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SINGAPORE CRIMES ABROAD

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I. INTRODUCTION

WHILE nowadays Singapore's Parliamentary proclamations of extraterritorial jurisdiction reflect a commonplace thing amongst nations, absent express statutory authority, the Singapore courts could yet adopt a more restrictive view of the permissible bounds of extraterritoriality than does its legislature. What stands in the way of a successful prosecution in a case involving two Singaporeans, a perpetrator and a victim, where the crime is physically committed abroad, but no mention is found of the extra-territorial reach of the relevant statutory penal provision, yet the victim dies in a Singapore hospital?

In *Public Prosecutor* v *Taw Cheng Kong*, Singapore's Court of Appeal quoted, in passing, the following presumption against the extraterritorial application of the common law:

> [T]he territorial principle in criminal law was developed by the courts to respond to two practical considerations, first, that a country has generally little direct concern for the actions of malefactors abroad, and secondly, that other States may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories. For these reasons the courts adopted a presumption against the application of laws beyond the realm… [1]

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1 *Libman* v *The Queen* 21 CCC (3d) 206, at 228-229 *per* La Forest J; cited in *Public Prosecutor* v *Taw Cheng Kong* [1998] 2 SLR 410.

Should this passage be taken in isolation, would it be the best guide for the future development of common law doctrine by Singapore's courts?[2] After all, in opposition to the two objections against extraterritoriality in the passage quoted above, Singapore's extraterritorial legislation already demonstrates the wider social need, albeit more so perhaps in the case of certain crimes, for the courts to exercise such jurisdictional powers. What is the extent of those powers, and are they truly confined to specific crimes for which there must first exist express legislative provision?

Admittedly, the more widely held view is that expressed in the course of Parliamentary debate on the extension of the Misuse of Drugs Act,[3] during which the Minister of Home Affairs referred to the need to close a "loophole" in the law. Prior to 1998 there was no statutory provision expressly covering conduct and events which occur "outside Singapore". The clear implication there was that express statutory authority is required for the Singapore courts to consider an extraterritorial crime triable in Singapore, and therefore a crime within the jurisdiction of the Singapore courts.

In *Taw Cheng Kong,*[4] the Court of Appeal, referring therein to an explicit "non-application to foreigners" clause in an extraterritorial statutory provision, went on to consider international comity and international law as reasons for the non-application of that statute to foreigners, and thus as reasons for saying that non-application of the statutory crime therein to a particular class of persons would not occasion a violation of the equal protection clause in the Singapore Constitution. According to the Court of Appeal, it would be wholly intelligible to the ordinary citizen that Parliament should take comity and Singapore's international law obligations seriously. The reference to the constraints imposed by considerations of comity should be understood in light of the constitutional challenge in that case. In other words, as falling within that class of considerations which would render a statute immune from challenge on the

[2] There is the policy argument that crime increasingly takes on a cross-border dimension today, and therefore the various nations of the world, whatever their political complexion or moral outlook, have great reason to resort to extraterritorial prescriptive and enforcement devices; see M Sornarajah, "Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives" (1998) SJICL 1; and also Professor Sornarajah's, "Globalisation and Crime: The Challenges to Jurisdictional Principles" [1999] SJLS 409, where he employs the "New Haven" phrase "international community policy". Be that as it may, hostility to extraterritoriality is not likely to arise where there is general agreement between States that a particular mischief can only be addressed by way of the extraterritorial jurisdiction of States, as is the case with crimes for which international law grants universal jurisdiction to domestic courts, such as the internationally recognised crimes of piracy, slavery, and so on.

[3] Misuse of Drugs Act (Cap 185).

[4] *Public Prosecutor* v *Taw Cheng Kong*, *supra* note 1.

basis of the equal protection clause. Regardless of the absence of a statutory provision expressly providing for the exercise of extraterritorial jurisdiction, there could nonetheless arise circumstances requiring recourse to extraterritoriality in order that a mischief provided for in the law could be addressed. The crime in question may, for example, be one which does not usually bring to mind an extraterritorial dimension, and in consequence of which extraterritorial jurisdiction is not thereby expressly provided for by statute. Does the common law's recognition of comity and international law as factors which should weigh upon extraterritorial judicial decision-making mean that in such cases the Singapore courts must be taken to lack penal jurisdiction?

With the greatest respect for the debate in Parliament, even without that amendment to the Misuse of Drugs Act, could not Singapore's Courts act to close "loopholes" such as those identified by the Minister whenever there arises the need to do so? Granted, the Courts would not otherwise have the guidance that Parliament has seen fit to provide under the current Misuse of Drugs Act as to the precise extent and limits of the extraterritorial penal jurisdiction contemplated therein. But what about other cases involving yet other crimes that could crop up under which there currently exists no express statutory provision for the exercise of extraterritorial penal jurisdiction?

II. PARLIAMENT

From the point of view of a strictly territorial doctrine of sovereign penal jurisdiction, Singapore would be "jurisdictionally-disadvantaged" by geography, and this difficulty is exacerbated by the daily passage of international goods, services and persons through Singapore.

There are already examples of legislation in relation to which Parliament in Singapore has of late prescribed laws of extraterritorial application, thus filling what may be thought of as "gaps" within the existing law. They include the Prevention of Corruption Act,[5] the Misuse of Drugs Act[6] and the Computer Misuse Act.[7] These will be described briefly, as they will subsequently serve as useful illustrations in the present article.

According to section 37 (1) of the Prevention of Corruption Act:[8]

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5 Prevention of Corruption Act (Cap 241).

6 Misuse of Drugs Act, *supra*, note 3.

7 Computer Misuse Act (Cap 50A).

8 Prevention of Corruption Act, *supra* note 5. According to section 37(2) of the Act: "Any proceedings against any person under this section which would be a bar to subsequent proceedings against that person for the same offence, if the offence had been committed in Singapore, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Singapore."

> The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.

Another example is the Misuse of Drugs Act,[9] section 8(b) of which states that "Except as authorised by this Act or the regulations, it shall be an offence for a person to … (b) smoke, administer to himself or otherwise consume — (i) a controlled drug, other than a specified drug; or (ii) a specified drug". Section 8A adds that:

> (1) Section 8 (*b*) shall have effect in relation to a person who is a citizen or a permanent resident of Singapore outside as well as within Singapore where he is found as a result of urine tests conducted under section 31 to have smoked, administered to himself or otherwise consumed a controlled drug or a specified drug.
>
> (2) Where an offence under section 8 (*b*) is committed by a person referred to in subsection (1) in any place outside Singapore, he may be dealt with as if that offence had been committed within Singapore.[10]

Speaking in Parliament during the Second Reading of the Misuse of Drugs (Amendment) Bill on 1 June 1998, the Minister for Home Affairs explained that:

> Currently, only consumption of controlled drugs within Singapore is punishable under the [Misuse of Drugs Act]. The Central Narcotics Bureau cannot charge persons who abused drugs overseas, say, in Malaysia, Batam, Bintan or Karimun, or anywhere else, and tested positive for drugs upon their return at our immigration entry points. There has been a noticeable trend of Singaporeans consuming drugs overseas in recent years.[11]

According to another Member:

> …a valuable area has been taken care of and the loophole has been covered. Under the new section 8A…the law on consumption of drugs

[9] Misuse of Drugs Act, *supra*, note 3.

[10] *Ibid*, s 8A.

[11] *Singapore Parliamentary Debates, Official Record*, 1 June 1998, Col 45 (Mr. Wong Kan Seng).

> outside Singapore is to be welcomed. It is extra-territorial. But I think we have other legislation, like the Women's Charter where bigamy is punished, whether it happens in Singapore or outside. So I think Members should not be surprised at this legislation.[12]

Finally, the Computer Misuse Act,[13] section 11, also states that:

> (1) Subject to subsection (2), the provisions of this Act shall have effect, in relation to any person, whatever his nationality or citizenship, outside as well as within Singapore.
>
> (2) Where an offence under this Act is committed by any person in any place outside Singapore, he may be dealt with as if the offence had been committed within Singapore.
>
> (3) For the purposes of this section, this Act shall apply if, for the offence in question —
>
> (a) the accused was in Singapore at the material time; or
>
> (b) the computer, program or data was in Singapore at the material time.

It is noteworthy that the crimes provided for under the Computer Misuse Act are not always extraterritorial crimes as a matter of Singapore law, even if the events to which they relate occur abroad in the physical sense. If the perpetrator of the act, or the computer, or programme, or data is found to have been situated in the territory of Singapore, howsoever that conclusion might properly be arrived at as a matter of Singapore law, the exercise of Singapore jurisdiction would amount to an exercise within the territories of Singapore.

Is it to be supposed that these legislative provisions are contrary to international law? *Taw Cheng Kong* shows that they are not, clearly, and the reason for that, for the purposes of international law, is also provided therein. That reason, as I shall seek to argue, does not require a distinction to be drawn between statutory and common law extraterritoriality. The question, if anything, is ultimately one of Singapore law.

[12] *Ibid*, Col 52 (Nominated Member, Mr. Shriniwas Rai).

[13] Computer Misuse Act , *supra* note 7.

III. A Question Of Sovereignty

A. Domestic Law Constraints on Extra-Territoriality? The Supremacy Clause Objection

Admittedly, the Court of Appeal in *Taw Cheng Kong* was dealing therein with two arguments alleging that the extraterritorial application of the Prevention of Corruption Act was unconstitutional under Singapore law.[14] Be that as it may, our attention is drawn specifically to the first of the two arguments.

According to this argument, since section 6(3) of the Republic of Singapore Independence Act (RSIA)[15] expressly excludes article 73(a) of the Federal Malaysian Constitution, the words in the Federal Malaysian Constitution "Parliament may make laws outside as well as within the Federation" were thereby excluded. This, counsel argued, meant that Singapore's legislature had expressly excluded its power to prescribe laws having extra-territorial effect, which would thereby mean that section 37(a) of the Prevention of Corruption Act, which seeks to extend the jurisdictional ambit of the provisions of the Act to the conduct of Singapore citizens situated outside Singapore, is *ultra vires* the Constitution and thereby a nullity.

At issue was Article IV ("the supremacy clause") of the Constitution.[16] The Court of Appeal, in recalling counsel's argument concerning the effect of section 6(3) of the RSIA, put it thus:

> By expressing that Part VI (and hence art 73(a)) of the Malaysian Constitution "shall cease to have effect in Singapore", Parliament could no longer enact extraterritorial laws. Because Parliament had excluded its power of extraterritoriality from the Constitution which is the supreme law in Singapore, it had thereby disabled itself constitutionally from enacting extraterritorial laws. If there had not been this constitutional disability, there would have been nothing to prevent Parliament from validly enacting an extraterritorial provision

[14] Prevention of Corruption Act, *supra* note 5.

[15] Republic of Singapore Independence Act 1965, section 6(3) of which states: "The following provisions of the Constitution of Malaysia shall cease to have effect in Singapore: Part I; Article 13; Articles 14 to 18; Article 19A; Article 22; Articles 28 and 28A; Articles 30, 30A and 30B; Part IV; Part V; Part VI; Part VII; Part VIII; Articles 133 and 134; Article 139; Articles 141 to 143; Articles 146A to 148; Part XII; Part XIII; Part XIV; The Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteenth Schedules."

