

WHICH ROAD TO THE PAST?—SOME REFLECTIONS ON LEGAL HISTORY

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I. INTRODUCTION

It is not customary to commence a *keynote* address with caveats and disclaimers. However, this is the rare occasion when such qualifications are necessary because—if I may be permitted a crude pun—of the lack of qualifications of the speaker himself. This is not false modesty. It is very real. I know that I have often been referred to in the Singapore context as a legal historian.¹ Clearly, the dearth of personnel has been a reason for what I consider to be an oversight. I have no professional qualifications—or formal training—in history (except for a couple of courses in, respectively, English and American legal history during my postgraduate studies).² I have some interest—but only as a rank amateur. As a result, nothing I shall say will be of any significance to virtually all (if not all) of you. However, as I shall elaborate upon later, in the *spirit of diversity* which I believe the discipline of history in general and of legal history in particular represents, I trust that the somewhat different perspectives which are contained in this paper will be of some interest to you—if only because some thoughts might arise even from the mistakes I make.

As I believe that the historical method is an integral part of the writing of legal history, I will commence this paper with a few (albeit amateurish) reflections on the nature of history in general and whether objectivity in history is possible in particular. I will then proffer—in the briefest of fashions—what I think a practical approach

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¹ See e.g., Kevin Y.L. Tan, "Essays in Singapore Legal History: An Introduction" in Kevin Y.L. Tan, ed., *Essays in Singapore Legal History* (Singapore: Singapore Academy of Law and Marshall Cavendish Academic, 2005) 1 at 3 [Tan, *Essays*]; the *Foreword* to Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Singapore: Singapore Academy of Law, 2006) at ii [Phang, *Foundation to Legacy*].

² Which were taught with great passion and learning by Professor Charles Donohue and Professor Morton J. Horwitz, both from Harvard Law School.

towards the practice of history might look like. I will then proceed to consider briefly the nature of *legal* history. These sub-topics (which comprise the first substantive part of this paper) constitute reflections on the *more general* aspects of legal history. Turning to the second substantive part of the paper, I will share some personal views on the *uses* of legal history as well as some experiences of my own *personal encounter* with the discipline of legal history before concluding this particular address.

II. SOME GENERAL REFLECTIONS

A. What is “History”?

Put simply, “history” seeks to give an account of the past. However, the problem, in my view, is how to accomplish this objective (assuming, for the moment, that the subject matter that an account is sought from can be clearly identified to begin with). In this regard, one cannot avoid the fact that there are *different ways* of “doing history”, with two approaches lying at extreme and opposite ends of the spectrum. Indeed, even the denial that there are different ways of “doing history” is *itself* a way of “doing” (or, more appropriately, *not* “doing”) history.

Again, put somewhat crudely, the *first* approach is what I would term “*the documentary approach*”. Indeed, this is the more traditional approach and appears to be the dominant one in the Singapore context—at least amongst legal historians. Put simply, such an approach is premised on the idea that every proposition made in every historical account must be supported by the relevant document or documents. No speculation is permitted in the absence of a document which, presumably, furnishes the evidential basis for the proposition being made. However, such an approach presupposes that the historical narrative is *co-extensive (indeed, coincident) with the document or documents concerned*. With respect, a moment’s reflection will reveal that, whilst supporting documents are extremely important as constituting part of the historical record as well as evidence upon which a particular historical narrative is based, they are *not the narrative itself*. Indeed, on many occasions, the document concerned either does *not* deal *directly* with the historical narrative as such *and/or* must *itself* be *interpreted*. It is true that a document can furnish the entire account that is sought but this is likely to be rare and (as I shall argue below) is more likely to be the case where the historical narrative is sought to be taken at a very broad or systemic level (and, even then, it might be argued that there is a danger that a logic fallacy in the nature of the “Humean guillotine” might nevertheless ensue inasmuch as it is being sought to derive an “ought” from an “is”, *i.e.* a prescriptive statement from a descriptive one).³ However, even at this broad level, the documents are likely to be sufficient simply because the historian concerned is painting in broad brush-strokes to begin with. If he or she were to descend, so to speak, into more detailed analysis, the documents concerned are not likely to be sufficient. *Further*, what happens when one encounters a *gap or gaps* in the documentary record? Surely, the

³ It has been sought to be argued that this was one of the major failings which led to the decline and fall of American Realism (and see, generally, Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) [Horwitz, *Transformation*]).

historian concerned is not to sit on his or her hands in despair and cease any attempt to soldier on in piecing together the historical narrative hitherto begun. And if the historian cannot state any proposition without supporting documentary evidence, he or she will speak in a “staccato voice”, with the result that the historical narrative will be jerky at best and in shards at worst. Indeed, in this last-mentioned regard, the resultant enterprise could hardly be characterised as an historical *narrative* to begin with.

As alluded to above, the *second* approach is in *direct contrast* to the first, and is to be found in the works of such scholars as Professor Keith Jenkins.⁴ It adopts much of the critique referred to briefly in the preceding paragraph with respect to “the documentary approach” but, in my view, goes *much further*. As Jenkins puts it, “there is a *multiplicity* of types of history whose only common feature is that their ostensible object of enquiry is ‘the past’.”⁵ The learned author proceeded to observe later in his work as follows:⁶

[T]he past and history are different things. Additionally, the past and history are not stitched into each other such that only one historical reading of the past is absolutely necessary. The past and history float free of each other, they are ages and miles apart. For the same object of enquiry can be read differently by different discursive practices... whilst, internal to each, there are different interpretive readings over time and space; as far as history is concerned historiography shows this.

Inasmuch as the above observation disavows the view that there can be an *objective* interpretation of the relevant historical material and endorses a postmodernist approach towards historical interpretation which holds that *any* interpretation is *equally* valid, I must beg to differ—a point which I will elaborate upon below. If I may be permitted some rather crude terminology (but which clearly conveys the essence of this particular approach), I would term this approach “the anything goes approach”.

B. *Is There Objectivity in Historical Interpretation?*

The “modern” approach (*viz.* “the anything goes approach”) that appears in vogue nowadays (as endorsed by Jenkins as well as others) is not surprising. Such an approach stems from the times in which we live and the mantra that “everything is subjective” is a broader phenomenon that is to be found in virtually every discipline—indeed, in the very lives we live, regardless of where we are situated. This postmodernist turn may well be pervasive but it is, in my humble view, impoverished and, in the final analysis, disempowering. But, as I have just mentioned, it pervades every discipline—including the one I am more familiar with (*viz.* the law). Indeed, insofar as the discipline of law is concerned, the approach I am now

⁴ See *e.g.*, his *Re-thinking History* (London & New York: Routledge, 2003), originally published by Routledge in 1991.

⁵ *Ibid.* at 4 [emphasis added].

⁶ *Ibid.* at 7.

considering is best epitomised—with one notable exception⁷—by the Critical Legal Studies Movement.⁸ Indeed, there are legal historians who are, in fact, members of that Movement. The key scholar is Professor Morton J. Horwitz, whose work is justly famous.⁹

With respect, I think that such an approach is deeply flawed at many levels. At, for example, the level of logical argument, such an approach *necessarily* presupposes that it is *itself absolute (and, hence, is universally applicable)*. However, this itself constitutes a logical contradiction since there cannot, on the basis of this approach, be an absolute and objective basis for historical interpretation. As importantly, *if such an approach is correct and, hence universally applicable, it would itself be flawed—based on its own terms.*

But that is not all. Such an approach is, as I have also pointed out elsewhere, both destructive and corrosive; as I observed:¹⁰

[L]egal doctrine is not an end itself. Its primary function is to guide the court, in a reasoned fashion, to arrive at a *fair result* in the case before it. Here, too, academic literature has a potentially significant (perhaps even pivotal) role to play. This is because, in some quarters, there has—particularly with the advent of postmodern legal thought—been an increased (and, unfortunately, increasingly) skeptical view taken of the law in general and legal objectivity in particular. Such an approach is, on any view, both corrosive as well as destructive. Whilst one cannot deny that the *application* of objective rules and principles is a *dynamic process* which may therefore give rise (on occasion at least) to some unpredictability as well as

⁷ This is the work of Professor Roberto Mangabeira Unger (see generally, e.g., *Knowledge and Politics* (New York: The Free Press, 1975); *Law in Modern Society: Towards A Criticism of Social Theory* (New York: The Free Press, 1976); *Passion: An Essay on Personality* (New York: The Free Press, 1986); *The Critical Legal Studies Movement* (Massachusetts: Harvard University Press, 1986); *Politics, A Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987); and which is contained in three volumes, spanning over a thousand pages (and was condensed somewhat in *Politics: The Central Texts*, ed. by Zhiyuan Cui (New York: Verso, 1997)); *What Should Legal Analysis Become?* (New York: Verso, 1996); *Democracy Realized: The Progressive Alternative* (New York: Verso, 1998); *What Should the Left Propose?* (New York: Verso, 2005); *The Self Awakened: Pragmatism Unbound* (Massachusetts: Harvard University Press, 2007); *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princeton: Princeton University Press, 2007). See also Robin W. Lovin & Michael J. Perry, eds., *Critique and Construction: A Symposium on Roberto Unger's Politics* (Cambridge: Cambridge University Press, 1990); Andrew Phang, *Toward Critique and Reconstruction: Roberto Unger on Law, Passion and Politics* (Hull: Hull University Law School, 1993) and, by the same author, "Roberto Unger and the Politics of Transformation in an Asian Context" [1997] *Journal of South African Law* 45, 287 & 472).

