

## Judicial Certainty and Creativity: An Evaluation of Stare Decisis

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### ABSTRACT

*Stare decisis forms part of the Malaysian legal system. It is inherited from the English common law. Although the doctrine has its positive aspects such as certainty, stability and continuity but at the same time it also produces some negative elements such as rigidity and in creativity towards the development of a legal system. The main theme of this paper is to examine how far the doctrine of stare decisis has played its role in the society especially in the legal, economic and political contexts. Whether the basis of certainty would deprive the liberty of activism, which was supposed to be played by the judiciary. With the establishment of the Federal Court as the highest court in Malaysia it is hoped that the said court will play its role in order to uphold justice by exercising its judicial power in a judicious manner.*

### ABSTRAK

*Ikatan duluan merupakan sebahagian daripada sistem perundangan Malaysia. Ia diwarisi daripada undang-undang biasa England. Sungguhpun doktrin ini mempunyai aspek-aspek positif seperti ketetapan, kestabilan dan keberterusan namun pada masa yang sama ia juga melahirkan unsur-unsur negatif seperti keketaan dan kejumudan terhadap pembangunan sesuatu sistem perundangan. Tajuk utama penulisan ini ialah untuk mengkaji sejauhmana doktrin ikatan duluan memainkan peranannya dalam masyarakat khususnya dalam konteks perundangan, ekonomi dan politik. Sama ada asas ketetapan akan mencabul kebebasan aktivisma, yang sepatutnya dimainkan oleh pihak kehakiman. Dengan penubuhan Mahkamah Persekutuan sebagai mahkamah tertinggi di Malaysia adalah diharapkan bahawa mahkamah ini akan memainkan peranannya dalam memartabatkan keadilan dengan menjalankan kuasa kehakiman secara adil.*

### INTRODUCTION

*Stare decisis* is one of the common features of the English legal system.<sup>1</sup> Its general rule, namely to stand by cases already decided, is that decisions of

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<sup>1</sup> Some authors classify that this doctrine is one of the significant characteristics of common law and the cornerstone of the English legal system, for example, see Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, Oxford University Press, New York and Oxford, 1980, 4<sup>th</sup> Edition pg. 12; and R.J. Walker, *The English Legal System*, Butterworth, London, 1980, 5<sup>th</sup> Edition pg. 128; and another author classifies it as one of the oldest and most fundamental features of the English Legal System, for example, see Phil Harris, *An Introduction to Law*, Weidenfeld and Nicolson, London, 1980, pg. 215.

judge is not bound to follow the decision of another<sup>17</sup> and no distinction could be made between a High Court judge exercising an appellate jurisdiction and one exercising an original jurisdiction<sup>18</sup> unlike the High Court in England.<sup>19</sup> With the establishment of the former Supreme Court on 1<sup>st</sup> January 1985 and the abolishment of the former Federal Court, it enjoyed all jurisdictions and powers as were conferred upon the former Federal Court, and its decision bound all decisions of courts subordinate to it. Its previous decision would bind a subsequent case,<sup>20</sup> and all decisions of the Privy Council did not bind the Supreme Court.<sup>21</sup>

With the restructuring of the judicial hierarchy in 1994<sup>22</sup> the Supreme Court was renamed as the Federal Court. Being the highest court of the land, it binds all courts subordinate to it, but is not bound by its own decisions. The Court of Appeal is now the second highest court. It is bound by its own decision subject to the three exceptions.<sup>23</sup> Its decision binds all courts subordinate to it. Below the Court of Appeal is the High Court, which decisions do not bind another High Court but bind all courts subordinate to it. The Federal Court in its recent decision of *Dalip Bhagwan Singh v. PP*<sup>24</sup> has affirmed positively the application of the common law *stare decisis* principles in Malaysia. The court says:<sup>25</sup>

“The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal. The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 *vide* its s. 3.

<sup>17</sup> *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211, pg. 213.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Police Authority for Huddersfield v. Watson*, *supra*, n. 5.

<sup>20</sup> See *Lorrain Esme Osman v. Attorney General of Malaysia* [1986] 2 MLJ 288, pg. 289.

<sup>21</sup> *Enesty Sdn. Bhd. v. Transport Workers Union & Anor* [1986] 1 MLJ 18, pg. 24; see also *South East Asia Fire Bricks Sdn. Bhd. v. Metallic Mineral Products Manufacturers Employees Union* [1980] 2 MLJ 165, pg. 167-168

<sup>22</sup> See s. 2 of the Constitution (Amendment) Act 1994 (Act A885). See also s. 5(c) of the Courts of Judicature (Amendment) Act 1994 (Act A886).

<sup>23</sup> See. Th.4.

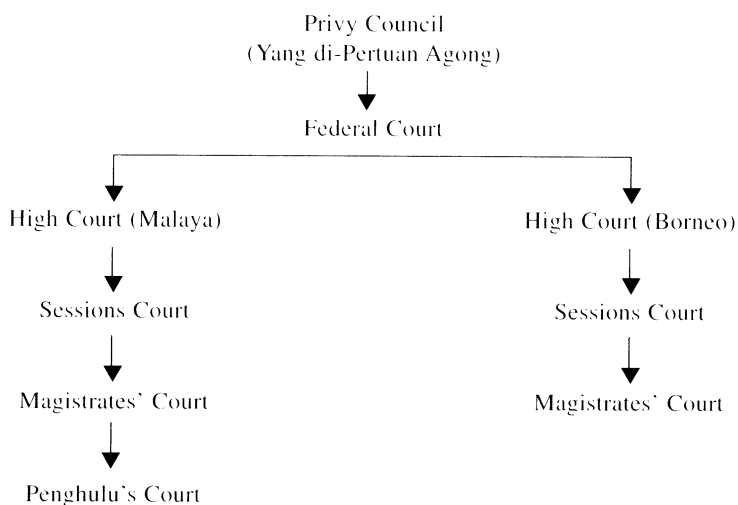
<sup>24</sup> [1998] 1 MLJ 1, pg. 12-14.

<sup>25</sup> *Ibid.*, pg. 12GH.

Conclusively, before 1985<sup>26</sup> the structure of courts in Malaysia was as follows: (a) the superior courts which consisted of the Privy Council as the highest court and followed by the Federal Court and the High Courts; and (b) the subordinate courts which consisted of the Sessions Courts, the Magistrate's Courts and the Penghulu's Courts (both Sabah and Sarawak have no Penghulu's Courts). With effect from 1985 until 1994 the structure of the superior courts was changed with the abolition of the Privy Council and the Federal Court and replaced by the Supreme Court as the highest court – a two-tier system. The position of the subordinate courts remained as they were. Beginning from 1994, the three-tier judicial hierarchy was reintroduced with the establishment of the Court of Appeal. There is no change to the structure of the subordinate courts.