[16] Article IV of the Constitution of the Republic of Singapore states: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

> (such as s 37(1) PCA) subsequently. Hence unless the Constitution is first amended to reinstate Parliament's power to enact extraterritorial laws, all extraterritorial provisions enacted since 1965 are ultra vires the powers of the legislature.[17]

However, the Court of Appeal found that the argument fails in light of the plenary powers that Parliament came to possess on Singapore Day. Article 73(a) of the Federal Malaysian Constitution is irrelevant to Parliament's powers to enact extraterritorial legislation. According to the Court of Appeal:

> The Attorney General's view, and we agreed with him, was that, when Singapore became independent on 9 August 1965, it acquired the attributes of sovereignty. The inherent nature of being an independent free sovereign republic, in our view, meant that Parliament could pass a law to regulate the rights and liabilities between persons in Singapore or, for that matter, anywhere else. The laws which Parliament had enacted would be perfectly valid in Singapore and would be given effect to by local courts as far as they could. In this sense, on the assumption of independence, Parliament in Singapore had plenary power, and if it chose to, it could also empower the local courts to punish any person present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect.[18]

In addition, the Court of Appeal also took the view that section 6 of the RSIA did not have the effect imputed to it by counsel, for it did not exclude what section 5[19] grants Parliament:

> …under s 5 of the RSIA, all plenary legislative powers previously possessed by the Malaysian Parliament (*which must also necessarily include the power to legislate extraterritorially*) ceased to extend to Singapore and were transferred to and vested in the Singapore Parliament instead.[20]

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17 *Public Prosecutor* v *Taw Cheng Kong* , *supra* note 1 at 418H-I – 419A-B.

18 *Ibid* at 423 F-H.

19 Section 5 of the Republic of Singapore Independence Act 1965 reads: "The legislative powers of the Yang di-Pertuan Agong and of the Parliament of Malaysia shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Head of State and in the Legislature of Singapore respectively."

20 *Public Prosecutor* v *Taw Cheng Kong* , *supra* note 1 at 425F.

While the Court of Appeal did concede that Section 6 "also excluded certain provisions of the Malaysian Constitution, and provisions under Part VI were amongst them: see s 6(3),"[21] the court went on to add that:

> This should come as no surprise. The entire Part VI (divided into seven chapters) of the Malaysian Constitution…was titled *'Relations Between The Federation And The States'*… Hence, following Singapore's departure from the Federation, there was no reason to preserve Part VI which dealt with, inter alia, the distribution of legislative powers, the distribution of executive powers, the distribution of financial burdens, land and national development within the Federation.[22]

As for the Attorney-General's alternative argument that, properly construed, the relevant provision of the Federal Malaysian Constitution could not, in any case, be viewed as an empowering provision, the Court of Appeal, while agreeing with the Attorney-General, thereby fortuitously avoided having to construe the terms of the Federal Malaysian Constitution, being the Constitution of a foreign nation.[23]

B. *Public International Law*

In response then to the argument that where a domestic constitution limits the power of a municipal legislature to exercise jurisdiction over conduct and events abroad, any legislation that does so violates the constitution, the Court of Appeal pointed out two things. First, the Constitution of Singapore does not limit Parliament in Singapore in this way. Secondly, as the Attorney General had argued, when a State achieves independence, it assumes sovereign powers; in other words, those legal powers inherent in a sovereign State cannot be divorced from the State without thereby perpetrating an assault on its sovereignty. Put differently, it cannot be merely supposed that a post-independence constitution would provide restrictions on the sovereign attributes of the independent State to which it relates. Strictly construed, the Court of Appeal's acceptance of the Attorney-General's argument was an acceptance *obiter*, but it clarifies a point which, had it not been addressed by the Court, could have caused some uncertainty in the law. Absent that clarification, confusion could perhaps arise regarding even Parliament's power to amend the Constitution so as to correct the matter, however peculiar that may seem to us.

The issue was, ultimately, one of international law, particularly the principles of international law regarding the scope and extent of the

[21] *Ibid* at 426A-C.
[22] *Ibid.*
[23] *Ibid* at 422E-F.

jurisdictional powers of sovereign States, and here the pronouncement of the Court of Appeal, while referring specifically to Parliament's powers, affirms, correctly, a larger point in relation thereto.

In an inter-war case before the Permanent Court of International Justice, quoted as recently as 1986 by the Supreme Court of Malaysia,[24] a Turkish penal provision was called into question, and according to which:

> Any foreigner who, apart from the cases contemplated by Article 4 [of the Turkish Penal Code], commits an offence to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey.

The question there was whether Turkey was required to show that a rule of international law permitted it to claim extraterritorial jurisdiction as prescribed under article 6 of the Turkish Penal Code. The Turkish contention was that unless France could prove a prohibition under international law, a duty to abstain from claiming extra-territorial jurisdiction in other words, Turkey possesses the liberty to assert its penal jurisdiction as provided for in article 6. In what has become a classic statement of the basis of obligation in international law, the court pointed out that, even if Turkey were required to show, as France had suggested, the permission of international law to assert extra-territorial jurisdiction, "before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey…one must…prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation".[25] Once the matter is viewed in this way, perhaps even

[24] *Rajappan* [1986] 1 CLJ 175.

[25] According to the Court: "International law governs the relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed…" and "…[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules…"; PCIJ Reports, Series A, Judgment No 10. The Permanent Court concluded that "Consequently, whichever of the two systems [suggested by France and Turkey, respectively] described…the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting…[the accused]." Put simply, in order to prove that rule *x* permits State *y* to perform *Ø*, it has to be shown, first, that rule *z* prohibits States from performing *Ø*. In

the term "extraterritorial jurisdiction" is misplaced (since such terminology suggests that jurisdiction is, ordinarily, territorial in scope only).

However, the view that State penal jurisdiction is co-extensive with territorial sovereignty and is thus limited in such a way did find a distinguished proponent in the late J.L. Brierly:

> International law did not start as the law of a society of States each of omnicompetent jurisdiction, but of States possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over resident non-nationals. If it is alleged that they have now acquired a measure of jurisdiction over non-resident non-nationals, a valid international custom to that effect should surely be established by those who allege it.

There are difficulties with such a view. If it were suggested that the territorial principle is simply a notion co-extensive with the political fact that sovereignty manifests itself over a particular defined territory, it would be no more than a tautology.[26] From the perspective of international law, in order for sovereign States to be so, aspirant States are normally required to first demonstrate the prerequisites of, *inter alia*, sovereign and independent authority over a defined territory and population. Brierly's argument involves therefore the highly suspect notion that sovereignty is derived from certain residual powers left untouched by limitations imposed by pre-existing jurisdictional rules and principles in international law, whereas it is the other way round. Jurisdictional powers are derived from sovereignty, not the other way round. With the broad acceptance by States at the Third United Nations Conference On The Law Of The Sea of the novel legal

either case then, rule *z* must first be established, only then would there be cause to have to establish the existence of rule *x*. Finding that there was no rule that prohibited, a person from being prosecuted by reason of the nationality of the victim, the Court found, moreover, that the "territorial principle" constituted an accepted head of jurisdiction under international law. Should the Turkish vessel be equated with Turkish territory, the crime would have continued unto the territory of Turkey where the deaths occurred. In other words, elements of the *actus reus* were to be found on, what was in effect, Turkish soil, indeed the crime was only completed on Turkish soil. Despite the fact that a collision at sea such as that which occurred on the given facts of the case involving the *S.S. Lotus* is now regulated by treaty, and, even where that is not the case, probably by a customary rule reflecting the terms of the 1982 Convention on the Law of the Sea, the *dicta* in the *Lotus* Case to the effect that prohibitions on the freedoms of States ought not to be presumed without sovereign consent remain good law. In any case, it is the more logical view since any disagreement between sovereign equals on this would thereby have to revert to the concept of consent as the basis of the obligation in international law.

[26] J.L. Brierly, "The 'Lotus' Case" (1928) 44 LQR 154, at 155-156; *cf* Sir Hersch Lauterpacht in E. Lauterpacht, ed, *International Law: Collected Papers* (Cambridge: Cambridge University Press, vol 1, 1977) at 236.

regime of the Exclusive Economic Zones of States, it has become accepted that territorial sovereignty and jurisdictional power need not converge. Even if, at some indefinite moment in history, States did not evince assertions of extra-territorial jurisdiction as frequently, or perhaps as publicly considering the recent advancements in communication, it is not a necessary deduction that, each and every one of these past instances, or even the majority of these past cases, was the consequence of a sense or conviction of a restraining obligation on their part. That assertions of extra-territorial jurisdiction are today so very common reflects the truth in saying that there is at the very least a sense, conviction, or appreciation of the permissibility of such under international law.

C. *"Expansive" or "Restrictive" View?*

Having seen that Singapore possesses the inherent legal power to assert extraterritorial jurisdiction, what ought to be made of the wider impact, if any, of the passage from *Taw Cheng Kong* cited at the outset of this article, evincing therein a conscious acknowledgement by the Court of Appeal of the difficulties involved in asserting domestic jurisdiction over persons, acts or events abroad? Clearly, if the Singapore courts do not require express statutory authority in order that they may exercise jurisdiction over acts or events occurring abroad, the difficulty in *Taw Cheng Kong* discussed above could thereby be circumvented. The common law would supply the basis for the exercise of jurisdiction in respect of persons, acts or events although they are not physically present or do not physically occur within the territories of Singapore.

Some such suggestion, regarding such a basis at common law, might be thought to lie by analogy with the court's finding that Parliament had plenary powers during the hiatus arising between Singapore Day and the enactment of the Republic of Singapore Independence Act and the Constitution of Singapore (Amendment) Act on 22 December 1965.[27] There, the Court of Appeal expressed the view that:

> Parliament's power, however, would have no legal effect in other countries, except to the extent that those countries permit it.[28]

But by the words "no legal effect" the court did not mean to also exclude Parliament's undoubted plenary power "on the assumption of independence…[to, should it choose to do so]…empower local courts to punish any person present in its territories for having done physical acts wherever the acts were done and wherever their consequences took

[27] Despite both Acts being dated retrospectively to 9 August 1965 (Singapore Day).

[28] *Public Prosecutor* v *Taw Cheng Kong* , *supra* note 1 at 423F-H.

effect."[29] Simply put, the exclusion of enforcement jurisdiction abroad does not automatically exclude enforcement in Singapore even if the acts, or omissions, occur abroad.

Two distinctions are relevant here; between (1) prescriptive and enforcement jurisdiction, a distinction which is well-established as a matter of legal principle,[30] and (2) enforcement jurisdiction in relation to persons in Singapore for acts committed abroad and in relation to persons abroad for acts committed abroad.

In practice, the second distinction may encounter some controversy in so far as a State keen on asserting that it has better title to jurisdiction would say that the "exception" referred to is actually tantamount to enforcement jurisdiction abroad. The argument here would be that there is no difference between enforcement action abroad in respect of extra-territorial crimes prescribed for and enforcement action locally. Both involve enforcement action for acts committed abroad. The proper reply to this is that while the former represents action in furtherance of enforcement jurisdiction abroad, the latter represents local enforcement action of extra-territorial prescriptive jurisdiction. In the latter, it is the prescriptive prelude to the enforcement jurisdiction called into question that is extra-territorial, not the enforcement measure itself, and thus no question arises as to whether a State may enforce its laws against persons abroad for acts or omissions occurring abroad.

