(2016) 28 SAcLJ 472
(Published on e-First 26 May 2016)

WHERE JUDICIAL AND LEGISLATIVE POWERS CONFLICT*

Dealing with Legislative Gaps (and Non-gaps) in Singapore

This article is concerned with the resolution of legislative gaps in Singapore. Legislative gaps can arise obviously, such as when the draftsman mistakenly omitted an obvious word in a legislative provision. Gaps can also arise more ambiguously, such as where an old statute has not kept pace with modern development, thereby leaving a gap between the statute's broad objects and particular application. Beyond the presence of gaps, the courts also have to consider how much weight, if at all, is to be placed on the absence of gaps. This article will propose a framework for dealing with legislative gaps (and non-gaps) in the local context.

GOH Yihan
LLB (Hons) (National University of Singapore), LLM (Harvard);
Advocate and Solicitor (Singapore);
Associate Professor, School of Law, Singapore Management University.

I. Introduction

1 According to Aristotle, when a case arises that is not covered by the law due to the legislator's oversimplification, then it is right to "correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known".[1] However, just *when* and *to what extent* the courts can do this remains unclear. Today, the courts still have to deal with whether they have the power to fill in legislative gaps. The correct approach to take, as Coxon points out, is perhaps made more complicated due to the separation of powers and the doctrine of parliamentary sovereignty.[2] Apart from legislative gaps, courts also have to deal with the situation where Parliament has intentionally *not* left a gap but it is unclear if that was intended to preclude judicial intervention. The Singapore courts are

* This research was supported in the Singapore Management University by the Singapore Ministry of Education Academic Research Fund Tier 1 Grant (14-C234-SMU-022). The author would like to thank Clarice Ting for very able and thorough editing.

1 Aristotle, *The Works of Aristotle: Oxford Edition* (J A Smith & William D Ross eds) (Catholic Way Publishing, 2015) at p 159.

2 Benedict Coxon, "Open to Interpretation: The Implication of Words into Statutes" (2009) 30 Stat L Rev 1.

not spared from these difficulties. Indeed, with the proliferation of legislation in Singapore, the courts increasingly not only have to deal with legislative gaps, but also with when Parliament has deliberately not left a gap.

2 This article is concerned with the resolution of legislative gaps and related issues in Singapore. As will be seen below,[3] such gaps can arise obviously, such as when the draftsman mistakenly omitted an obvious word in a legislative provision. Gaps can also arise less obviously, such as where an old statute has not kept pace with modern development, thereby leaving a gap between the statute's broad objects and particular application. When can the courts fill in these legislative gaps, if at all? Beyond the presence of gaps, the courts also have to consider how much weight, if at all, is to be placed on the *absence* of gaps. For example, does the fact that Parliament has dealt with a broad area in a statute preclude a court from developing the common law in that area?

3 In dealing with these questions, this article will first outline the problem of there being no clear framework for dealing with legislative gaps in Singapore. It will then examine the current approaches towards legislative gaps. It will be seen that these approaches miss the real issue of the proper relationship between the legislative and judicial power in discerning the legislative intent behind gaps. Next, in proposing a suitable framework for dealing with legislative gaps, it will set out the relevant background, that is, the rise of legislative rule in Singapore concurrently with a robust development of the common law. With this background in mind, this article will identify several guiding norms that can be used to guide the courts' approaches towards resolving legislative gaps.

II. The problem and present approaches

A. The problem

4 The problem with legislative gaps in Singapore is best illustrated by the High Court decision of *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan*[4] ("*AXA Insurance*"). In *AXA Insurance*, the plaintiff insurance company sued the defendant in the tort of harassment for persistently sending e-mails and phone calls to its employees and lawyers using vulgar and threatening language. The High Court rejected the plaintiff's contention, *inter alia*, because it doubted

3 See paras 10–12 below.
4 [2013] 4 SLR 545.

that there was a tort of harassment in Singapore. It held that since Parliament had (at the time) criminalised harassment under ss 13A and 13B of the Miscellaneous Offences (Public Order and Nuisance) Act[5] ("MOA"), it should be up to Parliament to determine whether the law should govern annoyance caused by means of letters, e-mails and telephone messages, and whether the present public order law ought to be expanded to allow a claim for civil remedies.[6] The court was fundamentally concerned that the court, which is not accountable in the way Parliament was to the electorate, should be restrained in the law-making process.[7] Since the tort of harassment was essentially a new tort, the court felt that Parliament should be the body to create it through a process of deliberation and debate. The court was also concerned that it would be impossible to formulate a definition for the tort of harassment that is sufficiently certain. If the courts were to proceed with a vague definition of harassment, the court was concerned that it would result in the creation of a "blockbuster tort", which might then be used by all manners of persons for apparently minor acts of nuisance.[8]

5 It is respectfully submitted that the High Court in *AXA Insurance* adopted a far too restrictive view of the judicial law-making process. First of all, as acknowledged by the Court of Appeal, it is now widely accepted that the common law courts do make law.[9] Law-making is not the exclusive domain of Parliament. In fact, even Parliament has acknowledged the existence of the tort of harassment made at common law, thereby acknowledging the courts' law-making powers. In his response speech at the Committee of Supply Debate on the Ministry of Home Affairs in 2004, Assoc Prof Ho Peng Kee acknowledged that the tort of harassment exists in Singapore. He had said this in the context of addressing protection against harassment in Singapore.[10] He regarded the tort of harassment as part of the protection against harassment that gave the victim civil remedies by way of an injunction or damages. Therefore, had Parliament thought that civil remedies for harassment were within its exclusive domain, it is conceivable that it would have acted to legislatively overrule *Malcomson Nicholas Hugh Bertram v*

5 Cap 184, 1997 Rev Ed. Sections 13A and 13B have since been repealed with the enactment of the Protection from Harassment Act 2014 (Act 17 of 2014).

6 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [8].

7 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [9].

8 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [10].

9 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [241], rejecting the declaratory theory of the common law and acknowledging that judges do make law.

10 Ministry of Home Affairs, "Response Given by the Senior Minister of State for Home Affairs and Law, Associate Professor Ho Peng Kee at the Committee of Supply Debate on the Ministry of Home Affairs" (*Singapore Parliamentary Debates, Official Report* (12 March 2004) vol 77 at col 1368).

Naresh Kumar Mehta[11] ("*Malcomson*"), especially since it had this knowledge since at least 2004. Yet, on the contrary, it regarded *Malcomson* as forming one of the many levels of protection against harassment in 2004.

6 More broadly, if one were to take the High Court's reasoning in *AXA Insurance* to its logical conclusion, then it would render the courts almost powerless in the face of changed societal conditions. As mentioned, the court's primary concern was that it did not infringe on Parliament's domain since Parliament had considered harassment in the criminal sphere. This concern is borne out by the court's holding that, since Parliament had criminalised harassment under ss 13A and 13B of the MOA, it should be up to Parliament to determine whether the law should govern harassment in the civil sphere. This means that whenever Parliament has considered an issue, the courts will be powerless to rule on *that* issue. Given that Parliament has obviously considered many issues to varying degrees in its legislative capacity, the reasoning in *AXA Insurance* means that the courts cannot consider any issue because everything has been considered by Parliament. This cannot be right.

