

Singapore — Where Common Law and Constitutions Meet

Anglo-Australasian Lawyers Society Breakfast Address

Chief Justice Robert French AC
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Singapore and Australia share a common legal heritage derived from the United Kingdom. That heritage informs our common law, our legal institutions, including the legal profession, and our concept of the rule of law. Important strands of our commercial and property law and our intellectual property laws have their origins in the United Kingdom. To the power of that common heritage in facilitating practical engagement between the legal systems of Singapore and Australia may be added the force of internationalisation of commercial and other important areas of the law.

In the past Singapore may have been more oriented towards the legal system and thinking of the United Kingdom and its courts than to those of Australia. There are, however, divergences between the United Kingdom and both our jurisdictions, particularly given the effect of European community on United Kingdom law via the *European Communities Act 1972* (UK). That Act has opened the door to a great influx of European Community treaties, directives, regulations and decisions which have their own impact upon the content and methodology of the United Kingdom legal system. In addition to the natural consequences of that divergence, the Singaporean government is distinctly outward looking in its approach to the involvement of foreign lawyers in the Singaporean legal system. There are greater opportunities for Australian lawyers to engage with Singapore and it seems those opportunities are being taken. Singapore and Australian courts may find it useful to refer to each other's decisions.

That having been said, the judiciary of the United Kingdom and its legal profession are and will continue to be highly respected in Singapore. Just over four weeks ago I delivered the twentieth annual lecture of the Singapore Academy of Law

on the topic of the Rule of Law. Earlier on that day, Lord Collins delivered the Herbert Smith Freehills — SMU Asia Arbitration Lecture on International Arbitration. In April, Lady Justice Mary Arden delivered a lecture for the Academy on the topic 'Coming to Terms with Good Faith'. Shortly, a number of Queens Counsel from the English Bar will be going to Singapore to undertake advocacy training for Singapore lawyers. It is, I suppose, some consolation that they will be using the Hampel method. The English are always with us and that is not a bad thing. We are in a global market place for legal services and there are many players.

There is a sense of dynamism about the Singaporean judiciary and the profession. There also seems to be a strong vein of voluntarism reflected in the provision of pro bono services, especially in conjunction with the lower courts for legal advice, mediation and other forms of dispute resolution. While in Singapore I met with Chief Justice Menon, the Justices of the Supreme Court, Judges of the Subordinate Courts and Attorney-General Chong. I also met with Executive members and administrators of the Singapore Academy of Law, the President and Executive of the Law Society of Singapore and the Deans and members of faculty and students at the law schools at the National University of Singapore and the Singapore Management University. Generally from these encounters I was left with the impression of a high level of institutional and individual commitment to excellence and innovation in the administration of justice in legal practice and in legal education. Chief Justice Menon remarked to me during my visit that Singapore is a place in which it is possible to have a good idea and to have it realised.

To put a personal perspective in a larger context, it should be remembered that since 2003 Australia and Singapore have had a free trade agreement, the key elements of which are:

Elimination of all tariffs from entry into force;

- Restrictions on wholesale banking licences to be eased over time and a more certain and enhanced operating environment for financial services suppliers;

- Conditions eased on the establishment of joint ventures involving Australian law firms;
- A significant increase in the number of Australian law degrees recognised in Singapore;
- The removal and/or easing of residency requirements for Australian professionals and short term entry for Australian business people extended from one month to three months;
- Facilitation of paperless trading in order to reduce business transaction costs.¹

We are not unique in that respect. Singapore has a number of free trade agreements, including a free trade agreement with the European Community.

It is an interesting conjunction that Mr K Shanmugan, who is the Minister for Foreign Affairs in Singapore, is also the Minister for Law. He is a graduate of the National University of Singapore, was admitted as an advocate and solicitor in 1985, and was appointed Senior Counsel in 1998. He became a Member of Parliament in 1988. He was appointed to the Cabinet in May 2008.

Foreign law firms, including Australian law firms, can establish practices in Singapore using any one of a number of mechanisms by obtaining the requisite licence from the Attorney-General. The mechanisms are those of:

- 1.1 Licenced foreign law practice (FLP).
- 1.2 Qualifying foreign law practice (QFLP).
- 1.3 Joint law venture (JLV); and
- 1.4 Formal law alliance (FLA).
- 1.5 Representative office (RO).²

¹ Australian Government Department of Foreign Affairs & Trade, *Singapore-Australia Free Trade Agreement* <<http://www.dfat.gov.au/fta/safta/>>.

