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CHAPTER 11

THE DOCTRINE OF JUDICIAL PRECEDENT AND CASE METHOD AND ANALYSIS

By Gary CHAN Kok Yew

I. Introduction

11.1 Singapore has received English common law and equity since 1826 via the Second Charter of Justice. With the enactment of the Application of English Law Act[1] which came into force in 1994, the common law and equity, which formed part of the law of Singapore prior to 12 November 1993, continued to be part of the law of Singapore subject to suitability and modifications according to local circumstances. After the cut-off date, the common law will be that as declared and developed by the Singapore courts subject to local circumstances.[2]

11.2 Following the historical reception of laws, the common law continues to serve as an indispensable source of law in Singapore, apart from the other legal sources such as the Constitution, statutes and subsidiary legislation. In addition, judge-made law can be the engine of autochthonous legal change and development[3] for the benefit of society in general. Indeed, it is central to the two perennial legal issues which a judge has to resolve when hearing a dispute: first, to determine what the law *is* and secondly, in cases of perceived gaps and injustices in the law, to ascertain what the law *ought* to be. To fulfil these two important aims, a good grounding in the doctrine of judicial precedent and case method and analysis would be necessary. The basic principles will be introduced in

1 (Cap 7A, 1993 Rev Ed).

2 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

3 See Goh Yihan & Paul Tan, "An Empirical Study of the Development of Singapore Law" (2011) 23 SAcLJ 176.

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the next section followed by a discussion of more specific issues relating to judicial precedent and the common law method in the subsequent sections.

II. The doctrine of judicial precedent and the common law method: general principles

11.3 In essence, the common law system of Singapore is characterised by the doctrine of judicial precedent (or *stare decisis*). Judges deciding on a particular dispute refer to and follow past court decisions that are regarded as legally binding on them. This obviates the need for judges to decide afresh each time they hear a dispute but allows them to rely instead on the collective judicial wisdom of the past. The doctrine of precedent therefore results in generally consistent judicial outcomes in similar circumstances as opposed to ad hoc and arbitrary decision-making. *Stare decisis* enhances the uniformity of the law, and in turn engenders greater legal certainty for litigants and lawyers.[4]

11.4 The principle of treating like cases in a similar manner is also a hallmark of fairness and justice. The doctrine of judicial precedent is thus intimately connected to the concept of the rule of law which is premised on the "exclusion of human arbitrariness from the processes of law and government" and the assumption that "past decisions yielded precepts of ready-to-be-known content" and "present and future decisions were already implicit in past ones" under *stare decisis*.[5]

11.5 There is also the consideration of social expectations. If a particular precedent has led people to believe that it will be adhered to, that is one reason at least for not deviating from the precedent. Furthermore, the use of a consistent body of law and reasoning processes in adjudication means that lawyers are able to participate meaningfully in the adjudicatory process through rational arguments to influence the direction of the law or to raise viable legal challenges (such as lodging an appeal against a

4 *Howard de Walden Ltd v Aggio and others; Earl Cadogan and Cadogan Estates Ltd* [2007] 3 WLR 542 at [92].

5 Julius Stone, "The Ratio of the *Ratio Decidendi*" (1959) 22 Modern Law Review 597 at 598–599.

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judicial decision) in order to protect their client's interests within the parameters permitted by the legal system.

11.6 According to this doctrine, the common law is created incrementally by judges via the application of legal principles to the facts of particular cases. In this regard, the judges are only required to apply the *ratio decidendi* (or the operative reason for the decision) of the higher court within the same hierarchy. In Singapore, the *ratio decidendi* found in the decisions of the Singapore Court of Appeal are strictly binding on the Singapore High Court, the District Court and the Magistrate's Court (vertical *stare decisis*). Horizontal *stare decisis* does not exist in Singapore. For example, a prior High Court decision is not binding on the High Court.[6]

11.7 The court decisions from England and other Commonwealth jurisdictions, which are not part of the Singapore judicial hierarchy, are not strictly binding on Singapore courts.[7] Other judicial statements made by the higher court which do not directly affect the outcome of the case (*obiter dicta*) may be disregarded by the lower court. Though the above judicial statements are not binding, they can nevertheless have significant persuasive effect on the decisions made by the Singapore courts.