7 The High Court's approach in *AXA Insurance* shows that a more calibrated approach towards legislative gaps (and correspondingly, non-gaps) should be formulated. *AXA Insurance* concerned an instance of legislative non-gap and, to be fair, there may be situations where the courts should *not* intervene in what Parliament has legislated for. However, as *AXA Insurance* shows, the dividing line between what is permissible and impermissible may not be all too clear. It is certainly unsatisfactory that the courts refuse to decide on an issue simply because Parliament has considered it in the broadest of fashions. The situation becomes even more unclear when one considers what Parliament meant by gaps in the legislation. The question is thus how the courts should deal with this problem.

B. Existing approaches

8 The existing approaches towards legislative gaps and non-gaps are to treat them as an issue of either statutory interpretation or whether the common law has been ousted by legislation. While similar, the existing approaches show an almost ritualistic formula that, it will be suggested below,[12] misses the main question that should be answered.

11 [2001] 3 SLR(R) 379.
12 See paras 31–33 below.

(1) Question of statutory interpretation

9 When there is a legislative gap, the current approach is to discern how the gap came about and then deal with it using established solutions. In this regard, Auchie identifies three situations in which legislative gaps may arise, namely, due to an obvious drafting mistake; the drafter failing to foresee a specific situation; and the legislation being unintelligible.[13]

(a) Legislative gap due to obvious drafting mistake

10 The first of these situations is the most obvious and is typically referred to as a *casus omissus*. The full maxim dealing with such legislative gaps is *casus omissus pro omisso habendus est*, which means that a case omitted is to be regarded as intentionally omitted.[14] The absolute rule against filling gaps has been gradually relaxed by the courts over time. In the House of Lords decision of *Wentworth Securities Ltd v Jones*[15] ("*Wentworth*"), Lord Diplock laid down three conditions to be satisfied before the courts can read words into statutes, thereby filling a *casus omissus*. The conditions would be satisfied if:[16]

> First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill was passed into law.

Lord Diplock added a further cautionary note when he said that unless the third condition is satisfied, any attempt at filling in the omission "crosses the boundary between construction and legislation" and usurps a function that "is vested in the legislature to the exclusion of the courts".[17] However, Lord Diplock's third condition, that requiring knowledge of the *exact* words that Parliament would have used, rendered the courts' power to fill a *casus omissus* almost impossible.

13 Derek Auchie, "The Undignified Death of the *Casus Omissus* Rule" (2004) 25 Stat L Rev 40.

14 John Trayner, *Latin Maxims and Phrases* (William Green & Sons, 4th Ed, 1894) at p 71.

15 [1980] AC 74.

16 *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105.

17 *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105–106.

11 Lord Diplock's conditions have since been refined by the House of Lords decision of *Inco Europe Ltd v First Choice Distribution*[18] ("*Inco*"). In *Inco*, Lord Nicholls confirmed that the courts' role in statutory interpretation is not confined to resolving ambiguities but may also extend to correcting obvious drafting errors, which may involve the addition, omission or substitution of words. With regard to Lord Diplock's three conditions in *Wentworth*, Lord Nicholls said this:[19]

> So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. …
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler*, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.

12 According to Coxon, Lord Nicholls' speech made two important clarifications to Lord Diplock's conditions in *Wentworth*.[20] First, in so far as the third condition is concerned, it is no longer a requirement that the exact additional words that Parliament would have used be ascertainable; it is sufficient that the substance of those words be obvious. This importantly makes filling a *casus omissus* more plausible. Secondly, a fourth condition was added, in that the additional words must not be too different from the language used by Parliament in the existing legislation. This therefore places a textual constraint on the words that courts use to fill in a legislative gap caused by an obvious drafting mistake. Such a requirement may already have been implicit in Lord Diplock's three conditions. Lord Diplock himself was more than likely to have intended that the statutory words should constrain how courts filled a legislative gap. Indeed, in the earlier case of *Duport Steels Ltd v Sirs*,[21] Lord Diplock stated that where the meaning of the statutory

18 [2000] 1 WLR 586.

19 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592.

20 Benedict Coxon, "Open to Interpretation: The Implication of Words into Statutes" (2009) 30 Stat L Rev 1 at 27.

21 [1980] 1 WLR 142.

words is plain and unambiguous, courts cannot invent ambiguities so as to escape from giving effect to the plain meaning.[22]

(b) Legislative gap due to failure to foresee a specific situation

13 A second instance of a legislative gap is when the draftsman fails to foresee a specific situation and does not therefore make provision for it. This is also known as a *casus improvisus*. Thus, if legislation has been passed to address a particular mischief and provides the situations it is to have effect, a situation that is omitted but yet comes within the targeted mischief is a *casus improvisus*.[23] The courts will not generally fill a *casus improvisus*. In *R v Peterborough City Council*,[24] Sir John Donaldson MR said that, if it is ascertained that a legislative gap is caused by a legislative failure to foresee the situation and not a legislative failure to spell out its intentions, the statutory language must be given effect to in accordance with their plain terms.[25] This is a stricter approach compared to a *casus omissus*. This difference can be explained by the fact that the legislative gap in the form of a *casus improvisus* is more likely to have been intentional on part of Parliament, rather than inadvertent.

14 However, mere omission in a legislation does not necessarily amount to a *casus improvisus*. It must be clear that the gap exists because Parliament has made no provision whatsoever for a particular situation. For example, in *London & Clydeside v Aberdeen*,[26] Lord Fraser said the fact that Parliament has not provided for the legal consequences to follow from a failure to carry out a statutory procedure does not give rise to a *casus improvisus* where they can be ascertained by the common law.[27] Similarly, under ss 3(1) and 3(2) of the Residential Property Act,[28] any transfer of any residential property to a foreign person shall be null and void. However, the statute is silent on the status of the purchase money. In such a case, there is no doubt that common law principles should intervene to decide how the money is to be dealt with. It would certainly be unworkable if the courts were to say that the common law has no role to play in such circumstances. The identification of a *casus improvisus* is therefore as important as knowing how to deal with it.

22 *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157.
23 John Trayner, *Latin Maxims and Phrases* (William Green & Sons, 4th Ed, 1894) at p 70.
24 (1986) 85 LGR 249.
25 *R v Peterborough City Council* (1986) 85 LGR 249 at 264.
26 *London & Clydeside v Aberdeen* [1980] 1 WLR 182.
27 *London & Clydeside v Aberdeen* [1980] 1 WLR 182 at 195.
28 Cap 274, 2009 Rev Ed.

15 In Singapore, one example of how the courts dealt with a *casus improvisus* is *WX v WW*[29] ("*WX*"), which concerned the interpretation of s 114 of the Evidence Act[30] ("EA"). The main issue in the appeal before the High Court was whether the appellant was the father of the child, which in turn was relevant in determining whether the appellant ought to pay maintenance for the child.[31] According to the respondent, she had had sexual relationships with two men between 2001 and May 2005, one of whom was the appellant. In June 2005, the respondent discovered that she was pregnant. The other man, H, thought that the child was his and married the respondent. The child was born in January 2006. However, it became apparent to H that the child could not be his biological daughter owing to her blood group. H then had a DNA test done and scientifically confirmed that he was not the biological father of the child. H commenced nullity proceedings that eventually resulted in the nullification of his marriage with the respondent. The respondent thereafter claimed for maintenance for the child against the appellant. The respondent succeeded before the District Court. The court believed the respondent that she only ever had sexual relations with the appellant and H. Since the DNA test report showed that H was not the child's father, the court concluded that the appellant must be the father of the child.[32] The appellant appealed to the High Court.