² Ministry of Law, Setting Up a Practice: Foreign law practice', http://www.mlaw.gov.sg/setting-up-a_practice/flp.html, 24 December 2012, date accessed 19 October 2013.

As of 1 July 2013 there were ten law firms holding qualifying foreign law practice licences. There were 114 foreign law practices, seven joint law ventures, five formal law alliances and three representative offices. For the most part, the foreign law firms carrying on their practice in Singapore were large international law firms.³

There have been interactions between our judiciaries. They will undoubtedly continue and hopefully increase. One question of importance in that regard is the extent to which our common legal heritage and common legal systems throw up common legal problems and answers.

There are significant differences between Singapore and Australia in land area, population, demographic mix, culture and history. Singapore consists of 5.3 million people living in a land area of 710 square kilometres. This may be compared with Australia's population of 23 million in a land area of 7.7 million square kilometres. Singapore is a unitary state while Australia is a federation. Singapore and Australia share a common legal heritage as a legacy of their colonial histories. Both have legal systems which rest upon written constitutions. There are some important human rights guarantees in the Singapore Constitution. They include:

- Article 9 — which provides that no person shall be deprived of his life or personal liberty save in accordance with law.
- Article 10 — which prohibits slavery.
- Article 11 — which prohibits retrospective criminal laws and repeated trials.
- Article 12 — which provides for equality before the law and entitlement to equal protection of the law.

³ Attorney-General's Chambers, 'Overview of Legal Professional Secretariat', http://app.agc.gov.sg/What_We_Do/Legal_ProfessionalSecretariat/Overview_of_Legal_Professional_Secretariat.aspx, 13 March 2013, accessed 19 October 2013.

- Article 13 — which provides that no citizen of Singapore is to be banished or excluded.
- Article 14 — which guarantees freedom of speech and assembly, subject to restrictions which may be imposed by the Parliament.
- Article 15 — which provides that each person has a right to profess and practice his religion and to propagate it.
- Article 16 — which prohibits discrimination against any citizen of Singapore on grounds only of religion, race, descent or place of birth.

There have been criticisms of Singapore's approach to human rights protection by such bodies as Human Rights Watch and Amnesty International. It is significant, however, that in recent times there has been vigorous discussion of Rule of Law related topics in Singapore. Last year a major Rule of Law symposium was held, which included presentations by the World Justice Project of its Rule of Law Index and the application of that Index to Singapore. The symposium was opened by the Minister for Foreign Affairs and Law.

In a judgment delivered in 2012,⁴ the Chief Justice of Singapore, who was then Chan Sek Keong, drew comparisons between Singapore's constitutional system and that of the United Kingdom. He made the point that as with the Westminster model, the sovereign power of Singapore is shared between the Legislature, the Executive and the Judiciary. On the other hand, he pointed to an important difference. While Parliament is supreme in the United Kingdom it is the Constitution which is supreme in Singapore. The latter proposition is generally true also for Australia. The Courts in both countries have the responsibility when disputes about validity are before the Court for determination, to decide whether a law is valid or invalid under the Constitution.

⁴ *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163.

Another distinction between Singapore and the United Kingdom which was pointed out in the judgment by Chief Justice Chan is that the sources of judicial power in Singapore are to be found in its Constitution and in statutes providing for Subordinate Courts pursuant to Article 93. Similarly in Australia, the source of federal judicial power is to be found in the Constitution. Under the Constitution, the judicial power of the Commonwealth is vested in the High Court and in such other Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction.⁵ The judicial power of the States is derived from the Constitutions of the States.