⁸ See e.g., Allan C. Hutchinson & Patrick J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 *Stan. L. Rev.* 199; Mark Kelman, *A Guide to Critical Legal Studies* (Massachusetts: Harvard University Press, 1987); Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Massachusetts: Harvard University Press, 1998).

⁹ See e.g., Horwitz, *Transformation*, *supra* note 3 as well as, by the same author, *The Transformation of American Law, 1780-1860* (Massachusetts: Harvard University Press, 1977), the former work of which was a sequel to the latter.

¹⁰ See Andrew Phang, "Doctrine and Fairness in the Law of Contract" in Jessica Young & Rebecca Lee, eds., *The Common Law Lecture Series 2008-2009* (Hong Kong: The University of Hong Kong, 2010) 17 at 21-24 [emphasis in original]. This is an expanded version of a public lecture delivered as part of the Common Law Lecture series held under the auspices of the Faculty of Law, University of Hong Kong on 16 April 2009. For a modified version, see Andrew Phang, "Doctrine and Fairness in the Law of Contract" (2009) 29 *L.S.* 534.

uncertainty (particularly in an imperfect world), it is certainly the very *antithesis* of the law to argue that the law is wholly subjective and that (putting it crudely) “anything goes”. Indeed, as I observed in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR(R) 927 at [26] (emphasis in the original text):

[I]t is important to stress that notwithstanding many academic critiques to the effect that commercial certainty and predictability are chimerical, it cannot be gainsaid that the *perception* of their importance is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular. It may be worth observing that most of these critiques stem from a radical view of the law. To put it bluntly, many of such views stem from the premise that objectivity of the law is not merely elusive but positively illusory. In particular, such a sceptical approach is based on the idea that everything is subjective. This is, of course, the very antithesis of the very enterprise of the law itself. Such an approach also conveniently misses its own absolute cast. Unfortunately, though, it is an absolute view that dispirits and disempowers. It is profoundly negative and ought to be avoided at all costs.

Indeed, the view that the law is subjective (and, consequently, arbitrary) would cause an irreparable loss in the *legitimacy* of the law in the eyes of *the public*. And, as just mentioned, it would also dispirit as well as disempower lawyers, judges and students alike. And, from just a logical perspective (as also pointed out in the judgment just mentioned), the very view that all law is subjective is *itself* an “absolute” proposition that thus involves circularity and (more importantly) self-contradiction.

If I may interpose briefly (albeit informally and personally), when I hear the corrosive—and disorientating as well as dispiriting—sounds of skepticism and cynicism, I am reminded that, often, what is unseen is more important than what is seen. In particular, I am reminded of the *values* that are embodied in the law – in particular, the nobility of the quest for justice and the weighty responsibility we bear (whether as students, lawyers, academics or judges) to pursue this noble aim. These cannot be seen but nevertheless constitute the ideals that are the foundation of the enterprise of the law itself. I am also reminded that, on a deeper level, nobility and goodness in general is not something that we should take lightly. On the contrary, these are qualities which we should treasure. They are the true ‘anchors’ that will prevent us from being cast adrift in troubled (and troubling) times such as we are experiencing at the moment. I am reminded, here, of how a schoolmate of mine sacrificed himself in the prime of his life to rescue a person who was drowning. In that split second, he lost his life in saving another. In that split second, he accomplished more than I could ever do in a lifetime.

So you will see that I am an advocate of the objective approach in law. More importantly, for the present purposes, I see no reason, in principle, why this ought not also be the approach which one ought to adopt with regard to history (not least because both entail interpretation of available evidence and, indeed, it may even be

said that the discipline of law (particularly that of the common law)¹¹ is itself also backward-looking in nature). But is it a *practical* approach? Put another way, is it not the case that there *are*, in fact, almost invariably *different* views by *different* historians on the *same* topic? On a related note, is that not what makes historical scholarship so interesting and vibrant in the first place?

The answers to these questions must surely be an unqualified “yes”. *However*, that does *not necessarily* entail that there is *no objectively correct historical narrative*—that may be embodied within one of the existing historical analyses (or perhaps even one that is *yet to come*). This would be an apposite juncture at which to indulge in some speculation of my own as I attempt to set out—in the briefest of fashions—what is *my* approach towards the interpretation of the relevant historical record.

C. Is There a “Middle Way”?

I term my approach “the middle way”. Readers would undoubtedly be wary of such terminology to begin with—and not without good reason. Any claim to having located a “middle way” tends to be reminiscent of slicing, as it were, a living and organic record into half. However, it may well be that some Solomonic wisdom might nevertheless ensue. In any event, what I propose is not a crude slicing of the historical record as such. As we shall see in a moment, what I shall be guilty of is not this charge but, rather, an alternative charge of ambiguity and vagueness instead. Before I plead my defence, I should perhaps set out the approach from which such a charge emanates.

Although it is necessarily theoretical (inasmuch as it necessarily embodies a claim to universal application), “the middle way” is termed as such because I believe that *both* “the documentary approach” and “the anything goes approach” constitute elements of “the middle way”. Let me elaborate briefly.

To begin with, I am a great “believer” in “the documentary approach”. Indeed, I would go so far as to say that, insofar as “the middle way” is concerned, “the documentary approach” plays a *primary* role in it. I hope that I do not betray the bias of a lawyer, but it seems to me that, even (perhaps, especially) in the practice of history, one cannot operate in the abstract, for that would be a licence for speculation that bears no correspondence to reality (indeed, if there is any correspondence at all, it would be merely coincidental and accidental and would, in the nature of things, be rare in any event). Put simply, the practice of history—and law, for that matter—is not an exercise in pure fiction; both are grounded in the reality which they seek to both describe *and interpret*. It is, however, the latter element of interpretation that makes it undesirable and, indeed, impossible (as I have argued earlier) to treat the documentary material as sufficient, *in and of itself*, to embody the historical narrative. On a related note, though, despite the allusion in the earlier part of this essay to the fact that the documentary material is itself often subject to interpretation, this does not (it should be emphasised) detract from *both the necessity as well as the utility of the material itself*. And on a further related note, the concept of interpretation is not confined only to the relevant documentary material but also extends (where applicable) to the relevant *context* as well.

¹¹ Which follows, *inter alia*, the doctrine of binding precedent.

I have already referred to the destructive as well as corrosive effect of “the anything goes approach”. However, what *is* valuable in that approach ought to be given due credit and—more importantly—be applied as well. In this regard, there are at least two (closely related and, in my view, undeniable) observations that arise from “the anything goes approach”. The first is that *interpretation is an integral part of the practice of history*. The point has already been acknowledged when dealing with “the documentary approach”, particularly in the preceding paragraph. This leads to a second—and closely related—point, which is that, as a result of the need to *interpret* the relevant historical material, it is likely that there will be a number—or even a multiplicity—of possible interpretations in any given historical analysis. *However*, I respectfully disagree with the “anything goes approach” insofar as it suggests that *there can be no objectively correct historical analysis*. As I have already pointed out above, this is undesirable from several points of view.

To summarise, “the middle way”, whilst giving primacy to the relevant documentary material, nevertheless acknowledges that (for the vast majority of cases) that material cannot (in and of itself) represent the true historical narrative. Indeed that material often has, as already mentioned, itself to be interpreted; and so (often as well) must the relevant context. In most cases, therefore, there will be more than one interpretation of a given historical issue. However, this does *not* mean that there is no *objective* interpretation and the historian’s task is to present the best possible account that he or she can based on his or her interpretation of the historical material and context (acknowledging, in the process, any possible bias as well as all underlying premises in the account itself). The historical material and context themselves furnish “natural” parameters beyond which each interpretation cannot “stray”. However, this still leaves considerable scope for a number of different interpretations by different historians. That this will often be the case cannot, in my view, be helped simply because human knowledge and its pursuit in all walks of life (and the practice of history is included) will always, in the nature of things, invariably be complex as well as imperfect.

