordinance, particularly the absence of a cut-off date, was a major reason for his position. He also failed to make clear if the position would be different if the legislative provision were worded differently.

Although it is not clear what weight Lord Diplock gave to the wording of the ordinance, it is clear that he considered important the fact that there is common membership between the House of Lords and the Privy Council. This common membership also existed in *Australian Consolidated Press,* but it was not even considered as relevant. Common membership in itself is also a rather weak argument, as has been pointed out by other writers.[42]

E. Tai Hing Cotton Mill

Tai Hing Cotton Mill Ltd. v. *Liu Chong Hing Bank Ltd. and Ors.*[43] raised issues of contract and tort relating to the customer's duty of care to his banker. The Privy Council reversed the decision of the Hong Kong Court of Appeal because it was inconsistent with two earlier decisions of the House of Lords. The reasons of their Lordships were delivered by Lord Scarman:

> "It was suggested, though only faintly, that even if English courts are bound to follow the decision in *Macmillan 's* case[44] the Judicial Committee is not so constrained. This is a misapprehension. *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. And their Lordships note, in passing, the Statement's warning against the danger of disturbing retrospectively the basis on which contracts have been entered into. *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.* An illustration of the principle in operation is afforded by the recent New Zealand appeal *Hart* v. *O'Connor* [1985] 3 W.L.R. 214, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disturbed person, holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principal of that law."[45]

[42] See Wesley-Smith, *supra* note 40.
[43] [1985] 3 W.L.R. 317 (P.C).
[44] *London Joint Stock Bank Ltd.* v. *Macmillan* [1918] A.C. 777, (H.L.).
[45] *Supra* note 44 at p. 331.

F. Analysis of Tai Hing Cotton Mill

The statement of the Privy Council in this case is similar to that in *de Lasala* in that it can also be seen as placing stricter limits on the scope for divergent development of the common law than had been recognised in *Australian Consolidated Press.* The Privy Council seems to be limiting the circumstances where a court is free to depart from a decision of the House of Lords to situations where, by reason of custom, statute or other reason peculiar to the jurisdiction, English law is not suitable. In any other case, the local courts should regard themselves as bound by a decision of the House of Lords, for the Privy Council will regard itself as bound. It might even be argued that the statement in this case seems to be little more than a reformulation of the local circumstances exception which has always qualified the reception of English law.[46]

On the other hand, Lord Scarman seems to qualify his statement by stating that it applies only to situations where "it has been decided or accepted" that English law is to be applied. He states that in *Tai Hing Cotton Mill* it was accepted that the applicable law was English law. Another justification given by Lord Scarman for the decision to reverse the Hong Kong Court of Appeal is that the area of law involved was contracts, an area of law where it is important not to change the law retrospectively.

The most important question which arises from Lord Scarman's statement is whether it applies only when it "was accepted or decided" that the question is to be governed by English law. If so, how does the Privy Council determine in a given case that it was accepted or decided that English law applied? Lord Scarman does not indicate how he arrived at the conclusion in this case that it was accepted that English law applied. Did the Privy Council consider the terms of the Application of English Laws Ordinance relevant on this question? Perhaps they should have, but they failed to mention it if they did. Was the statement of the Privy Council that it was accepted that English law applied based upon the fact that the Hong Kong Court of Appeal had accepted that the matter was governed by English law? Although the Court of Appeal in *Tai Hing Cotton Mill* seems to have accepted that English law applied, it is not clear how they reached that decision. It is not clear that they reached their decision because they were directed to apply English law under the terms of the Application of English Law Ordinance. Only one judge, Cons J., mentioned the Ordinance. He stated that he reached his conclusion based upon what he took to be established principles of English law.[47] After referring to the American authorities cited by counsel, he further stated:

> "[I]t seems to me that none of the authorities to which we have been referred conflicts significantly with what I have ventured to suggest is the result of established principles of English law. There is therefore no need, as I see it, to make a choice. Even had it been otherwise, I would respectfully have declined the invitation so charmingly extended by Mr. Morritt. This Court should apply what we take to be the common law of England unless 'the

[46] *Supra,* note 1.
[47] [1984] Lloyd's L.R. 555 at p. 563.