Separation of powers is built into the Singapore Constitution as it is into the Australian Constitution. The executive authority is vested in the President by Article 28. Legislative power is vested in the Legislature consisting of the President and the Parliament by Article 38. The judicial power is vested by Article 93 in the Supreme Court and such Subordinate Courts as may be provided by any written law. The arrangement of those provisions is similar to the arrangement in our own Constitution of key provisions, ss 1, 61 and 71 relating to legislative, executive and judicial power contained in three separate Chapters. The structural division tells the same story for both countries. Last year the Court of Appeal in Singapore considered whether laws imposing mandatory minimum sentences constituted legislative interference with the judicial power. It was not surprising in that context that the Court of Appeal had regard to decisions of the High Court of Australia about the separation of powers and, interestingly, *Totani*,⁶ a case in the *Kable* line of cases concerning the imposition upon Courts of functions incompatible with their institutional integrity.

In the area of public law and particularly constitutional law there is some important common ground relevant to the rule of law. In *Ramalingam Ravinthran v Attorney-General*,⁷ the Court of Appeal of the Supreme Court of Singapore last year affirmed a basic principle of the Rule of Law in both Singapore and Australia. The Court of Appeal said:

⁵ Commonwealth Constitution, s 71.

⁶ *South Australia v Totani* (2010) 242 CLR 1.

⁷ (2012) SGCA 2.

All legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the Rule of Law.⁸

In Australia where we have written Commonwealth and State Constitutions there is no such thing as unlimited official power be it legislative, executive or judicial. The legislative power of the Commonwealth is confined to the subjects upon which the Commonwealth Parliament is authorised to make laws and is subject to guarantees and prohibitions set out in the Constitution or implied from it. The legislative powers of the States are conferred by their own constitutions. They are subject to the paramountcy of Commonwealth legislation and to guarantees and prohibitions express or implied to be found in the Commonwealth Constitution and applicable to State Parliaments. Similarly the executive and judicial powers of the Commonwealth and the States are subject to constraints express or implied imposed by the Commonwealth Constitution and in the area of State executive power by State constitutions. No law in Australia can confer upon a public official unlimited power. The simple reason for that constraint is that such a power could travel beyond constitutional limits.

A particular example of a common public question arising in both countries is that of judicial review of prosecutorial discretions. Last year the High Court in *Likiardopoulos v The Queen*⁹ affirmed earlier authority relating to limitations on judicial review of prosecutorial discretions. The Court thus reaffirmed the proposition that the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what. A similar issue arose in the recent decision of the High Court in *Magaming v The Queen*¹⁰ delivered on 11 October 2013. That case concerned provisions of the *Migration Act 1958* (Cth) creating two offences prohibiting a person organising or facilitating the bringing or coming to Australia of persons who are not citizens and have no lawful right to come to Australia. One offence called 'people smuggling' involved bringing another person to Australia who was an unlawful non-citizen. The second offence described as 'an aggravated offence of people smuggling' involved

⁸ (2012) SGCA 2, [17]; affirming *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 [149] (Chan CJ).

⁹ (2012) 246 CLR 265.

¹⁰ [2013] HCA 40.

bringing at least five unlawful non-citizens to Australia. The appellant asserted that the two provisions gave prosecuting authorities a choice about what sentence an accused would suffer on conviction. The Court having stated that:

It is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences.¹¹

said:

although the prosecutor chooses which charge to lay, the prosecutor does not choose what punishment will be imposed. The court must determine the punishment to be imposed in respect of the offence of which the accused has been convicted and the court must determine that punishment according to law.¹²

Singapore has recently had to grapple with the question of prosecutorial discretion and its interaction with the guarantee of equality before the law and equal protection of the law under Article 12 of the Singapore Constitution. The question has arisen in the Court of Appeal in connection with decisions to charge co-offenders with different criminal offences relating to drug trafficking when one offence carries a mandatory death penalty and the other does not.¹³

Beyond the field of constitutional and public law the legal system of Singapore bears a strong resemblance to the English legal system.¹⁴ That is not surprising given the history of British colonisation of Singapore. The reception of English law can be traced back to two Charters of Justice issued to the East India Company in 1786 and 1826 respectively. Under the second Charter, a court was created to serve Penang, Singapore and Malacca.¹⁵ In the latter half of the 19th Century the colonial Judges held that English law as it existed on 27 November 1826 had been introduced into the Straits Settlement by the second Charter of Justice.¹⁶

¹¹ [2013] HCA 40, [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (footnote omitted).

¹² [2013] HCA 40, [26].