At this juncture, I have a “confession” to make. This approach is analogous to that proffered by the late Professor Ronald Dworkin in the context of a jurisprudential exposition of the nature and function of the judicial process.¹² However, the logical contradiction in the claim to (“absolute”) subjectivity was, with respect, less clearly expressed in Dworkin’s earlier work.¹³ Contrast this with his later work, which

¹² See generally, e.g., *Taking Rights Seriously* (Massachusetts: Harvard University Press, 1978); *A Matter of Principle* (Massachusetts: Harvard University Press, 1985); *Law’s Empire* (Massachusetts: Harvard University Press, 1986).

¹³ See his reference to the late Professor W.B. Gallie’s philosophical device, viz. the idea of *essentially contested concepts* (as to which, see W. B. Gallie, “Essentially Contested Concepts” (1955-6) 56 *Proceedings of the Aristotelian Society* 167 (reprinted in Chapter 8 of his book, *Philosophy and the Historical Understanding*, 2nd ed. (New York: Schocken Books, 1968)) in “Hard Cases” in *Taking Rights Seriously*, *supra* note 12, c. 4 at 103, n. 1—which is, apparently, the only reference at this early stage of his theory of the judicial process. Interestingly, Professor Peter Novick also refers to Professor Gallie’s work in the very first page of his impressive survey of the idea as well as ideal of objectivity in the American historical profession (see Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (Cambridge: Cambridge University Press, 1988) at 1. As interestingly, perhaps, is the subtitle of the “Introduction” of his book—“Nailing jelly to the wall” (which was attributed to “a crusty political historian’s characterization of the attempt to write intellectual history” (see *ibid.* at 7)).

makes the point both expressly as well as clearly.¹⁴ More importantly, however, this was *just one part of* his overall argument. It still remained for Dworkin to elucidate *which* theory best described the judicial process (which he, in fact, attempted to do *via* his theory of “law as interpretation”).¹⁵ Unfortunately, although I agree with the first part of Dworkin’s argument to the effect that there *is one objectively correct* theory of adjudication although it is *controversial which conception* of the *concept* of adjudication is the *objectively correct* one, Dworkin’s theory did not itself provide any *real way of arriving at the conclusion as to whether or not his own theory of adjudication (or any other of the theories on offer for that matter) was the objectively correct one*. At this juncture, I must admit that the *same* difficulty afflicts the practice of history as well. *However*, that does not mean that we ought to throw up our hands in abject surrender. In this regard, therefore, I return to “the middle way”, but with the caveat that it is still a *very broad* approach which therefore requires some guidance as to how it is to be *effected* (*i.e.* the problem of *application*). Such “guidance” may, arguably, be said to be *theoretical* in nature—at least insofar as it purports to arise from (and is integrated with) “the middle way”. However, this is not, in my view, a critical point. Indeed, such “guidance” is itself neither rigid nor dogmatic. It constitutes a set of guidelines that may or may not be applicable in relation to a given historical situation. Much would depend on the particular historical situation itself. More often than not, I would imagine that a combination of these guidelines would be in play in relation to the historical analysis undertaken. Let us turn, then, to consider these guidelines.

D. Guidelines for “the Middle Way”

The first guideline (or, perhaps, even pre-requisite) is that we must strive to gather as much of the relevant historical material as possible—including even less conventional materials if they are indeed relevant.¹⁶ This is, in my view, both logical as well as commonsensical, for without the relevant historical material, there is nothing to interpret in the first place. I think that this point was well-put by the famous legal historian, Sir John Baker, as follows: “I am concerned with the more basic truth that history cannot be written in any reliable way until the best evidence has been harvested.”¹⁷ This is even more needful where comparative legal history is involved.¹⁸ Of course, one can never be sure whether one has been exhaustive in

¹⁴ See *e.g.*, Dworkin, *Law’s Empire*, *supra* note 12 at 78-85 as well as, by the same author, “Law, Philosophy and Interpretation” (1994) 80 A.R.S.P. 463 especially at 474, 475, and “Objectivity and Truth: You’d Better Believe It” (1996) 25 Philosophy and Public Affairs 87.

¹⁵ And see generally the works cited at note 12 above.

¹⁶ See *e.g.*, A.H. Manchester, “An Introduction to Iconographical Studies of Legal History: England and Wales” in W.M. Gordon & T.D. Fergus, eds., *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow, 1989* (London: The Hambledon Press, 1991) 85, c. 6; Anthony Musson, “Visual Sources; Mirror of Justice or ‘Through a Glass Darkly’?” in Anthony Musson & Chantal Stebbings, eds., *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012) 264.

¹⁷ See J. H. Baker, “Why the History of English Law Has Not Been Finished” [2000] Cambridge L.J. 62 at 64.

¹⁸ Indeed, this is why works such as the following volumes edited by Professor M.B. Hooker are especially important as scholarship that can (in accessible (here, the English) language) point us to the relevant source materials: *The Laws of South-East Asia, Volume I: The Pre-Modern Texts* (Singapore: Butterworths, 1986) and *The Laws of South-East Asia, Volume II: European Laws in South East Asia* (Singapore: Butterworths,

mining all the relevant materials. However, one must nevertheless persevere to gather as much as one possibly can. Nevertheless, the materials cannot—as is the case with “the documentary approach”—be ends in themselves. They are, rather, the means to an end, which end is sought to be achieved via the process of interpretation.

The second guideline—like the first—is also probably less of a guideline than a pre-requisite. It is of signal importance: we must try our level best to write as objective a historical narrative as possible and must therefore be aware of (and thereafter avoid) any *bias* on our part. As we are imperfect, this is perhaps only an ideal which we strive to achieve but can never *fully* attain. But strive we must. And this begins, in my view, by setting out—as far as is possible—any actual (or possible) biases which we might have¹⁹ in order that the reader would be aware of them and can therefore take them into account when reading our work.²⁰ On a related (and somewhat more positive) note, such an attitude also paves the way to be open to the rich and textured diversity of other views on the same topic. As a learned author perceptively observed:²¹

No one analytical framework or viewpoint is likely to provide all the answers, let alone the perfect model. This, in turn, means being sensitive to the weaknesses as well as to the strengths of one’s own perspective—to what one’s theories, hypotheses and methodologies leave out or obscure as well as to what they may illuminate. Multiple approaches are, therefore, essential for the realization of an undogmatic history of law and material society. They might enable us to re-interpret existing data and question the validity of more traditional analyses.

I turn now to the third (and final) guideline—the process of (indeed, the necessity for) *interpretation* itself. This particular guideline is arguably the most important (and the most difficult to get a handle on, so to speak).

It is perhaps trite to state that historical interpretation can take place at several levels of generality. However, this observation has significant theoretical as well as practical implications. Put simply, the question that arises is this: *what is the optimal level at which to pitch the historical narrative concerned?* As already alluded to above, the available *documentary materials* would furnish some parameters. *The purpose of the writer would also be crucial.* If, for example, the purpose is only to provide a broad picture of the topic concerned, then the resulting historical narrative can indeed be pitched at a more general level—and vice versa. In this last-mentioned (and *contrasting*) regard, there are, of course, a great many very specialised topics which require extremely close textual as well as contextual analyses—as a result of which meticulous attention to detail becomes the order of the day. Much of the

1988). See also my review of both volumes in (1988) 30 Mal. L. Rev. 467 as well as the important (and interesting) essay by Professor David Ibbetson entitled “Comparative Legal History: A Methodology” in Musson & Stebbings, *supra* note 16, 131.

¹⁹ Including viewing (at least in an unreasonable fashion) the past through the lenses of the present.

²⁰ And see *e.g.*, the material cited in Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990) at 372, 373, n. 18 [Phang, *Development of Singapore Law*], with regard to the undue influence of so-called Western concepts and modes of analysis. See also, in this regard, the book review by the late Professor G.W. Bartholomew of the late Professor R.H. Hickling’s book, *Malaysian Law* (Kuala Lumpur: Professional (Law) Books Publishers, 1987) in (1988) 30 Mal. L. Rev. 497.

²¹ See David Sugarman, “Law, Economy and The State in England, 1750-1914: Some Major Issues” in David Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press, 1983) 213, c. 9 at 258.

time, though, I suspect that the historical project concerned will lie somewhere in the middle. In this regard, I find the following observation both memorable and (more importantly) pertinent:²²

There is something about the advancing movement of historical scholarship that induces this periodic absorption of creative minds in technical problem-solving—*an alternating dipping and soaring motion of the mind as it drops down to scrutinize puzzling, tangled details, then struggles, not always successfully, to rise again to view the landscape whole. Perhaps that is the way historical understanding must grow.* But, whether or not that is so, large areas of history, including some of the most intensively cultivated, have become shapeless, and scholarship is heavily concentrated on unconnected technical problems. Narratives that once gave meaning to the details have been undermined and discredited with the advance of technical scholarship, and no new narrative structures have been constructed to replace the old.