16 Before the High Court, the appellant argued that s 114 of the EA raised a conclusive presumption that the child was the legitimate daughter of H since she was born when the marriage between the respondent and H was still subsisting. Section 114 of the EA provides as follows:

> **Birth during marriage conclusive proof of legitimacy**
>
> **114**. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

17 The appellant thus argued that he could not be the child's father and was not liable to pay maintenance, notwithstanding the DNA test report that showed that H was not the biological father of the child. Faced with the DNA test report, the court understandably thought that the appellant's argument "offend[ed] both justice and commonsense"[33]

29 [2009] 3 SLR(R) 573.
30 Cap 97, 1997 Rev Ed.
31 Pursuant to s 69(2) of the Women's Charter (Cap 353, 2009 Rev Ed).
32 *WW v WX* [2008] SGDC 93 at [8]–[13].
33 *WX v WW* [2009] 3 SLR(R) 573 at [6].

and that upholding the appellant's position would mean that "the law would hold that H is the father of the child even though the science has shown otherwise".[34] The court therefore found the appellant to be the biological father of the child and upheld the lower court's decision ordering him to maintain the child.

18 The court was cognisant of s 114 of the EA. It, however, decided that s 114 was concerned only with the issue of legitimacy and not paternity.[35] The court gave two reasons for this conclusion. First, s 114 of the EA does not expressly provide for a presumption of paternity in the same way it provides for a presumption of legitimacy.[36] Secondly, the presumption of legitimacy in s 114 of the EA arises even in circumstances where "some person other than the husband is likely to be the biological father".[37] Since s 114 of the EA was concerned with the issue of legitimacy and the protection of a child as such, the court thought that it would be wrong to interpret s 114 to deny protection to a child in terms of maintenance by the biological father.[38] For these reasons, the court concluded that s 114 of the EA only concerned the conferment of legitimacy "in the circumstances set out in the provision and not to rebut or invalidate evidence that a man is the biological father of a child".[39]

19 As a secondary ground for its decision, the court pointed out that ss 68 and 69 of the Women's Charter[40] ("the Charter") establishes a legal duty on the part of the parent to contribute to the maintenance of his children whether they are his legitimate children or not.[41] This meant that because the DNA test report showed the appellant to be the biological father of the child, he was liable for her maintenance under those provisions. Whether the child was the appellant's legitimate or illegitimate child did not matter. While the court said that this conclusion was independent of its interpretation of s 114 of the EA,[42]

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34 *WX v WW* [2009] 3 SLR(R) 573 at [6].

35 *WX v WW* [2009] 3 SLR(R) 573 at [11]. See also *AAE v AAF* [2009] 3 SLR(R) 827 at [25], where the High Court understood the court in *WX v WW* to have:

> … reasoned that the presumption of legitimacy in s 114 [of the Evidence Act (Cap 97, 1997 Rev Ed)] is confined to the status of the child alone; paternity of itself – whether the child is an issue of the husband – is a different matter and falls outside the provision.

36 *WX v WW* [2009] 3 SLR(R) 573 at [11].

37 *WX v WW* [2009] 3 SLR(R) 573 at [12].

38 *WX v WW* [2009] 3 SLR(R) 573 at [14].

39 *WX v WW* [2009] 3 SLR(R) 573 at [14].

40 Cap 353, 1997 Rev Ed.

41 *WX v WW* [2009] 3 SLR(R) 573 at [15].

42 *WX v WW* [2009] 3 SLR(R) 573 at [15]:

> Even if I were wrong in my interpretation of the scope of s 114 of the [Evidence Act (Cap 97, 1997 Rev Ed)], I would hold that it does not apply in respect of s 69(2) of the Charter …

it is respectfully submitted that this is not the case. A step in the reasoning must be that paternity *can* be separated from legitimacy in s 114 of the EA. If not, the presumption that the child is the legitimate daughter of H (which the court did not discount) raises the corresponding presumption that H is the biological father of the child, in which case there would be no paternity relationship between the appellant and the child *in law*, notwithstanding the *scientific* conclusion reached in the DNA test report.[43]

20 Finally, the court opined that it was "difficult" to see how Parliament, in enacting ss 68 and 69 of the Charter more than half a century after s 114 of the EA was enacted, could have intended to relieve the duty to provide maintenance under the Charter *vis-à-vis* the biological father when the mother happened to be married to another man at the time of birth.[44] In sum, the consequence of the court's reasoning is that s 114 did not foresee the situation where there was DNA evidence and that this *casus improvisus* could be filled by the court.

(c) Legislative gap due to legislation being unintelligible

21 A legislative gap can also arise due to legislation being unintelligible. In such cases, the courts will try to make sense of provisions that are otherwise nonsensical.[45] Auchie provides two instances of when this may occur. The first is when a court substitutes a word in the legislation so as to make sense of it. In *R v Oakes*,[46] s 7 of the UK Official Secrets Act 1920[47] provides that:

> Any person who … aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony …

22 Oakes was charged with doing an act preparatory to the commission of a specified offence only. He thus argued that he was not guilty on a literal reading of s 7 since the Prosecution needed to show that he was *also* aiding or abetting the offence. Lord Parker CJ acknowledged this argument, but thought that would have rendered the section nonsensical. He held that the courts could read in or change

43 The starting point is s 114 *of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), not s 68 of the Women's Charter (Cap 353, 1997 Rev Ed)*. In other words, a *legal* conclusion that the appellant is the biological father of the child cannot be reached without interpreting s 114 of the EA.

44 *WX v WW* [2009] 3 SLR(R) 573 at [17].

45 Derek Auchie, "The Undignified Death of the *Casus Omissus* Rule" (2004) 25 Stat L Rev 40 at 43.

46 [1959] 2 WLR 694.

47 c 75.

words according to the supposed intention of Parliament where the literal meaning was unintelligible. According to this principle, he substituted the word "and" in s 7 with the word "or".

23 The second instance of how courts fill a legislative gap arising due to unintelligibility is when they adopt a strained interpretation of the statutory wording.[48] For example, in *Adler v George*,[49] the defendant argued that he did not contravene s 3 of the UK Official Secrets Act 1920 because he was within the grounds of a prohibited area, as opposed to being in its vicinity, as was provided by the statute. Lord Parker CJ rejected this argument and held that s 3 should be read as meaning "in or in the vicinity of". As Auchie has said, this could be seen as an example of a strained interpretation of the expression "in the vicinity of".[50]

(2) Relationship between common law and statute

24 A similar problem arises with regard to how courts should deal with legislative non-gaps. The problem is that even though Parliament has statutorily provided for a particular issue, it may have done so without expressly excluding judicial consideration of that issue. In this case, should the courts consider themselves precluded from doing so?

25 There are three situations where such a problem may arise. The first situation is the most obvious and occurs where there is an express or implied ouster of common law principles. The second is where Parliament has statutorily provided for the exact same issue that is presently being the court. The issue is whether the statute should be taken to have an exclusive regime or exist alongside the common law. The third situation is where Parliament has only provided for the broad issue without providing for the specific issue at hand. In this case, does the fact that Parliament has indicated that it might develop the law in a particular way mean that the courts should exclude themselves from that area of law? The current approach is to treat this as involving the consideration of several factors, some of which are not concerned with discerning the legislative intent.

(a) Express or implied ouster of common law principles

26 First of all, it is uncontroversial that if legislation has covered an area of law specifically to the exclusive of the common law, then the

48 Derek Auchie, "The Undignified Death of the *Casus Omissus* Rule" (2004) 25 Stat L Rev 40 at 43.

49 [1964] 2 WLR 542.