¹³ See for example *Ramalingan Ravinthran v Attorney-General* 2 SLR 49; *Yong Vui Kong v Public Prosecutor* 2 SLR 872; *Quek Hock Lye v Public Prosecutor* 2 SLR 1012.

¹⁴ Helena H Chan, *An Introduction to the Singapore Legal System* (Lawbook, 1986) 1.

¹⁵ *Ibid* 5.

¹⁶ *In the Goods of Abdullah* (1835) 2 Ky 8; *R v Willans* (1858) 3 Ky 16; *Ong Cheng Neo v Yeap Cheah Neo* (1872) 1 Ky 326.

The most important of the decisions was *R v Willans* in which Sir Benson Maxwell declared that:

a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England.¹⁷

It seems to have been accepted that only English law of general policy and application was received. It was to be applied subject to local customs and religions and local legislation.

In three decisions in the early 1920s, the Privy Council affirmed a view expressed by Sir Benson Maxwell in 1869 that:

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.¹⁸

It has been observed, however, that judicial decisions modifying the operation of English law were more forthcoming in areas 'which least conflicted with British commercial interests'.¹⁹ Polygamous marriages were recognised. However, in areas of contract, commercial law, procedure and evidence 'English law of general application virtually displaced indigenous law completely'.²⁰

The *Penal Code* and the *Evidence Act* had their origins in the Indian equivalents for which, of course, Sir James Fitzjames Stephen was primarily responsible although Lord Macaulay prepared a first draft of an Indian Penal Code in 1837.²¹ The application of the Indian statutes is not surprising given that from 1833

¹⁷ *R v Willans* (1858) 3 Ky 16, 25.

¹⁸ *Choa Choon Heoh v Spottiswoode* (1869) 1 Ky 216, 221. For the Privy Council decisions see *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369; *Khoo Hooi Leong v Khoo Hean Kwee* [1926] AC 529; *Khoo Hooi Leog v Khoo Chong Yeok* [1930] AC 346.

¹⁹ Chan, above n 14, 10.

²⁰ Ibid.

²¹ Barry Wright, 'Macaulay's Indian Penal Code: Historical context and originating principles' in Wing-Cheong Chan, Barry Wright and Stanley Yeo (eds) *Codification, Macaulay and the*

to 1867 the Straits Settlement was subject to the legislative power conferred upon the Governor-General of India in Council by the *Charter Act* of 1833. By a curious quirk of history, the *Penal Code* of the Colony of Singapore, as it stood in 1958, and a number of other Singaporean laws, continued to apply to Christmas Island and the Cocos and Keeling Islands, formerly part of the Colony of Singapore, after they became territories of Australia in 1958. As a Federal Court Judge I sat on a Full Court hearing an appeal from a conviction for murder in the Supreme Court of the Christmas Island territory in which the applicable law was the *Penal Code of Singapore* in 1958.²² The law of the Territory has since been overhauled and the *Criminal Code of Western Australia* now applies in lieu of the *Penal Code of Singapore*.

The *Civil Law Act 1878* which was only repealed in 1993 provided that:

If a question or issue arises in Singapore with respect to certain enumerated categories of law or with respect to mercantile law generally, the law to be administered shall be the same as that administered in England at the corresponding period, unless other provision is made by any law having force in Singapore.²³

There were some 55 English Acts that were taken as having effect in Singapore by operation of that Act. It is not surprising therefore that the English legal system as it stood prior to the United Kingdom involvement with the European Community was reflected in the Singaporean legal system.

The prominence of English law in the first 21 years after independence was reflected in citation statistics in the Singaporean Courts. During that time 66.7 per cent of all cases cited in the Singapore High Court were English, 23.8 per cent local and 9.5 per cent from other jurisdictions.²⁴ Appeals to the Privy Council were abolished in 1994 and since that time it would seem likely that the hold of English authority has and will continue to diminish.

Indian Penal Code (Ashgate, 2011) 19–55, 20.

²² *Chong Wooi Sing v The Queen* (1987) 40 A Crim R 22.

²³ As cited in Walter Woon, 'The Continuing Reception of English Commercial Law' in Walter Woon (ed) *The Singapore Legal System* (Longman, 1988) 137–169, 139.

²⁴ Walter Woon, 'The applicability of English law in Singapore' in Walter Woon (ed) *The Singapore Legal System* (Longman, 1988) 197–136, 107.