> circumstances of the Colony or its inhabitants make it inappropriate'. As to maintaining current accounts with a bank, it seems to me that the circumstances and inhabitants of Hong Kong are identical with those of England."[48]

Another important question which arises from the statement is whether the statement must be read in light of the area or field of law in issue. Lord Scarman mentions specifically the warning in the 1966 Practice Statement "against the danger of disturbing retrospectively the basis on which contracts have been entered into". Although he does not say so, it could have been argued that the area of law in this case (banking) was one in which there was more of a need for uniformity, given Hong Kong's place as an international banking centre. It therefore can be argued that the attitude of the Privy Council may be different if the dispute is in a field of law which is determined largely by judicial policy, or which is of considerable domestic significance, or where there is no special need for certainty or uniformity.

In conclusion, although the statement of the Privy Council in this case, like that in *de Lasala,* seems to limit the scope for divergent development to situations where the decision to not follow decisions of the House of Lords is due to circumstances peculiar to the jurisdiction, the statement can be qualified if it is read in its context. It is not clear to what extent the statement of the Privy Council in this case was influenced by the terms of the Application of English Law Ordinance. Nevertheless, it can be argued that the statement should be limited to situations in which it is "accepted or decided" by the appellate court in the jurisdiction that the issue in question is to be governed by English law. In addition, it can be argued that the statement should be read in light of the fact that the dispute was in an area of law where there was a special need for certainty and uniformity.

If the statement in this case is limited to circumstances where it is accepted or decided that English law applies, then it would not apply to limit divergent development in any jurisdiction where the appellate court had declared that it was not bound by decisions of the House of Lords, particularly if in the case at hand the court specifically chose to not follow an English decision. However, it might be applicable even in jurisdictions which had declared that they do not consider themselves bound by the House of Lords, if in the case at hand, it is agreed that the matter should be governed by English law.

V. THE DEVELOPMENT OF THE COMMON LAW IN NEW ZEALAND AND THE JUDGMENT OF THE PRIVY COUNCIL IN *HART* V. *O'CONNOR*

A. The Reception of English Law in New Zealand

Although there was apparently some doubt as to when New Zealand became subject to the laws of England during the early days of English

[48] *Ibid,* at p. 564.

settlement,[49] that doubt was removed by the passage of the English Laws Act by the New Zealand Parliament in 1858. The Act provided that the laws of England, so far as they were applicable to the circumstances of the colony, should be deemed to have been in force in the colony since January 14, 1840. The same provision is now contained in the English Laws Act 1908.[50]

The New Zealand provision on the application of English law is similar to those in Australia. It provided for the reception of the laws of England as of January 1840 so far as applicable to local circumstances. It had no specific provision on the application of the English common law or the common law and rules of equity. As far as the common law was concerned, it was left to the courts to determine the authority of decisions after 1840. The courts in New Zealand acted under the assumption that there was one single common law. The decisions of the highest English courts were scrupulously followed. The New Zealand courts regarded themselves as absolutely bound by decisions of the House of Lords, unless there was a conflicting judgment of the Privy Council.[51]

B. The Move for Divergent Development in New Zealand[52]

The New Zealand Court of Appeal moved slowly to assert its independence from the House of Lords in matters governed by the common law. When it began to assert its independence from the House of Lords in the 1970's, it followed the approach of the Australian High Court. It does not appear to have considered relevant the legislative provision in New Zealand on the application of English law. Like the High Court in Australia, it merely declared in the course of its judgments that it was not technically bound by decisions of the House of Lords.

The case which is regarded as finally establishing that the New Zealand Court of Appeal is not bound by decisions of the House of Lords is *Bognuda* v. *Upton & Shearer Ltd.*[53] In that case the New Zealand Court of Appeal addressed the question of the liability of the owner of land in respect of damage to adjacent land due to excavation. The court refused to follow the 1881 decision of the House of Lords in *Dalton* v. *Angus*[54] which stated that no action would lie unless the neighbour had an easement of lateral right of support. The Court held that the rule in *Dalton* v. *Angus* was built up on a theory of prescriptive rights and that theory was not a part of the law of New Zealand. In the course of their decision the members of the Court of Appeal stated that while judgments of the House of Lords were entitled to the greatest respect, they technically were not binding. This decision in itself could be explained as one in which the Court of Appeal did not follow the