50 Derek Auchie, "The Undignified Death of the *Casus Omissus* Rule" (2004) 25 Stat L Rev 40 at 44.

legislative power will trump the judicial power. This is probably what the Court of Appeal had in mind in *Lim Meng Suang v Attorney-General*[51] ("*Lim Meng Suang*"). In that case, the court rejected the appellant's argument that the court has the duty to declare a statute unconstitutional – in that case, s 377A of the Penal Code[52] – if its object is "illegitimate" based on purely extra-legal reasons.[53] *Lim Meng Suang* is of course concerned with the constitutionality of legislation, but the more general proposition that can be drawn is that where legislation has covered an area of law specifically, the courts do not have the power to interfere.

(b) Legislation covers area specifically but is silent on effect on common law

27 The correct approach becomes more difficult where legislation covers an area specifically but is otherwise silent on its effect on the common law. A good example raised by Andrew Burrows[54] is the House of Lords decision of *Revenue and Customs Commissioners v Total Network SL*[55] ("*Total Network SL*"). In that a case, a bare majority of the court decided that the Revenue and Customs commissioners could claim for damages arising from the tort of unlawful means conspiracy in respect of a Value Added Tax ("VAT") fraud. This was notwithstanding the commissioners' power provided by legislation to recover VAT. The question of principle considered by the court was thus whether the fact that Parliament provided for the specific remedy in the statute precluded any recourse at common law.

28 The minority judges reasoned that the relevant statute was a comprehensive code and thus precluded a concurrent tort claim. In their words, "[t]he notion of the common law filling in the holes in a taxing statute … appears wrong in principle".[56] In contrast, the majority judges thought that there was no objection to there being a concurrent tort claim. Indeed, as Lord Mance pointedly stated, "the statute must be positively shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available".[57] The sharp distinction

51 [2015] 1 SLR 26.
52 Cap 224, 2008 Rev Ed.
53 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [83].
54 Andrew Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232 at 238.
55 [2008] 1 AC 1174.
56 *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 at [201].
57 *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 at [130].

between the two decisions reveals an inconsistent starting point in discerning how to treat a legislative coverage in such a situation.

29 A local example can be seen in *Law Society of Singapore v Top Ten Entertainment Pte Ltd*[58] ("*Top Ten Entertainment Pte Ltd*"). There, the question was whether O 59 r 3(2) of the Rules of Court[59] governed the issue of costs with respect to proceedings under Pt VII of the Legal Profession Act[60] ("LPA"). The Court of Appeal held that it did not. In its view, Pt VII of the LPA provided a comprehensive framework for disciplinary proceedings and an attendant cost regime. Thus, although the court did not say so expressly, the legislation was treated as ousting an alternative cost regime. This could very well have applied to oust a common law cost regime as well.

(c) Legislation covers area generally but is silent on specific areas

30 The situation where legislation covers an area of law generally has been discussed above. In this regard, there are of course different degrees of generality, and what is contemplated here does not extend to broad subject areas like "contract", "tort" or "crime", but general contractual issues, particular torts and specific crimes. *AXA Insurance* concerned the tort of harassment, which Parliament had legislated for from a criminal, not civil, perspective. The legislation therefore covered the area of law (here, harassment) generally, in the sense that the legislation was concerned with a criminal offence and not a civil action. The High Court held that the courts have no power to intervene in such cases. The substantive reasons given were that the law is so complex that the Judiciary could not deal with it, so far-reaching that the Judiciary could not control it effectively, and so socially and morally controversial that the Judiciary cannot deal with it.

C. The real issue: Relationship between legislative and judicial power and ascertaining the legislative intent

31 The central problem with the current approaches is that there is an unnecessarily sharp distinction drawn between the solutions for legislative gaps and non-gaps. It is of course true that each requires its own unique solution, but to condition the subsequent analysis exclusively on an initial question of whether there was a legislative gap or non-gap seems to obscure the real issue in such cases. And the real issue, it is submitted, is the proper relationship between legislative and judicial power. Failure to recognise this runs the risk of following

58 [2011] 2 SLR 1279.
59 Cap 322, R 5, 2006 Rev Ed.
60 Cap 61, 2009 Rev Ed.

mechanically an established set of solutions without appreciating the underlining reasons.

32 Indeed, without recognising this real issue, the current approaches are apt to confuse and result in inconsistent answers. Such inconsistency can be seen, for example, in *WX*, where the High Court appeared to suggest that the courts can trump legislation where it is outdated. However, that broader approach is inconsistent with the narrower approach in *AXA Insurance*, where the High Court restrained itself from dealing with a matter that Parliament has only broadly touched. Even within *Total Network SL*, the House of Lords was split by the narrowest of margins on the proper approach to take in dealing with the effect of legislation dealing with a matter specifically.

33 If it is accepted that the real issue is the proper relationship between legislative and judicial powers, then the solution to solve the problems occasioned by the current approaches is thus to discern the proper relationship between the two powers and then set out a series of norms to assist the courts in dealing with legislative gaps and non-gaps. The following parts will explain and substantiate a framework with those norms in mind.

III. Suggested framework for dealing with legislative gaps and non-gaps

A. Background

(1) Legislative power as it evolved in England

34 In order to understand the relationship between legislative and judicial powers as it exists in Singapore today, it is necessary to briefly sketch out the history of how legislation as a source of law came to be in the first place. That would require tracing the development of legislation in England itself, for that is where Singapore's modern legal history started. It has been said that it is only really from the 16th century that legislation as it is known today came to exist in England.[61] Between the Anglo-Saxon and the Norman periods, what may be vaguely described as "legislation" only declared or clarified customs rather than pronounced new law.[62] It was only in the late 13th century that "statute" came to mean a form of law distinct from the common law.[63] However, even then, there was no clear division between the judicial and legislative

61 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 20.
62 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 20.
63 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 21.

powers. This was because statutes, or legislation, were not all enacted through the same process. In fact, the king's judges were also members of his council with some involvement in the drafting of legislation.[64] Thus, in *Aumeye's Case*,[65] when a serjeant tried to explain the second Statute of Westminster 1285[66] to the Court of Common Pleas, Hengham CJ, who was certainly involved in the drafting of that statute, said that he knew it better for he had made it. According to Plucknett, the practice and theory of English law at the time was that the maker of the statute should also be its interpreter, if necessary.[67]

35 The separation between the judicial and legislative powers as expressed in legislation only came to be in the second half of the 14th century.[68] By the 15th century, not only had the House of Commons' control over the enactment process strengthened, but it also began to put texts of bills into exact wording of the statutes being proposed.[69] However, even though judges were no longer significantly involved in the drafting process, they still wanted a say over the validity of a statute.[70] This followed one version of the Aristotelian argument, which held that a statute that yielded an outcome contrary to justice should be disregarded.[71] In *Bonham's Case*,[72] Sir Edward Coke said that:[73]

> … when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

However, such a view lost its validity in the 17th century, particularly following the revolution of 1688, which placed limitations on the power of the king and vested legislative authority in Parliament.[74] By 1765 Blackstone was able to observe that:[75]

> … acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know

64 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 22.
65 (1305) YB 33–5 Edw I, 78 at 82.
66 c 1 (UK).
67 Theodore F T Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* (Cambridge University Press, 1922) at p 21.
68 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 22.
69 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 23.
70 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 27.
71 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 28.
72 (1610) 8 Co Rep 107a.
73 *Bonham's Case* (1610) 8 Co Rep 107a at 118a, as cited in Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 29, although Duxbury also notes that some legal historians conclude that Coke was referring to a principle of statutory interpretation and not a full-scale judicial review.
74 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 31.
75 1 Bl Comm 91, as cited in Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at pp 30–31.