The recognition of common ground between Australia and Singapore exists not only in the area of constitutional law, but in relation to corporations, securities regulation, and land titles. The *Singapore Companies Act 1967* was substantially based on the *Uniform Companies Acts 1961-1962* of the Australian States which themselves were derived originally from the United Kingdom *Companies Act 1948*. The evolved Singapore Act has been revised 16 times.

Some aspects of the *Securities Industries Act 1973* (Singapore) have their origins in the *Securities Industry Act 1980* (Cth).²⁵ Section 103 of the Singaporean Act, regulating insider trading, is almost word for word copied from s 128 of the Australian Act. The Torrens system of land registration has been adopted by Singapore through the *Land Titles Act*. All interest in real property in Singapore must be registered.

Beyond these practical areas of overlapping law, there are important areas of the law which are common to many countries and have a kind of transnational character about them, even though expressed in each country as domestic statutes. The areas covered include maritime law, intellectual property and competition.

One class of case of cross-jurisdictional significance is the field of statutory interpretation. The *Interpretation Act* (2002 Revised Edition) (Singapore) imports a requirement that Courts apply a purposive approach in statutory interpretation and provides for use of extrinsic materials in the interpretative process. Although some distinctions in operation exist between Singapore and Australia²⁶ it is likely that there will be an increasing reference to Australian case law in Singaporean decisions that turn on statutory construction. Given the significance of statutory interpretation, a task which Australian Courts undertake at all levels, there is fertile ground for cross-fertilisation.

²⁵ Walter Woon, 'Regulation of the Securities Industry in Singapore' (1995) 4 *Pacific Rim Law and Policy Journal* 731, 753–754.

²⁶ Goh Yihan, 'A Comparative Account of Statutory Interpretation in Singapore' (2008) 29 *Statute Law Review* 195, 213–226.

There are many international lawyers now practicing in Singapore. Between 2000 and 2013 the number of foreign lawyers grew by about 42 per cent from 804 to 1142, while the number of local lawyers increased from 3,419 to 4,334. The foreign lawyer category is not further differentiated. It is not possible therefore to extract figures on the number of Australian or UK lawyers specifically.²⁷ What can be said is that Australian lawyers working in Singapore are likely to contribute to the process of judicial orientation towards Australia. That contribution may be inferred from the general phenomenon relevant to the common law of which Helena Chan said:

The essence of the common law system does not lie in rules of substantive law but in the unique methodology practiced by common lawyers. This is a peculiar mental attitude and habit of legal thought that historically evolved in England but continues to be utilised by lawyers in all legal systems identified as belonging to the common law family today. Thus the common law tends to be carried wherever common lawyers go, and the reception of English common law by legislative fiat is generally preceded by the arrival of common lawyers.²⁸

It is important to note that there is an aspect of community diversity which is reflected in particular laws. Singapore's Muslim minority is permitted to exercise Islamic law in discrete areas particularly marriage, divorce and inheritance.

In *A History of the Evolving Role of Islamic Law in Singapore* its author, Armad Nizam Bin Abbas, observed that the Singaporean courts had refused to apply British common law to Muslims in Singapore and instead applied what they understood to be Islamic law. Today, Islamic law is governed by the *Administration of Muslim Law Act 1966* which governs the Muslim community in religious, matrimonial and related matters. It established the Syariah Court with jurisdiction in marriage related matters.

Singapore is part of a global legal community. Its heavy use of English case law has abated in favour of more and varied sources. It seeks to take full advantage of the benefits of globalisation and in particular the global convergence of commercial law. The present Chief Justice of Singapore is keen to establish a commercial court

²⁷ Ian Poh, 'Foreign lawyers' pool grew 42% in 6 years', *AsiaOne* 7 January 2013 <<http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20130106-393644.html>>, date accessed 23 October 2013.

²⁸ Chan, above n 14, 134.

which would use international judges. A Working Group headed up by a Justice of the Supreme Court was established in February 2013 to explore the feasibility of such a proposal. If there is any lesson to be taken from this account of what is happening in Singapore it is that there is no time like the present for Australian lawyers to engage constructively with a legal system that can and is likely to have increasing commonality with the Australian legal system.