IV. "TRIABILITY" & JURISDICTION

There is, however, a general difficulty with the broader suggestion herein that the Singapore courts could assert extraterritorial jurisdiction at common law. Kenny's editor wrote in 1962 that "[a]ccording to international law, a State ought only to exercise jurisdiction over such persons and property as are within its territory" and further that "in criminal matters [a State] does not always exercise jurisdiction over an offender even though he actually be within its territory" for "many States hold the view that a State may not try foreigners for offences committed outside its territorial jurisdiction".[31] In

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[29] *Ibid.*

[30] See, A E S Tay, "Extra-Territorial Legislation" (1959) 1 Mal LR 360. See also, D. Bowett, "Jurisdiction: Changing Patterns of Authority Over Activities and Resources" (1982) 53 BYBIL 1, at 1 ("There is, of course, a necessary distinction to be drawn between prescriptive jurisdiction and enforcement jurisdiction. The former embraces those acts by a State, usually in legislative form, whereby the State asserts the right to characterize conduct as delictual…The latter embraces acts designed to enforce the prescriptive jurisdiction, either by way of administrative action such as arrest or seizure or by way of judicial action through the courts or even administrative agencies of a State").

[31] J.W. Cecil Turner, ed, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 18th ed, 1962) at 532.

this regard, Mr, Turner cited W.E. Beckett.[32] But if this view is, generally, still correct in England, it would only be through the inflexible operation of *stare decisis,* such as, for example, that advocated by Stephenson LJ, but which Lord Denning MR and Shaw LJ argued so cogently against, in *Trendtex Trading Corporation* v *Central Bank of Nigeria*.[33] As has been seen, and even if the point had not been affirmed in *Taw Cheng Kong*, international law has never required such a view and it is international law and no other that the common law is seen to rely upon here.

Insofar as there remains nonetheless the perception (a pervasive one I am told) that Singapore law does not provide generally for extraterritorial criminal jurisdiction, this would be due principally to two considerations, and they are that:

(1) The statutory "offence-creating" provisions, unless they provide otherwise, do not support a reading which confers extraterritorial application, and the fact that there exist such express provisions elsewhere indicates that such express provision is required.

(2) The "adjectival" law also suggests this, by which is meant certain provisions of the Supreme Court of Judicature Act and the Criminal Procedure Code.

A. *Triability*

First, section 3 of the Penal Code,[34] entitled "Punishment of offences committed beyond, but which by law may be tried within Singapore" states:

> Any person liable by law to be tried for an offence committed beyond the limits of Singapore, shall be dealt with according to the provisions of this Code for any act committed beyond Singapore, in the same manner as if such act had been committed within Singapore.

This provision begs the question as to when a person is liable by law to be tried for an offence committed beyond the limits of Singapore. On its plain and ordinary meaning, section 3 in itself does no more than provide that where a person does commit an extraterritorial offence (*ie* s/he is 'liable by law to be tried for an offence committed beyond the limits of Singapore'), s/he should be dealt with in the same manner as if the act had been committed within Singapore. The statutory language does not suggest

[32] (1925) 6 BYBIL 44.

[33] [1977] QB 684. The case involved the question of restricted State Immunity or the "trader theory" which is, today fully accepted before the English courts, see the judgment of Lord Wilberforce in the House of Lords case of *I Congreso del Partido* [1983] 1 AC 244.

[34] Singapore Penal Code (Cap 224).

that a person cannot be tried for an offence beyond the (territorial) limits of Singapore unless there exists an express provision to that effect. The particular language in which some ambiguity of meaning can be seen, and hence on which some division of opinion could be based, is the scope and meaning of the words "the provisions of this Code for any act committed beyond Singapore". Do these words limit the number of extraterritorial offences only to those mentioned in the Code?[35] In other words, only to those acts that under the Code (and other express statutory enactments) would constitute an "offence committed beyond the limits of Singapore".

Secondly, the rule of construction of "*noscitur a sociis*" suggests that the terms of section 2 and the excision of section 4 in the Singapore Penal Code might also have a bearing on the proper interpretation of section 3. According to section 2:

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he is guilty within Singapore.[36]

The language of section 2 is identical to that of its counterpart in the Indian Penal Code, which reads (in section 2 thereof):

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.[37]

According to Ratanlal & Dhirajlal,[38] the term "within India" in section 2 means that "[I]f the offence is committed outside India it is not punishable under the Penal Code, unless it has been made so by means of special provisions such as ss. 3, 4, 108A, etc., of the Code".[39] Should this view (that section 2 of the Indian Penal Code contains words of limitation on the exercise of extraterritorial jurisdiction) be correct in India, the argument could be made in Singapore that, owing to the origins of the Singapore

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[35] For example, s 108A, entitled "Abetment in Singapore of offences outside Singapore", reads: "A person abets an offence within the meaning of this Code who, in Singapore, abets the commission of any act without and beyond Singapore which would constitute an offence if committed in Singapore. Illustration : *A*, in Singapore, instigates *B*, a foreigner in Java, to commit murder in Java. *A* is guilty of abetting murder. " *Ibid*.

[36] *Ibid*, section 2.

[37] Indian Penal Code (Act XLV of 1860).

[38] Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, M. Hidayatullah, ed, *The Indian Penal Code* 26th ed (Nagpur: Wadhwa, 1987) at 3.

[39] The Indian Penal Code, section 108A is virtually identical to section 108A of the Singapore Penal Code.

Code in its Indian counterpart,[40] that should also be the correct interpretation of section 2 of the Singapore Code, all things remaining equal.[41] In addition, section 4 of the Indian Penal Code states that the provisions of the Indian Code "apply also to any offence committed by (1) any citizen of India in any place without and beyond India" and "(2) any person on any ship or aircraft registered in India wherever it may be". This provision is absent from the Singapore Penal Code. This fact would reinforce the argument that a restrictive meaning should be ascribed to "within Singapore" (corresponding to "within India" in section 2 of the Indian Penal Code) in section 2 of the Singapore Penal Code.

Yet this entire argument, if accepted, would be repugnant to the canons of statutory construction. Rather than ascertaining the scope and meaning of a statutory provision by reading it in the company of other provisions in the same statute, this argument would require that the provision in question be read in conjunction with another provision that does not exist in the local statute but instead is contained in a foreign statute. The argument for such a restrictive reading depends also on the further assumption that the foreign provision *ought to* exist in the local statute. If anything, the contrary argument could be made, *viz*, that section 4 of the Indian Penal Code is not required in its Singapore equivalent, for the power to legislate extraterritorially comes with the achievement of sovereign status and not with express legislative licence.

Thirdly, a similar, although not identical, drafting formula as that found in section 3 of the Singapore Penal Code is employed in other Singapore statutes. Thus, the Prevention of Corruption Act[42] states, in section 37(1):

> The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore *in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.*

Similarly, the Misuse of Drugs Act[43] states, in section 8A(2):

[40] K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia* (Singapore and Kuala Lumpur: Malayan Law Journal, 1989) at 6ff.

[41] M Sornarajah, "Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives", *supra* note 2, at 12, and the text thereto where Professor Sornarajah expresses the view that: "The common law position that criminal jurisdiction was confined within the territorial jurisdiction of the courts, is stated in the Commonwealth penal codes".

[42] Prevention of Corruption Act, *supra* note 5, my emphasis.

[43] Misuse of Drugs Act , *supra* note 3, my emphasis.

> Where an offence under section 8 (b) is committed by a person referred to in subsection (1) *in any place outside Singapore, he may be dealt with as if that offence had been committed within Singapore.*

Again, in Part III of the Computer Misuse Act,[44] section 11(2) states:

> Where an offence under this Act is committed by any person in any place outside Singapore, he may be dealt with as if the offence had been committed within Singapore.

The words italicised above (the "deeming clauses") are neutral on the issue of extraterritoriality, they merely clarify that it matters not where the crime is actually, physically, committed. In other words, they show that section 3 does not furnish an answer to the question of whether the Singapore courts may construe statutory penal provisions that are silent on the issue of extraterritoriality in such a way as to accord them extraterritorial effect.

In sum, the fact that there are express provisions for extraterritoriality in such statutes is not sufficient in itself to show that such express provisions are actually required in all cases.[45]

B. *Jurisdiction*

With regard to the second point, the Supreme Court of Judicature Act,[46] section 15, which deals with the original criminal jurisdiction of the High Court, states:

> (1) The High Court shall have jurisdiction to try all offences committed —
>
> a) within Singapore;
>
> b) on board any ship or aircraft registered in Singapore;
>
> c) by any person who is a citizen of Singapore on the high seas or on any aircraft;
>
> d) by any person on the high seas where the offence is piracy by the law of nations;

[44] Computer Misuse Act, *supra* note 7, my emphasis.

[45] M Sornarajah, "Extraterritorial Jurisdiction Over Crimes in Singapore, Malaysia and the Commonwealth" (1987) 29 Mal LR 200 at 207.

[46] Supreme Court of Judicature Act (Cap 322).

e) by any person within or outside Singapore where the offence is punishable under and by virtue of the provisions of the Hijacking of Aircraft and Protection of Aircraft and International Airports Act (Cap. 124); and

f) in any place or by any person if it is provided in any written law that the offence is triable in Singapore.

The intention behind section 15 is to obviate the need to ask whether triability presents issues additional to jurisdiction, since jurisdiction is automatically available in the case of an offence committed "in any place or by any person" so long as "the offence is triable in Singapore".[47] But the argument could arise that, by negative implication alone, the phrase "within Singapore" in subsection 1(a), as well as the terms of subsections 1(b)-(e) must mean that the High Court is in the absence of express legislative provision denied extraterritorial jurisdiction. The Minister for Law, during the course of Parliamentary debate on the amendment which became section 15,[48] had presented the proposed amendment by saying that "clause 9 amends section 15 so that …[t]he High Court will also have jurisdiction to try an offence committed by any person outside Singapore where the offence is punishable under any written law which expressly provides that the offence is punishable even if committed outside Singapore."

The question that arises then is that of what "even if committed outside Singapore", and, similarly, the oft-witnessed drafting language of "outside Singapore" and "within Singapore" (in the Prevention of Corruption Act, Misuse of Drugs Act, and the Computer Misuse Act, for example) ought to be taken to mean. In law, "extraterritorial jurisdiction" means simply those offences which are defined by law to have been committed outside Singapore, and this phrase and similar drafting language, it is respectfully submitted, need not necessarily be taken to mean that the High Court does not thereby possess jurisdiction over persons, conduct and events simply because the physical acts attendant to the critical legal act called into question might have taken place physically outside Singapore. Terms such as "within Singapore" and "outside Singapore" need not therefore involve questions merely of fact alone, but may also present questions, in the context of criminal offences, purely of legal definition, or even "mixed" questions of both fact and law in determining the true *locus* of the critical legal act.

For example, if the Computer Misuse Act[49] were not to state explicitly, as we have seen, in section 11(1) of the Act that "the provisions of this Act

[47] See, Tan Yock Lin, "Supreme Court of Judicature Act 1993" [1993] SJLS 557 at 570.

[48] *Singapore Parliamentary Debates, Official Record*, 12 April 1993, Cols 95-96 (Professor S Jayakumar).