The diagrams below illustrate the hierarchy of precedents.

i. The hierarchy before 1985



<sup>26</sup> Further information on the structure of the judiciary prior to 1985 can be referred to: (i) the Federal Constitution, Part IX, aa. 121-131A; and (ii) the Courts of Judicature Act 1964: (a) for the Privy Council, see Part IV, ss. 74-79; (b) for the Federal Court, see Part III, ss. 38-73; and (c) for the High Courts, see Part II, ss. 18-37. For the present structure, see (i) the Federal Constitution, Part IX, aa. 121-131A; and (ii) the Court of Judicature Act 1964: Part II, ss. 18-37 for the High Courts; Part III, ss. 38-73 for the Court of Appeal; and Part IV, ss. 74-102 for the Federal Court.

values. This calls for a rational justification of adjudication according to established rules as the optimum process of decision-making.

The importance of precedent varies with individual judges, for although common law normally recognizes precedents as binding,<sup>31</sup> judges not only may occasionally depart from precedent where it appears right to do so, but they may distinguish between various precedents in evolving new law. Moreover, times and conditions change with changing society.

## PROPOSERS

The present system of *stare decisis*, it has been argued, supports the orientation of human conduct in the directions approved the society.<sup>32</sup> First, the knowledge of the society that judges and other officials including the police who are responsible to apply the standard rules will enable members of society to channel their behaviour in accordance with this norm. Law in official actions must be approximately close to law in the books. Of course, the majority of individuals do not know the law, beyond the outlines of criminal prohibitions. This legal value thus assumes that lawyers are consulted for correct advices.

Second, the precedent system is said to have the outstanding advantage of ensuring that the law is kept up to date, through authoritative pronouncements from the top of the judicial hierarchy through the system of appeal,<sup>33</sup> while at the same time maintaining stability<sup>34</sup> within the law by requiring all other courts to follow higher courts' decisions.

Third, the system also gives the assurance that litigants at any particular time will be equally treated by the court. It will be argued that if somebody was treated in a certain way yesterday, then another person in a similar case today ought to be treated in the same way. This application corresponds to the principle of equal justice, which says like situation should be treated alike.<sup>35</sup>

<sup>31</sup> For further arguments concerning the legal status of *stare decisis*, see: (i) Laurence Goldstein, "Four Alleged Paradoxes in Legal Reasoning", (1979) 38 *Cambridge Law Journal*, pg. 373; (ii) P.J. Evans, "The Status of Rules of Precedent", (1982) 41, *ibid.*, pg. 162; (iii) Laurence Goldstein, "Some Problems About Precedent", (1984) 43, *ibid.*, pg. 88; (iv) Jim Evans, "The Status of Rules of Precedent: A Brief Reply", (1984) 43, *ibid.*, p. 108; and (v) C.E.F. Rickett, "Precedent in the Court of Appeal", (1980) 43 *Modern Law Review*, pg. 136.

<sup>32</sup> M.D.A. Freeman, *The Legal Structure*, Longman, London, 1974, pg. 120.

<sup>33</sup> Phil Harris, *supra*, pg. 139.

<sup>34</sup> *London Street Tramways Co. v. London County Council*, *supra*, n. 3; see also *Saunders v Anglia Building Society* [1971] A.C. 1004, pg. 1035.

<sup>35</sup> For further discussion on equality, see the Federal Court judgments in *PP v. Su Liang Yu* [1976] 2 MLJ 128, pp. 129-130; *PP v. Khong Teng Khen* [1976] 2 MLJ 166, pg. 170; and *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155, pg. 165-166

Fourth, certainty<sup>36</sup> in law can be achieved through this system. If the legal problem raised has been solved before, the judge is bound to adopt a similar solution. Meanwhile, individuals within the society will plan their own activities in the light of the known rules of the group as understood from time to time, and they can have no security in their planning unless they feel that the rule laid down today will be applied tomorrow in the same way as it was applied yesterday. Thus, the degree of uniformity in the understanding of the rules, at least in a complex or advanced society, will be important factors in the certainty with which any member of the group can plan his future. For legal rules which conflict with the community's moral values will drive to litigation and ultimately produce instability in the society.<sup>37</sup> The recent example of conflicting decisions that had been made by the Federal Court pertaining to quantum of proof, which ought to be proved by the prosecution at the close of its case forced Parliament to amend the Criminal Procedure Code (FMS Cap 6).<sup>38</sup> Historically, the test at the close of the prosecution's case, which is the "prima facie" test was made by the Supreme Court consisting of 3 judges in *Munusamy v. PP*<sup>39</sup> based on the Privy Council's judgment in *Haw Tua Tau v. PP*,<sup>40</sup> a case on appeal from Singapore. However, *Munusamy*'s case was overruled by the Federal Court consisting of 5 judges in *Khoo Hi Chiang v. PP*,<sup>41</sup> which held that the quantum of proof was beyond reasonable doubt. The Federal Court was of the view that the Privy Council's interpretation of the Singapore's section 188 (1) of the Criminal Procedure Code, which is in *pari materia* with section 180 of the Malaysian Criminal Procedure Code was obiter dicta.<sup>42</sup> Not long after that, the Federal Court consisting of 3 judges overruled *Khoo Hi Chiang* in a subsequent case of *Tan Boon Kean v. PP*<sup>43</sup> by restoring the "prima facie" test. The limbo came up again in the majority judgment (5:2) of the Federal Court in *Arulpragasam v. PP*<sup>44</sup> by holding that the quantum of proof was beyond reasonable doubt. The Federal Court was of the opinion that there is a fundamental difference between applying a mere prima facie and the beyond reasonable doubt test at the intermediate stage of criminal trial.<sup>45</sup> The Federal Court says:<sup>46</sup>

<sup>36</sup> *Jones v Secretary of State for Social Services* [1972] 1 All E.R. 145, pg. 149.

<sup>37</sup> Lawrence, M. Friedman, *The Legal System*, Russell Sage Foundation, New York, 1975, pg. 216.

<sup>38</sup> See ss. 2, 4 and 6 of the Criminal Procedure Code (Amendment) Act 1997 (Act A979/97). [1987] 1 MLJ 492, pg. 497-498.

<sup>39</sup> [1981] 2 MLJ 49, pg. 51-53.

<sup>40</sup> [1994] 1 MLJ 265, pg. 292-293.

<sup>41</sup> *Ibid.*, pg. 288.

<sup>42</sup> [1995] 3 MLJ 514, pg. 534-535.

<sup>43</sup> [1997] 1 MLJ 1, pg. 12, 15 & 63.

<sup>44</sup> *Ibid.*, pg. 42.

<sup>45</sup> *Ibid.*, pg. 42B-F.