11.8 What follows is a brief general discussion of the common law method based on the doctrine of judicial precedent. In legal reasoning, we argue from certain premises to a conclusion. The conclusion is a normative or "ought" proposition (*eg,* that A ought to compensate B for the breach of contract). The premises consist of a combination of a major premise (*eg,* the normative proposition that a party who breaches a contract ought to compensate the other contracting party) and a minor premise (*eg,* the factual proposition that there was a breach of contract by B). This process of drawing a conclusion from the major and minor premises is known as syllogism.

11.9 Deductive Reasoning refers to the method of reasoning from general legal principles to the particular facts of the cases. This takes place when the legal principle from a prior precedent which

6 *Wong Hong Toy and another v Public Prosecutor* [1985–1986] SLR(R) 656 at [11]; *M V Balakrishnan v Public Prosecutor* [1998] 2 SLR(R) 846 at [10]; *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [4].

7 *Mah Kah Yew v Public Prosecutor* [1968–1970] SLR(R) 851 at [12].

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is binding on a judge is clear and wide enough to cover the facts of the dispute before the judge. The legal principle itself may be found in a single precedent, a series of case precedents or a statutory provision. For instance, consider the common law principle that a person who intentionally makes a false representation to induce another person to enter into a contract shall have to pay damages to compensate the losses suffered by the innocent party. Suppose the plaintiff claims that the defendant had intentionally and falsely represented certain facts to him thereby causing the plaintiff to enter into a loss-making contract. The judge may apply the legal principle via *deductive reasoning* to the proven facts in the dispute. Where the proven facts of the dispute before the judge satisfy each of the elements of the legal cause of action in deceit (namely representation, falsehood, intentional conduct by the defendant, inducement and losses), the plaintiff would be able to recover for the damages. The conclusion necessarily flows from the fulfilment of all the elements of the legal cause of action. The premises compel the conclusion *ie,* it would be contradictory to assert the premises and at the same time, deny the conclusion. In this syllogism, the logical *validity* of the deductive argument does not, however, automatically mean that the conclusion is *true*. The truth of the conclusion is dependent on the truth of the premises. The latter is a matter of empirical fact-finding within the legal process that is closely related to the law of evidence.[8]

11.10 Common law development arises not only from deductive reasoning but also inductive reasoning. Inductive reasoning involves the method of deriving a general or universal rule from particulars. In such cases, there may not be any clear legal principle, upon a survey of case precedents, which covers the facts in dispute (*eg,* the defendant makes a negligent statement causing economic loss to the plaintiff). There may, however, be a narrower legal principle which only cover the specific facts in a few prior precedents (*egs,* liabilities arising from vehicular collisions, sale of noxious substances and manufacture of defective products) but not the dispute at hand. Using inductive reasoning, the judge may "induce" a wider legal principle from the existing case precedents based on the *common characteristics* contained therein (*eg,* the

8 See discussion of facts in relation to inductive reasoning in paras 11.10–11.11.

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absence of ordinary or reasonable care causing damage to others).[9] In this way, a new and wider legal principle may be created to cover the dispute before the judge. This wider legal principle obtained via inductive reasoning should be further tested against the prior precedents to ensure that the facts are properly covered by this new principle.

11.11 Unlike the principle based on deductive reasoning, inductive reasoning does not compel the conclusion. It is based instead on the likelihood that the premises would lead to the conclusion.[10] Where there are several narrower principles of legal liabilities applying to particular fact situations, inductive reasoning leads to the *inference* that a wider principle of legal liability based on the common factual matrices in the prior cases exists. As this is merely an inference based on past precedents, it remains possible that a novel case with a different factual matrix that runs contrary to the conclusion might arise in the future.

11.12 Analogies in law may be resorted to where there is no existing legal principle covering the dispute at hand. The judge may seek to *extend* the existing legal principle found in a case precedent to the dispute at hand by referring to the *similarity* between the two cases[11] or some *general policy consideration* governing the existing legal principle in the case precedent which should also apply to the dispute before the judge. Similar to inductive reasoning, the argument based on analogy is not conclusive. In fact, one may argue that reasoning by analogy is a subset of inductive reasoning in which similarities are discerned from the facts of the case precedent in order to arrive at a new legal principle. The difference between inductive reasoning and reasoning by analogy in the above example is that the former attempts to draw a general principle from a series of specific case precedents whilst in the latter, the new principle is drawn by comparing the facts in a specific case precedent to those of another specific case (*ie,* the dispute at hand). It is noted that analogies may also be drawn with a group or series of case precedents.