The ideal analogy would be that of the eagle, whose near-perfect vision (which gives it an unparalleled and, indeed, majestic view of the overall landscape below from the skies above) is coupled with the swift and efficient capture of its prey on the ground below. But I think that Professor Bailyn has captured a more realistic picture, so to speak, in the words just quoted. We aspire to be “historical eagles” but we are constrained by our own limitations. In the circumstances, we can only do the best we can with whatever historical materials we have. The lesson, however, is both clear as it is valuable: we must not lose the wood for the trees and must tend to the trees when it is necessary in order that the wood not be depleted or even lost. We do this by what I have termed an “*interactive*” process.²³ It is admittedly, rather “hazy”, but furnishes us with a *balanced* perspective of both overall structure as well as the specific details within that structure. Only then, I believe, will we be able to furnish a nuanced narrative as well as analysis of the topic we are considering. It is, of course, easier said than done. However, it is precisely in the “doing” that the scholarship we aspire towards is, in fact, produced.

Whilst on the process of interpretation, and bearing in mind the inherent “haziness” of the process which I have been able to only sketch out in very broad brushstrokes, perhaps the more nuanced views of Professor G. Edward White might furnish us with more understanding as well as guidance. Professor White basically views historical scholarship at four levels, as follows:²⁴

A work of historical scholarship can communicate at *four levels*. On a *first* level of communication, which is commonly taken to be the most significant, the work *seeks to contribute to or to recast existing scholarly wisdom through a proposed interpretation of a particular series of events*. I call this level *the level of historical narrative*. At a *second* level, the work *seeks to subsume this proposed interpretation within a particular perspective on the subject of history itself*: I call this level *the level of historiography*. At a *third* level, the work

²² See Bernard Bailyn, “The Challenge of Modern Historiography” (1982) 87 Am. Hist. Rev. 1 at 7 [emphasis added].

²³ See generally Phang, *Development of Singapore Law*, *supra* note 20 at 8-13.

²⁴ See G. Edward White, “Truth and Interpretation in Legal History” (1980-1981) 79 Mich. L. Rev 594 at 595 [emphasis added].

argues for the general primacy of that historiographical perspective as a way of interpreting reality: I call this level the level of metahistory. And at a fourth level, if the basic assumptions and perspectives of the second and third levels are adopted, the work suggests that certain normative implications for contemporary policy-making follow. I call this level the level of metapolitics.

The learned author proceeds to observe as follows:²⁵

Not all historical scholarship, of course, explicitly communicates on each of these four levels, and some does not even address the kinds of issues that one associates with the levels of metahistory and metapolitics.

He then suggests two canons which guide as well as constrain historical writing, *viz.* the “canon of detachment”²⁶ and the “criterion of engagement”,²⁷ respectively. Constraints of space preclude me from describing these canons in any detail.²⁸ Suffice it to state that Professor White views the “canon of detachment” as comprising “two distinct aspects”²⁹—“interpretive detachment”³⁰ and “truth detachment”,³¹ respectively. Insofar as the “criterion of engagement” is concerned, Professor White views it as also comprising two senses—the first referring to “the scholar’s immersion in his subject”³² and (more importantly) the second which “refers to the professional reader’s immersion in the organizing interpretive principle of a historical narrative”,³³ with engagement in this second sense “[becoming] a synonym for the process of stimulating further scholarly inquiry.”³⁴ Both the “canon of detachment” and “criterion of engagement” interact with each other.³⁵ However, Professor White’s approach eschews the criterion that the interpretation *must* conform to the historical record.³⁶ In his view, “all the evaluative criteria for successful historical scholarship are *interpretive* criteria, and that therefore the canon of detachment in historical writing is meaningful only in its interpretive aspect.”³⁷ Professor White is also quick to point out that one cannot thereby arrive at the conclusion “that no interpretation could ever be deemed ‘unsuccessful’ because it offended some variety of internal professional logic.”³⁸ However, in addition to the “internal logic” criterion, he also posits what he considers to be two more central criteria, *viz.* the criteria of “contemporary fit” and “current common sense”, respectively³⁹—bearing in mind that the latter (*viz.* “current

²⁵ *Ibid.* at 595, 596.

²⁶ *Ibid.* at 597.

²⁷ *Ibid.* at 598.

²⁸ Though see the helpful summary, *ibid.* at 601. However, it is submitted that a mere perusal of this summary alone is insufficient and that the reader is advised to read the analysis in the pages leading to that summary as well.

²⁹ *Ibid.* at 597.

³⁰ Which he describes as “the suspension of prejudgment toward the historical evidence that one is examining” (see *ibid.*).

³¹ Whose focus, he states, “is primarily on the levels of historical narrative and historiography” (see *ibid.*).

³² *Ibid.* at 598.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* at 599, 601.

³⁶ *Ibid.* at 601.

³⁷ *Ibid.* [emphasis in original].

³⁸ *Ibid.* at 603.

³⁹ *Ibid.* at 604.

common sense”) relates to that of *the professional community* itself.⁴⁰ Insofar as Professor White is concerned, “[h]istorians cannot avoid interpretation, and ‘successful’ interpretations become, through the process of provisional acceptance of their explanations by a professional community, surrogates for truth.”⁴¹ In his view, “[t]he writer engages the reader with the suggestiveness of an interpretation, but presents that interpretation in a manner that emphasizes its internal logic, its contemporary fit, and its current common sense.”⁴² Professor White then proceeds to observe—on a broader level (engaging the latter perspectives referred to earlier)—as follows:⁴³

In so doing the writer is seeking, as a preliminary strategy, to detach his interpretation from any grand theory of reality that the interpretation conveys. Then, after the reader has digested and assessed the plausibility of the interpretation, he is led, by the power of the interpretation itself, to consider its suggestiveness—to assess the theoretical perspective on which it implicitly rests and the guidelines it provides for future research. In the schema of this Essay, metahistorical perspectives must not be permitted to overwhelm historiographic interpretations; historiographic interpretations must be consistent with a number of plausible metahistorical perspectives and must provide suggestive examples for professionals. An interpretation of this kind can be said to be consistent with, but not dependent upon, a view of reality.

I think that there exists much food for historical thought and method in Professor White’s observations as well as suggestions. However, they do confirm something which I had hoped they would not—that the very nature of *interpretation* in history is rather more fluid than what we would like. Whilst, as I have alluded to, there ought in principle to be one objectively correct interpretation, the complexity as well as imperfection in scholarship (and, indeed, life itself) will almost invariably engender a variety of interpretations with respect to any given topic. But perhaps this is no bad thing, given the very nature of the university itself (which, by its very nature and terminology, endorses unity in diversity). However, as I have also pointed out above, the process of arriving at these interpretations is not an arbitrary one. As Professor Wilfrid Prest very eloquently put it:⁴⁴

Of course, the past is gone forever, and we can never hope to ‘reconstruct’ it in all its complexity. But this does not mean that we are free to treat it as blank canvas for our own creative imaginations, or present-day preoccupations, to work

⁴⁰ *Ibid.* at 605. Professor White also observes (in the “Conclusion” to his essay) thus (*ibid.* at 614): Professional communities, I believe, are united not by ideology, but by tacitly accepted definitions of their professional functions. However one defines the function of an historian, it is not synonymous with the function of an ideologue. Even if one rejects the criteria for “successful” historical scholarship that I have set forth in this Essay, I suspect that one would have to substitute criteria that sharply distinguish between the art of historical interpretation and the art of ideological oratory.

⁴¹ *Ibid.* at 607.

⁴² *Ibid.*

⁴³ *Ibid.* at 607, 608.

⁴⁴ See Wilfrid Prest, “Lay Legal History” in Musson & Stebbings, *supra* note 16, 196 at 210. See also the observations of Professor White, reproduced at *supra* note 40. The following observations by Professor Novick may also be usefully noted (see *supra* note 13 at 2):

The objective historian’s role is that of a neutral, or disinterested, judge; it must never degenerate into that of advocate or, even worse, propagandist. The historian’s conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with the judiciary, these qualities are

upon—at least if we aspire to call the result history, not fiction or polemic. On the contrary, professed historians are under an obligation to those who were once as alive as we are now, to tell the story of their actions, emotions and thoughts in as balanced, fair and truthful a fashion as possible—if only because they are no longer in a position to speak for themselves. That must be the aim, even if our achievements are doomed always to fall short of this ideal, and not necessarily for want of trying. Any other stance risks regress to a relativistic nihilism, where the work of historians is ultimately assessed in terms of congruence with some more or less dogmatic orthodoxy of their own times.