[49] Computer Misuse Act, *supra* note 7.

shall have effect, in relation to any person, whatever his nationality or citizenship, outside as well as within Singapore", but only, as it does in section 11(3), that "[f]or the purposes of this section, this Act shall apply if, for the offence in question — (a) the accused was in Singapore at the material time; or (b) the computer, program or data was in Singapore at the material time", section 11(3) already ensures that, as a matter of law, the crime is confined to one whose elements are, as a matter of Singapore law, at least partly committed within the territories of Singapore. The effect would, however, be the same since the phrase "outside as well as within Singapore" refers not to fact, but the legal definition contained in section 11(3).

Would it then be appropriate to say that where there obtains real or potential harm to Singapore's interests, and where territoriality or otherwise concerns the judicial construction of Singapore's "offence creating" provisions, the Singapore courts, meaning the High Court, could never possess the jurisdiction to try the accused? I think the answer here, clearly, is "no".

Similarly, the Criminal Procedure Code,[50] section 8(3) states that:

> The jurisdiction and powers conferred upon a Magistrate's Court under subsection (1) (*c*), (*d*) and (*e*) may be exercised by a Magistrate at any place within Singapore.

Here, the term "within Singapore" grants the courts a measure of judicial discretion, in relation to which it is instructive that the English courts have, in their jurisprudence, given much reason to depart from the common law fiction of territoriality.

V. The Territorial Principle at Common Law

The English authorities are coloured by the view that, as a general rule, "it is a fundamental principle of our law that offences are cognisable exclusively by the State within whose territory they are committed. Any exceptions to this rule must be clearly defined and strictly construed."[51] This has had its effect on Singapore law.

The Magistrate, sitting in Singapore in a Straits Settlement case, and in whose judgment that passage is found, went on to quote *MacCleod* v *Attorney General for New South Wales*,[52] to the effect that:

[50] Criminal Procedure Code (Cap 68).

[51] *Attorney-General* v *Wong Yew* (1906) 10 SSLR 44, *per* GG Seth.

[52] 17 Cox CC 345.

> All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed and, except over her own subjects, Her Majesty and the Imperial legislature have no power whatsoever.[53]

MacCleod also used to be good authority for the proposition that even if it had been the intention of the legislature to confer jurisdiction beyond these limits, that would be *ultra vires* the powers of the colonial legislatures. But this view was dismissed by the Indian Supreme Court in *Mobarak Ali* and *Mobarak Ali* was subsequently approved by Singapore's Court of Appeal in *Taw Cheng Kong*.[54] According to the Indian Supreme Court in *Mobarak Ali*:

> Undoubtedly some of [the cases] seem to support the view pressed before us on behalf of the appellant that criminal jurisdiction cannot extend to foreigners outside the State. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited, under the influence of the decisions like those in *MacCleod's* case [1891] AC 455, in spite of the decision in *R* v *Burah* [1878] 3 AC 889.
>
> However that may be these concepts are no longer tenable after India became a dominion by the Indian Independence Act of 1947 and after it became an independent free sovereign republic under the present Constitution.[55]

What then remains of the influence of the view taken in *MacCleod* , and on which doubt had already been cast as early as 1959 in Singapore's colonial jurisprudence?[56] What ought to be made of the continued application in Singapore law of the common law doctrine that, so far as the courts are concerned, "all crime is local" or that "offences are cognisable exclusively by the State within whose territory they are committed"?

Even in *MacCleod* wherein the principle that all crime is local (the territorial principle) was confirmed, an "exception" was nonetheless acknowledged in regulating the conduct of Her Majesty's subjects wherever they might be at the time of the commission of the offence, and this exception finds further support in the jurisprudence of the Straits

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53 *Ibid* .

54 *Public Prosecutor* v *Taw Cheng Kong*, *supra* note 1 at 422G-I – 423A-D.

55 *Ibid* .

56 *Re Choo Jee Jeng* (1959) 25 MLJ 217; and the excellent commentary to be found in A E S Tay, *supra* note 30.

Settlements.[57] In *R* v *Poh Lam Tengah*,[58] for example, the Recorder, sitting in Penang, was confronted with the argument on behalf of the prisoner that the court did not have jurisdiction in a case where "the alleged larceny was committed in a foreign country and the prosecutor and prisoner were foreigners", and not simply that "the alleged larceny was committed in a foreign country", which would have been more appropriate if the restrictions imposed by the narrow common law view of extraterritoriality were indeed that much more stringent. Similarly, in construing a legislative provision which extended jurisdiction to the conduct of certain classes of foreigners abroad, the Recorder, sitting in Penang, expressed the law by way of a refinement of the nationality principle. He said:

> The 2nd Sect. Of Act 1 of 1849 declared that *not only British subjects*, and all persons in the service of the Government, *but also* "all persons who shall have dealt for six months" in any part of British India and who shall be apprehended or delivered to a Magistrate there, might be tried for offences wheresoever committed, if they were offences which our criminal law considered as such.[59]

And even if territoriality and nationality are the only clear principles here, does it then mean that the presumption should always be in favour of the limitation of jurisdiction to these two core principles? Does it then mean that should this presumption be applied nonetheless, the objective of avoiding diplomatic controversy would necessarily be assured? Undoubtedly not, for allegations of international law violation could nonetheless be made by another State wherein the acts or events called into question took place however strong, or indeed weak, the connection with the claimant State. As Bowett points out, in the context of the nationality principle, "there is inherent in the notion of a State's domestic jurisdiction, and its counterpart – the principle of non-intervention – the idea that certain matters are only properly regulated by the territorial state." [60]

At the heart of the entire issue, is that the proper relationship between concurrent and competing jurisdiction has never been satisfactorily resolved. The two principal heads of "territoriality" and "nationality" in international law grant jurisdiction on account of the *locus* of the crime and the nationality of the perpetrator, respectively. The territorial principle, when defined broadly by municipal courts, is singularly capable of giving rise to concurrent, even competing, jurisdiction where a crime is committed

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[57] 17 Cox, CC, 345, cited with approval in *Attorney General* v *Wong Yew* (1906) 10 SSLR 44; see also, *R* v *Poh Lam Tengah, infra* note 58.

[58] *R* v *Poh Lam Tengah* (1854) 2 Ky Cr 74.

[59] (1861) Leic 147, my emphasis.

[60] D. Bowett, "Changing Patterns of Authority Over Activities and Resources", *supra* note 30 at 8.

at least in part in the territory of more than one state. This, the English courts have come to accept.[61] On the other hand, while the nationality principle is "universally accepted and continental countries make extensive use of it", the "English courts claim jurisdiction on this ground over only a few crimes, such as treason, murder and bigamy" although "the United Kingdom does not challenge the extensive use of this principle by other countries".[62]

Apart from these widely accepted principles, there is also acceptance, to varying degrees in the practice of States, of the "protective principle", which has been employed in the English courts,[63] and also two further heads of "universality" and "passive personality". While the principle of universality grants jurisdiction (what is also called "universal jurisdiction") in cases where custody alone suffices, there is widespread acceptance of this principle, or so-called "jurisdiction by proxy", only in respect of certain crimes which are generally recognised under international law, such as piracy, slavery and hijacking.[64] The passive personality principle, in turn, grants jurisdiction where the victim of an offence is a national, or is a "national character" (the terminology of the Harvard Draft here is quaint, but its intent clear), of the asserting State or nation.[65] Finally, there is the

[61] Harvard Research Draft Convention On Jurisdiction With Respect To Crime (1935) 29 AJIL Supp 443 at 494 (which "conforms to the modern trend by combining the subjective and objective application of the territorial principle"); *DPP* v *Doot* [1973] AC 807 for an application of the "objective territorial principle" or the "terminatory theory" granting jurisdiction to the place where the offence was completed; for a further example of the application of the "terminatory theory" in the jurisprudence of the Straits Settlements, see, *R* v *Wee Huat* (1881) 2 Ky Cr 103.

[62] The late Michael Akehurst's, *A Modern Introduction to International Law* 6th ed (London and New York: Routledge, 1987), at 105. For a wide interpretation of the nationality / allegiance principle by the English courts, see, *Joyce* v *DPP* [1946] AC 347, in which it was said that the fact that the accused had fraudulently obtained a British passport was a sufficient basis in itself to establish his allegiance to the Crown.

[63] For its application in England, see also, *Joyce* v *DPP*, *ibid*.

[64] Akehurst, *supra* note 62, at 106. See further discussion of this principle by the municipal courts in *Attorney-General* v *Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem); *Yunis* v *Yunis* (1991) 30 ILM 403 (US Court of Appeals, DC Circuit) wherein the Court of Appeals referred to the district court's view that as a matter of customary international law, the "universal principle", amongst others, would confer jurisdiction and that jurisdiction under the Hostage Taking Act was thereby not precluded by the norms of customary international law; and recent discussion of this principle in England in *Reg* v *Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 3) [2000] AC 147 (House of Lords).

[65] The Commentary in the Harvard Draft Convention views the passive personality principle as "the most difficult to justify in theory". Professor Louis Henkin, who is perhaps the pre-eminent authority in international law in the United States today, went so far as to say, in the context of the Israeli trial of Adolph Eichmann, (1961) 36 ILR 5, that "the right to vindicate the "passive personality of a state in the person of its nationals…was (and is) widely rejected"; L Henkin, *How Nations Behave - Law and Foreign Policy* 2nd ed (New

United States' "effects doctrine", in essence a kind of protective principle, but one, which is not confined to the protection of security interests. It allows United States courts to claim jurisdiction where a particular conduct is injurious to the United States and thereby extends beyond the scope of the territorial principle, even where this last principle is broadly defined.

By accepting the concurrent jurisdiction of two or more States then, international law itself creates the legal grounds for competing jurisdictional claims, and in relation to which international law does not provide settled criteria for a legally authoritative choice to be made between such competing claims to penal jurisdiction, let alone impose prohibitions on (prescriptive) extraterritorial jurisdiction. In practice then, the "correct legal position" is not simply doctrinal, but also involves what the courts of the various States actually do in response to the myriad circumstances that may present themselves for adjudication. This is sometimes true even where there is a treaty regulating the issue of jurisdiction since such treaties would often enough also grant concurrent jurisdiction.

In any event, the restrictive rule has been honoured in recent decades in the jurisprudence of the English courts with the emergence of a panoply of

York: Council on Foreign Relations/Columbia University Press, 1979) at 272. See also the dissenting opinion of Judge Moore in the *Lotus* case, *supra* note 25, wherein Judge Moore cited the official record of the "Cutting" incident, *Foreign Relations of the United States, 1887* at 751; *idem*, 1888, II, at 1114 and 1180 to the effect that while the Mexican prosecution was discontinued "on grounds of public interest", the exchange of legal arguments between the two Governments evinced the view of the United States that it would be a violation of international law for Mexico to "try a citizen of the United States for an offence committed and consummated in his own country, merely because the person offended happened to be a Mexican". Nonetheless, this principle is now firmly accepted even by the United States, see, *Restatement (Third) Foreign Relations Law of the United States*, vol 1, at 240, and treatment of the United States' position today in Malcolm N. Shaw, *International Law* 4th ed (Cambridge: Grotius, 1997) at 467-468, to which might be added the grounds adduced by the United States in its intervention in Grenada. The principle is also to be found in the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970* (1971) 10 ILM 133, article 4(1)(c) of which confers jurisdiction "when the offence is committed on board an aircraft leased without crew to a lessees who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State"; and also in the *Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (1984) 23 ILM 1027 and (1985) 24 ILM 535, article 5(1)(c) of which confers jurisdiction when "the victim is a national of that State if that State considers it appropriate". For obvious reasons, such evidence of the customary law position could be self-defeating – the argument being, why else would a treaty rule be required if not for the absence of such a rule in general international law. Admittedly, the principle was not discussed in *Ex Parte Pinochet Ugarte (No 3)*, *ibid*, nor was it discussed in the first hearing, *Reg* v *Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* [2000] AC 61, but this only confirms the United Kingdom Government's acceptance of the Spanish reliance on this principle in so far as it formed the basis of the Spanish request.

exceptions and that development in English law has special significance for the future development of the law in Singapore.