> of no power that can control it … for to set the judicial power above that of the legislature … would be subversion of all government.

The predominant view, as Goldsworthy has noted, is that Parliament possessed a legally unlimited legislative authority within Britain.[76]

36 Judges, now no longer really involved in the enactment of legislation and faced with the prevailing thought that Parliament was representative of the people's will, considered themselves "less informed than Parliament" and "began to be reluctant to tread in political fields" and "to show a greater deference to Parliament than they had shown before".[77] It had become accepted in 19th-century Britain that courts cannot overrule what Parliament enacts, and that the judicial power was subordinate to the legislative power in so far as common law must yield to legislation in areas of conflict.[78] This has remained the view in the English legal system in contemporary times; in the 1968 case of *Madzimbamuto v Lardner-Burke*,[79] Lord Reid held that if Parliament chooses to do any of those things that most people, for moral, political or other reasons, regard as improper, the courts could not hold the Act of Parliament invalid.[80]

37 In his important book, Duxbury cautions against treating too simply the subordination of the judicial power to legislative power. Indeed, he notes that the judges protected the common law from legislative intervention by creating a presumption that legislation only alters the common law to the extent that its words make absolutely clear.[81] Despite being discredited by some, this presumption has stood the test of time and is still applied well into the late 20th century.[82] This presumption has led Baade to question if parliamentary sovereignty is more apparent than real.[83]

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76 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999) at p 233. However, there was still widespread difficulty in actually finding an official record of legislation until the start of the 19th century, when the Record Commission published the first official collection of statutes, *viz*, the Statutes of the Realm: see Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 24.

77 Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) at p 384, as cited in Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at pp 33–34.

78 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 34.

79 [1969] 1 AC 645.

80 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 37.

81 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723.

82 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 39.

83 Hans W Baade, "The *Casus Omissus*: A Pre-history of Statutory Analogy" (1994) 20 Syracuse J Int'l L & Com 45 at 90.

38 What is significant for the purposes of this article is that there was largely a separation of the judicial and legislative powers at around the 19th century, when statutes were regarded as a separate source of law from the common law. Judges also largely regarded their domain as interpreting, not making, legislation.

(2) Legislative power in colonial Singapore

39 It is in that context that legislation in colonial Singapore will now be discussed. At the time of Singapore's founding by the British in 1819, the idea of "statutes" as a distinct source of law from the common law had already become established in the English legal system. Furthermore, there was already a distinction between the judicial and legislative powers in that English judges shied away from legislating, only interpreting and applying legislation.

40 Indeed, well before the English common law ever reached Singapore,[84] the first semblance of the English legal system came in the form of a code. After concluding a treaty with Sultan Hussein and the Temenggong on 6 February 1819 that allowed the British to set up a trading post in Singapore, Raffles formulated a code of local laws and regulations to govern Singapore on 1 January 1823. Two aspects of the British legal system were introduced by the 1823 Code, namely, the establishment of the procedure for the passage of laws and the constitution of the first courts in Singapore.

41 The 1823 Code was followed by the Singapore and Malacca Act 1825,[85] by which the English parliament authorised the East India Company to place Singapore under the administration of Prince of Wales' Island (later known as Penang).[86] That Act also empowered the Crown to issue letters patent providing for the administration of justice in the newly formed Straits Settlements.[87] One of the most important was the Second Charter of Justice ("Second Charter"), dated 27 November 1826, which established the reception of English law in Singapore. The Second Charter gave the Governor and Council of Prince of Wales' Island a general legislative power, in addition to the

84 It is a well-established principle that in the case of ceded or conquered colonies, the existing law continued in force until changed by either Crown or Parliament: see *Sahrip v Mitchell* (1870) Leic 466, as cited in Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 12.

85 c 108.

86 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 13.

87 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 13.

limited power possessed by Prince of Wales' Island under s 98 of the Indian Charter Act 1813[88] to issue regulations.[89]

42 In 1830, the legislative power within the Straits Settlements evolved when it was transferred to the control of the Bengal presidency. Prince of Wales' Island lost its power to issue regulations under the Indian Charter Act 1813.[90] This power was assumed by the Governor-General of Bengal but was highly suspect.[91] In any case, whether there had been a problem became moot because all the Indian presidencies lost their power to issue regulations when the Indian Charter Act 1833[92] transferred sole legislative power to the Governor-General of India in Council.[93] In *R v Burah*,[94] the Privy Council held that, pursuant to this transfer, the Indian legislature had plenary powers of legislation as large as those of the English parliament, provided that it did not exceed the powers limited by the Indian Charter Act 1813. Indian acts, whether original or in the form of re-enacted English acts, became part of the law applicable in the Straits Settlements.[95] Finally, as a result of the Straits Settlements Act 1866,[96] the Straits Settlements were separated from India and constituted a separate colony with its own legislature in the form of the new Legislative Council of the Straits Settlements.[97] The new Legislative Council passed laws for the good governance of the Straits Settlements. Nonetheless, laws passed by the Governor-General of India in Council still applied in the Straits Settlements.

43 This state of affairs in so far as the legislative power was concerned remained largely unchanged until the Japanese Occupation between 1942 and 1945. After the Japanese surrender, the British Military Administration was established on 15 August 1945 by a proclamation issued by the Supreme Allied Commander, South East Asia.[98] Clause 2 of this proclamation purported to give the commander

88 c 155.
89 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 15.
90 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 18.
91 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 19.
92 c 85.
93 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 20.
94 (1878) 3 App Cas 889.
95 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 21.
96 c 115.
97 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 22.
98 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 26.

"full judicial, legislative, executive and administrative powers and responsibilities". The breadth of this statement was doubted by Murray Aynsley CJ in *Battat v R*,[99] where he said that "military authority has under no circumstances any power of legislation".[100]

44 In any case, the Straits Settlements were disbanded on 1 April 1946 and Singapore became a separate colony. Under the terms of the Singapore Colony Order in Council,[101] a Singapore legislative council was formed with power to legislate for the peace, order and good government of the colony.[102] The path to independence for Singapore was laid with the Singapore Colony Order in Council 1955 ("1955 Order"), which replaced the former legislative council with a legislative assembly. This 1955 Order was further revoked by the Singapore (Constitution) Order in Council 1958,[103] which granted Singapore internal self-government. Lee Kuan Yew was elected the first Prime Minister of Singapore. Throughout the process, the continuity of English legislation was preserved. Merger with Malaysia in 1963 changed the legislative assembly to the Legislature of Singapore but with limited powers restricted to the list set out in the Malaysian Constitution.[104] Finally, Singapore became independent on 9 August 1965, with its own parliament that has the legislative power as it is known today.

45 Concurrently with the evolution of the legislative power, the judicial power also changed. By the time the British arrived in 1819, pragmatism overtook any formal adherence to the separation between judicial and legislative powers. For example, because the Governor of the Straits Settlements had the power to overrule the Recorder's legal judgments, there was a concentration of judicial and executive power in the Governor's hands.[105] However, this was to come to pass when a Third Charter of Justice was granted on 12 August 1855, creating the office of the Second Recorder in Singapore. Thereafter, the Recorder of Singapore, who is the predecessor to the Chief Justice of Singapore, together with the Governor and the Resident Councillor, had jurisdiction over Singapore and Malacca. The separation between the

99 [1950] MLJ 52.
100 *Battat v R* [1950] MLJ 52 at 53.
101 c 54.
102 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 28.
103 SI 1958 No 1956.
104 Geoffrey W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 31.
105 Kevin Y L Tan, "A Short Legal and Constitutional History of Singapore" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore University Press, 2nd Ed, 1999) at p 34.

judicial and legislative powers came to be more clearly distinguished later on.