What, however, I think ought to be assiduously avoided is the temptation to reduce all historical events as being subject to one overarching metatheory. To this end, I would eschew at the very least the latter two levels of historical scholarship which Professor White refers to, *viz.* the levels of metahistory and metapolitics, respectively. Indeed, the quintessential example of such a metatheory may be found in Marxist historiography. Of all the metatheories, it is amongst the most popular. This is not surprising, not least because of its intuitive attractiveness that results from its use in various forms to combat injustice. Indeed, even Lord Denning did not wholly reject Marxian theory.⁴⁵ He has expressed the following view with respect to State ownership or nationalisation in the development of the Welfare State:⁴⁶

Many people would deny that this has any Christian backing. They would say that derived from the atheist Karl Marx, who held that in an industrial community, the only alternative to private capitalism was state ownership of land and capital, and he advocated a revolt of the lower classes to bring this about. This has not happened in England; we have had a social revolution, but it has all happened peacefully, and I believe that at bottom it is because we are still a Christian country, and that a certain part of Marxist teaching (though by no means all) is quite in accord with Christian ethics.

The following observations by Professor Bailyn are also interesting:⁴⁷

We are all Marxists in the sense of assuming that history is profoundly shaped by underlying economic or “material” configurations and by people’s responses to them; *few* of us are Marxists in *the doctrinal sense* of believing that these forces and these responses *alone* are sufficient to explain the course of human affairs.

guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship or bias—not having any investment in arriving at one conclusion rather than another. Objectivity is held to be at grave risk when history is written for utilitarian purposes. One corollary of all this is that historians, as historians, must purge themselves of external loyalties: the historian’s primary allegiance is to “the objective historical truth,” and to professional colleagues who share a commitment to cooperative, cumulative efforts to advance towards that goal.

⁴⁵ Cf. Claire Palley, “Lord Denning and Human Rights—Reassertion of the Right to Justice” in J. L. Jowell & J. P. W. B. McAuslan, eds., *Lord Denning: The Judge and the Law* (London: Sweet & Maxwell, 1985) 251 at 365, where she argues that, because of his emphasis on justice, Denning could “turn to his Marxist critics, saying that, rhetoric or not, he has reified justice, with the consequence that the profession now focuses upon it.”

⁴⁶ See Sir Alfred Denning, *The Christian Approach to the Welfare State: The 17th Shaftesbury Lecture* (London: The Chaseton Press of H Williams & Son, Ltd, 1953) at 10.

⁴⁷ See Bailyn, *supra* note 22 at 6 [emphasis added].

I would endorse the view just quoted, not least because, to rely upon Marxist theory as an overarching one that explains (here) history is, with respect, to court a reductionism that is both artificial as it is unscholarly. Indeed, even Marxist historians such as the late E.P. Thompson have eschewed a reductionist approach which views law as mere superstructure (as opposed to having any substantive value in itself).⁴⁸ Put simply, life (and, *a fortiori*, history) is just far too complex to be explained by a single overarching metatheory.⁴⁹

However, I have hitherto—and, I might add, unwittingly—strayed into the next sub-topic. In particular, I have proceeded on the assumption (apparent at least now and again throughout this paper) that there is such a “creature” as “legal history”. But am I correct and, if so, what does it look like?

E. What is “Legal History”?

Despite my best efforts to leave the threshold question open, the heading of this part of my paper has, I am afraid, immediately given the game away. I hope that the reader will not think me biased if I state that there *is* such a “creature” as “legal history”. And, in this regard, I would—with great temerity and humility—beg to differ from the (contrary) view expressed by one of the most eminent legal historians, Professor Frederic William Maitland, and suggest that “legal history” is *not* the *same* as “history”. In suggesting this, I hope, simultaneously, to avoid the critique that I am merely an apologist for the legal status quo. This has, in fact, been the critique levelled (in the main by Critical Legal Historians such as Professor Horwitz) against what has been alleged to have been a profoundly conservative approach towards doing legal history by focusing only on the history of *legal doctrine* and hence artificially separating law from politics and justifying the world as it is.⁵⁰ I would suggest that such a critique—at least in its more trenchant form—is somewhat exaggerated, and that the appropriate approach lies somewhere in-between. Let me elaborate.

The critique just mentioned is exaggerated because, as I have already emphasised earlier in this paper, there ought to be a foundation or base from which further research can be undertaken. Such a foundation or base comprises the more basic—and conventional—legal history which focuses, in the main, on gathering together the relevant legal materials.⁵¹ Whilst it is true that the very selection of these

⁴⁸ See E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975) at 258, 269.

⁴⁹ Cf. also White, *supra* note 24 at 608-613.

⁵⁰ See e.g., Morton J. Horwitz, “The Conservative Tradition in the Writing of American Legal History” (1973) 17 *Am. J. Legal. Hist.* 275 [Horwitz, “Conservative Tradition”]. See also Graham Parker, “The Masochism of the Legal Historian” (1974) 24 *U.T.L.J.* 279, especially at 287, 288; Robert W. Gordon, “Recent Trends in Legal Historiography” (1976) 69 *Law Libr. J.* 462; Chantal Stebbings, “Benefits and Barriers: The Making of Victorian Legal History” in Musson & Stebbings, *supra* note 16, 72 at 86, 87.

⁵¹ This is presumably what Professor Robert Gordon would term “internal”—as opposed to “external”—history: see Robert W. Gordon, “Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography” (1975-1976) 10 *Law & Soc’y Rev.* 9, especially at 11. See also David M. Rabban, “Methodology in Legal History: From The History of Free Speech to the Role of History in Transatlantic Legal Thought” in Musson & Stebbings, *supra* note 16, 88, especially at 93, 94.

materials entails at least some measure of interpretation, one ought not to gainsay the importance of such basic—or, more appropriately in my view, foundational—work.

However, there is no small measure of truth in the critique, especially if the focus on the history of legal doctrine is viewed as the be-all-and-end-all of the enterprise of doing legal history. Indeed, as I shall elaborate upon in the penultimate part of this paper, that is why I embarked upon not only a historical but also a socio-economic and political analysis of the development of Singapore law in my doctoral thesis. The fact of the matter is that one cannot simply indulge solely in the history of legal doctrine because the history of such doctrine is virtually always, as well as inextricably, connected or linked to its wider socio-economic as well as political context. At the very least, an understanding of such a broader context will furnish a more textured and nuanced analysis of the history of the legal doctrine concerned. The danger, however, facing the legal historian is that the moment he or she steps out of the boat of pure legal doctrine, that scholar is quite likely to step into unfamiliar and (perhaps more importantly) dangerous as well as (by its very nature) uncharted extralegal waters. An integrated analysis of the history of any given aspect of the law or legal doctrine as viewed in its relevant extralegal context is invariably going to pose difficulties—simply because the extralegal context is always going, *ex hypothesi*, to be foreign or alien to the legal historian. Indeed, even where the legal historian concerned is—and this quite common nowadays—schooled in both the law and some other non-legal discipline (for example, history, sociology, politics, economics, business or accountancy), the broader context is almost invariably too complex and involves too many other disciplines for the legal historian to cope with *all* of them in a comfortable fashion. And the degree of specialisation (even within a particular discipline) has become so accentuated nowadays that the difficulty just mentioned is likely to be exacerbated rather than reduced. Interdisciplinary collaboration is, of course, always a possibility but other problems might arise—not least the difficulty of collaboration between (or amongst) individual scholars coming from quite different disciplines (with all the ingrained ways of thinking that the discipline concerned has itself instilled within the individual concerned). Even where a broader approach has purportedly been adopted, this may still be unsatisfactory to the (especially more radical) critics.⁵²

However, despite the difficulties briefly set out in the preceding paragraph, one thing is, nevertheless clear—legal historians ignore the broader context at their peril, although this does *not* mean that “legal history” is *necessarily* the *same* as “history”,⁵³ if for no other reason that the extralegal context embraces much more “territory” than that covered by the discipline of history alone. Indeed, the broader, extralegal, context is important, *regardless* of the period under study. That an understanding of such context is important even with respect to more ancient periods is acknowledged by legal historians, although the difficulty of accessing such material is accentuated,

⁵² The great legal scholar, Professor Roscoe Pound, for example, is well-known for calling (from an extremely early time) for a sociological jurisprudence (see *e.g.*, Roscoe Pound, “The Need Of A Sociological Jurisprudence” (1907) 19 Green Bag 607), but even his work has not escaped criticism by, *e.g.*, Professor Horwitz (see Horwitz, “Conservative Tradition”, *supra* note 50). Admittedly, one should not be surprised at such dissatisfaction as well as critique, given Professor Horwitz’s roots in the Critical Legal Studies Movement.