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9 *Egs*, Brett MR's *dictum* in *Heaven v Pender* (1883) 11 QBD 503; and the neighbour principle in *Donoghue v Stevenson* [1932] AC 562.

10 See William Twining and David Miers, *How To Do Things With Rules* (Cambridge University Press, 5th Ed, 2010) at p 349.

11 *Ibid,* at p 349.

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11.13 In addition to deductive, inductive and analogical reasoning, there are other types of subsidiary arguments commonly employed by judges in decision-making. Two examples are *a fortiori* (meaning 'with stronger force') argument *ie,* if proposition X is true, then Y must also be true (with stronger force)[12] and the argument *ad absurdum ie,* that a particular argument taken into its logical conclusion leads to absurdity.[13]

11.14 Legal principles, which have been established from case precedents, vary in breadth and richness in detail. General legal principles,[14] whether in the nature of *ratio decidendi* or *obiter dicta*, possess the potential for wider application to a broad array of factual situations and adaptation to social changes. As such, they are more malleable and flexible. In some cases, the width of the general legal principle can be trimmed by adding new requirements[15] to be satisfied or via the use of more restricted language in order to accommodate novel situations and/or social changes.

11.15 The durability of case precedents over time determines, to a large extent, the scope and direction of the common law development. Factors which may enhance the weight of a case precedent include the frequency in which it has been reinforced or endorsed by subsequent courts, whether it is a long-standing decision and whether it has created expectations and stability in commerce and proprietary matters. On the other hand, negative factors include the presence of strong dissenting judgements and criticisms by subsequent judges or law academics.[16]

11.16 Incrementalism is accepted as a natural part of the common law method.[17] As highlighted in a recent Singapore Court of Appeal

12 *Eg,* the court in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [33] stated that "ignorance of the law is no excuse – for laypersons and, *a fortiori,* for a legally-trained person such as the appellant".

13 *Eg, Poh Kay Keong v Public Prosecutor* [1995] 3 SLR(R) 887 at [46] (on the interpretation of a commentary in an Indian text on evidence).

14 *Eg,* the neighbour principle in *Donoghue v Stevenson* [1932] AC 562.

15 *Eg,* in the content of duty of care in negligence, the addition of the requirements of proximity and public policy to a general principle based merely on reasonable foreseeability.

16 Glanville Williams, *Learning the Law* (Sweet & Maxwell, 15th Edition, 2013) at pp 120–121.

17 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [35].

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decision, "It is trite to state that the common law is incremental in nature: the doctrine of stare decisis obliges judges to adjudicate with reference to decided *cases*".[18] Incrementalism connotes a variety of ideas: decision-making that is dependent on prior case precedents, by way of analogy with established categories[19] of precedents, and made on a case by case basis. Where the legal test or principle was perceived to have developed without a proper consideration of past authorities or existing principles, so as to amount to "judicial legislation",[20] it is not acceptable case law development that exceeds the bounds of incrementalism. According to the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* ("*Spandeck*"),[21] the concept of incrementalism

> …… is not a distinct and alternative method which results in a plethora of discrete sets of rules (as opposed to a set of general (and universal) principles). Instead, it is an analogical process to *apply* specific facts to the general principle. According to this approach, a court should, when applying the specific step of the general principle, utilise the incremental methodology to decide first whether that specific step (or criterion) can be satisfied *with reference to decided cases*. This will provide an essential check to any unwarranted expansion of liability ……

11.17 Apart from logical reasoning from principles, judges also resort to public policy arguments to justify their decisions. The great American jurist Holmes J had remarked that 'the life of the law has not been logic, it has been experience'. Apart from logical arguments, recourse to practical experience concerning human behaviour and the wider socio-economic circumstances is just as important in judicial decision-making. These policy arguments are extra-legal in nature as opposed to the positivist legal principles and rules prevailing in the common law and statutes. They are generally related to societal goals such as social welfare and

18 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 at [35].

19 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1; see also *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge ("the more traditional categorisation of distinct and recognisable situations").

20 See *Murphy v Brentwood District Council* [1991] 1 AC 398 at 471–472 per Lord Keith of Kinkel (criticising the two-stage test for duty of care in *Anns v Merton* [1978] AC 728).