Where once there was the rule that, unless statute provides otherwise, the English courts would not possess jurisdiction even where a foreigner strikes a blow on another on land abroad and the victim dies in England,[66] in *R* v *Baxter*[67], the Court of Appeal took the contrary view that:

> He who dispatches a missile or a missive arranges for its transport and delivery (essential parts of the attempt) and is thus committing part of the crime within the jurisdiction by the means which he has arranged. The physical personal presence of an offender within this country is not, according to our law, an essential element of offences committed here.[68]

Again, in *Treacy* v *DPP*, while the Court of Appeal considered the possibility that, in England at least, an "initiatory", as opposed to "terminatory", theory might be unsupported, it concluded, nonetheless that:

> Even if this court is not bound to go with the current of existing authority against the initiatory theory, we are willing to assume for the purpose of this appeal that the last constituent element does determine the place where the offence is committed.[69]

According to the Court of Appeal, the offence of blackmail therein was complete when the letter containing the demand was posted. The accused, who had posted the letter from the Isle of Wight to Germany, could thereby be tried in England. This reasoning enabled the court to circumvent objection to an "initiatory theory" of extraterritoriality.

As for further confirmation of the "terminatory theory", in *DPP* v *Doot*, the question arose as to "[w]hether an agreement made outside the jurisdiction of the English courts to import a dangerous drug into England

[66] *R* v *Lewis*, Dears & B 182; *R* v *Depardo*, R & R 134; *R* v *De Mattos*, 7 C & P 458.

[67] [1971] 1 QB 1, involving the despatch from Northern Ireland to Liverpool of fraudulent football claims forms.

[68] *Ibid*, at 12. There is also authority from the Supreme Court of the Straits Settlements, *R* v *Wee Huat* (1881) 2 Ky Cr 103, involving consideration of Ordinance V of 1870, which states, in section 31: "Whenever an offence of which any person shall be accused shall consist of anything which has been done and of any consequences which had ensued therefrom, the person accused may be dealt with, tried and punished by any Division of the Supreme Court, if either the act shall have been done or the consequences shall have ensued within the local limits of the jurisdiction of such Division in the same manner as if both the act had been done and the consequences had enacted within such local limits"; see, S Jayakumar, *Public International Law Cases from Malaysia and Singapore* (Singapore: SUP, 1974), note 1 at 61.

[69] [1971] AC 537 at 543.

and carried out by importing it into England is a conspiracy which can be tried in England. "[70] In that case, the Court of Appeal took a view that, in truth, was consistent with both *Baxter* and *Treacy*, in that while "the offence is completed when the agreement is made", this does "not make the agreement to commit [the offence] itself triable in England".[71] Lord Pearson, with whom the House as a whole agreed, put it thus:

> When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place…But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with…The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.[72]

Lord Wilberforce concluded therefore that:

> …there can be no question here of any breach of any rules of international law if they are prosecuted in this country. Under the objective territorial principle (I use the terminology of the Harvard Research in International Law) or the principle of universality (for the prevention of the trade in narcotics falls within this description) or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law. The position as it is under international law is not, however, determinative of the question whether, under our municipal law, the acts committed amount to a crime. That has to be decided on different principles. If conspiracy to import drugs were a statutory offence, the question whether foreign conspiracies were included would be decided upon the terms of the statute. Since it is (if at all) a common law offence, this question must be decided upon principle and authority.[73]

[70] *Supra* note 61 at 816.

[71] [1973] QB 73 at 81-82.

[72] *Supra* note 61 at 827.

[73] *Ibid*, at 817. See now the Criminal Justice Act 1993, sections 1-2 which lists certain offences in relation to which any act, proof of the commission of which is required for a conviction, is deemed to have been committed in the jurisdiction. Section 3(2)(3) provides for extraterritorial conspiracies and attempts in respect of listed offences where there is an intention to commit an offence in England, even where no act is committed within the jurisdiction and whether the accused is a British national or not. Section 108A of the Singapore Penal Code states: "A person abets an offence within the meaning of this Code who, in Singapore, abets the commission of any act without and beyond Singapore which would constitute an offence if committed in Singapore. Illustration: *A*, in Singapore, instigates *B*, a foreigner in Java, to commit murder in Java. *A* is guilty of abetting murder."

Doot, by supporting a terminatory theory, or the so-called, objective territorial principle, wherein the place of completion of the crime becomes determinative, did not therefore exclude an initiatory theory, it merely provided for the possibility that the conspiracy as such may persist in a place other than the place the agreement was reached. In other words, where an "overt" act taking place where the crime of conspiracy is directed would be sufficient to found jurisdiction on the basis of the "terminatory theory", this is not in itself necessary. In sum, *Treacy* (and *Baxter*) on the one hand, and *Doot* on the other, reject the notion that either the so-called "initiatory" or "terminatory" theory would prevent the jurisdiction of the English courts with regard to cases of conspiracies either directed at or initiated in England respectively. Both types of cases are caught within the ambit of the law.

To *Baxter* and *Treacy* might also be added the celebrated case wherein the House of Lords confirmed the jurisdiction of the English courts despite the accused, then a prominent Member of Parliament for Walsall North, having performed abroad all the physical acts necessary to commit the offence of obtaining property by deception. Put differently, that it might have been said here that the only "connection" with England was the intention that the Member's wife, an innocent agent in this case, would thereafter claim on his insurance policy in England, would nonetheless have been an insufficient reason to defeat the jurisdiction of the English courts.[74]

That case was in turn cited more recently in *Liangsiriprasert* v *United States Government*,[75] involving Hong Kong jurisdiction to detain and extradite a Thai national to the United States. The appellant alleged that the conspiracy was fully formed abroad and no overt act had taken place in Hong Kong, which would give rise to jurisdiction. The Crown argued against the restrictive application of the so-called "over act" doctrine in the case of conspiracies committed abroad:[76]

The reverse (*ie* the scenario in *Doot*) is not captured by the Penal Code, or indeed in any other Singapore penal statute.

74 *DPP* v *Stonehouse* [1978] AC 55 at 67-68, *per* Lord Diplock. As a commentator on such affairs describes it: "The embattled MP argued that he had been a man of honour – honourable on the grounds that he had left his wife of twenty-six years huge insurance sums to collect after his death. Mrs Stonehouse was unimpressed. She returned to Britain within hours, declared that her husband was mad, and started divorce proceedings"; Matthew Parris, *Great Parliamentary Scandals* (London: Robson Books, 1997) at 204.

75 [1991] 1 AC 225.

76 The Law Commission had also said that: "As to conspiracies abroad to commit offences in England, we take the view that such conspiracies should not constitute offences in English law unless overt acts pursuant thereto take place in England"; Law Commission Working Paper No. 29 – "Territorial and Extraterritorial Extent of the Criminal Law" (London: HMSO, 1970), para 96 at 54.

> Absurdity results from a strictly territorial approach to the crime of conspiracy. If three men agree in Belgium to murder persons in England, and on their way to Ireland for an innocent purpose they land in England owing to bad weather, are they indictable or must the police wait for a murder? If one of those three men comes to England to attend a funeral before the conspiracy is put into effect, and lawfully acquires a map of London, intending to use it to find the place of the funeral but also to use it later in connection with the conspiracy, is the conspiracy continuing in England? Do different principles apply if two of the conspirators buy the map, or if the other two in Belgium have asked him to buy it? Is it material that one of the conspirators comes innocently to England but then commits a crime such as applying for a passport in a false name for use in the conspiracy? These are all questions which cannot be resolved by the narrow ratio in *Reg.* v. *Doot* [1973] A.C. 807…

The Judicial Committee agreed, and Lord Templeman, whose judgment contains a valuable survey of the relevant English authorities, put it thus:

> But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence… it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.[77]

Lord Templeman added too that:

> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.[78]

Admittedly, there are cases which would not fit so easily within the analysis presented here. The view taken by the Privy Council in

[77] *Supra* note 75 at 251.
[78] *Ibid*.

Liangsiriprasert contends with the subsequent view taken in the Court of Appeal in England in *R* v *Atakpu*,[79] in which jurisdiction was denied in a case involving a conspiracy to steal cars from a rental company in Belgium and to drive them to England for sale. Moreover, the tendency to restrict the scope and ambit of the criminal law is sometimes so strong that even where Parliament has provided for the extraterritorial application of English criminal laws, the presumption remains in place that, as was noted by Singapore's Court of Appeal in *Taw Cheng Kong*, Parliament's words should be construed narrowly. Thus in *Taw Cheng Kong*, the Court of Appeal referred to the general canon of construction that "it is presumed that legislation is not intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction",[80] citing, amongst others, the view in the Canadian Supreme Court Case of *Libman* v *The Queen* (quoted at the outset of this article), the nineteenth-century English case of *R* v *Jameson*[81] and, more recently, the view expressed by Lord Diplock in *Air India* v *Wiggins*.[82] A similar pronouncement in the United States may also be found in the judgment of the United States Court of Appeals in *Yunis* v *Yunis*.[83]

Having said that, the choice still falls to the Singapore courts, particularly as to whether the courts here would consider it appropriate to employ a more relaxed understanding of the territorial principle, and to interpret that principle to "fit the mischief" for which the criminal law seeks to provide, or to employ some other head of jurisdiction, such as the nationality of the offender, in order to do this. While one view might perhaps suggest that *Taw Cheng Kong* confirms the continued importance of comity and international law in these matters, that case not only concerned the proper construction of Parliament's intent, but also concerned circumstances wherein it might otherwise have been thought that what Parliament intended is unconstitutional. To this additional constitutional element would apply "always a presumption in favour of the constitutionality of an enactment and this burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles".[84] Read in this way, is it surprising that when the extraterritorial application of Singapore's criminal laws falls to be considered, particularly where there clearly exists a long-established prejudice in the common law against the extraterritorial application of criminal laws, Parliament would

[79] [1993] 4 All ER 215.

[80] *Public Prosecutor* v *Taw Cheng Kong*, *supra* note 1 at 432E-G.

[81] [1896] 2 QB 425, per Lord Russell CJ at 430.

[82] [1980] 1 WLR 815, per Lord Diplock at 819.

[83] *Supra* note 64. According to the court, "[t]o be sure, courts should hesitate to give penal statutes extraterritorial effect absent a clear congressional directive…Similarly, courts will not blind themselves to potential violations of international law where legislative intent is ambiguous".

[84] *Lee Keng Guan* v *PP* [1975-1977] SLR 231 at 237 *per* Wee Chong Jin CJ.

rightly be attributed respect not only for the law of nations but also by the common courtesy of nations? That, if it might be permitted to suggest, is all that was meant by the references to "comity", and indeed "international law", in the Court of Appeal's judgement in *Taw Cheng Kong*.