[49] See J.L. Robson, *The British Commonwealth, The Development of its Laws and Institutions,* Volume 4, New Zealand, pp. 4–5 (2d ed., 1967).
[50] 1908, No. 55, Reprinted Statutes of New Zealand, Vol. 6, at p. 359 (1980).
[51] Robson, *supra* note 50 at pp. 101–103.
[52] See generally, Sir Robin Cooke, "Divergences — England, Australia and New Zealand" [1983] N.Z.L.J. 297.
[53] [1972] N.Z.L.R. 741.
[54] (1881)6 App. Cas. 740.

judgment of the House of Lords because it was not applicable to local circumstances. It therefore would fit within the general principles governing the reception of English law or the statements in *de Lasala,* or *Tai Hing Cotton Mill.* Nevertheless, the decision signaled a new assertion of independence from decisions of the House of Lords.

When the question of punitive damages arose in New Zealand in *Taylor* v. *Beere,*[55] the New Zealand Court of Appeal decided to follow the lead of the Australian High Court. It asserted its independence and refused to follow the decision of the House of Lords in *Rookes* v. *Barnard.* The most assertive statement of independence was made by Richardson J.:

> "This Court has not been called on to consider the scope of exemplary damages under New Zealand law following the decisions of the House of Lords in *Rookes* v. *Barnard* and *Broome* v. *Cassell* and the Judicial Committee in *Australian Consolidated Press* v. *Uren* [1969] 1 A.C. 590; [1967] 3 All E.R. 523. Nevertheless, it seems that, notwithstanding *Broome* v. *Cassell,* New Zealand trial judges have continued to adopt the wider approach which is also reflected in the decision of the Australian and Canadian Courts. While, for obvious reasons, we always give great weight to decisions of the House of Lords, *this is an area of social policy and legal philosophy where in the end it is for the New Zealand Courts to decide what the policy of the law of New Zealand should be.* In *Australian Consolidated Press* v. *Uren* Lord Morris of Borth-y-Gest, in delivering judgment of a Board which included North P of this Court, set out the relevant considerations in the following passage...."[56]

In *North Island Wholesale Groceries Ltd.* v. *Hewin,*[57] a case involving the assessment of damages, Richardson J. made the following statement:

> "[S]ince then a broader approach to precedent questions of this kind has been enunciated by this Court. See for example *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741 and *Taylor* v. *Beere* [1982] 1 N.Z.L.R. 81. For the obvious reasons indicated by the Privy Council in *de Lasala* v. *de Lasala* [1980] A.C. 546 we always give great weight to decisions of the House of Lords. *But the assessment of damages is necessarily an area of social policy and legal philosophy where in the end it is for the New Zealand Courts to decide what the policy of the law of New Zealand should be:* see, too, *Australian Consolidated Press* v. *Uren* [1969] 1 A.C. 590, 641."[58]

In the same case Somers J. stated that "it cannot now be said that this Court is bound by the House of Lords nor, since *Australian Consolidated Press* v. *Uren* [1969] 1 A.C. 590, that the common law is a uniform whole."[59]

[55] [1982] 1 N.Z.L.R. 81.
[56] *Ibid.* at p. 89. Emphasis added.
[57] [1982] 2 N.Z.L.R. 176.
[58] *Ibid.* at p. 190. Emphasis added.
[59] *Ibid.* at p. 195.

More recently, in *Busby* v. *Thorn EMI Video Programmes Ltd.,*[60] Cooke J. made several statements relating to the authority of decisions of the House of Lords in New Zealand. First, he cited *Jorgenson* v. *News Media (Auckland) Ltd.*[61] as "the leading illustration of a distinctly New Zealand development of the law of evidence".[62] Second, he cited *Bognuda* as "the case that may be regarded as perhaps finally establishing that this Court is not bound by the House of Lords, although always regarding decisions of the House with great respect and very slow to differ from them."[63] Third, he cited the above statements from *North Island Wholesale Groceries* as further authority for the proposition that the New Zealand Court of Appeal was independent from the House of Lords.[64]

The Rt. Hon. Sir Robin Cooke became the President of the New Zealand Court of Appeal in May 1986. In an interview in the New Zealand Law Journal shortly after his appointment, he spoke of the increasing number of cases in which the Court has been called upon:

> "[T]o try, cautiously but nevertheless definitely, to evolve something in the nature of a New Zealand common law, to develop the law in grey areas in a way which seems best suited to the circumstances, the environment and nature of this country."[65]

In the same interview he stated that the Court of Appeal has tended to look a little more widely for authorities from other jurisdictions, including significant American and Canadian authorities.[66]

C. Hart v. O'Connor

Hart v. *O'Connor*[67] raised the issue of the validity of a contract entered into by a lunatic. The members of the Privy Council refused to accept the proposition of law enunciated by the New Zealand Supreme Court in the case *of Archer* v. *Cutler*[68] even though the decision in that case had been expressly approved by a unanimous decision of the New Zealand Court of Appeal in the instant case as setting out what was the law of New Zealand. The reasons of their Lordships were delivered by Lord Brightman. The relevant paragraphs for our purposes are:

> *"*If *Archer* v. *Cutler is properly to be regarded as a decision based upon 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 upon the

60 [1984] 1 N.Z.L.R. 461.
61 [1969] N.Z.L.R. 961.
62 *Supra* note 61 at p. 472.
63 *Ibid,* at p. 473.
64 *Ibid.*
65 [1986] N.Z.L.J. 170 at p. 174.
66 *Ibid.*
67 [1985] 3 W.L.R. 214.
68 [1980] 1 N.Z.L.R. 386.

> 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. In their Lordships' opinion the latter is the correct view of the decision.[69] … In the opinion of their Lordships, to accept the proposition enunciated in *Archer* v. *Cutler* that a contract with a person ostensibly sane but actually of unsound mind can be set aside because it is "unfair" to the person of unsound mind in the sense of contractual imbalance, *is unsupported by authority, is illogical and would distinguish the law of New Zealand from the law of Australia,... for no good reason, as well as from the law of England from which the law of Australia and New Zealand and other "common law" countries has stemmed.* In so saying their Lordships differ with profound respect from the contrary view so strongly expressed by the New Zealand courts."[70]

D. Analysis of Hart v. O'Connor

The statements of Lord Brightman are similar in some respects to those of the Privy Council in *de Lasala* and *Tai Hing Cotton Mill.* He seems to be saying that unless a decision of the Privy Council is based on circumstances peculiar to New Zealand, in a matter of local significance, they must be regarded as statements which have general application throughout all jurisdictions based upon the common law. Although he does not say it directly it can be inferred from the decision that when it falls into the former category, it is permissible for the New Zealand Court of Appeal to depart from English decisions, but when it falls into the latter category, it is not permissible to depart from English decisions. In this case the decision was considered as falling into the latter category. It was then overruled. The main reasons given are that it was "unsupported by authority and illogical" and would distinguish the law of New Zealand from that in Australia and England for no good reason.

The most important question which arises is whether the principles enunciated in this case should be qualified when read in the context of the actual case and the other relevant factors. In our analysis of *Tai Hing Cotton Mill* we concluded that its principles would not be applicable unless it were accepted or decided that English law applied. In *Tai Hing Cotton Mill* Lord Scarman cited the decision in *Hart* v. *O'Connor* as an example of a case where because English law applied, the duty of the New Zealand Court of Appeal was not to depart from English law.

Was Lord Scarman correct in stating that this was another case where it had been accepted that English law applied? Perhaps it should be so read. However, in my opinion it is not clear from the judgments in the New Zealand cases that it was accepted or decided that English law applied. The New Zealand authority in question was the 1980 Supreme Court decision *of Archer* v. *Cutler.*[71] The court in *Archer* v. *Cutler* had undertaken a detailed examination of the leading textbook

[69] *Ibid.* at p. 223. Emphasis added.
[70] *Ibid.* at p. 233. Emphasis added.
[71] *Supra* note 69.

and case authorities on the subject and concluded that "the English law on the subject is ill-defined".[72] It then examined authorities from Australia and Canada, and concluded that there was nothing in policy or principle to prevent it from holding as it did.[73] It never expressly stated that it accepted that the matter was to be decided according to English law. In *O'Connor* v. *Hart*[74] the New Zealand Court of Appeal expressly approved the decision in *Archer* v. *Cutler.* In *O'Connor* v. *Hart* counsel on both sides accepted that the applicable law on the avoidance of contracts for lack of contractual capacity was correctly set out in *Archer* v. *Cutler.*[75] The Court of Appeal also took the opportunity to say that the law as set out in *Archer* v. *Culter* "is the law of New Zealand".[76]