“...that there is a fundamental difference between applying a mere ‘prima facie’ standard of proof and the ‘beyond all reasonable doubt’ standard of proof, at the intermediate stage of trial, would be where, at the conclusion of the prosecutor’s case, there is strong prosecution evidence but there remains a reasonable tenable doubt. In such a situation, if the standard of proof is a mere ‘prima facie case’, in other words, a mere prima facie supposition that the accused *may* be guilty, then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is ‘beyond all reasonable doubt’, then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to acquitted and discharged without his defence being called.

Furthermore, if the onus on the prosecution at the close of its case, into establish a ‘mere prima facie case’, the test to be applied is a minimal evaluation of the prosecution’s evidence to ensure that it is not inherently incredible. Whereas, if the onus on the prosecution at the close of its case, into establish a case ‘beyond all reasonable doubt’, then the test to be applied to the prosecution’s evidence is a maximum evaluation of the prosecution’s evidence, which calls for ‘a more rigorous test of credibility’, in order to answer the question: if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt?

Then the court makes its conclusion, by saying:<sup>47</sup>

“Clearly, therefore, there is a world of difference between applying the test of a mere ‘prima facie case’ and applying the ‘beyond all reasonable doubt’ test to the evidence led by the prosecution at the close of its case.

The uncertainty was finally resolved with the insertion of the new section 182A and the amendment to section 173(f, h & m) and section 180 of the Criminal Procedure Code (FMS Cap 6), which provide that the quantum of proof at the close of the prosecution’s case is “prima facie”.

Fifth, one of the main motives affecting the development of most organized system, whether in law or otherwise, has been the desire to provide individuals with protection from the exercise of naked power. Many attempts have been made to prevent the subjection of individuals to the whims and caprices of other individuals holding power over them. This is the aim so aptly described as a desire for rule by law and not by men. Unfettered discretion and abuse of power can be filtered through the established rules.<sup>48</sup> And, finally, to meet the role of law, particularly in a changing society, the precedent system creates flexibility<sup>49</sup> in applying laws. Flexibility is achieved

<sup>47</sup> Ibid, pg. 43C. For further discussions, see Mimi Kamariah Majid, *Criminal Procedure In Malaysia*, University of Malaya Press, Kuala Lumpur, 1999, 3rd Edition, pg. 270-283 and pg. 310-318.

<sup>48</sup> *Jones v. Secretary of State for Social Services*, supra, n. 36.

<sup>49</sup> *Saunders v. Anglia Building Society*, supra, n. 34.

by the possibility of decisions being overruled and by the possibility of distinguishing and confirming the operation of the decisions, which appear unsound. The judges are able to adapt the law to meet changing circumstances within the perimeter allowed by the rules. Legislative activity is directed towards the general and typical core problems. By their very nature many disputes concern open and marginal questions. A judge's attention is often focussed on a specific issue, and always directed towards the human implications of law-making. Although judges are working within the framework of precedents, judgments are sufficiently discursive and open ended to allow for considerable flexibility, whereas legislation's abstract blue print is more limited and produces rigidity rather as choice.

The followings show how *stare decisis* has played an important role in various branches of law in meeting with social, economic, and political order in society.

#### CONSTITUTIONAL AND ADMINISTRATIVE LAW

In constitutional law, the place of *stare decisis* is even more tenuous. A judge looking at a constitutional decision may feel the compulsion to revere or devote past history and accept what was once written. But he remembers above all else that it is the constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he formulates his own views, rejecting some earlier ones as false and embracing other ways of interpretation.<sup>50</sup> He cannot do otherwise unless he lets man long dead and unaware of the problems of the age in which he lives do his thinking for him.<sup>51</sup>

One of the most important provisions in a Constitution is the fundamental right. The fundamental rights must be guaranteed by the Constitution<sup>52</sup> and that guarantee afforded by the Constitution is the supremacy of the law,<sup>53</sup> and the power and duty of the courts is to enforce these rights and to annul any attempt to subvert any of them by legislative or executive action or otherwise through judicial review;<sup>54</sup> and therefore displaces Parliamentary supremacy. Once the courts have settled the law, local society will feel secured of their rights. Foreign investors will not hesitate to invest their capital since there exists settled rules giving guarantees of their rights. Therefore, *stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence.

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<sup>50</sup> This is normally done through distinguishing *ratio decidendi*.

<sup>51</sup> William O. Douglas, "Stare Decisis", (1949) 49 *Columbia Law Review*, 735.

<sup>52</sup> Federal Constitution, aa. 5-13.

<sup>53</sup> *Ibid.*, a. 4.

<sup>54</sup> *Ibid.*, aa. 4, 128 & 130.

The constitutional law has a close relation with the administrative and executive actions. It is a common feature of modern life that administrative agencies are empowered with substantive decisions in a wide array of individual cases. The procedures used to dispose off these cases are in the first instance determined by the legislature or agency, as the case may be. Yet once established, these procedures are subject on constitutional grounds to review under the doctrine of *ultra vires*.<sup>55</sup> The Constitution only provides that a person shall not be deprived of his fundamental rights save in accordance with law.<sup>56</sup> Hence the Parliament uses its 'saving power' to enact laws giving wide powers (discretionary powers) to the executive.<sup>57</sup> The Supreme Court has held that the executive power of the Attorney General in transferring cases, which are triable in the subordinate courts to the High Court was null and void as it contravened the Constitution.<sup>58</sup> This decision has cleared the doubts among the society of the unfettered discretionary power of the executive, which was eventually abused and politicized.<sup>59</sup> However, not long after that judgment, Parliament amended article 145 of the Federal Constitution and section 418A of the Criminal Procedure Code empowering the Attorney General, who is also the Public Prosecutor, to choose a suitable venue for the trial.<sup>60</sup>

The rights of natural justice, particularly the right to be heard, are not only given to the local people but to foreigners as well. An order made by the

<sup>55</sup> Stephen F. William, "Liberty and Property: The Problem of Government Benefits", (1983) 12 *Journal of Legal Studies*, pg. 3.

<sup>56</sup> For example, article 5 (1) of the Federal Constitution says: "No person shall be deprived of his life or personal liberty save in accordance with law".

<sup>57</sup> See Mohd Arif Yusof, "Saving 'Save in Accordance with Law': A Critique of *Kulasingam v. Commissioner of Lands, Federal Territory*", (1982) *Journal of Malaysian Comparative Law*, pg. 155.

<sup>58</sup> See *PP v. Dato' Yap Peng* [1987] 2 MLJ 311, pg. 320. In this case the accused (respondent) was charged with committing a criminal breach of trust, an offence triable in the Sessions Court. By virtue of section 418A of the Criminal Procedure Code (FMS Cap 6) the Attorney General who is also the Public Prosecutor issued a certificate to have the case transferred to the High Court. In the preliminary objection raised by the accused before the High Court, the judge ruled that the transfer was unconstitutional on the ground that section 418A is *ultra vires* to article 121 (1) of the Federal Constitution. On appeal to the Supreme Court by the Public Prosecutor it was held by the majority 3 to 2 that section 418A is unconstitutional. As a result of this case Parliament amended article 145 of the Federal Constitution and section 418A of the Criminal Procedure Code (FMS Cap 6) empowering the Public Prosecutor to transfer a case from a subordinate court to the High Court; see the Federal Constitution, new clause 3A of article 145 and the Criminal Procedure Code (Amendment) Act 1989 (Act A728/89), s. 3.