VI. PARLIAMENT, THE EXECUTIVE & THE COURTS

There is after all good reason to suppose that the Singapore courts may choose to go down the road of a common law doctrine of extraterritoriality, for as the Court of Appeal put it:

> As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief. But we must not lose sight that Parliament, in enacting such laws, may be confronted with other practical constraints or considerations which the courts are in no position to deal with. The matter, ultimately, must remain in the hands of Parliament to legislate according to what it perceives as practicable to meet the needs of our society.[85]

Yet, regardless of whether Parliament should, in such a case, specify more closely the kinds of circumstances in relation to which the "effects" doctrine would be applicable, or indeed to leave it to the discretion of the courts altogether, there remains the need to address an ineluctable tension between the constraints that might be imposed by international law and comity on the one hand, and the competing consideration that there might be an increasing need in the future to develop Singapore's extraterritorial penal laws. There would always be genuine conceptual difficulties about the extent to which judicial policy should intrude on foreign policy questions. After all, it is on the basis of such considerations that the common law's prejudice against the extraterritorial application of penal laws rides. Even Parliament's will may itself depend on matters within the knowledge, even within the sole knowledge, of the executive at a particular moment. As the Court of Appeal put it, in *Taw Cheng Kong*:

> [W]e also thought that it was highly relevant to consider how the section [in the Prevention of Corruption Act] was worded. The wider its ambit, the greater the encroachment upon the affairs of non-citizens outside Singapore's jurisdiction, making it more compelling to leave out non-citizens so as to abide by the comity of nations. Conversely, a narrower ambit (eg where a nexus of harmful consequences is required

[85] *Public Prosecutor* v *Taw Cheng Kong*, *supra* note 1 at 437F-G.

> under the penal provision) could well render an argument based on comity less persuasive.[86]

And to be sure, the issue of comity concerns the executive branch most. For example, during the 1989 Parliamentary session, a question was put to Parliament about the arrest of certain illegal Indian workers and the impact of this on relations with the Indian Government. The then Minister of Foreign Affairs explained that the strength of bilateral relations was founded on "mutual respect for each other's sovereignty and non-interference in each other's internal affairs", but that "Singapore has long had a problem with illegal immigrants" which, given Singapore's "size and scarce resources," requires it to "take tough measures". Nonetheless, "Singapore and the Indian authorities have worked together to resolve the issue amicably" and "Singapore made a major concession by agreeing not to prosecute all those Indian overstayers who surrendered themselves" during a repatriation exercise in relation to which Singapore provided assistance to the Indian High Commission. But "for those who have already been charged, or already convicted, and are appealing, the law has to take its course" and "[t]he Government cannot intervene in cases which are before the Courts".[87]

Might it not then be inferred from this that, while the law has to take its course, its effect might be so wide at times as to have been unintended even by Parliament, to whom the executive, should it choose the exercise of its prerogative in the way it did in the Indian workers' incident, is in any event accountable? In *Libman* v *The Queen*, which was cited by the Court of Appeal in *Taw Cheng Kong* to emphasise the importance of international comity in addressing such matters, La Forest J put the entire point therein in the following manner:

> …the English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country.[88]

[86] *Ibid* at 433F-G.

[87] *Singapore Parliamentary Debates, Official Record*, 29 May 1989, Col 149.

[88] *Supra* note 1 at 221, *per* La Forest J.

Comity features therefore only in the exceptional, and not the usual, case. And while the Government cannot always intervene in cases, which are before the courts, it should also be remembered that, in addition to the discipline of collective cabinet responsibility, the executive branch is ultimately accountable to Parliament and the executive can sometimes "intervene", particularly where this is at the request of the courts themselves. I am referring here to the practice of judicial requests for executive certification in those cases wherein the input of the executive may not only be desirable but necessary where the boundaries are unclear between the exercise of a legitimate judicial function and the prerogative of the executive to conduct the foreign relations of a nation.

The Government has, aside from those areas in relation to which Parliament has enacted legislation, a wide prerogative in foreign affairs. It is responsible for the conduct of foreign relations with other nations in connection with which it has solely within its knowledge certain matters, which may come before the courts, even in relation to those matters concerning which Parliament itself has supplied legislation.[89] Even where executive certification is employed, it would only enable the executive, subject to the scrutiny of Parliament, and the courts, to balance the competing considerations of addressing a particular mischief for which the law provides against the potential risk of diplomatic controversy. Would not a practice that enabled the courts to request certification of the Government of the day as to certain questions allow the State as a whole to "speak with one voice"?[90]

Following the Court of Appeal's suggestion, if Parliament were to adopt the "effects" doctrine in the future, it might wish to rely on a control mechanism such as that provided by way of the device of executive certification. Regardless of whether the "effects" doctrine is employed on a statutory footing, or whether we are only considering the common law discretion of the courts, such a mechanism would address the reasons for having a restrictive view of extraterritoriality, and it might be thought that once these reasons are accounted for in this way, there would be less that would remain to commend the territorial principle.

A. *The Executive Certificate in English Law*

The practice of executive certification came to be settled practice in the English courts with the passage of the United Kingdom's Foreign Jurisdiction Act, 1843 (later consolidated in the Foreign Jurisdiction Acts of 1890 and 1913). Originating in the *iura regalia*, the new statutory footing

[89] *Halsbury's Laws of Singapore* (Singapore: Butterworths, 1999), Volume 1, 10.008 at 12-13.

[90] As Lord Atkin once put it "[o]ur State cannot speak with two voices…the judiciary saying one thing, the executive another"; *The Arantzazu Medi* [1939] AC 256 at 264.

gave rise to the establishment of consular courts by the Crown wherever it could obtain "by negotiation, treaty, usage or simple assumption"[91] the privilege of extraterritoriality for its subjects. The demise of this administrative practice, together with the surrender of Turkey in 1924, Siam in 1926, and Persia in 1929 was due to historical reasons, and it is no reason to suppose that it is because certification is somehow intrinsically unsound.

To the objection that this practice could in any case not possibly have any relevance to the circumstances of modern Singapore, it is noteworthy that section 1 of the Act of 1890 was actually framed in such terms that alien nationals were also included by implication within the ambit of the Act. Furthermore, "the existence or extent of British jurisdiction in a foreign country" continues to receive mention from the editors of *Oppenheim's International Law*[92] as one of the areas in which the Foreign Office Certificate remains available. This view was confirmed elsewhere in 1986 by a legal officer in the British Foreign and Commonwealth Office, according to whom we learn that the Act of 1890 requires the Secretary of State to respond to questions from a court inquiring into the extent of Her Majesty's jurisdiction in a foreign country.[93]

Except for the recognition of Governments, in relation to which a certificate is no longer issued, the position under English law with regard to those matters which have an element of foreign relations contained therein, remains largely as follows:

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91 GA Forrest (ed), *Ridges' Constitutional Law* 8th ed (London: Stevens, 1950) at 512, see also, p 221.

92 Sir Robert Jennings & Sir Arthur Watts (eds), *Oppenheim's International Law,* 9th ed vol. 1 (Essex: Longman, 1992) at 1049.

93 Elizabeth Wilmshurst, "Executive Certificates in Foreign Affairs: The United Kingdom" (1986) 35 ICLQ 157 at 165. In *Al Baker* v *Alford* [1960] AC 786 in which the appellant contended that Her Majesty's jurisdiction in Bahrain did not include the power to extend the Colonial Prisoners Removal Act, 1869, to subjects of Bahrain or Qatar, the Privy Council took the view that, with regard to the question as to whether Her Majesty's jurisdiction in Bahrain did include that power, and taking into account the language of s 4 of the Foreign Jurisdiction Act of 1890, as well as the certificate issued by the Secretary of State for Foreign Affairs, the certificate issued there was wholly conclusive of the matter. According to s 4(1) of the Act of 1890: "If in any proceeding, civil or criminal, in a court in Her Majesty's dominions or held under the authority of Her Majesty, any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State shall, on the application of the court, send to the court within a reasonable time his decision on the question, and his decision shall for the purposes of the proceeding be final." s 4(2) states that "The court shall send to the Secretary of State, in a document under the seal of the court, or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned by the Secretary of State to the court, and those answers shall, on production thereof, be conclusive evidence of the matter therein contained."

> In England, prerogative powers have conferred on the Crown the right of making war or peace, of declaring neutrality, of making treaties, of recognising or refusing to recognise foreign States and Sovereigns, of appointing and receiving diplomatic agents and of issuing passports. In all these matters, the Crown is by virtue of the prerogative supreme and, while its acts are, of course, subject to the advice of the Foreign Secretary and Cabinet and, through them, to Parliamentary control, in law it enjoys complete irresponsibility.[94]

The position in Singapore today is also essentially the same. According to *Halsbury's Laws of Singapor*e:

> Prerogative powers today mean in Singapore no more than high executive governmental powers, such as the powers exercisable in defence, national security, and in the conduct of external relations, which, by their very urgent nature, requires no consultation of Parliament or any other body before their exercise.[95]

Should the issue of Singapore's treaty relations with a foreign state come before the courts, *Halsbury's Singapore* states also that "the court should seek guidance from the executive whose views must be taken as conclusive evidence; the views of the executive on treaty relations may be volunteered to the court and where the Attorney General appears and states those views, such a statement is equally conclusive evidence".[96]

The point has also been aired in a pre-independence appeal from Singapore to the Privy Council in the case of sovereign immunity.[97] It is therefore only a very short step for the executive, by virtue of its prerogative powers in foreign affairs, to establish a regularised practice whereby, following the request of the courts in cases which concern the scope and ambit of Singapore's penal jurisdiction over conduct or events occurring abroad, the executive may choose to issue a certificate whenever appropriate.

How have the English courts fared here?

[94] *Ridges' Constitutional Law*, *supra* note 91 at 218.

[95] *Halsbury's Laws of Singapore*, vol 1, *supra* note 89, 10.008 at 12-13.

[96] *Ibid*, 10.456, *supra* note 6 at 378.

[97] *Sultan of Johore* v *Tungku Abu Bakar* [1952] MLJ 115.

B. *The English Experience*

Despite *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik*, certificates issued today under the so-called "*Kelantan* rule" need not always be conclusive for the purposes of the English courts.[98]

The argument has been made that where an argument in favour of the conclusiveness of certificates might be had on the basis of the separation of powers doctrine, the doctrine itself is ambivalent on this point. The courts of different nations relying upon the doctrine have also come up with different conclusions. It is said in this regard, in relation to the Dutch courts for example, that the courts in the Netherlands view certain matters as involving questions of evidence in relation to which it would be improper for the executive to interfere.[99]

Another argument is that the issue may involve facts, which the Crown is not solely in the (best) position to testify thereto.[100] As Sir Francis Vallat put it:

> It is believed that the test of a true certificate is not whether the facts are peculiarly within the knowledge of the Foreign Office or such as the Foreign Office may reasonably be expected to know or which the Foreign Office ought to know in the conduct of its business, but the presence of some element of recognition by Her Majesty's Government…When, however, it comes to a matter of recognition, there is no source which can state with equal authority what is or is not recognised by the Government.[101]

It is therefore sometimes said here that where the issue that requires certification is not purely one of fact, an executive certificate is not necessarily conclusive for the purposes of the English courts.[102]

[98] *Duff Development Co* v *Kelantan Government* [1924] AC 787; *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik*, *The Times*, 18 April 1985 (QBD), wherein it was held that certificates under the UK Crown Proceedings Act 1947, section 40(3) and the UK State Immunity Act 1978, section 21, are not subject to judicial review on the basis of the rule in *Wednesbury Corporation* v *Asscociated Picture Houses* [1948] 1 KB 223. But see further, *Council for Civil Service Unions* v *Minister for Civil Service* [1985] AC 374.