When delivering the judgment of the Privy Council in *Hart* v. *O'Connor* Lord Brightman undertook a detailed analysis of the reasoning of McMullin J. in *Archer* v. *Cutler.* Lord Brightman begins by stating that the judgment in *Archer* v. *Cutler* contains "a most scholarly and erudite review by the judge of the textbook authorities and reported cases".[77] He ends by concluding that the judgment is illogical and unsupported by authority.[78] He gives no weight to the statement of the New Zealand Court of Appeal that it expressly approved *Archer v. Cutler* on the basis that its principle should be adopted for New Zealand. Lord Brightman stated that because the decision in *Archer* v. *Cutler* was not based upon local considerations or circumstances, the Privy Council could not properly treat the unanimous decision of the Court of Appeal as necessarily decisive. Since the decision must be regarded as having general application throughout all jurisdictions based upon the common law, the Privy Council cannot allow it to stand because it is not supported by authority.

How then, is the decision in *Hart* v. *O'Connor* to be read? Was the Privy Council not influenced by the fact that the New Zealand Court of Appeal had asserted its independence from the decisions of the House of Lords? Is *Hart* v. *O'Connor* a radical departure from the statements of Lord Morris in *Australian Consolidated Press*? I do not think so. Even if the Privy Council had applied the broader principles enunciated in *Australian Consolidated Press,* the decision in *Hart* v. *O'Connor is* not likely to have been upheld. In *Australian Consolidated Press* the Privy Council had declared that "had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it." Clearly the Privy Council was of the opinion that the decision in *Archer* v. *Cutler* was based upon faulty reasoning. Because the New Zealand courts had misread both the English and Commonwealth authorities, the Privy Council decided it must correct their decision. It must also be remembered that in this case the New Zealand courts did not expressly reject or refuse to follow English law.

72 *Ibid.* at p. 400.
73 *Ibid.* at p. 401.
74 [1983] N.Z.L.R. 280.
75 *Ibid.* at p. 284.
76 *Ibid.* at p. 290. This was later affirmed in another report on the case on appeal from a supplementary judgment, [1984] 1 N.Z.L.R. 754 at p. 755; a paragraph from this judgment is quoted by the Privy Council in *Hart* v. *O'Connor* [1985] 3 W.L.R. 214.
77 [1985] 3 W.L.R. 214 at p. 224.
78 *Ibid.* at p. 233.

It can be argued that the tenor of the judgment in *Hart* v. *O'Connor* suggests the Privy Council has a more generalized negative attitude towards divergent development of the common law, and that the judgment is a step back from their previous statement in *Australian Consolidated Press.* On the other hand, it can also be argued that the decision in *Hart* v. *O'Connor* is best confined to its facts as a case where the New Zealand courts wrongly applied both English and Commonwealth decisions. Alternatively, we can accept the analysis of Lord Scarman in *Tai Hing Cotton Mill* that *Hart* v. *O'Connor* was an illustration of a case where "because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law."[79] If either of the latter two interpretations of the statement in *Hart* v. *O'Connor* are correct, there will still be considerable scope for divergent development of the common law in New Zealand.

Since the New Zealand Court of Appeal has asserted its independence from decisions of the House of Lords as a matter of general principle, if in a given case it should choose to depart from a decision of the House of Lords and expressly say so in it's judgment, the Privy Council might still apply the broader principles enunciated in *Australian Consolidated Press.* If so, the area or field of law will be important in determining whether in a given case the Privy Council will allow the New Zealand Court of Appeal to depart from a decision of the House of Lords.

VI. Conclusions Regarding the Most Important Factors Determining Divergent Development

A. Legislative Provisions on the Application of English Law

The precise wording of any legislative provision governing the application of the English common law may be of critical importance in determining the authority of decisions of the House of Lords in the particular jurisdiction and thus the scope for divergent development of the common law. In the jurisdictions examined in this article there appear to be three different types of legislative provisions, each with different effects.