⁵³ And see T.F.T. Plucknett, “Maitland’s View of Law and History” (1951) 67 Law Q. Rev. 179, especially at 192.

even with regard to obtaining such materials in the first place. However, as Sir John Baker has pointed out, even though “[t]he extrajudicial legal world of the past is, inevitably, to some extent beyond recall”, “there are various forms of evidence in writing, increasing in their range after 1500, such as arbitration awards, legal opinions, conveyancing practice, teaching, tracts and articles in journals, and even personal letters.”⁵⁴

Indeed, the broader context is not something that legal historians can flee from—even if they were minded to do so. As Professor Gordon quite aptly observes:⁵⁵

We used to think there were two realms: the realm of law and the realm of social context. On closer inspection “law” seems to dissolve and merge into context; we have been in the swamp all along without knowing it.

However, the same writer proceeds—acknowledging (in substance at least) the difficulties referred to above—to observe as follows:⁵⁶

In the absence of guiding theory, it has not been easy to find solid pathways through the swamp.

However, are we then destined to sink in the swamp through lack of pathways and consequent exhaustion? I would suggest *not* but, before elaborating (from my own personal experience) why one need not succumb to such despair, it might be appropriate, first, to turn to an important issue (albeit also viewed from a personal perspective), *viz.* the *uses* (if any) of legal history.

III. SOME PERSONAL REFLECTIONS

A. *The Uses of Legal History*

Although there is no definitive data, it would appear that legal history is not a popular subject in law schools.⁵⁷ Speaking from my own experience, this certainly appears to be the case in the Singapore context. Yet, it is imperative that students as well as lawyers understand the need for legal history in all its various forms. There are, in my view, at least two main (and related) benefits that result from the study of legal history. The first is more aspirational in nature, whilst the second is rather more practical in nature. However, before proceeding to briefly consider these benefits, I think that, contrary, for example, to Professor Maitland’s views, the search in the discipline of law for general principles is *not necessarily* incompatible with the analysis in the discipline of history of particular facts.⁵⁸ Indeed, the common law

⁵⁴ See Baker, *supra* note 17 at 78, 79 (although it is acknowledged that many of the materials mentioned are still fairly “legal” in nature).

⁵⁵ See Gordon, “Recent Trends in Legal Historiography”, *supra* note 50 at 466.

⁵⁶ *Ibid.*

⁵⁷ See *e.g.*, Parker, *supra* note 50, especially at 279, 280.

⁵⁸ Though *cf.* Plucknett, *supra* note 53, especially at 190, 191. Professor Maitland is, of course, a giant in English legal history (see *e.g.*, Sir Frederick Pollock & Frederic William Maitland, *The History of English Law: Before the Time of Edward I*, 2nd ed. reissued (Cambridge: Cambridge University Press, 1968); Frederic William Maitland & Francis C. Montague, *A Sketch of English Legal History*, ed. by James F. Colby (New York: G P Putnam’s Sons, 1915)). Reference may also be made to C. H. S. Fifoot, *Frederic William Maitland: A Life* (Massachusetts: Harvard University Press, 1971).

system in general and its system of precedent in particular require lawyers and the courts to look *backwards* at prior decisions (extracting the general rules and principles embodied in these decisions from the fact situations concerned). I realise that this may not be a perfect comparison but I do think that, at the very least, the study of law is *not necessarily* incompatible with the study of history.

Returning, then, to the possible benefits of legal history and, in particular, to the first benefit, I cannot put it better than in the following words which were penned right at the outset of a book I had written some years back:⁵⁹

Historical foundations do not exist for their own sake. On them, institutions are built and (more importantly) have a secure base from which to flourish. Without them, institutions are more likely to become anaemic and may even deteriorate over time. An historical memory enables us both to be encouraged by the successes of the past as well as to learn from its failures. It also guides us in the present and helps us to plan wisely for the future.

The above observations do not comprise mere abstract ideals. I truly believe that a historical perspective is one of the essential qualities that helps one become a “complete” lawyer. Put simply, such a lawyer must integrate the past, present and future into his or her repertoire of legal skills.⁶⁰ The *present* involves a good understanding of the legal rules and principles which are essential to everyday legal practice. The *future* involves an at least minimal understanding of theory—with the concomitant ability to think as well as analyse *conceptually*—which ability transcends both space and time. Indeed, the *methodology* inherent in *legal theory* has helped the courts on many occasions in making connections which arid legal reasoning would never have permitted—for example, in seeing the connections between what appear to be disparate legal rules. And, in making such connections, we have managed to develop the law and (more importantly) achieve justice in the case at hand. However, the *past* is no less important. Consistent with the views just quoted, a sense of history and context is important in the practical sphere as well. Often, in the courts, knowing the precise historical origins of a particular legal rule helps us to understand and apply it to the facts before us. Indeed, the entire methodology of the common law itself is (as alluded to at the outset of this part of the paper) historical (or, put in simple terms, is *backward-looking*). For completeness, I should add that there is also a fourth attribute that binds all these qualities together is the integration of *character and ideals*. In my view, when you have both character and ideals, you will want to do the right thing—and will always find ways of doing the right thing.

Let me now refer—in the briefest of fashions—to a couple of actual court decisions where an historical approach was essential to respective decisions arrived at by the Singapore Court of Appeal.

The first decision is *Seiko Epson Corporation v. Sepoms Technology Pte Ltd*,⁶¹ in which the history of s. 69 of the Singapore *Patents Act*⁶² was explored with reference to the relevant English parliamentary debates in relation to various pieces

⁵⁹ See Phang, *Foundation to Legacy*, *supra* note 1 at 1.

⁶⁰ This was one of the main themes I dealt with in my Mass Call Speech delivered on 24 May 2008. What follows is, in fact, drawn from that particular speech.

⁶¹ [2008] 1 S.L.R.(R.) 269 [*Seiko Epson Corporation*].

⁶² Cap. 221, 2005 Rev. Ed. Sing.

of English legislation—in particular, the *Patents Act 1977*,⁶³ the *Patents Act, 1949*,⁶⁴ the *Patents and Designs (Amendment) Act, 1907*⁶⁵ and the *Patents and Designs Act, 1907*.⁶⁶

By way of very brief elaboration, the *Seiko Epson Corporation* case was one in which the Singapore Court of Appeal dealt with an issue which had, thus far, not appeared to have been considered by any other court previously. It related to the question as to whether the defence of innocent infringement (contained in s. 69(1) of the Singapore *Patents Act*) is a defence to liability or is, instead, merely a restriction on the relief awardable. The court considered the text of the provision, its legislative history in both the local and English contexts, the relevant case law as well as textbook commentary, and concluded that the provision merely operates as a restriction on the relief to be awarded to a plaintiff.

The second decision was one relating to an important point of family law that had hitherto not come before the Singapore courts for a definitive ruling. In the Singapore Court of Appeal decision of *ADP v. ADQ*,⁶⁷ the main issues which arose for decision was whether or not the Singapore courts had jurisdiction under ss. 112 and 113 of the Singapore *Women's Charter*⁶⁸ to order, under the respective provisions, a division of matrimonial assets and maintenance in a *void* (as opposed to a *voidable*) marriage. In arriving at the conclusion that the Singapore courts did have such jurisdiction, the court looked not only at the express language of these provisions but also undertook a comprehensive (and historical) review of the relevant Singapore, Malaysian and English statutes as well as the historical origins of the distinction between void and voidable marriages in English law.

By way of a coda of sorts, it might also be noted that an article on the origins of the major criminal enactments of Singapore,⁶⁹ was also cited in the Singapore Court of Appeal decision of *Lee Chez Kee v. Public Prosecutor*.⁷⁰

I turn now to illustrate many of the themes I have been speaking on from a very brief account of my own experience in attempting to research and write on the legal history of Singapore.

B. *Personal Experience*

Much of what has been hitherto discussed in this paper is perhaps more theory than practice. I therefore think that it is useful to relate my own experience—in particular, the difficulties I experienced as a lawyer on the one hand and as a rank amateur (at best) as a historian—to illustrate some of the difficulties set out above and, in particular, how I attempted to respond to them.

⁶³ (U.K.), 1977, c. 37.

⁶⁴ (U.K.), 12, 13 & 14 Geo. VI, c. 87.

⁶⁵ (U.K.), 7 Edw. VII, c. 28.

⁶⁶ (U.K.), 7 Edw. VII, c. 29.

⁶⁷ [2012] 2 S.L.R. 143.

⁶⁸ Cap. 353, 2009 Rev. Ed. Sing.

⁶⁹ See Andrew Phang Boon Leong, “Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore” (1989) 31 Mal. L. Rev. 46 [Phang, “Codes and Ideology”].

⁷⁰ [2008] 3 S.L.R.(R.) 447 at paras. 126, 128. The article was cited in the process of describing the background to the *Indian Penal Code, 1860* (No. 45 of 1860) (which was adopted in Singapore).

