

Standing by decided things: How the Singapore courts decide cases

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Muhammad Ali Jinnah, the first leader of Pakistan apocryphally said, “Think 100 times before you take a decision, but once that decision is made, stand by it as one man.”

Our lives have their shapes because of decisions made or not made. Of course, some decisions are weightier than others. In particular, the decisions that judges make regarding the cases before them have significant bearing on many, even extending in more extreme cases to determining whether a person lives or dies.

With such power over people’s lives, it is important to be aware that judges also have to operate within certain rules. Specifically, judicial decisions in the common law system (in which Singapore is included) are bounded by the rule of *stare decisis*. This article explains what *stare decisis* is, what it looks like and its implications. This will shed some light on how judges make decisions, and show that judicial decision-making in Singapore is generally principled and disciplined.

What is *stare decisis*?

Literally translated from the Latin, *stare decisis* means “to stand by decided things”. It is a feature of legal systems like Singapore’s, called common law systems.¹ In such systems, courts rely on prior court decisions (or “precedent”) to determine present matters. Further, under the common law system, the rule of *stare decisis* obliges courts to follow these precedents if the present matter is similar to the precedent. In other words, courts are to stand by the “decided thing” if there is no good reason to depart from it.

There are two kinds of *stare decisis*: vertical and horizontal. Vertical *stare decisis* applies in cases where lower courts are bound by precedents made by higher courts. For instance, a

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¹ The other main legal system is the civil law system, which is usually found in continental European states and other countries influenced by them. The civil law system was based on Roman law, which contained a series of “codes” codifying the various legal principles in a referable system. In contrast, common law systems do not codify all legal principles, but draw some of them (especially in certain areas, such as contract law and sentencing for criminal offences) from previous judgments by courts.

District Court is bound by a precedent set by the High Court, while the High Court is in turn bound by a precedent set by the Court of Appeal. Horizontal *stare decisis*, on the other hand, applies in cases where courts are bound by precedents made by a court of the same level. While courts are not technically bound by precedent set by courts at the same level in a previous like matter,² they tend not to depart from such precedent, unless there is a good reason to do so.

Precedent determines a large part of our law, with the other source of law being statutes (i.e. the laws created by Parliament). For example, most of the rules making up what we deem as “law of private wrongs” is found in these precedents. Thus, the general rule that a manufacturer of a product owes a duty to take reasonable care in the production of that item is based on precedent.³ Determining the appropriate sentence for a particular case within the sentencing ranges for criminal offences (as provided for in statutes) are also based on precedent. For instance, in *PP v Koh Thiam Huat*,⁴ the accused was charged with one count of dangerous driving. On appeal, the High Court set out a sentencing framework for dangerous driving,⁵ detailing the factors subsequent courts should take into account in deciding on the appropriate sentence. This would serve as precedent for sentencing decisions in future such cases.

Why *stare decisis*?

The first obvious benefit of *stare decisis* is the consistency that it brings to judicial decisions. In common law systems that rely on precedent for the development of the law, *stare decisis* ensures that subsequent decisions are made according to established legal principles and rules found in prior similar cases. This ensures consistency in judicial decision-making, since courts are not allowed to decide similar cases differently. For instance, a court that hears a case about the validity of a contractual term must decide the case based on the established principles that deal with validity of contractual terms.

Even when a court decides to depart from precedent, *stare decisis* demands that it provide good reasons to do so, as *stare decisis* also obliges a court to openly explain its decision to depart

² *Wong Hong Toy v Public Prosecutor* [1985-1986] SLR(R) 656 at [11]; *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [4]; Gary Chan Kok Yew, “The Doctrine of Judicial Precedent and Case Method and Analysis” in *The Legal System of Singapore: Institutions, Principles and Practices* (Gary Chan Kok Yew & Jack Tsen-Ta Lee eds) at [11.6].

³ *Donoghue v Stevenson* [1932] 1 AC 62; *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100.