(1) The legislative provision may free the courts from having to follow modern decisions of the House of Lords. For example, if there is a modern provision like that in Malaysia which states that the courts are to apply *the common law as administered in England on a particular date,* the Privy Council seems to accept that decisions of the House of Lords after that date are merely persuasive. The principles set down in *Jamil* v. *Yang Kamsiah* would then be applicable.

(2) The legislative provision may be important in limiting the scope for divergent development in the jurisdiction if it specifically provides for the continuing reception of modern English decisions. Although the evidence is not conclusive, the Application of English Law Act of Hong Kong could be

[79] See quotation in text which is cited in note 45.

interpreted to provide for the continuing reception of the English common law unless it is not applicable due to local circumstances. This is because it declares that English common law is applicable, without providing any cut-off date. If the legislation is so interpreted, it could have the effect of determining that English law is to apply, and the Privy Council would apply the principles enunciated in *de Lasala* and *Tai Hing Cotton Mill.* In such a case the local court would not be allowed to depart from a decision of the House of Lords unless the circumstances in the jurisdiction or its inhabitants were such that the English decision was not suitable. As explained earlier, it is not clear from the cases that the Hong Kong ordinance is to be interpreted this way.

(3) The legislative provision may not be important in determining the scope for divergent development except that it does not prevent the appellate courts from asserting their independence from the House of Lords. This is the situation in Australia and New Zealand, which have legislative provisions which provide that "the law of England" was received as of a particular date in the nineteenth century. In such legislation there is no specific provision on the application of the "English common law" or "the common law and rules of equity". Also, there is no specific provision stating that the English common law is to apply "as administered on a particular date". In such a situation, it is apparently up to the courts in the jurisdiction to determine the authority of modern English decisions. Australia and New Zealand are jurisdictions with legislation of this type where the highest appellate courts have expressly stated that they will not be bound by decisions of the House of Lords. They have apparently not considered the legislative provision relevant to the question of whether they have the freedom to assert their independence from the House of Lords.

B. The Attitude of the Judiciary in the Jurisdiction

In the final analysis, the most important factor which will determine the degree of divergence from the English common law in any jurisdiction which retains appeals to the Privy Council will be the level of consciousness of the members of judiciary in that jurisdiction. It is only when there is a consensus among the members of the highest appellate court that it is necessary and desirable to develop the common law in their jurisdiction to meet the particular needs and circumstances of their society, that divergent development is likely to take place. When such a need for divergent development is recognised by the judiciary, they are likely to assert their independence from decisions of the House of Lords unless their power to do so is limited by legislation on the application of English law.

The highest appellate courts in Australia and New Zealand appear to have made a deliberate and conscious effort in the 1960's and 1970's to assert their independence from the House of Lords and assume a greater role in developing the common law for their jurisdiction in accordance with their particular needs and circum-

stances. When the highest appellate court in the jurisdiction makes it clear that it does not regard itself as bound by decisions of the House of Lords, it seems to me that it must be acknowledged by the Privy Council that there is scope for divergent development of the common law in that jurisdiction according to the principles enunciated in *Australian Consolidated Press.* This would allow the appellate court to depart from decisions of the House of Lords for reasons other than the peculiar circumstances in their jurisdiction.

C. Whether it is Accepted that English Law Applies

If in a given case the appellate court in a jurisdiction accepts that the legal issue in question is governed by English law, the Privy Council would be correct in applying the principles enunciated in *Tai Hing Cotton Mill.* For even if the appellate court has as a matter of principle asserted that it is not bound by decisions of the House of Lords, if it accepts that English law is to apply in a given case, the Privy Council should not allow the decision if that court has wrongly applied English law.

On the other hand, if in any case the appellate court in a jurisdiction decides to not follow a decision of the House of Lords, it should expressly state in its judgment that it does not accept that English law applies, and that it intends to not follow a decision of the House of Lords. This would be a clear signal to the Privy Council that it expects the broader principles enunciated in *Australian Consolidated Press* to be applied.

D. The Area or Field of Law

When an appellate court in a jurisdiction chooses to not follow a decision of the House of Lords, the crucial question will be whether the Privy Council will allow the departure if the case is appealed. This may depend to a large extent on the area or field of law in issue in the case at hand. Among the reasons which are most likely to be accepted by the Privy Council for a court not following the House of Lords are the following:

(a) that the particular area or field of law has developed along different lines and is well settled in that jurisdiction, and that to follow the House of Lords would necessitate overruling a line of decided cases. This argument is even stronger if the area or field of law is one where persons could be expected to have relied upon the settled law in planning and carrying out their activities.