<sup>59</sup> The post of Attorney General is changeable; it was sometimes held by a minister and sometimes by a civil servant. Presently the Attorney General is a civil servant having qualified to be a judge of the Federal Court; see article 145(1) of the Federal Constitution.

<sup>60</sup> See eg *Nadarajah v. PP* [2000] 4 CLJ 634, pg. 641-643.



Immigration Department cancelling the work permit of a foreign staff of a newspaper based in Kuala Lumpur without his first having been given an opportunity to be heard was declared null and void as it contravenes the rights of natural justice.<sup>61</sup> However the right may be ignored if the statute expressly excludes such right.<sup>62</sup>

Since the Constitution determines the structure of a government *stare decisis* has the effect of stabilizing political tension in the country. A Head of State<sup>63</sup> cannot simply dismiss a Head of Government<sup>64</sup> without cause but the latter may resign voluntarily on his own accord. As a country practising the parliamentary democracy, the Head of State may dismiss a Head of Government under certain circumstances as enshrined in the Constitution,<sup>65</sup> namely; if a vote of no confidence has been passed in the House<sup>66</sup> and if the Head of Government thereafter has to refuse to resign and has not advised a dissolution of the House. A mere signed letter attached together with the names of the State Assemblymen expressing no confidence in the Chief Minister to the Governor did not constitute a vote of no confidence.<sup>67</sup> Since members of the House had been elected by the people, they cannot simply overthrow the ruling government by signing a piece of paper, they had to go to the House where the people's confidence was placed or they must face the

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<sup>61</sup> See *John Peter Berthelsen v. Director General of Immigration* [1987] 1 MLJ 134, pg. 138.

<sup>62</sup> See *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 3 MLJ 72, pg. 92-94.

<sup>63</sup> At the Federal level is the Prime Minister and the State levels are the Menteri Besar or the Chief Ministers as the case may be.

<sup>64</sup> At the Federal level is the Yang di-Pertuan Agong (King) and the State levels are the Sultans or the Governors as the case may be.

<sup>65</sup> Federal Constitution, article 43(4). It provides, *inter alia*, if the Prime Minister ceases to command the confidence of the majority of the members of the House of Representatives, then, unless at his request the Yang di-Pertuan Agong dissolves Parliament, the Prime Minister shall tender the resignation of the Cabinet. This provision has been adopted by all State Constitutions, see Schedule 8, Part 1 (known as the essential provisions, see a. 71(4)).

<sup>66</sup> At the Federal level it is known the Dewan Rakyat (House of Representatives) and the State levels as the Dewan Negeri (State Assembly).

<sup>67</sup> *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* (1966) 2 MLJ 187, pg. 193; distinguish this case with *Adegbenro v Akintola* (1963) 3 W.L.R. 63, pg. 74-75 where the Federal Supreme Court of Nigeria had held that the constitutional method of assessing lack of confidence required a decision or resolution on the floor of the House but on appeal the Privy Council took an opposite view and held that there was no limitation as to the material by which lack of confidence should be assessed. For further details, see: Ahmad Ibrahim, "Power to Dismiss the Prime Minister or a Chief Minister in Malaysia", (1977) LVIII The Parliamentarian, pg. 34. The relationship between the Head of State and the Head of Government can be referred to *Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang Di Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* (no. 2) [1986] 2 MLJ 420, pg. 467.

people directly through ballot papers.<sup>68</sup> Therefore, political stability could be achieved through settled legal rules and the government may concentrate their effort on social, economic, and political development.

## LAW OF EVIDENCE

In the area of the law of evidence, particularly in criminal proceedings, the doctrine of *stare decisis* has settled the rules regarding the burden of proof. There is a presumption of innocence so that the general burden of proving that an accused is guilty of the crime charged is upon the prosecution although there are exceptions to this general rule. Consequently, the prosecution enjoys the right to begin. For instance, if the prosecution desires the court to give judgement that X be punished for a crime, which the former alleges that X has committed, he must prove that X has committed that crime.

Nevertheless, there are occasions when the burden is cast on the defence as when there is a presumption of facts. For example, under section 114 of the Evidence Act 1950, the court may presume the existence of certain facts having regard to the course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Hence, if a man is in possession of stolen goods soon after the theft, the court may presume that he is either the thief or has received stolen goods knowing them to be stolen and the burden is on him to prove his innocence. It was held that an accused needs only raise a reasonable doubt as to the existence of any defence, except insanity, to have the benefit of that defence.<sup>69</sup>

It is to be noted that what has been mentioned above is only the general burden of proving guilt. In addition to this, it is mandatory for the prosecution to discharge the specific burden of proving every element in the charge framed, subject to exceptions, to disprove all defences of which there is some evidence.<sup>70</sup>

The standard of proof required by the prosecution to discharge the burden of proof in criminal proceedings is 'proof of beyond reasonable doubt'.<sup>71</sup> Where the burden of proving a fact is upon the defence, the standard

<sup>68</sup> See *Datuk Amir Kahar Tun Mustapha v. Tun Mohamed Saed Keruak* [1994] 3 MLJ 737, pg. 747-749 where the court held that a vote of no confidence could be assessed from surrounding circumstances. The strict rule of voting from the floor may be dispensed with.

<sup>69</sup> *Looi Wooi Saik v. P.P.* (1962) MLJ 337, pg. 340.

<sup>70</sup> The leading case on the burden of proof in criminal proceedings is *Woolmington v. D.P.P.* (1935) A.C. 462, pg. 480-483.