This takes me back three decades when I was a young lecturer fresh out of law school. I do not happen to believe that things happen by coincidence but, whether by coincidence or destiny, I was tasked to teach—unbeknownst to me at that particular point in time—both legal method as well as a new course on the Singapore legal system. This entailed, for the first, teaching, *inter alia*, the methodology of the common law as well as the doctrine of binding precedent (the latter of which had more than its fair share of local idiosyncracies (including what I would term strands of “colonial *stare decisis*”)⁷¹) and, for the second, teaching, *inter alia*, the general⁷² as well as specific⁷³ reception of English law. Not surprisingly, the very nature of these topics was wholly legal in nature. But, as I have already mentioned above, research and writing in such areas are nevertheless necessary—at least as basic and

⁷¹ See *e.g.*, Walter Woon, “Precedents that Bind—A Gordian Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore” (1982) 24 Mal. L. Rev. 1 and, by the same author, “*Stare Decisis* and Judicial Precedent in Singapore” in A.J. Harding, ed., *The Common Law in Singapore and Malaysia: A Volume of Essays Marking the 25th Anniversary of the Malaya Law Review* (Singapore: Butterworths, 1985) 115; “The Doctrine of Judicial Precedent” in Kevin Y.L. Tan, ed., *The Singapore Legal System*, 2nd ed (Singapore: Singapore University Press, 1999) 230; as well as Michael F. Rutter, *The Applicable Law in Singapore: A Guide to Reception, Precedent and the Sources of Law in the Republic of Singapore and the Federation of Malaysia* (Singapore: Malayan Law Journal, 1989); Harbajan Singh, “*Stare Decisis* in Singapore and Malaysia—A Review” [1971] 1 M.L.J. xvi; Ho Peng Kee, “Fettering the Discretion of the Privy Council” (1979) 21 Mal. L. Rev. 377; Max Friedman, “Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia” (1980) 22 Mal. L. Rev. 227; Keith R. Evans & Margaret Fordham, “Singapore Appeals to the Judicial Committee of the Privy Council—An Endangered Species?” (1985) 27 Mal. L. Rev. 284; Helena Chan Hui Meng, “The Privy Council as Court of Last Resort in Singapore and Malaysia: 1957-1983” in Harding, *ibid.*, 75; Robert C. Beckman, “Divergent Development of the Common Law in Jurisdictions Which Retain Appeals to the Privy Council” (1987) 29 Mal. L. Rev. 254; Andrew Phang, “*Stare Decisis* in Singapore and Malaysia: A Sad Tale of the Use and Abuse of Statutes” (1983) 4 Sing. L. Rev. 155, as well as, by the same author, “‘Overseas Fetters’: Myth or Reality?” [1983] 2 M.L.J. cxxxix; and Andrew Phang, V.K. Rajah & Kenneth W.K. Tan, “The Case for a Re-Appraisal and Re-Statement of the Doctrine of *Stare Decisis* in Singapore” [1990] 2 M.L.J. lxxxi, xcvi & cxiii.

⁷² See *e.g.*, G. W. Bartholomew, *The Commercial Law of Malaysia: A Study in the Reception of English Law* (Singapore: Malayan Law Journal, 1965); Rutter, *supra* note 71; Mohan Gopal, “English Law in Singapore: the Reception That Never Was” [1983] 1 M.L.J. xxv; Valerie Ong Choo Lin & Ho Kin San, “The Reception That Never Was” (1984) 5 Sing. L. Rev. 257; Phang, *Foundation to Legacy*, *supra* note 1; Andrew Phang Boon Leong, “English Law in Singapore: Precedent, Construction and Reality or ‘The Reception That Had To Be’” [1986] 2 M.L.J. civ [Phang, “Precedent, Construction and Reality”], as well as, by the same author, “Of ‘Cut-Off’ Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore” (1986) 28 Mal. L. Rev. 242 [Phang, “Cut-off”]; “Reception of English Law in Singapore: Problems and Proposed Solutions” (1990) 2 Sing. Ac. L.J. 20; “Cementing the Foundations: The *Singapore Application of English Law Act 1993*” (1994) 28 U.B.C. L. Rev. 205; “The Reception of English Law” in Tan, *Essays*, *supra* note 1.

⁷³ See *e.g.*, E. R. K., “Section 5 of Civil Law Ordinance” [1935] M.L.J. xlvii; N. Vaithinathan, “Logic and the Law: A Note on Section 5(1) of the Civil Law Ordinance (Cap. 24)” [1957] M.L.J. xxxvi; Chan Sek Keong, “The Civil Law Ordinance—Section 5(1): A Reappraisal” [1961] M.L.J. lviii & lxxv; R.H. Hickling, “Civil Law (Amendment No. 2) Act 1979 (No. 4): Section 5 of the Civil Law Act Snark or Boojum?” (1979) 21 Mal. L. Rev. 351; David K.K. Chong, “Section 5 Thing-Um-A-Jig!” [1982] 1 M.L.J. c; Soon Choo Hock & Andrew Phang Boon Leong, “Reception of English Commercial Law in Singapore: A Century of Uncertainty” in Harding, *supra* note 71; Phang, *Foundation to Legacy*, *supra* note 1, as well as, by the same writer, “Theoretical Conundrums and Practical Solutions in Singapore Commercial Law: A Review and Application of Section 5 of the Civil Law Act” (1988) 17 Anglo-Am. L. Rev. 251; “Reception of English Law in Singapore: Problems and Proposed Solutions”, *ibid.*; “Cementing the Foundations: The *Singapore Application of English Law Act 1993*”, *ibid.*; “The Reception of English Law”, *ibid.*

foundational platforms from which to build further. Indeed, the local context had more than its fair share of material which required analysis as well as writing.⁷⁴ More specifically, much of my writing in my early years as an academic focused not only on these areas,⁷⁵ but also on other aspects of local legal history such as the abolition of the jury system in criminal cases;⁷⁶ the history and development of criminal law and procedure in Singapore in general,⁷⁷ and the main criminal statutes of Singapore in particular;⁷⁸ the need to develop an autochthonous Singapore legal system;⁷⁹ and even a few biographical pieces as well.⁸⁰ All this work would, I suppose, be classified as mere doctrinal work that is open to the critique mentioned above.⁸¹ However, I have no regrets—not least because becoming involved in such work *prompted me to reflect and (more importantly) to research further*. In particular, as I prepared to go overseas for my postgraduate legal studies, I was intrigued by the fact that so much more remained to be written about the Singapore legal system. This led to my Master of Laws (“L.L.M.”) paper, which was later published (in modified form) in two articles.⁸² More importantly, writing that particular paper, amongst other things, prompted me to extend my research into a full-blown study of the development of the Singapore legal system. To cut a long story short, my L.L.M. paper contained at least some of the seeds for my doctoral thesis, which was later published as a book.⁸³ Constraints of time and space preclude me from describing the details of this work, save to say that, although it was researched and written closer to three decades ago, many of its themes still seem to me to be relevant and the analysis still worthy of consideration. But this is perhaps not surprising as it was essentially a work of local legal *history*. At this juncture, I would like to acknowledge—once again—my deep and profound gratitude for the supervision and (more importantly) generosity of the late Professor Harold J. Berman,⁸⁴ whose magisterial work not only in Russian law but also in European legal history will, in my view, continue to enlighten us for

⁷⁴ See *e.g.*, the works cited in the preceding three notes.

⁷⁵ See the works cited at notes 71, 72 and 73 above.

⁷⁶ See Andrew Phang Boon Leong, “Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution” (1983) 25 Mal. L. Rev. 50 and, by the same author, “Jury Trial in Singapore and Malaysia: A Note on the Case-Law” [1984] 2 M.L.J. cxli. It should be noted that there was never any provision for jury trial for civil cases in Singapore.

⁷⁷ See Chan Wing Cheong & Andrew Phang, *The Development of Criminal Law and Criminal Justice in Singapore* (Singapore: Singapore Journal of Legal Studies, 2001) and, by the same authors, “The Development of Criminal Law and Criminal Justice” in Tan, *Essays*, *supra* note 1, 245.

⁷⁸ See Phang, “Codes and Ideology”, *supra* note 69.

⁷⁹ See *e.g.*, Phang, *Foundation to Legacy*, *supra* note 1 and, by the same writer, “Of Generality and Specificity—A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System” (1989) 1 Sing. Ac. L.J. 68.

⁸⁰ See Andrew Phang Boon Leong, “Mr Young Cheng Wah—A Personal Appreciation” (1995) 16 Sing. L. Rev. 23 and, by the same author, “Exploring and Expanding Horizons: The Influence and Scholarship of Professor JL Montrose” (1997) 18 Sing. L. Rev. 15; as well as “Founding Father and Legal Scholar—The Life and Work of Professor LA Sheridan” [1999] Sing. J.L.S. 335.

⁸¹ See the main text accompanying note 50 above.