(3) Division between judicial and legislative powers today

46 From the brief historical sketch, it may be observed that the trump of the legislative power has had a long historical development. Indeed, the courts have recognised the historical division between legislation and the common law today. Thus, they have occasionally maintained that they should not act like "mini-legislatures". For example, in *Lim Meng Suang*, the Court of Appeal said that "the courts are *separate and distinct from* the Legislature" [emphasis in original].[106] More specifically, the court explained that while the courts do "make" law, they do so only in the context of the interpretation of statutes and the development of the principles of common law and equity. The court further emphasised that it is impermissible for the courts to "arrogate to themselves *legislative power* – to become, in order words, '*mini-legislatures*'" [emphasis in original].[107] It is clear that the Singapore courts do, broadly speaking, draw a distinction between their judicial power and the legislative power such that they have no legislative power and will respect the power of the Legislature "to review its own legislation and amend legislation accordingly if it is of the view that this is necessary".[108] The key exception, of course, is that Singapore courts can strike down statutes that are unconstitutional – something that the English courts, without the benefit of a written Constitution, have had to resort to "common law constitutionalism" to do should they so wish.[109]

47 While the Court of Appeal in *Lim Meng Suang* is undoubtedly correct that courts should not be "mini-legislatures", that can only take one so far. Indeed, it is indisputable that courts should not amend legislation on their own accord even if they think they know better. It is also certainly the case that the courts should not, as the Court of Appeal put it in *Tan Kiam Peng v Public Prosecutor*,[110] "distort the relevant statutory language".[111] However, in less-than-obvious instances where the judicial and legislative powers conflict, the answer may not be so clear. It is necessary to discern some basic norms for dealing with legislative gaps in Singapore before suggesting a possible framework.

106 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77].
107 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77].
108 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [82].
109 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) at p 43.
110 [2008] 1 SLR(R) 1.
111 *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [25].

IV. Suggested framework for dealing with legislative gaps in Singapore

A. Basic norms

(1) Separation between legislative and judicial powers

48 The first clear norm is that there is a separation between legislative and judicial powers. However, this does not mean that the legislative power will always trump the judicial power – the exclusive domain of each power still needs to be understood.[112] Indeed, as the Court of Appeal succinctly said in *Tan Seet Eng v Attorney-General*[113] ("*Tan Seet Eng*"):[114]

> … though the branches of government are co-equal, this is so only in the sense that none is superior to the other while all are subject to the Constitution.

However, each branch has separate and distinct responsibilities.[115] It is only in that context that the hierarchy of responsibilities can be demarcated.

49 In *Mohammad Faizal bin Sabtu v Public Prosecutor*,[116] the High Court gave the following definition of "judicial power":[117]

> In essence, the judicial function is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State. The judicial function entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future.

This definition is in line with the broader recognition, accepted by the Court of Appeal in *Tan Seet Eng*, that courts and judges are not the best equipped to deal with matters that are largely concerned with issues of "policy or security or which call for polycentric political considerations".[118] How this particular deference had developed historically has been discussed. Thus, this definition merely emphasises that courts and judges are more concerned with "justice and legality in

112 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [19].
113 [2015] 1 SLR 779.
114 *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [90].
115 *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [90].
116 [2012] 4 SLR 947.
117 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [27].
118 *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [93].

the particular cases that come before them".[119] Indeed, as Sir Thomas Bingham MR said in *R v Secretary of State for Defence, ex parte Smith*:[120]

> … the greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational.

According to Lord Diplock, the exclusive functions of the Judiciary include interpreting the written law and declaring the unwritten law.[121] The point is that the legislative and judicial powers are distinct and in certain areas, the legislative power *will* trump the judicial power.

(2) Legislation can oust existing common law but only if intended

50 Secondly, flowing from the separate and exclusive domains of the legislative and judicial powers, legislation can through written law oust existing common law, but only if this is clearly intended.[122] An example can be seen in *Review Publishing Co Ltd v Lee Hsien Loong*,[123] where the Court of Appeal recognised that Art 14(2)(*a*) of the Constitution expressly provides that it is Parliament which has the final say on how the balance between constitutional free speech and protection of reputation should be struck. Hence, the courts should be very slow in developing the common law of defamation in a different direction.[124]

51 In the absence of clear legislative intention, it should be presumed that the common law should be developed concurrently with the statutory law. In *Goldring Timothy Nicholas v Public Prosecutor*,[125] the High Court held as a fundamental presumption of statutory interpretation that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to that effect.[126] This principle is justified by the reality that there should be as little gap in the law as possible. As such, Parliament should be regarded as being very slow to disturb the existing *corpus* of

119 *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [93].
120 [1996] QB 517 at 556, cited in *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [92].
121 Lord Diplock, "Judicial Control of Government" [1979] MLJ cxl at cxlvii, cited in *Tan Seet Eng v Attorney-General* [2015] 1 SLR 779 at [94].
122 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [79]. This includes rules of equity as well.
123 [2010] 1 SLR 52.
124 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270].
125 [2013] 3 SLR 487.
126 *Goldring Timothy Nicholas v Public Prosecutor* [2013] 3 SLR 487 at [51].

common law without saying that it intended to do so and what the legislative replacement is.

52 However, this principle should not be confined to express provisions. Indeed, legislative silence as expressed through gaps can also, where appropriate, amount to a positive intention to oust the common law as well. This is in line with a basic axiom of contractual interpretation where silence can be taken to mean positive intention as well.[127] The practical significance of this is that comprehensive codes may be taken to oust the common law even though there is "silence" on the specific question concerned. It can be taken that Parliament, through the provision of a comprehensive code, and in line with the reasoning in *Top Ten Entertainment Pte Ltd*, intended to stifle the concurrent development of the common law in the same area. However, the intention to oust the common law must be clearly ascertained.

(3) Judicial power requires judges to develop common law

53 Thirdly, the judicial power requires judges to develop the common law, which is their exclusive domain. Thus, judges should not, as far as possible, avoid developing the law on vague notions that it is too "difficult" or "far-reaching" such that Parliament is the better placed to do so. As Burrows put it:[128]

> … the existence of a statute is rarely a good reason for denying a natural development of the common law. Reasoning to that effect has seriously tarnished some areas of the law. While factors such as impracticability and inconsistency would justify not developing the common law, it is misguided to see a statute as reflecting Parliament's intention that the law should be frozen as is. Leading on from that, it is an abdication of judicial responsibility for judges, at least in the law of obligations, to decline to develop the common law on the grounds that legislation is more appropriate. Even if a statutory solution would be better, no-one can predict whether legislation will, or will not, be passed. It is therefore preferable for judges to proceed as they think fit, whether the decision be in favour or against a development, knowing that the Legislature is free to impose a statutory solution if the common law position is thought unsatisfactory or incomplete.

54 However, this is not to say that the judicial power extends to pronouncing via the common law on all matters. Indeed, as has been discussed above, there are matters that are so far-removed from the judicial expertise that the judges would be ill-placed to decide or rule on

127 *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [51]–[52].