<sup>71</sup> With the amendment to sections 173 (f) and 180 and the insertion of section 182A to the Criminal Procedure Code (FMS Cap 6), which were made in 1997, the quantum of proof in a criminal case at the close of the prosecution's case is *prima facie*, and beyond reasonable doubt at the close of the defence case; see *Dalip Bhagwan Singh v. P.P.*, supra, n. 16, pg. 18-19; see also n. 38, supra; and Mimi Kamariah Majid, supra, n.47.

required is only proof on a balance of probabilities. Thus, the standard of proof required of the defence when the onus is on him is much lower than that of the prosecution.<sup>72</sup>

## LEGAL PROCEDURE

In legal procedure, the system of *stare decisis* aims to minimize the sum of two types of costs: firstly, error costs i.e. the social costs resulting from the judicial system's mistakes in adjudicating cases, and secondly, direct costs i.e. the actual costs involved in litigation activity.<sup>73</sup> *Stare decisis* enables and increases the likelihood of private settlement of dispute. *Stare decisis* does this by enabling lawyers to predict with reasonable degree of success the outcome of a court hearing. A counsel's opinion thus has a quasi-judicial function by settling the case without a full trial, something that is often stressed when a divided legal profession is defended.<sup>74</sup> The desire to settle out of court is reinforced by the cost system.<sup>75</sup> The majority of potential court actions do not even reach the writ or summons stage. If every dispute were to require trial by a judge, the judicial system would break down.<sup>76</sup> Therefore, only a small number of cases reach trial. Furthermore, the institution of adjudication is viable because of a shared consensus between the Bar and the Bench as to the arguments that will be used to justify a judicial decision. Without this agreement, the adversary system, under which lawyers representing each side adduce arguments to persuade the judge that they have a better case, would collapse. For any case worth submitting to a judge there are arguments both ways. There is always a variety of competing considerations, and the judge,

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<sup>72</sup> For further reading, see Bron Mckillop, "Burden of Proof on an Accused in Malaysia", (1964) 2 Malaya Law Review pg. 250.

<sup>73</sup> Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration", (1973) 2 Journal of Legal Studies, pg. 399.

<sup>74</sup> This mechanism is known as "out of court settlement". Since lawyers are court officials, their opinions or advices may loosely be classified as a part of quasi-judicial function. In England, the legal profession is divided into two categories i.e. Barrister and Solicitor; but such division does not exist in Malaysia. The term used is 'Advocate and Solicitor'; once a qualified lawyer is admitted to the Malaysian Bar he is known as an 'Advocate and Solicitor': see s. 3 of the Legal Profession Act 1976.

<sup>75</sup> Legal costs and legal fees vary depending on various factors, for example, the nature of the case whether it is a serious or a minor case (offence); whether the case is triable before the High Court or the subordinate court; and also the goodwill of a lawyer in which normally if a client engages a senior lawyer having good reputation the cost will be high. Another important factor is if the case is settled out of court, the cost will be much lesser.

<sup>76</sup> New court buildings and officials are required. During the economic recession such demand could not be entertained. Therefore the present system of *stare decisis* has been benefiting the government and the public at large from spending a huge sum of money to recruit court officials.

unlike, for example a legislator, is expected to give a reasoned decision. The process of argument will not constitute a chain of demonstrative reasoning. It would be intolerable if the hesitations and doubts, the difficulties and differences of views, which attend the resolution of such dispute at first impression were to be repeated every time a similar dispute arose for decision. In the sphere of concrete and particular dispute, justice requires speed and finality.<sup>77</sup>

## OPPONENTS

In the earlier discussion, it has been mentioned how *stare decisis* played an important role in society, but at the same time it also has been criticized.

## INHERENT RIGIDITY

The first criticism is that its inherent rigidity, which may occasionally cause hardship to the society. This arises from the vast and ever-increasing bulk of reported cases to which the court must advert to determine what is the law, since an excess of case law tends to obscure basic principles of *stare decisis*.<sup>78</sup> For every case cited by a counsel in support of his client's case, his opponent will have discovered among the many thousands of reported cases, with similar weight which will also support his client's case. It becomes more difficult when there exists a conflicting precedent.<sup>79</sup>

Inherent rigidity also creates difficulties especially to lay-lawyers.<sup>80</sup> 'Maneuvering' with decided and reported cases is not their business. They normally base their arguments on facts collected from their clients. Thus, a

<sup>77</sup> D.P. Derham, F.K.H. Maher and P.L. Waller, *An Introduction to Law*, The Law Book Company Limited, Sydney Melbourne Brisbane Perth, 1977, 3<sup>rd</sup> Edition, pg. 101.

<sup>78</sup> For example, in *Qureishi v. Qureishi* [1976] 1 All E.R. 325 where some 94 authorities (and 8 text books) appear to have been cited to the court.

<sup>79</sup> Phil Harris, *supra*, pg. 220. See the latest pronouncement of the Federal Court pertaining to the right of natural justice particularly the right of hearing in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*, *supra*, n. 62; where the decision is contrary to the earlier decision of the Supreme Court in *John Peter Berthelsen v Director General of Immigration*, *supra*, n. 61.

<sup>80</sup> See Daniel S. Lev, "Bush Lawyer in Indonesia", in Yash Ghai, Robin Lukham and Francis Snyder (eds.), *The Political Economy of Law: A Third World Reader*, Oxford University Press, New Delhi and London, 1986, pg. 718. The term used by the writer is 'para-professional' advocate which means anyone who performs a service of access to legal institutions (bureaucracy, courts, political authorities generally) or offers the same service as these legal institutions, but without the formal qualifications normally belonging to professional lawyers. In Indonesia these lawyers are known as 'pokrol bambu'; meanwhile in Malaysia they are known as pleader: see s. 3 of the Legal Profession Act 1976.

simple case, which normally can be done by them with nominal fees turns into a care for professional qualified lawyers with very high fees which is unbalanced to the value of the subject matter in dispute. Therefore, hardship is not only inflicted on the lay-lawyers, which might lose their income but also to society at large bearing the high costs of litigation. As a result, the professional lawyers monopolise the legal service.<sup>81</sup>

The rigidity of the doctrine applies too to foreign trade in which the rule causes injustice to foreign traders in business dealings with local companies. This could happen in currency exchange.<sup>82</sup> If the court decided to follow an old rule of precedent in which the payment of debt, although arising from a contract which stipulated for payment of the price to be made in supplier currency, should be awarded according to local currency<sup>83</sup> it might be detrimental to the foreign trader if the local currency depreciates in value. This would have also been a disaster for the local traders who have business transactions with their foreign counterparts overseas.<sup>84</sup> It was also argued that the decision of a court, which affects the future activities of one of the litigants, is like an asset, or liability, for which a present value can be calculated. Thus, the theory of legal precedents is treated as an application of capital theory, where the end of legal precedents has a value, which depreciates overtime.<sup>85</sup>

## RESTRAINT ON JUDICIAL ACTIVITY

The second criticism, which is considered very obvious, is that the system of *stare decisis* limits judicial activity. It requires the judge to apply law rather than to make it. Every rule of law must have its origin. If it is not created by

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<sup>81</sup> Ibid.

<sup>82</sup> See cases *Schorsch GmbH v. Hennin* [1975] Q.B. 416, pg. 427; *Re United Railways of Havana* [1961] A.C. 1007, pg. 1052; and *Miliangos v. Geo. Frank* [1975] 1 Q.B. 487, pg. 504-505. In the first case the plaintiff a German company supplied goods to the defendant a firm in England, had stipulated for payment of the price to be made in German Deutchmarks. The defendant failed to pay the debt and the plaintiff sued them in the English court asking for payment of debt in German Deutchmarks. The court refused for the payment to be made in Deutchmarks on the ground that the court is bound by the House of Lords' decision in the second case that an English court could only give judgment in pound sterling. But later on in the third case the House of Lords overruled its previous decision in the second case in which they could give judgment in foreign currency ie Swiss Francs.