⁴ *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099.

⁵ *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [41].

from precedent. For instance, the Court of Appeals in *PP v UI*⁶ held that that a plea of guilt only has mitigating value if it indicates genuine remorse on the part of the accused. However, the court subsequently departed from this principle in the later case of *Ng Kean Meng Terence v PP*.⁷ There, the court instead held that a guilty plea should *always* be considered a factor in mitigation, because of the utilitarian benefits in saving costs and victims from testifying and reliving their trauma.⁸

Therefore, the first and most visible effect of *stare decisis* is consistency. Where there is inconsistency (in that precedent is departed from), it ensures that such an inconsistency is both deliberate and reasoned.

The second benefit flows from the first: given that there is consistency in judicial decisions, there is certainty for people in knowing what can or cannot be done. For instance, precedents pertaining to contracts have established the well-known rule that minors are not bound by contracts that they enter into.⁹ Therefore, if you enter into a contract with a minor, you cannot legally make him fulfil his obligation. On the other hand, *you* remain liable to him. Though this example is admittedly esoteric (who really makes contracts with children, right?), it illustrates the fact that consistent rules that are consistently applied result in certainty for society as to what the law is. This point about certainty was further elucidated in the recent case of *Ong Ming Johnson v AG* (“**Ong Ming Johnson**”),¹⁰ which stated that vertical *stare decisis* cannot be jettisoned even when interpreting rights under the Singapore Constitution,¹¹ as that would result in great uncertainty as to the scope of these rights.¹²

Thirdly, *stare decisis* does not involve judges deciding cases according to their whims and fancies. Given that they have to follow precedent, judges are precluded from bringing in their own personal opinions without underlying reasoned legal principle.

⁶ *Public Prosecutor v UI* [2008] 4 SLR(R) 500.

⁷ *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449.

⁸ *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [67]-[71].

⁹ *Bruce v Warwick* (1815) 6 Taunt 118 at 120. See also Andrew Phang Boon Leong (gen ed) *The Law of Contract in Singapore* (Academy Publishing, 2012) at [09.004].

¹⁰ *Ong Ming Johnson v Attorney-General* [2020] SGHC 63.

¹¹ Constitution of the Republic of Singapore (1999 Reprint).

¹² *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [308]-[313].

For instance, in September 2019, Terence Siow was sentenced to 21 months of supervised probation after pleading guilty to one charge of outraging the modesty of a woman on a train and on an escalator, after alighting the train to follow her.¹³ Within two days of that decision, an online petition calling for a harsher sentence¹⁴ garnered over 40,000 signatures.¹⁵ The petition implied that there had been favouritism shown towards Siow because of his university education and good grades. Social media exploded with a common message: the judge was elitist and those with good educational backgrounds can expect to get off with lighter sentences for an equivalent offence.¹⁶

When the case went on appeal to the High Court, however, Chief Justice Sundaresh Menon clarified that the District Judge's decision was not "unprincipled" nor "especially remarkable".¹⁷ This was because her decision had been in line with appropriate precedent, which stated that when an offender has shown strong propensity for reform, courts tend to choose rehabilitation over incarceration. However, the High Court did disagree with the District Judge's opinion over Siow's actual propensity to reform (based on the evidence available), and sentenced him instead to two weeks' imprisonment.¹⁸ Similarly in the case of *PP v Parti Liyani*,¹⁹ where the lower court had incorrectly considered the evidence, on appeal the High Court acquitted the accused upon correctly considering the evidence.²⁰

¹³ David Sun, "'Potential to excel in life': NUS undergrad who molested woman gets probation for 'minor intrusion' offences" *Straits Times* (26 September 2019) <<https://www.straitstimes.com/singapore/courts-crime/university-student-who-molested-woman-gets-probation-for-minor-intrusion>> (accessed 17 February 2021).