[99] Colin Warbrick, "Executive Certificates in Foreign Affairs: Prospects for Review and Control" [1986] 35 ICLQ 13 at 155.

[100] *The Fagernes* [1927] P 311, per Atkin LJ at 324 ("The Court has to inform itself from the best material available…Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive"), although it has been said that the issue in that case is no longer fit for Executive certification under English law, see, Wilmshurst, *loc cit*, at 158; also the criticisms of R. Edeson, "The Prerogative of the Crown to Delimit Britain's Maritime Boundary" (1973) 89 LQR 364.

[101] *International Law and the Practitioner* (1966) at 54.

[102] *Oppenheim's International Law*, *supra* note 92 at 1049.

Finally, it ought also to be asked "Is the interpretation of statute involved?" for it has also been said that the English courts will not always accept the construction placed upon a statutory provision by the executive branch.[103]

C. *Should Singapore Adopt The English Experience?*

The advantage of the English position is that the courts possess some measure of discretion over what sort of certificate would be considered conclusive when issued by the executive, and therein lies a measure of flexibility. Some issues are normally treated as questions of fact known peculiarly and only to the executive, such as whether a particular State is recognised by the Government, but not all cases are to be treated in this way.

So the courts do have some measure of discretion. In some cases, executive certificates are inconclusive for the question certified therein is not truly one of fact. Questions of treaty interpretation for example are normally resolved in favour of the conclusiveness of executive certification. Even "if it is generally correct to say that the Foreign and Commonwealth Office certifies as to facts, not law, the existence of the facts certified will often depend upon a determination of law".[104] In some cases involving "mixed" questions of fact and law, and in relation to which there is room for judicial discretion,[105] certification of matters involving (within it) some question of law need not therefore be fatal to the conclusiveness of the certificate.

The executive also possesses a measure of discretion due to another sort of distinction. Namely, between saying that certificates are normally issued where the Foreign and Commonwealth Office regards the question as one of fact, and saying that the courts will only recognise the conclusiveness of a certificate where it pertains purely to fact. It is only in the latter situation that certification, for example of "mixed" questions of fact and law, might invite a judicial finding that a certificate is not conclusive. There are also

[103] *In re Al-Fin Corporation's Patent* [1971] Ch 60, involving the extension of a patent under statute where a patentee has suffered loss "by reason of hostilities between His Majesty and any foreign state", thus requiring judicial consideration of an Executive Certificate testifying as to whether His Majesty's Government considered North Korea a "foreign state". See further, *Attorney-General* v *De Keyser's Royal Hotel* [1920] AC 508; *Laker Airways* v *Department of Trade* [1977] QB 643; *and R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 All ER 244 (House of Lords).

[104] Wilmshurst, *supra* note 93 at 160.

[105] Such as in the *Kelantan* case wherein the appellant sought, unsuccessfully however, to distinguish certification as to whether Her Majesty recognises another State from certification as to whether another State is a sovereign and independent State; *Kelantan* case, *supra* note 98 at 815.

some cases involving questions of law in relation to which, in England, the Foreign and Commonwealth Office will, by virtue of its prerogative power, refuse to issue a certificate at all, such as where the question is whether a certain person is by reason of diplomatic immunity immune from suit.[106] Finally, there are also matters in relation to which the executive envisages that the courts would find some measure of law contained therein and exercise their discretion, but the executive would prefer a pronouncement by the courts.

Yet Parliament need not abdicate control. Quite apart from the accountability of the executive to Parliament, in those further cases in which may be involved the interpretation of a statute (in England, for example, section 21 of the UK State Immunity Act 1978, section 4 of the UK Diplomatic Privileges Act 1964, and section 1(7) of the UK Deep Sea Mining (Temporary Provisions) Act 1981), much would turn on the terms of the statute. The statute may be drafted in such a way that a certificate is to be deemed conclusive, even as to any legal determination contained therein. There is no reason in legal principle why Parliament in Singapore, or the United Kingdom for that matter, could not eschew the drafting language "shall be conclusive as to that fact", or even "shall be conclusive evidence", and say, instead, "shall be conclusive before any court of law", or some such language, should Parliament choose to do so. Parliament could, as we already know, place a prerogative on a statutory footing and, in this fashion, provide for the possibility of judicial review of adminis trative action. This could overcome the difficulty of the courts finding that a certificate purporting to attest to some factual state of affairs seeks instead to determine an underlying, or "hidden", legal question, and that the certificate is thus legally inconclusive.

Should there ultimately come to pass a practice of requesting executive certification, there are perhaps distinct advantages in "having it to the courts" to make the request. As Wilmshurst points out, "the court, with the aid of counsel as necessary, will be able to frame the questions in a way which it considers most appropriate for the purposes of the litigation. It also helps to maintain impartiality between the parties. In cases of complexity, a good deal may depend upon the exact wording of the certificate, and, accordingly, of the questions."[107] But we are also told, a certificate may, in England, be given in response to a request of both parties, or even only of one of them, and that in criminal cases the Foreign and Commonwealth Office would be ready to send a certificate to the prosecution without necessarily settling the terms with the defendant.[108]

[106] Wilmshurst, *supra* note 93 at 168.
[107] *Ibid* at 167.
[108] *Ibid*.

Without going into the matter at great length, it suffices for the purposes of this article to show that executive certification is a malleable device of State, and that its use can be adapted to the circumstances of a particular legal system, or indeed of particular forms of government.

VII. EQUAL PROTECTION UNDER THE LAW?

For the sake of completeness, it is worth mentioning also that there was a second constitutional challenge in *Taw Cheng Kong*. This latter constitutional challenge is of significance as it could succeed against the "effects" doctrine, executive certification on a statutory basis, or indeed both, and so, finally, I shall have to turn to it.

According to this argument , where the purpose of the Act is to address the harm to Singapore that is likely to be occasioned by widespread corruption, section 37(a) of the Prevention of Corruption Act is over-inclusive where it makes criminal the conduct of Singapore citizens who commit corruption abroad with no adverse effect on Singapore. It is also under-inclusive insofar as non-citizens would escape the application of the Act, even where the conduct called into question occurs in Singapore and harms Singapore, such as where the accused, a foreigner, is a civil servant in Singapore. According to this argument, the question that thereby arises, in light of this concurrent under and over-inclusiveness, is whether section 37(a) of the Act violates the equal protection clause (Article XII) in the Constitution.

The Court of Appeal confirmed that the test in Singapore is that of whether an ordinary and reasonable citizen would discover a sufficient nexus between the mischief that Parliament seeks to address and the trait used in the statute as the basis of classification in terms of the differential treatment to be accorded to different classes of person. In other words, would the over and under-inclusiveness of s. 37(a) of the Act make the classification according to citizenship unintelligible to an ordinary citizen because of a disjunction between the purpose and effect of the provision? On the face of it, the over-inclusiveness of s.37(a) of the Act might appear to discriminate against "harmless" citizens *where* it allows "harmful" foreigners to escape instead. While Karthigesu JA concluded that the provision was therefore a nullity in the face of Article XII of the Constitution of the Republic of Singapore, the Court of Appeal was unpersuaded and found the over-inclusiveness intelligible instead on grounds of international comity and the sovereign equality of States.[109]

[109] For the judgment of Karthigesu JA, see, *Taw Cheng Kong* v *Public Prosecutor* [1998] 1 SLR 943. The Court of Appeal found, however, that "in view of the all-encompassing ambit of s 37(1), which would have captured all corrupt acts independently of harmful consequences in Singapore, we unanimously concluded that it was rational to draw the line

One North American commentator points out, in the comparative context of the equal protection jurisprudence of the United States Supreme Court,[110] that this "rational-nexus" or "baseline rationality" test is (admittedly) difficult to justify in theory precisely because legislatures do not act for no reason.[111] When then would the test invalidate an extraterritoriality clause? One answer is that it would rarely do so in such cases since an equal protection challenge to an extraterritoriality clause is in the majority of cases probably a fallacious argument, and is, in any event, unlikely to defeat existing legislation relying on the territorial or nationality/allegiance principles, such as the Misuse of Drugs Act and the Computer Misuse Act. Parliament's intent would itself have to be unconstitutional, for example, for the test to do this. However, where the "effects doctrine", even one based on statute, is adopted, the test could "bite", but again that is an issue that would only confront the Parliamentary draftsman. The point bears some elaboration by way of a swift comparison with the relative certitude of the allegiance principle as applied in the Misuse of Drugs Act, and the territorial principle as applied in the Computer Misuse Act.

D. *Where The Modalities Of Penal Jurisdiction Are Circumscribed By The Singapore Constitution*

(i) *The Misuse of Drugs Act*

The mischief addressed in the Act is one that pertains to the conduct of the regular inhabitants of Singapore, and consequently a foreigner who is not a permanent resident and who ingests controlled drugs abroad before arriving in Singapore is not caught by the terms of the Act. One complication, at first glance, is that a citizen or permanent resident who ingests controlled drugs abroad and who normally, or now, resides abroad is caught by the Act. But this is only true so long as he is "found as a result of urine tests conducted under section 31 to have smoked, administered to himself or otherwise consumed a controlled drug or a specified drug". In other words, if he enters Singapore. Since the purpose of the Act is to avoid the possibility of circumvention of Singapore's drug laws through short trips abroad (the places the Minister had in mind are all at a short-distance from Singapore), that delinquent tourists escape Singapore's drug laws in this

at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations"; *Public Prosecutor* v *Taw Cheng Kong*, *supra* note 1 at 434E.

[110] John Hart Ely, *Democracy and Distrust – A Theory of Judicial Review* (Cambridge Mass: Harvard University Press, 1980), *supra* note 69 at 251.

[111] See: Note, "Legislative Purpose, Rationality, and Equal Protection," (1972) 82 Yale LJ 13.

way is therefore intelligible to the ordinary citizen, at least for the purpose of Article XII of the Constitution. No difficulty arises here.