128 Andrew Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232 at 258.

them. Precise examples of such matters will not be easy to list. The general guidance may be to avoid what Lord Bingham, quoting from Lord Reid,[129] has referred to as being "[w]here the question involves an issue of current social policy on which there is no consensus within community".[130] This may also be understood as the non-lawyer's law, which is essentially rules in fields outside of the lawyer's expertise.[131]

(4) Judicial power requires judges to interpret, which may involve reading in or subtracting words from legislation

55 Fourthly, the judicial power requires judges to interpret, and this may involve reading in or subtracting words from the legislation concerned. Lord Diplock's otherwise strict test in *Wentworth* requiring the *exact* alternative words to be known is not consistent with how the courts have approached the interpretation of legal documents where there has been an obvious mistake. Instead, the modern approach in *Inco* in not insisting on knowing the *exact* words that Parliament intended to include but for the mistake should be preferred. This would bring it in line with the approach adopted in the leading case governing common law rectification under English law, *East v Pantiles (Plant Hire) Ltd*[132] ("*East*"). Brightman LJ laid down two conditions for correcting an obvious clerical mistake by the process of construction as follows:[133]

> Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.

56 The statement of common law rectification in *East* has been accepted and applied by the Singapore courts. The first instance is the High Court case of *Ng Swee Hua v Auston International Group Ltd*[134] ("*Ng Swee Hua*"), in which the court used common law rectification to amend an investment agreement that misidentified the relevant company. In the court's words:[135]

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129 Lord Reid, "The Judge As Law Maker" (1972–1973) 12 JSPTL (NS) 22 at 23, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [178].

130 Tom Bingham, "The Judge As Lawmaker: An English Perspective" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) ch 2, at p 31, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [179].

131 Tom Bingham, "The Judge As Lawmaker: An English Perspective" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) ch 2, at p 32, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [179].

132 [1982] 2 EGLR 111.

133 *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 at 112.

134 [2008] SGHC 241.

135 *Ng Swee Hua v Auston International Group Ltd* [2008] SGHC 241 at [33].

> In the Investment Agreement, the 'Company' is identified as AIMT. Clause 3.2.5 on its face bears out a clear error of drafting which has led to a meaningless clause. A literal reading gives rise to absurdity. It is plain from the language used that a mistake was made by the draftsman. It is necessary to cure the drafting error to reflect the true intention of the draftsman. It is clear what corrections need to be made in order to cure the mistake. Reference to 'Company' in cl 3.2.5 should read as Auston.

57 This approach in correcting for mistake as a matter of contractual interpretation should be applied in statutory interpretation. While there may be differences between the interpretation of contracts and statutes, this is not an occasion calling for a different approach since the drafter's intention is still being given effect to.

(5) Legislative power dictates judges cannot substitute their own intent for legislative intent

58 Fifthly, the legislative power dictates that the courts must not substitute their intention for the legislative intent, where the legislative intent is clear. Relevantly, in the High Court decision of *Public Prosecutor v Low Kok Heng* ("*Low Kok Heng*"),[136] V K Rajah JA (as he then was) stated that any discussion on the construction of statutes in Singapore takes place against the backdrop of that section.[137] More specifically, Rajah JA in *Low Kok Heng* also thought that statutory provisions should not, in the name of applying the purposive approach, be interpreted in a manner that goes against all possible and reasonable interpretations of the express actual wording of the provision.[138] In essence, the court is bound by the text as enacted.[139] Perhaps the best support for these views was stated by Andrew Phang Boon Leong J (as he then was) in *Nation Fittings (M) Sdn Bhd v Oystertec plc*,[140] in which the learned judge said that the court's purposive interpretation should be "consistent with, and should not either add to or take away from, or stretch unreasonably, the literal language of the statutory provision concerned".[141] In other words, the language is the framework

136 [2007] 4 SLR(R) 183.

137 *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [39].

138 *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [52]. See also *Tan Un Tian v Public Prosecutor* [1994] 2 SLR(R) 729 at [45] and *Comfort Management Pte Ltd v Public Prosecutor* [2003] 2 SLR(R) 67 at [18], in which the High Court stated that if the statutory word is capable of one meaning, the courts should not give it an alternative meaning, for to do so would be to perform a legislative function: "A line must still be drawn between purposive interpretation and law-making."

139 *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [53].

140 [2006] 1 SLR(R) 712.

141 *Nation Fittings (M) Sdn Bhd v Oystertec plc* [2006] 1 SLR(R) 712 at [27].

within which the legislative purpose must expressly or implicitly manifest, failing which the latter cannot be given effect to.

59 A parallel may also be drawn between this situation and contractual interpretation. In *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd*[142] ("*Soup Restaurant*"), the Court of Appeal accepted the UK Supreme Court's approach in *Arnold v Britton*,[143] which is that the court should ordinarily start from the position that the parties did not intend that the term(s) concerned were to produce an absurd result. However, this is only a starting point – and no more. The court cannot ignore and disregard the intention of the parties (based on the objective evidence), thus rewriting the term(s) of the contract for them based on the court's (subjective) view of what is just and fair. This approach aptly mirrors what the courts should do in interpreting statutes and discerning the legislative intent.

60 With these five norms in mind, the proposed framework within which the courts should resolve both legislative gaps and non-gaps can now be considered.

B. Resolving legislative gaps

(1) Did Parliament intend the gap?

61 The first question is whether Parliament intended the legislative gap. If Parliament intended the gap to be present, then the courts cannot purport to fill in such an intentional gap. Again, a similar approach is taken in the implication of contractual terms and it is from there that valuable lessons can be drawn in resolving legislative gaps.

62 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[144] the Court of Appeal prescribed a three-step process to guide the implication of terms in fact.[145] The first step requires the court to ascertain that a gap in the contract had arisen because the parties had not contemplated the gap; it is only in such a situation that a term can be implied. The court identifies as one instance of a false gap where the parties "contemplated the issue" but did "not agree on a solution" and hence did not make any provision for it.[146] This is uncontroversial: were a court to imply a term despite finding that the parties had considered but omitted to provide

142 [2015] 5 SLR 1187.
143 [2015] 2 WLR 1593.
144 [2013] 4 SLR 193.
145 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].
146 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [94]–[95].

for a given issue, it would certainly be making the contract for the parties.[147]

63 Similarly, in so far as legislative gaps are concerned, the fact that Parliament *intended* the gap must mean that the courts cannot fill it. Intention must be ascertained at the time Parliament passed the statute, similar to how contracts are interpreted. This does not mean that the meaning of the statute is necessarily fossilised at the time of enactment; Parliament can always intend that an "updating" interpretation is to be applied. However, in absence of such intention, it is safer for the courts to interpret the legislative intent on the basis of what Parliament is taken to know at the time of enactment.

64 This provides guidance on how courts should interpret a statute that is "outdated". It is respectfully submitted that the correct approach can be seen in the Court of Appeal's decision in *AAG v Estate of AAH, deceased*[148] ("*AAG*"). In that case, the court had to interpret ss 2 and 3(1) of the Inheritance (Family Provision) Act[149] ("IFPA"), which was enacted some 45 years ago.[150] The appellant sought, on behalf of her two illegitimate daughters, maintenance from the estate of the deceased, the respondent, under the IFPA. The High Court had dismissed her application. On appeal, the sole issue was whether an illegitimate child could claim for support under the IFPA.

65 The relevant provisions were s 3(1) read with s 2 of the IFPA. Section 3(1) allows, amongst others, a wife to apply for maintenance for certain dependants, including a son and daughter. Section 2 of the IFPA defines "son" and "daughter" but does not expressly exclude an illegitimate child from claiming maintenance.