<sup>83</sup> Ibid., *Schorsch GmbH v. Hennin*.

<sup>84</sup> Lord Denning, *The Discipline of Law*, Butterworths, London, 1979, pg. 308.

<sup>85</sup> John C. Goodman, "An Economic Theory of the Evolution of Common Law", (1978) 7 *Journal of Legal Studies*, pg. 393; see also William M. Landes & Richard A. Posner, "Legal Precedent: A Theoretical and Empirical Analysis", (1976) 19 *Journal of Law & Economy*, pg. 249.

statute, then the it must have been created by the court. Thus where there is no precedent, the doctrine breaks down and the judge is bound to reach a decision in accordance with general principles. Even in modern time, cases arise for which there is no precedent. These cases are described as cases of first impression and require the judge to make law rather than to apply it. This the judge will do by reference to analogous principles but even legal principles must have their origin so that the 'declaratory theory' of the common law is not of universal application.<sup>86</sup> Historically judges did make and develop law.<sup>87</sup> The more precedents there are, the less development is there for law.<sup>88</sup>

The strongest argument for judicial creativity is not that it is the best method of law reform but that, as things stand, it is in a large area of law, the only method. The organs of government are partners in business law-making; courts and legislatures are in the law business together.<sup>89</sup> Some legislation in Britain and Malaysia are introduced by the executive,<sup>90</sup> and when they have been enacted at the behest of the executive, are frequently implemented by ministerial regulation. Thus the executive commands both the principles and the details of the statute. So, what is the function of the judge? He has no right to tell and direct the appropriate minister to get his views about the next step of action. Without this communication, the judge must develop the law to meet social justice on behalf of the government and the governed. Mere application of rules, either by statute or precedent to facts should give way to the immediate necessity of shaping the law to fit the need of modern society.<sup>91</sup>

The notion of judicial creativity as discussed in the two preceding paragraphs has also been criticized as undemocratic, improper, uncertain and involving retrospective application of a judicial decision.<sup>92</sup> The judicial creativity is undemocratic because Malaysia and Britain are both practising parliamentary democracy; whereas the judges are not elected by the people. Democracy means election i.e. Parliament determines the root of power. It is

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<sup>86</sup> See Lord Simon's observation upon the declatory theory of common law in *Jones v. Secretary of State for Social Services* [1972] A.C. 944, pg. 1026.

<sup>87</sup> Devlin, "Judges and Lawmakers", (1976) 39 *Modern Law Review*, pg. 5.

<sup>88</sup> Buswell, *The Life of Samuel Johnson*, Everyman Edition, J.M. Dent & Co. 1906, Vol. I, pg. 416.

<sup>89</sup> Jaffe, *English and American Judges as Law-Makers*, Clarendon Press, Oxford, 1969, pg.20.

<sup>90</sup> In Britain, Malaysia and USA, the executive law is known respectively as statutory instrument, subsidiary legislation and delegated legislation.

<sup>91</sup> W. Friedman, *Law in Changing Society*, Peguin, London, 1972 pg. 74; see also Lord Dennings's remark in *Dutton v. Bognor Regis UDC* [1972] 1 Q.B. 373, pg. 397-398.

<sup>92</sup> Devlin, *supra*, pg. 10-11; see also Laurence Goldstein, "Some Problems About Precedent", *supra*, pg. 101-105. In Malaysia, the judgment of the Supreme Court in *PP v. Dato' Yap Peng*, *supra*, n. 58, pg. 320-321 has cleared the doubt of the application of prospective overruling principle.

improper because judges by themselves, sitting in bench, are no complete law-makers unlike the Parliament. It is uncertain because it might cause litigants' confusion about the likely outcome of a case. The objection of retrospectivity is that the judge can change the law only by applying to the decision of a case a law different from that in force at the time the legal process in that case was initiated. Therefore, promulgating retrospective law is unjust. These four arguments – pros and cons – have been discussed either directly or indirectly in the earlier part of this article.

### FREQUENT CONSTITUTIONAL AND JUDICIAL HIERARCHY CHANGES

The application of the doctrine creates, sometimes, problems when the constitutional relationship between constituent territories of a state changes repeatedly over a short period of time, and at the same time the court structure is frequently revised and reorganized.<sup>93</sup> Thus, problems of stability and certainty are more likely to become acute. The practice with regard to the doctrine could simply reflect these changes. Firstly, courts might hold themselves not to be bound by decisions of the other courts which existed prior to the latest constitutional change, so that each change would mean a new start; and secondly, on the other hand, the courts might establish a degree of continuity in the law by holding themselves bound by the decisions of previous courts which had been abolished, on the ground that they were their successors in title. These situations had happened in *PP v. Joseph Chin Saiko*<sup>94</sup> of the High Court at Kota Kinabalu, Sabah (formerly known as North Borneo) discussing the degree of negligence as required in section 304A of the Penal Code. The judge pointed out the inconsistency referred to above with regard to the case *China Insurance v. Loong Moh*.<sup>95</sup> The judge, after tracing the history of the courts, concluded that the jurisdiction of the Federated Malay

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<sup>93</sup> Before 1985, the Federal Court was the end product of a bewildering series of mergers and un-mergers among the courts of three distinct geographical entities: the Federation of Malaya, Singapore and Borneo. Eleven predecessors of the Federal Court could be counted, each with some claim to be a court of coordinate jurisdiction. The Court of Appeal had twelve. The impact of all these on the application of the doctrine was unclear. The Federal Court shared that history, with additional wrinkles of its own even after the separation of Singapore from Malaysia. For further discussions on the position of this doctrine in Singapore, see: Walter Woon, "Stare Decisis and Judicial Precedent in Singapore", in A.J. Harding (ed.), *Common Law in Singapore and Malaysia*, Butterworths, Singapore, 1985, Chapter 4; Harbajan Singh, "Stare Decisis in Singapore and Malaysia – A Review", [1971] 1 MLJ xvi; and Andrew Phang, "Stare Decisis in Singapore and Malaysia: A Sad Tale of the Use and Abuse of Statutes", (1983) *Singapore Law Review*, pg. 155.

<sup>94</sup> [1972] 2 MLJ 129, pg. 131-132.

<sup>95</sup> [1964] MLJ 307, pg. 307.