¹⁴ "Say NO to Favorable Sentences for 'Educated' Sex Offenders" *change.org* <<https://www.change.org/p/attorney-general-s-chambers-say-no-to-favorable-sentences-for-educated-sex-offenders>> (accessed 17 February 2021).

¹⁵ "More than 40,000 sign petition against NUS student's sentence in molest case" *Channel News Asia* <<https://www.channelnewsasia.com/news/singapore/petition-nus-student-terence-siow-mrt-molest-case-probation-11948074>> (accessed 17 February 2021).

¹⁶ Belmont Lay, "S'poreans make dank memes of NUS undergrad molester with good grades" *mothership* (27 September 2019) <<https://mothership.sg/2019/09/singapore-nus-undergrad-molester-memes/>> (accessed 17 February 2021).

¹⁷ *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [3].

¹⁸ "NUS student Terence Siow gets jail after probation sentence for molest is overturned" *Channel News Asia* <<https://www.channelnewsasia.com/news/singapore/nus-student-terence-siow-molest-train-appeal-jail-probation-12678476>> (accessed 1 March 2021).

¹⁹ *Public Prosecutor v Parti Liyani* [2019] SGDC 57.

²⁰ *Parti Liyani v Public Prosecutor* [2020] SGHC 187.

Conversely, in *PP v Lam Leng Hung*,²¹ the Court of Appeal affirmed the High Court’s interpretation of the definition of an “agent” under section 409 of the Penal Code,²² stating that to give it a wider reading to attract a harsher punishment would go against the statutory language.²³

Opportunity to correct

The operation of *stare decisis* is admittedly not perfect. The tendency towards consistency and certainty in the law does not guarantee that the “right” decision (at least in the public’s view) will be made by the courts in every given instance. For instance, in *Ong Ming Johnson*,²⁴ the plaintiffs brought a constitutional challenge against section 377A of the Penal Code, which criminalises homosexual acts between men. The High Court dismissed the application and held that section 377A was constitutionally valid.²⁵ It was an unpopular decision in some quarters,²⁶ but it was in line with precedent, since the prior cases have all unanimously held that section 377A was constitutional and need not be repealed.²⁷ That is not to say that there is no hope for the repeal of section 377A – but as the High Court in *Ong Ming Johnson* clarified, it was not the role of the court to determine public morality; neither does it have the power to do so. Rather, any repeal must come from Parliament, which is the only state organ that has the electorate’s mandate to determine public morality.²⁸

²¹ *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659.

²² Penal Code (Cap 224, 2008 Rev Ed) s 409(1)(b): Whoever, being in any manner entrusted with property, or with any dominion over property, in the way of his trade, profession or business as a banker, a merchant, a factor, a broker, an attorney or an **agent**, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine (emphasis added).

²³ *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [237], [285]-[286].

²⁴ *Ong Ming Johnson v Attorney-General* [2020] SGHC 63.

²⁵ *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [315].

²⁶ See e.g. “Our response to today’s Singapore High Court verdict” #Ready4Repeal (30 March 2020) <<https://ready4repeal.com/news/2020/3/30/our-response-to-todays-singapore-high-court-verdict>> (accessed 27 March 2021); “Gay Sex Still a Crime in Singapore Thanks to Dubious Legal Rulings” *Human Rights Watch* (14 April 2020) <<https://www.hrw.org/news/2020/04/14/gay-sex-still-crime-singapore-thanks-dubious-legal-rulings>> (accessed 27 March 2021); “Govt’s decision to not enforce 377A still ‘unsettling’ because it’s not binding on future Attorneys-General: Senior Counsel” *today* (26 January 2021) <<https://www.todayonline.com/singapore/govts-decision-not-enforce-377a-still-unsettling-because-its-not-binding-future-attorneys>> (accessed 27 March 2021); “Supreme Court of Singapore passes up opportunity to decriminalise sex between men” *Human Rights Law Centre* (30 March 2020) <<https://www.hrlc.org.au/human-rights-case-summaries/2020/3/30/supreme-court-of-singapore-passes-up-opportunity-to-decriminalise-sex-between-men>> (accessed 27 March 2021).