⁸² *Viz.* Phang, “Precedent, Construction and Reality”, *supra* note 72; Phang, “Cut-off”, *supra* note 72.

⁸³ See Phang, *Development of Singapore Law*, *supra* note 20; reviewed by Walter Woon in [1992] Sing. J.L.S. 306; Andrew J. Harding in (1992) 41 I.C.L.Q. 961; and Jon S.T. Quah in (1994) 25 Journal of Southeast Asian Studies 453.

⁸⁴ The James Barr Ames Professor of Law at Harvard Law School and later the Robert W. Woodruff Professor of Law at Emory Law School.

all time.⁸⁵ I would also like to mention that my doctoral thesis—and the book upon which it was based—constituted the basis for a comparative (albeit only preliminary) study of the development of the Singapore and Hong Kong legal systems.⁸⁶ Indeed, if you would like a summary of my doctoral thesis, this comparative study would furnish it as well.

Before I leave this extremely brief discussion of my work, it would—in the context of the present Conference—be appropriate to state that the catalyst for my doctoral thesis was the desire to find out more about the historical development of the Singapore legal system. I was not content with merely writing about only the legal aspects because, as we have seen, those aspects alone rarely furnish us with the full picture. I realised, very early on, that this would entail looking at the broader extralegal context as well.⁸⁷ But this was a daunting task, to say the least. I had no expertise whatsoever in other (extralegal) disciplines relating to Singapore. However, I was fortunate in at least two related ways. First, Singapore was a small country and there were, consequently, fewer issues that needed to be examined. Secondly, as a consequence of the first, the research in Singapore, whilst still substantial, was manageable. More importantly, perhaps, most of the research in disciplines in the local context such as history, sociology, politics and economics were written by relatively few scholars, all of whom were experts in their respective fields and on whose work, therefore, I could rely without having to do my own research and collapsing from the sheer magnitude of the task that would have ensued.

However, there remained the methodological difficulties, which I have referred to above and which have also been summarised elsewhere.⁸⁸ Professor Berman was also very helpful. Right from the outset, he realised that I had bitten off more than I could chew. So I narrowed my focus to the civil and criminal law, leaving out the analysis of public law which has since been dealt with by another of my former colleagues.⁸⁹ Even then, that part of the proposed thesis on the civil law had to be further reduced to manageable proportions. In the end, I decided to focus on the development of the common law as well as selected legislation which had unique local roots. Insofar as the development of the common law was concerned, I also had

⁸⁵ Insofar as the latter area is concerned, see, in particular, Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Massachusetts: Harvard University Press, 1983) and, by the same author, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Massachusetts: Harvard University Press, 2003).

⁸⁶ See Andrew B. L. Phang, “Convergence and Divergence—A Preliminary Comparative Analysis of the Singapore and Hong Kong Legal Systems” (1993) 23 Hong Kong L.J. 1.

⁸⁷ Though *cf.* Rabban, *supra* note 51, who appears to view history and the social sciences as being in competition with each other in the U.S. context. But perhaps this is simply a historical fact. Normatively, however, I view both as being *complementary*, rather than in competition, with each other.

⁸⁸ See generally Phang, *Development of Singapore Law*, *supra* note 20 at 1.

⁸⁹ See Kevin Y.L. Tan, *The Development of Constitutional Government in Singapore 1945-1995* (JSD Thesis, Yale Law School, 1996) [unpublished]. See also, by the same author, “The Evolution of Singapore’s Modern Constitution: Developments from 1945 to the Present Day” (1989) 1 Sing. Ac. L.J. 1; “A Short Legal and Constitutional History of Singapore” in Tan, *The Singapore Legal System*, *supra* note 71, 26; “A Short Legal and Constitutional History of Singapore” in Tan, *Essays*, *supra* note 1, 27; and *An Introduction to Singapore’s Constitution* (Singapore: Talisman Publishing, 2005). Reference may also be made to Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Abingdon: Routledge-Cavendish, 2009); Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012).

to focus—in some detail—not only on the development of the legal profession but also on the wider societal context which had (in turn) impacted the development of the legal profession. It was a fascinating exercise, stretching over a number of years. But it was also a very arduous one. In order to cope with the vast amount of both legal as well as extralegal materials (not to mention teaching), I had to create what we would now classify as “mindmaps” on large sheets of blank paper. Indeed, each of these sheets of papers contained not only the flow of the research and argumentation but also references (in shorthand code, naturally) to hundreds of references and their respective page numbers. Looking back now, I wonder how I managed to cope with such a vast amount of materials and still manage to write a thesis to boot. On a personal level, I can only put it down to divine guidance and providence because sheer hard work and willpower alone were, in my view, insufficient.

This has been a lengthy paper, so it is perhaps appropriate now to conclude it briefly.

IV. CONCLUSION

Although, as emphasised at the outset of this paper, I am a rank amateur,⁹⁰ I have found the process of researching as well as writing this paper to be a fascinating one. It has afforded me the opportunity to revisit many of the issues I had dealt with only cursorily decades ago and has made me reflect further not only on the nature of history and legal history but also on how a legal historian ought to go about practising his or her craft, given the fact that, although there is (in theory at least) the ideal of objectivity, the situation is rather different in *practice*. But this is not something, in my view, which ought to discourage us. Nor does it mean that we are free, to use Professor Prest’s words, to treat the past “as blank canvas for our own creative imaginations, or present-day preoccupations, to work upon”.⁹¹ What it does mean is that there will be continuing discourse stemming from a variety of interpretations, sincerely held, about a variety of topics. And, on occasion at least, historical research does however (albeit at a much more basic level) actually aid the courts in arriving at their decisions. It might perhaps be apposite to end by quoting (*in extenso*) both the introduction as well as conclusion of a recent essay by one of the foremost legal historians of our time which, I might suggest, epitomises much of what I have been attempting to say and which ought, simultaneously, to encourage us to persevere with our research with both passion and joy:⁹²

When I was asked, some while ago, to give a talk on how I go about ‘doing’ legal history, it seemed—as these distant invitations always do—an opportunity to be grasped. I was quite interested to hear the result myself. It is, I fear, banal and not very surprising. After due reflection, I have come to the conclusion that I have no easily describable method, perhaps no method at all apart from the indulgence of curiosity. My main thesis here is that there may be some merit in this.

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⁹⁰ Cf. also Prest, *supra* note 44. However, it is very clear that Professor Prest is much more learned than I could ever be.

⁹¹ *Ibid.* at 210.

⁹² See Sir John Baker, “Reflections on ‘Doing’ Legal History” in Musson & Stebbings, *supra* note 16, 7 at 7, 16, 17.

But I ought to return to the core enterprise of the legal historian, and my lack of deliberate method. It hardly needs to be pointed out that if one merely collects unrelated facts and piles them up in heaps of notebooks, perhaps picking out the colourful or quaint for public display, one has not contributed much, if anything, to history. The historian, like the lawyer, has to find something above and beyond the sources—a story, a changing institution, or an evolving idea. Having given up the idea of hunting for needles in haystacks, I need a different metaphor, adapted from one of Professor Milsom's. Let us say that we are faced instead with an enormous tea chest full of jumbled jigsaw pieces, without any box lids to guide us in assembling the pictures. We can start by sorting the pieces according to thickness and style, trying to establish how many puzzles there might be: that is the editing stage. We might then make some basic deductions—a lot of sky suggests an outside scene. But most of the pieces are missing. And our pieces of legal history, not being physical objects, can in truth be assembled into a number of different pictures. How do we achieve this? In conformity with my theme, I would suggest that this creative process cannot really be reduced to a describable method. We must have stored in the backs of our minds numerous questions arising from our reading of the secondary literature, from our knowledge of what went on in other periods and places, and above all from the sources themselves. As we uncover more evidence, and try to sift out what is useful, we are simultaneously relating it to our older questions and formulating new ones, until now and again we see enough light to propose some answers. We never produce final answers, but we help to take the general understanding forward. It is a collective exercise. Sooner or later, someone will find some more new material which qualifies what we thought earlier. It happens to all of us, living or dead—even Maitland. In my experience it is very rare for new material to disprove completely what went before, although some writers like to overstate what they have found. Almost all historical work builds on what has gone before. And yet, inevitably, the discovery of new pieces of material may greatly change the picture and lead us to abandon explanations designed to fit the imperfect previous knowledge. I therefore think of most historical work as continual revision.

Whether one can go further than that and discover entirely new insights, perhaps even using the same old material, is a matter still less reducible to method than the search for evidence. For some it is a matter of genius. Even lesser mortals experience those happy moments when light suddenly dawns. But we cannot all be Maitlands or Milsoms, however hard we prepare and practise. The practical course is to get on with what we do, to rewrite everything several times before we print it—and as the years pass to rewrite some things several times after we have printed them—and to hope that in the process something new will emerge. Now and again it does.