(b) that the area of law is one which is of considerable domestic significance and one in which the economic, social or political conditions in the jurisdiction may not be the same as in England. This area is closest to the traditional local circumstances qualification. This would be in contrast to an area like international trade or banking law where there may be reasons for certainty and uniformity in the rules of the common law.

(c) that the area of law is one which is determined by the courts as a matter of judicial policy. An example would be the determination of a duty of care in negligence. Could a court choose to follow the decision from Canada or the United States in preference to a decision of the House of Lords because the court preferred as a matter of policy the judgment of the other court to that of the House of Lords? This would be a very difficult case and the court would be advised to try to link their decision to local circumstances in their jurisdiction and not rely only on the fact that the law is determined by judicial policy.

If an appellate court chooses to depart from the House of Lords along the lines described above, the role of the Privy Council will be to apply the principles enunciated in *Australian Consolidated Press* v. *Uren.* Unless the decision has "developed by faulty reasoning or been founded on misconceptions", the Privy Council should allow the departure from the decision of the House of Lords.

In conclusion, in my opinion there is still scope for divergent development of the common law in jurisdictions which retain appeals to the Privy Council in accordance with the principles enunciated in *Australian Consolidated Press.*

VI. Scope for Divergent Development of the Common Law in Singapore

Although independent since 1965, Singapore has chosen to retain appeals to the Privy Council. The above analysis is therefore directly relevant in determining the scope for divergent development of the common law by the courts of Singapore. I will therefore discuss the factors listed above in light of the situation in Singapore.[80]

There is no statute or other legislative provision in Singapore which governs the general reception of English law or the application of the English common law. However, it is generally accepted that the law of England as it stood in 1826 was received in Singapore and the rest of the Straits Settlements under the Second Charter of Justice[81] of 1826.[82] This means that the situation in Singapore would not be like that in Hong Kong, where the Application of English Law Act can be read to provide for the continuing reception of the common law. Neither would it be like Malaysia, where the legislative provision calls for reception of English law up to a particular "cut-off" date. The situation in Singapore would be similar to that in Australia or New Zealand, where the legislative provisions are not significant, and it is up to the courts to determine the authority of modern decisions of the House of Lords.

[80] The issues raised in this article were briefly addressed by Andrew Phang in a recent addition of this review: A. Phang, "Of 'Cut-off Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore", 28 Mal. L.R. 242 at pp. 247–249.

[81] Letters Patent establishing the Court of Judicature at Prince of Wales' Island, Singapore, and Malacca dated November 27, 1826.

[82] See generally, G.W. Bartholomew, "The Singapore Legal System" in *Singapore: Society in Transition* (R. Hassan, editor, 1976); A. Phang, "English Law in Singapore: Precedent, Construction and Reality or The Reception That Had To Be"', [1986] 2 M.L.J. civ.

The above statements on legislative provisions in Singapore are subject to one major exception. Although there are no legislative provisions on the application of the law of England generally or on the application of the English common law, there are legislative provisions in Singapore which direct the Singapore courts to apply English law in certain situations. The most important of these is section 5 of the Civil Law Act.[83] Section 5 provides that if issues with respect to mercantile or commercial law arise, 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. . . . " In situations where section 5 is applicable, the Singapore court is therefore bound to apply English law, whether it is statute law or case law. Since the final authority on English law is the House of Lords, in such cases the Singapore courts are bound to follow decisions of the House of Lords. This situation has been recognised by the Singapore courts. In *Gomez nee David* v. *Gomez,*[84] Coomaraswamy J. made the following statement:

> "The binding nature of English cases must be looked at against the context of the topic of law in question. Where under the provisions of our law the law of England is made the law in Singapore, courts in Singapore will feel bound by and apply the decisions of English courts in exactly the same way as a corresponding court in England would. This is of course subject to any provisions in the Singapore statute making the law of England applicable in Singapore. An example is section 5 of the Civil Law Act."[85]

It naturally follows that when such special legislative provisions are not applicable, the Singapore courts are not bound by decisions of the House of Lords on areas governed by the common law. To determine the scope for divergent development of the common law by the Singapore courts in such situations, we must consider the statements of the Privy Council in the above cases as well as the other factors which might be relevant.