(ii) *The Computer Misuse Act*

In the case of the Computer Misuse Act, it allows a Singapore citizen not present in Singapore at the time, and who commits a crime similarly provided for under a foreign law in relation to a programme or data abroad, to escape. This too is, however, intelligible as no harm to Singapore results. A slightly more difficult case might involve the unauthorised disclosure of an access code[112] by an offender (party A) to another, a Singapore citizen (party B), who thereafter discloses it to a third party (party C), whereupon the third party then gains access to a programme or data in Singapore and thereby occasions wrongful loss. Assume satisfaction of the requisite *mens rea* in the case of all three parties. Assume also that party A (or party C) is a foreign citizen situated abroad, and is either situated in or a national of a country that neither shares an extradition treaty with Singapore nor would be willing to extradite its nationals even if it did. During the Second Reading of the Computer Misuse Bill, 18 March 1993, Nominated Member of Parliament, Dr. Toh Keng Kiat, alluded to this possibility where he expressed:

> …doubt that when the audit trail of a computer misdeed, particularly one that deals with security matters, leads to…a teenaged hacker, we will be prepared to surrender him to a foreign country for prosecution, extradition and mutual assistance arrangements notwithstanding. Vice versa, I doubt that a foreign country will also readily give up one of its citizens for trial here for a similar offence. Computer skill of this quality is often tacitly condoned as invaluable in fifth column activity as well as industrial espionage.[113]

One argument here could therefore be that the Act does not satisfy its intended purpose of protecting the programme or data located in Singapore,

[112] Computer Misuse Act , *supra* note 7, s 8 of which states:

(1) Any person who, knowingly and without authority, discloses any password, access code or any other means of gaining access to any program or data held in any computer shall be guilty of an offence if he did so —
(a) for any wrongful gain;
(b) for any unlawful purpose; or
(c) knowing that it is likely to cause wrongful loss to any person.

(2) Any person guilty of an offence under subsection (1) shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 5 years or to both.

[113] *Singapore Parliamentary Debates*, Official Record, 18 March 1993, Col 314.

or Singapore from cyber-attack, and consequently the prosecution of a Singapore citizen (party B) would be unintelligible in this sort of case. The response to this superficially attractive argument is that a person who successfully flees criminal prosecution not only fails to obviate criminal responsibility. She cannot, in this way, invalidate the criminal rule. In truth, such an argument, if made, amounts only to introducing the "supremacy clause objection" in *Taw Cheng Kong* through the back-door, for all it says is that the Singapore authorities cannot enter into the territory of another State to enforce Singapore law. Put differently, that extradition may break down could hardly be a reason to challenge the constitutionality of the underlying conduct rule. So too then, no difficulty arises here.

(iii) *The "effects doctrine"*

Things are more complicated with regard to the application of an "effects doctrine". As Lord Keith had put it in *DPP* v *Stonehouse*,[114] wherein it was considered whether an "effect" in England is required to found the jurisdiction of the English courts:

> [I]f a person on the Scottish bank of the Tweed, where it forms the border between Scotland and England, were to fire a rifle at someone on the English bank, with intent to kill him, and actually did so, he would be guilty of murder under English law. If he fired with similar intent but missed his intended victim, he would be guilty of attempted murder under English law, because the presence of the bullet in England would be an intended effect of his act. But if he pressed the trigger and his weapon misfired, he would be guilty of no offence under the law of England, provided at least that the intended victim was unaware of the attempt, since no effect would have been felt there. If, however the intended victim were aware of the rifle being pointed at him, and was thus put into a state of alarm, an effect would have been felt in England and a crime would have been committed there. The result may seem illogical, and there would appear to be nothing contrary to international comity in holding that an act done abroad intended to result in damage in England, but which for some reason independent of the actor's volition had no effect there, was justiciable in England.

The "effects" doctrine, if it is to be adopted in Singapore, should perhaps be addressed by way of legislation, but the results attendant to the application of the doctrine in certain cases may not only be unpredictable and arbitrary, but may *thereby* be unconstitutional under Article XII of the Constitution of

[114] *Supra* note 74 at 93.

Singapore. Would it be that difficult to show that, in the myriad circumstances which such an Act is to apply, an ordinary and reasonable citizen, however hard she might try, would not discover a sufficient nexus between the mischief that Parliament seeks to address and the criterion or criteria used as the basis of classification? True, "counterexamples, do not void a classification so long as a reasonable person could find sufficient correlation between the evil combated and the trait used as the basis of classification".[115] The problem, including that of principle, is after all not insurmountable. Statutory language such as "where the effects are felt in Singapore" should probably be avoided in favour of the *clausula* "where harm is occasioned within Singapore", for example. This form of language would capture the function and basis of the "effects" doctrine and yet make plain Parliament's intent for the purposes of the "rational-nexus" test under the equal protection clause in the constitution. The courts would thereby be left in their discretion to address the mischief or harm which Singapore's criminal law seeks to address. Coupled with executive certification, this would also allow the courts recourse to the executive in doubtful cases arising due to the wide-ranging possibilities thrown up by the "effects" doctrine. As the Court of Appeal would have it in *Taw Cheng Kong*, comity does indeed have a role to play, but is confined to that purpose, and the relevant passage from the Court of Appeal's judgment need not, I think, be taken for strong acceptance of the territorial principle.

VII. SUMMATION

Without some general extraterritorial device or general resort by judicial means to such a device, the various forms of social harm that the criminal laws of Singapore are intended as a whole to address might otherwise escape regulation. Examples include the case where a blow is struck on land abroad by a Singapore citizen and the victim, who is also a Singapore citizen, dies in a Singapore hospital as a result. So too abetment, including abetment by conspiracy, abroad ("without and beyond" Singapore) of offences within Singapore, in other words the exact reverse of the scenario provided for in section 108A of the Penal Code, but in relation to which, if the English experience is anything to go by, there is cause for reflection.[116] Yet another example would be the case where Singapore enters into a treaty

[115] Ely, *supra* note 110 at 31.

[116] Singapore Penal Code, *supra* note 34, section 108A: "A person abets an offence within the meaning of this Code who, in Singapore, abets the commission of any act without and beyond Singapore which would constitute an offence if committed in Singapore. Illustration : *A*, in Singapore, instigates *B*, a foreigner in Java, to commit murder in Java. *A* is guilty of abetting murder."

obligation to either prosecute or extradite[117] those who commit particular crimes, but where an enabling Act granting the specific form of extraterritorial jurisdiction agreed in the treaty is yet to be enacted, and there are reasons that might point against extradition of a Singapore national.[118]

[117] The principle *"aut dedere aut punire"* is a normal feature of treaties which aim to ensure that the perpetrator of a crime recognised by treaty, or in some other way already recognised by international law to be a crime, does not escape punishment, and thus to this extent consider the question "Who shall try the accused?" a secondary issue. See further, *infra* note 118.

[118] To say here that Parliament can always remedy that defect when it occurs, the argument would have to confront Article XI(1) of the Constitution of the Republic of Singapore which states: "No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed". See further the defence strategy in *Pinochet (No 3)*, *supra* note 64. If there is to be a conviction in the absence of an enabling Act of Parliament, the Singapore courts would have to show that the offence in question existed as a common law offence by way of the common law giving effect to customary international law, but the jurisdiction issue will also have to be addressed, failing which the ignoble choice would have to be that between extradition, which in itself would be suspect because of the "double criminality" rule, or violation of Article XI of the Constitution, or the violation of a treaty obligation. It is perhaps of assistance to the reader should something be said here about the written law as it stands in Singapore.

In the case of piracy *iure gentium* and slavery, ss 130B and 370 of the Singapore Penal Code make these offences triable in Singapore, and, as has been seen, s 15, Supreme Court of Judicature Act expressly grants the High Court jurisdiction over "any person on the high seas" charged with the offence, see *supra* note 46, but there is no express provision for jurisdiction in the case of slavery, apart from the abetment provision in s 108A of the Singapore Penal Code, *supra* note 34. These are, in any event, cases in relation to which no violation of a treaty obligation is called into question. However, in other cases, treaty obligations may be brought into question, such as the case of hijacking committed "by any person within or outside Singapore," and "other acts endangering safety of aircraft and acts endangering safety of an international airport" currently defined under ss 3, 6 and 7 of the Hijacking of Aircraft and Protection of Aircraft and International Airports Act (Cap 124), and in relation to which s 15, Supreme Court of Judicature Act expressly grants the High Court jurisdiction over "any person within or outside Singapore", and, more generally, in relation to offences "on board any ship or aircraft registered in Singapore" and where an offence is committed "by any person who is a citizen of Singapore on the high seas or on any aircraft." Hijacking and other acts endangering safety of aircraft and acts endangering safety of an international airport, piracy and slavery are all listed in Part One of the First Schedule attendant to the Extradition Act (Cap 103) and, except for piracy, involve legal obligations as well as legal rights in relation to the other States parties to the 1988 Montreal Protocol (Treaty No 916), the Paris Treaty of 1910 (Treaty No 46), and the Geneva Convention of 1921 (Treaty No 70). In the case of the Montreal Protocol, however, the principle *"aut dedere aut punire"* is adopted. It is with situations like these that, during the hiatus that arises prior to the passing of an enabling Act, the problem described herein is most likely to arise, and may be exacerbated in certain highly exceptional, although, admittedly, equally highly unlikely, circumstances; see, C L Lim & O A Elias, "Sanctions

I have sought to argue that, in such cases, be they potential or merely hypothetical, the courts have some measure of common law discretion in this, and that statutory words of limitation such as "outside Singapore", "within Singapore", and so on, might in any case require judicial determination. Judging by the experience of the English courts, differences of result might ensue where such differences might simply be the result of the tortured history of the common law. We have seen this, for the twin-purposes of triability and jurisdiction, in the case of abetment by conspiracy and conspiracy *simpliciter*. Should an "overt act" be required then this would exclude conspiracies hatched fully abroad, but would not exclude "abetment by conspiracy" where there might be found to exist a "continuing act".[119] How the Singapore courts would choose to deal with such distinctions is a matter for the Singapore courts and Singapore judges to decide. It is clearly also a matter for Parliament to decide whether "having it to the courts" is, all things considered, the best way forward. In all this, there are genuine issues to be thrashed out. I would only venture to say here that, should it come to that, executive certification might have something therein to commend it.

When it is sometimes said then that express statutory authority is required for there to be "extraterritorial jurisdiction", which is different from saying that "the jurisdiction of the courts is founded on statute", it could simply be taken to mean that there is good reason to have the criteria governing jurisdiction over acts and events that occur beyond Singapore's territories spelled out in relation to the very specific circumstances appertaining to each category of crime. Certain types of crime would require treatment that would be different from that required of others, and

Without Law? The Lockerbie Case (Preliminary Objections)", (1999) 4 Austrian Review of International and European Law 204, for an account of the controversy arising in the United Nations in relation to the Lockerbie incident where the issue concerned the international law rights and obligations of Libya, the United Kingdom and the United States, respectively, under the 1988 Montreal Protocol.

[119] Recalling that, under the Singapore Penal Code, *ibid*, abetment by conspiracy under s 107(b) (which states that "A person abets the doing of a thing who…(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing") requires "an act or illegal omission" to take place in pursuance of a conspiracy, but where conspiracy *simpliciter*, defined in s 120A of the Penal Code does not require such an "overt" or "further" act where the agreement is to commit an act which is an offence; see the rule enunciated by the Orissa High Court in India in *Marsi Balayya* v *State of Orissa* (1976) 42 Cut LT 374. S 120A of the Singapore Penal Code states: "When two or more persons agree to do, or cause to be done — (a) an illegal act; or (b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

the argument could indeed be made that Parliament would be the best judge of that. That would only be an argument for codifying all extraterritorial crimes. The proposition need not mean, however, that since some crimes may require that the courts err on the side of the restrictive view, that the courts, without express legislative words, do not therefore possess jurisdiction over all such acts and events that occur "outside Singapore". In yet other cases, the courts should not exercise jurisdiction, even assuming jurisdiction exists, but here executive certification could allay any apprehension that having it to the law courts might, in some unforeseeable cases, overstep the mark of the common courtesy of nations.