States (F.M.S.) Court of Appeal had been absorbed by the Court of Appeal of the Malayan Union. The successor of that court, the Court of Appeal of the Federation of Malaya, had held itself bound by the decisions of the Malayan Union Court of Appeal in *Henry v. De Cruz*.<sup>96</sup> Therefore, reasoned the learned judge, the Federation of Malaya Court of Appeal had to be bound by the F.M.S. Court of Appeal. And since the Federation of Malaya Court of Appeal is bound by the F.M.S. Court of Appeal, the judge held that he was bound by *Cheow Keok v. PP*.<sup>97</sup> However, he also felt himself bound by the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *PP v. P.G. Mills*.<sup>98</sup> Being faced with two equally binding but conflicting decisions, the learned judge opted to follow *Mills*' case because the case had given a correct interpretation on the standard of negligence required for a conviction under section 304A of the Penal Code, namely, an ordinary degree of negligence.

### UNREPORTED DECISIONS

Sometimes the problem may arise if the case is not reported in the law report or is reported but later than the case under consideration. This is what happened in *Saiko*'s case. The decision in *Saiko* was appealed to the Federal Court but unfortunately no written judgment was ever given.<sup>99</sup> In May 1972, six months after *Saiko*'s case, the Federal Court had the opportunity to reconsider section 304A in *Adnan bin Khamis v. PP*.<sup>100</sup> This case was reported earlier in the Malayan Law Journal than *Saiko*'s case, even though it was decided later. *Saiko*'s case was not mentioned in the judgment. The Federal Court in *Adnan* decided once and for all that section 304A did not codify the English law on manslaughter by negligence i.e. high degree of negligence, and that the court in *Cheow Keok*'s case was mistaken in suggesting that section 304A had not been construed either locally or in India<sup>101</sup> i.e. as referring to an ordinary degree of negligence. Therefore the Federal Court was unanimously of the opinion that the judgment delivered in *Cheow Keok* must be regarded as *per incuriam*. Unfortunately, the Federal Court did not say anything regarding how a court might determine which decisions of which predecessor courts were to be treated as binding.

In practice, the Federal Court had treated itself as bound by decisions of the Court of Appeal of the Federation of Malaya,<sup>102</sup> its immediate

<sup>96</sup> [1949] MLJ 62, pg. 62.

<sup>97</sup> [1940] MLJ 82, pg. 84. This case was held by the Federated Malay States Court of Appeal.

<sup>98</sup> [1971] 1 MLJ 4, pg. 5-6.

<sup>99</sup> See *Abdul bin Palaga v. PP* [1973] 2 MLJ 177, pg. 177-178.

<sup>100</sup> [1972] 1 MLJ 274, pg. 277-278

<sup>101</sup> *Ibid.* Section 304A of the Malaysian Penal Code is in *pari materia* with the Indian Penal Code.

<sup>102</sup> *Eg., Yong Chin Lang v. Tan Chong & Sons Motor Co. Ltd.* [1968] 2 MLJ 8, pg. 11.



predecessor in the Peninsula. Indeed, on several occasions, judges sitting in the Federal Court had spoken of the Federation of Malaya Court of Appeal as though it were one and the same court.<sup>103</sup> It also held itself bound by decisions of the Straits Settlements Court of Appeal<sup>104</sup> and the Court of Appeal of Singapore<sup>105</sup> when sitting in Singapore.

Regarding the High Court sitting in Borneo, the Federal Court also held that decisions of the F.M.S. Court of Appeal and the Sarawak, North Borneo and Brunei Court of Appeal were both binding on Malaysian High Courts.<sup>106</sup>

The above problems had shown that the doctrine of *stare decisis* has created a question of practical unity of the judicial system as a result of the constitutional changes i.e. that courts in Peninsular Malaysia held themselves bound by the decisions of the Federation of Malaya Court of Appeal, while courts in Singapore and Borneo held themselves bound only by decisions of the former Courts of Appeal in their respective territories. Although in theory the formation of Malaysia united the courts of the Federation of Malaya (Peninsular Malaysia), Singapore and Borneo into one system, in practice it seemed that the sense of separateness of the system persisted for some time after the merger.

## INFLUENCE OF FOREIGN JURISDICTIONS

There has also been some criticism that in some instances the application of the rule of *stare decisis* has been extended to cases where the decision of the overseas court has been followed notwithstanding the fact that the law is not completely in *pari materia*. The doctrine has even encroached a court decision to the extent of setting aside local legislation as in the case of *Tengku Mariam v. Commissioner for Religious Affairs, Trengganu & Ors.*<sup>107</sup> In this case which is on appeal, the Federal Court expressed the view that the courts in Malaysia

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<sup>103</sup> For instance, Thomson L.P. in *Khoo Hean Kee v. Chop Wong Soon Co.* [1964] MLJ 19, pg. 19 (Federal Court 3<sup>rd</sup> December 1963) said that "Mr Justice Neal decided the matter as he did because he took the view that the case of *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1, was wrongly decided by this court". The case referred to was decided by the Federation of Malaya Court of Appeal in 1960. In fact the Lord President when sitting in the Federal Court persistently referred to the Federation of Malaya Court of Appeal as this court, e.g. in *U.M.B.C. Ltd. v. Ipoh Mining Co. (M) Ltd.* [1964] MLJ 69, pg. 70; *Ravamanickam v. PP* [1966] 1 MLJ 60, pg. 61 etc. So have other judges eg. Azmi C.J. in *Abdullah v. PP* [1967] 2 MLJ 95, pg. 95; and Raja Azlan Shah J in *Natesan v. Goh Gok Hoon* [1968] 2 MLJ 3, pg. 8. Neither the Court of Appeal of Singapore nor that of Sarawak, North Borneo and Brunei had been referred to in quite the same way.

<sup>104</sup> *China Insurance v. Long Moh* [1964] MLJ 307, pg. 309.

<sup>105</sup> *Re Lee Gee Chong* [1965] 1 MLJ 102, pg. 110.

<sup>106</sup> *Adnan bin Khamis v. PP*, supra, n. 100.

<sup>107</sup> [1970] 1 MLJ 222, pg. 223.

were bound by the judgment of the Privy Council in the case of *Abdul Fata Muhamad Ishak v. Russomoy Dhar Chowdhury*,<sup>108</sup> a decision on an appeal from India on the question of the validity of a family *wakaf*. In that case the Privy Council held that a *wakaf* for the benefit of the family of the deceased was bad despite the validity of such *wakaf* under Islamic Law and the law of the State of Trengganu.<sup>109</sup>

With the abolition of the Privy Council and the former Federal Court, the Supreme Court seemed to have tried to create stability, continuity, and certainty in law.<sup>110</sup> There was no distinction drawn between its original and appellate powers concerning the rules of *stare decisis*.<sup>111</sup>

But it was not quite clear whether the Supreme Court was bound by the former Federal Court decisions. It was argued that, if the Supreme Court was the successor of the former Federal Court, it would be bound as it would normally have followed its predecessor's decisions. But there was neither a statutory provision nor any case law describing it as the predecessor of the former Federal Court.<sup>112</sup> From the cases decided, it seemed to have followed the practice of the former Federal Court, i.e. the Supreme Court was bound by its own decisions. But the position of the doctrine became cloudier where it had decided that a previous decision of the Privy Council could be reviewed because the former had become the highest court of the land.<sup>113</sup> The former Federal Court on the other hand held itself to be bound by the decisions of the Privy Council because the former was subordinate to the latter.<sup>114</sup> If the

<sup>108</sup> [1894] 22 I.A. 76.