²⁷ See *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26; *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059.

²⁸ *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [192].

Precedents that were created in the past may also not be as applicable today, e.g., due to changing social mores. Further, even if courts correctly apply the precedents and make a decision that is perfectly aligned with them, there may be a risk that those precedents were decided incorrectly in the first place.

Therefore (as indicated above), the common law system also has in place a system of appeals, where parties who feel that the lower courts ruled incorrectly against them can appeal their cases to higher courts. In doing so, the appellate courts generally have the power to re-examine precedents and set new law where appropriate. Indeed, the law will gradually adapt to changing societal mores.

For instance, the case of *Lau Siew Kim v Yeo Guan Chye Terence*²⁹ involved the principle that when a husband and wife purchase a house together, the husband is generally presumed to intend to give the entire house to his wife. However, the traditional principle only works one way – it does not presume that the wife intended to give the house to her husband. The court recognised that certain legal principles were made in different societal contexts, and that there is room for change.³⁰ It thus stated that such a “patriarchal” principle ought to “be assessed in accordance with contemporary societal norms”,³¹ and held that a reconsideration of the principle to include cases of wives intending to give houses to husbands might be appropriate.³²

Finally, even if mistakes happen at the level of the Court of Appeal itself, it nonetheless has the power to depart from its own previous decisions,³³ although of course such power should only be exercised carefully and with full consideration of the abovementioned principles.

Thus, though *stare decisis* does not always result in the “right” outcome, the common law system of appeals gives the opportunity for incorrect decisions, including decisions based on poor precedent and outdated mores, to be made right.

²⁹ *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108.

³⁰ *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [60].

³¹ *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [60].

³² *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [60].

³³ *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689.

Implications of *stare decisis* for the public

While *stare decisis* does not guarantee the perfect outcome for everyone involved, it does generally mean principled outcomes. As mentioned above, *stare decisis* obliges subsequent courts to follow the applicable precedents. Thus, *stare decisis* ensures that judicial decisions are consistent, certain, principled and not based on the whims of the judges. This is even more vital for criminal cases, where the decision rendered could mean imprisonment or liberty, death or life. While this does not ensure that judicial decisions are perfect, imperfect decisions can still be reviewed through the system of appeals.

With that in mind, there are certain implications of *stare decisis* for the public in general.

Most importantly, the public can have confidence in the judicial decision-making process. *Stare decisis* means that the judicial decisions made will be consistent, certain and clear. Like cases are decided alike. In the event of departure from precedent, the courts must give their reasons for doing so. These reasons are public and can be scrutinised by the higher courts on appeal (whose own judgments are also publicly made and scrutinised).

Of course, no system is perfect, and Singapore's legal system is no exception. Further, judges are also human and may, regrettably, make mistakes. Thus, the recent case of *PP v Parti Liyani*³⁴ was shown to be incorrect on appeal.³⁵ Nonetheless, in this regard, the principle of *stare decisis*, which guides their decision-making for the cases before them, remains a powerful tool to ensure consistency and fairness in the application of the law.

While there remains a concern that consistency appears to be prized over “correctness” under the system of *stare decisis*, the alternative would be problematic. It would be something akin to “palm-tree justice”, where judges decide willy-nilly on matters, with no reference to established legal principles that make sense within the wider fabric of Singapore jurisprudence. The rule of law, which is foundational to a civilised legal society, demands as well that legal rules are consistently applied in every case, an outcome that is achieved by *stare decisis*.

³⁴ *Public Prosecutor v Parti Liyani* [2019] SGDC 57.

³⁵ *Parti Liyani v Public Prosecutor* [2020] SGHC 187.

For decisions that shape the lives of others, the rule of *stare decisis* is necessary and welcome for the flourishing of our society.