I have argued that the attitude of the judiciary towards the need for divergent development in their jurisdiction is a critical factor. In contrast to the courts in Australia and New Zealand, the Singapore courts have not expressly asserted their independence from decisions of the House of Lords.[86] It is not clear whether any members of the Supreme Court believe that it is necessary and desirable to assert their independence from the House of Lords or develop the common law in Singapore to meet the particular circumstances and needs of

[83] Cap. 43, Singapore Statutes, 1985 Rev. Ed.

[84] [1985] 1 M.L.J. 27.

[85] *Ibid.* at p. 28.

[86] Statements in two cases in the Singapore High Court in the 1980's indicate that although Singapore judges do not regard themselves as "bound" by decisions of the House of Lords, they are "of high persuasive authority" or "always treated with respect". *The "Kota Pahlawan",* [1982] 2 M.L.J. 8 at p. 9; *Low Kok Tong* v. *Teo Chan Pan,* [1982] 1 M.L.J. 62 at p. 63. However, both of these cases involved the question of the authority of decisions of the House of Lords in interpreting a local statute. They were not concerned with the authority of decisions of the House of Lords in areas governed by the common law, which is the focus this article.

Singapore. Studies indicate that it is mostly English decisions which are cited by the Singapore courts.[87] In many cases when the issue in dispute is governed by the common law it is probably assumed by counsel for both sides and the courts that the matter is to be decided according to English (and local) decisions, even if the area or field of law is one where the Singapore courts might have the discretion to not follow a decision of the House of Lords.

If members of the bench and bar in Singapore continue to look almost exclusively to English decisions when determining questions governed by the common law, the scope for divergent development of the common law in Singapore is not likely to be considered by the Singapore courts. However, the situation would change if members of the Singapore bar begin to look to authorities from other leading Commonwealth jurisdictions when faced with issues governed by the common law. This situation might arise if on a given question of common law, one of the other highly respected Commonwealth courts, such as the High Court of Australia, has refused to follow a decision of the House of Lords, and has developed the law in Australia in a different direction. The law in Australia and England on the point of law in question would differ, even though neither the decision of the House of Lords nor the decision of the Australian High Court would be based on faulty reasoning or founded on misconceptions. If the House of Lords decision favoured one party and the Australian decision the other party, the Singapore court might be asked to make a choice as to which to follow.

When faced with conflicting decisions of the House of Lords and the Australian High Court on a question of common law, the Singapore court could simply consider the House of Lords as more highly persuasive and follow it. Alternatively, it could consider both decisions to be highly persuasive. It would then have to choose the decision which in its judgment is better suited to the local circumstances in Singapore. If in its opinion both were equally suitable to local circumstances, it could choose the decision which it believed was more just or which it believed was better reasoned.

If in such a situation the Singapore Court of Appeal chose to follow the Australian High Court rather than the House of Lords, how would the Privy Council react if the case were appealed to it? Would it allow divergent development? Would it apply the reasoning of *Australian Consolidated Press* or *Hart* v. *O'Connor*? The reaction of the Privy Council would most likely depend upon the exact issue and the area of law in question, as well as the reasoning and justifications presented by the Singapore Court of Appeal for not following the House of Lords. The Privy council would be most likely to allow a departure from the House of Lords where the area of law is determined by judicial policy and the area of law is one where the need for uniformity is not present. The case would be even stronger if in the course of its decision the Singapore Court of Appeal stated that it believed that the Australian decision was more suitable to the local circumstances and conditions of Singapore. A harder case would be one where the Singapore Court of Appeal acknowledged that both

[87] W. Woon, "The Reception of English Law in Singapore", paper delivered at the Conference on the Common Law in Asia, December 15–17, 1986 at p. 24.

decisions would be equally suitable to the circumstances and conditions in Singapore, but stated that it chose to follow the Australian decision because it preferred its logic or reasoning to that of the House of Lords.

If such a case were considered by the Privy Council they hopefully would clarify their seemingly contradictory; statements in previous cases on the scope for divergent development of the common law in jurisdictions which retain appeals to the Privy Council.

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