<sup>109</sup> See, Administration of Islamic Law Enactment, Terengganu, 1955, section 18. There are special provisions for *wakaf* in the Enactment. Both *wakaf 'am* (general charity) and *wakaf khas* (special charity) are mentioned in the Enactment. *Wakaf 'am* is defined as a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognised by Islamic law and includes the property so dedicated. *Wakaf khas* means dedication in perpetuity of the capital and income of property for religious or charitable purposes recognised by Islamic law and includes the property so dedicated, the income of which is to be paid to a person or persons for purposes prescribed in the *wakaf*. For further comments, see Professor Ahmad Ibrahim, Privy Council Decisions On *Wakaf*. Are They Binding in Malaysia [1971] 2 MLJ vii.

<sup>110</sup> *Lorrain Esme Osman v. Attorney General of Malaysia*, supra, n. 20.

<sup>111</sup> Ibid.

<sup>112</sup> Under the Federal Constitution, article 122 as it was amended in 1985 by the Constitution (Amendment) Act no. 566, the name 'Federal Court' was substituted with the name 'Supreme Court'. The Federal Constitution and the Court of Judicature Act 1964 did not state whether the Supreme Court was the successor of the Federal Court and the Privy Council. However from the provisions seemed that the Supreme Court was the successor to both the Federal Court and the Privy Council by substitution of the name.

<sup>113</sup> *Enesty Sdn. Bhd. v. Transport Workers Union & Anor*, supra, n. 21.

<sup>114</sup> *Khalid Panjang & Ors v. PP*, supra, n. 7; see also *Sundralingam v. Ramanathan Chettiar*, supra, n. 17.

Supreme Court would not regard itself as the successor of the Federal Court and treated itself as the highest level of the judicial hierarchy in this country, then it is submitted that the rules which applied to the Privy Council should be adopted by the Supreme Court i.e. its own previous decisions should not be binding upon it and its decisions should bind the courts subordinate to it.<sup>115</sup> With the present structure of the judiciary it is hoped that such problematic situations, which had been encountered by the Supreme Court will not be a hurdle, especially the present Federal Court and the Court of Appeal in pursuing their judicial activity.

## CONCLUSION

Precedent is the basis of the Common Law. The feature that has distinguished the English system from other legal systems in this respect is the coercive nature of the English doctrine; a judge shall have no option but to follow a binding precedent if the case before him cannot be distinguished from the prior case. This is so even if he disagrees with the prior precedent, and, indeed, even if the application of the precedent would lead to injustice in the case before him.<sup>116</sup>

A study of the development of the rules of *stare decisis* shows that they change over time with the changing practice of the courts<sup>117</sup> as the result of changing society. The complexities and confusions surrounding a court's powers to depart from its own decisions, and its powers to depart from those of a higher tier, as well as the conditions under which any of these powers may be exercised, continue to proliferate. Yet, up to Lord Denning's retirement in mid-1982, another dimension of the precedential hierarchy was perhaps growing in significance. This was the issue of how legal decisions affected the precedential authority of the tier, when that tier felt compelled to affirm on appeal decisions reached by the lower court's 'rebellious' rejection of a precedent from the higher tier.<sup>118</sup> A good example can be seen in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union*<sup>119</sup> where the Court of Appeal had decided not to follow the decision made by the Privy Council in *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral*

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<sup>115</sup> See, *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, pg. 25,31, 38 & 39.

<sup>116</sup> Per Lord Halsbury LC in *London Street Tramways Co. v. London County Council*, supra, n. 3, pg. 380.

<sup>117</sup> The best example of this phenomenon is the House of Lords, which is slightly over a century went from not being bound by its own decision to being bound, then back to not being bound again; see Practice Statement, supra, n. 3.

<sup>118</sup> Julius Stone, *Precedent And Law*, Butterworths, Sydney, 1985, pg. 203.

<sup>119</sup> [1995] 2 MLJ 317, pg. 336-344.

*Products Manufacturing Employees Union*,<sup>120</sup> pertaining to the distinction between error of law within jurisdiction and outside jurisdiction. The Court of Appeal opined that the Privy Council's decision was a controversial one, and ought not to be followed.<sup>121</sup>

The court says:<sup>122</sup>

...an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction.

It is generally conceded that some provisions must be made in a legal system for the possibility of departure from precedents. In the present time Malaysia has her own highest court, the Federal Court. The position of the Federal Court cannot be classified as equivalent to the former Federal Court or the defunct Supreme Court. The old rules, which were pronounced in *Young v. Bristol Aeroplane Co. Ltd*<sup>123</sup> had been affirmed in *PP v. Datuk Tan Cheng Swee & Anor*,<sup>124</sup> where the former Federal Court accepted unreservedly a common law *stare decisis* system<sup>125</sup> should be reviewed to meet the changing society. As was done by the Privy Council,<sup>126</sup> the crucial point seems to be that in many cases, and for a variety of reason<sup>127</sup> the Federal Court is effectively the court of last resort so that it too needs the power to waive earlier erroneous decisions to do justice for the society at large.<sup>128</sup>

<sup>120</sup> Supra., n. 21.

<sup>121</sup> Op.cit., pg. 336.

<sup>122</sup> Ibid., pg. 342EF.

<sup>123</sup> Supra, n. 4.

<sup>124</sup> Supra, n. 15.

<sup>125</sup> Ibid, pg. 277; as Chang Min Tat FJ said: 'It is...necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly'.

<sup>126</sup> The Privy Council held that its decision does not bind itself; see *Read v Bishop of London*, supra, n. 13.

<sup>127</sup> See Lord Denning's views concerning his disagreement to the proposition that the Court of Appeal should be bound by its own decision. See *Conway v. Rimmer* [1967] 1 WLR 1031, pg. 1035-1042; *Boys v Chaplin* [1968] 2 QB 1, pg. 19-26; *W and JB Eastwood v. Herrod* [1968] 2 QB 923, pg. 930-935; *Hanning v. Maitland (2)* [1970] 1 QB 580, pg. 585-589; *Barrington v. Lee* [1971] 3 All ER 1231, pg. 1238; *Davis v. Johnson* [1979] AC 264, pg. 278-283; see also the arguments made by CEF Rickett, Precedent In the Court of Appeal, (1980) 43 Modern Law Review, pg. 136.

<sup>128</sup> See, the judgment of Peh Swee Chin FCJ in *Dalip Bagwan Singh v. PP*, supra, nn. 24 & 25, particularly at pg. 12-14.

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