66 Notwithstanding this, the Court of Appeal dismissed the appeal and held that the respondent need not provide any maintenance for the appellant's daughters. It disregarded social developments since the enactment of the IFPA and decided that the original legislative intent present at the time of enactment was determinative of the correct interpretation of the provisions concerned. The court emphasised that the IFPA was enacted to introduce into Singapore the provisions of the UK Inheritance (Family Provision) Act 1938.[151] The established interpretation of the UK legislation by the English courts was that illegitimate children were not entitled to maintenance under it. This

147 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [95].
148 [2010] 1 SLR 769.
149 Cap 138, 1985 Rev Ed.
150 *Singapore Parliamentary Debates, Official Report* (21 April 1966) vol 25 at col 78 (Yong Nyuk Lin).
151 c 45.

interpretation was relevant because during the second reading of the IFPA in Parliament, the Minister had said that:[152]

> … [t]he provisions relating to family provision appear to have worked well in England and it is proposed to introduce them into Singapore.

That was legislative intention and the court held that it was obliged to give effect to such intention.[153] In the end, the court urged Parliament to seriously consider making the necessary reforms to enable an illegitimate child to claim for maintenance under the IFPA, but did not regard the judicial power as being able to trump the legislative power in the circumstances.

67 This approach is further substantiated by the difference between interpretative and non-interpretative doctrines.[154] Barak states that the authority to alter a text is one which belongs to its author, that is, Parliament, but not to the Judiciary. The act of interpretation is the giving of a legal text a meaning its language (explicitly or implicitly) can bear and does not involve the express rewriting of the language.[155] Interpretation ends at the point at which language ends.[156] The separation of powers restricts interpreters from stretching the meaning of statutory provisions.[157]

68 While language is open to varying degrees of interpretation,[158] this does not mean that it is infinitely malleable and can take on any

152 *Singapore Parliamentary Debates, Official Report* (21 April 1966) vol 25 at col 78 (Yong Nyuk Lin).

153 *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [40].

154 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at pp 14–15.

155 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at p 18.

156 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at p 15.

157 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at p 20. This was also alluded to by V K Rajah JA in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [52] when he said:

> Courts must be cautious to observe the limitations on their power and to confine themselves to administering the law. 'Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins' (*per* McHugh JA in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423). Section 9A of the *Interpretation Act* should not be viewed as a means or licence by which judges adopt new roles as legislators; the separation of powers between the judicial branch and the legislative branch of government must be respected and preserved.

See also Edmund W Thomas, "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5.

158 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at pp 23–24.

meaning. The only question is *what* the relevant legislative intent was and to what extent the court can take into account any "updates" to the original legislative intent. In this respect, an "updating interpretation" is probably permissible if the updating is simply to include within a wide category (for example, a manner of communication) specific modes which were not in existence at the time the legislation was introduced.[159] This much was acknowledged by the Court of Appeal in *AAG*.[160] The language is not stretched because the concern was with the broader category generally, not modes of it specifically. However, it is a different thing if the "updating" gives rise to the impression of rewriting the legislation.

(2) If not intended, did Parliament intend the statute to be a comprehensive code for the subject-matter?

69 If Parliament did not intend for a specific gap, the related question is whether it nonetheless intended for the statute to represent a complete code that would displace the concurrent development of the common law. For example, in *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd*,[161] the High Court noted that the EA is a comprehensive code of evidence, with the implication that it could be regarded as having overridden the common law of evidence, except that the Act itself provides that it only repealed common law rules of evidence inconsistent with it.[162] The default position thus appears to be that a comprehensive code *can* preclude the concurrent development of the common law.

(3) If not intended, and Parliament did not intend statute to be comprehensive code, Judiciary can fill the gap in limited situations

70 If Parliament did not intend for a specific gap and for the statute to be a comprehensive code, then any gap would be inadvertent. However, this does not mean that the courts can fill in all gaps because there may be no compass for them to do so. The courts cannot substitute their view of what is the right result in correcting the legislative provision. This explains why any power to do so is confined to obvious drafting mistakes and unintelligible provisions.

159 For example, in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651 at [78].

160 *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [30].

161 [2014] 2 SLR 1342.

162 *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [88].

71 Thus, the Court of Appeal in *Kok Chong Weng v Wiener Robert Lorenz*[163] ("*Kok Chong Weng*") held that a court may *exceptionally* read words into a statute that were not expressly included in it if:[164]

> (a) it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that Parliament sought to remedy with the Act; (b) it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and (c) it was possible to state with certainty what the additional words would be that the draftsman would have inserted and that Parliament would have approved had their attention been drawn to the omission. In *Inco Europe Ltd* at 592, Lord Nicholls of Birkenhead framed the third requirement in a broader fashion as follows: that the court must be abundantly sure of 'the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed'. In our view, given the broad wording of s 9A of the Interpretation Act, the broader formulation of Lord Nicholls is more consonant with the legislative purpose of that provision.

72 However, this is a very limited power that is applied only in very clear cases. It may be arguable that s 9A(1), in providing that preference be given to an interpretation that promotes the purpose underlying the written law, even if such purpose is not expressly stated, might be helpful for reading in words in a statute to promote such an unstated purpose. However, it is submitted that, in the normal situation, the words of the statute constitute the ambit within which the statutory purpose can be realised. Indeed, the test in *Kok Chong Weng* envisages not only that the rectifiable error in the statute must be clear (and hence not a judicial inference), but also that the court must be certain what Parliament would have intended. These are strict conditions that will only be satisfied in exceptional cases. However, as discussed above, the approach should also not be so strict as to negate all possibility of the courts reading a statute in the sense it was intended to be even though its text is mistaken.

C. Resolving legislative non-gaps

(1) Did Parliament intend to oust the development of common law?

73 In so far as legislative non-gaps are concerned, the question is whether Parliament intended to oust the concurrent development of the common law. Unless there is some clear indication of this, the courts

163 [2010] 1 SLR 1041.

164 *Kok Chong Weng v Wiener Robert Lorenz* [2010] 1 SLR 1041 at [57].

should be very slow to find that this is the case. Factors indicative of such an intention, short of an express stipulation, may be a comprehensive code.

74 This is in line with the judicial duty to develop the common law. Thus, it is respectfully suggested that the fact that Parliament has touched on a matter generally does not preclude the courts from developing the common law in this regard. Indeed, even if Parliament has dealt with a matter specifically, that does not, without more, preclude the development of the common law.

(2) The limited exception

75 However, this reluctance to find that courts intend to stifle the concurrent development of the common law may not be applicable where the matter concerns issues removed from the judicial domain. This, as discussed above, would include matters involving non-lawyer's law or matters that are the subject of current social debate that is not within the courts' expertise to resolve.

D. Summary

76 It will be observed that the respective suggested frameworks for resolving legislative gaps and non-gaps are very similar. This resolves the problems earlier identified about how the current approaches miss the real question and hence risk the adherence to a ritualistic formula that could yield inconsistent results. At the heart of the problem of legislative gaps and non-gaps is the interplay between legislative and judicial powers. It is only through confronting that interplay that a principled approach can be arrived at.

V. Conclusion

77 This article has sought to deal with the problem of legislative gaps and non-gaps. What Aristotle said centuries ago is still a problem that has to be confronted by modern courts so long as there is a division of power between the different branches of government. The judicial pronouncement that courts should not be "mini-legislatures", while undoubtedly correct, is only the start of the analysis. A more nuanced approach, from both history and principle, has been advanced in this article to deal with legislative gaps and non-gaps. There remains much that obviously cannot be covered in the space of one article, but it is hoped that the ideas in this article will be useful to further the discussion to what is an important issue in Singapore's system of law.