21 Supra note 17 at [43].

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competing moral claims.[22] Public policy arguments include the concern that imposing legal liability may open the floodgates of litigation[23] and the need for the law to adapt to particular socio-economic and political changes. These are arguments of a qualitative nature which require the weighing and balancing of myriad interests and values. Unanimous and definitive legal responses to such issues are likely to be elusive.

11.18 In addition, common law development involves a delicate balancing process between the apparently conflicting aims of certainty and flexibility as expressed by Lord Reid:

> People want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.[24]

11.19 That being said, general policy considerations that have been accepted by the courts are likely over a period of time to find more concrete expression in the legal principles and rules within particular domain areas such as contract, criminal or tort laws. We find in contract law, for example, the legal principle that employment contracts in restraint of trade are generally void subject to the requirements of reasonableness due to the competing policy considerations between freedom of trade, on the one hand, and the promotion of the individual party's freedom of contract and the wider public interests, on the other.[25] Policy considerations and the application thereof vary from jurisdiction to jurisdiction. The principle in *Rondel v Worsley*,[26] which grants immunity to lawyers in respect of their conduct in litigation, is a case in point.

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22 *Ibid,* at [85].

23 *Eg,* Lord Buckmaster's caution against extending liability for negligence pithily expressed in the now famous slogan "If one step, why not fifty" in *Donoghue v Stevenson* [1932] AC 562.

24 Reid, "The Judge As Law Maker" (1972–1973) 12 Journal of the Society of Public Teachers of Law (NS) 22 at 26.

25 See Andrew Phang Boon Leong, "Illegality and Public Policy" in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 13.161 and 13.169.

26 [1969] 1 AC 191.

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It was extended a decade later in England,[27] but subsequently rejected, first by the courts in Singapore,[28] and later in England[29] and New Zealand.[30] The immunity, however, continues to apply in Australia.[31]

11.20 Bearing in mind the reasoning processes based on legal principles and policy we have discussed above, the Singapore Court of Appeal's description of the common law method in *Spandeck*[32] appears particularly apt:

> The common law is built on interconnected layers of principles, universal and particular, each dependent on and interacting with the other, held together by the overarching goal of fairness and justice. To understand this is to comprehend the common law's eternal search for rational and universal principles in the law. Thus, in the area of negligence, the principles relating to the imposition of a duty of care must be rational and coherent and be reliably and consistently determined. With the universal in the form of general principles, the law will be a coherent body of rules, and not consist of singular instances of judicial decisions unrelated to each other. However, to have the universal without the particular is to lose sight of the need for practical solutions for the myriad of disputes that come before the courts. These general principles provide the focus to which the particular (*viz*, the facts of decided cases *and* the present case) must then be analysed so that the courts may, within this aggregation of the universal and the particular, reach a result that is fair and just.

11.21 In sum, common law development consists of the marrying of universal and the particular principles that are consistently and coherently applied in order to achieve the overall goal of justice and fairness.

11.22 Common law development is as much about building from the past as it is for the future. Every case precedent is, in essence, a decision about the rights and duties of the litigants based on past events. Yet, each of them contains the seeds for further development of the

27 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.
28 *Chong Yeo and Partners v Guan Ming Hardware and Engineering Pte Ltd* [1997] 2 SLR(R) 30.
29 *Arthur JS Hall & Co v Simons* [2002] 1 AC 615.
30 *Lai v Chamberlains* [2007] 2 NZLR 7.
31 *Giannarelli v Wraith* (1988) 165 CLR 543; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.
32 *Supra* note 17 at [28].

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common law in the future.[33] The judge therefore has to be mindful of the impact of his decision not only in respect of the litigants in the present case but also for similar cases in the future.[34] As Professor Dworkin had remarked at the end of his seminal work *Law's Empire*, "Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keep the right faith with the past".[35] Whether and how the common law in a particular area will develop depends largely on the relevance, persuasiveness and authoritative value of the case precedents and the prevailing social circumstances, an important issue which we will examine in greater detail below.

III. Specific issues on the doctrine of judicial precedent and case method and analysis: of rules, discretion and justification

11.23 This section builds upon the doctrine of judicial precedent and the common law method discussed in the preceding section. It examines in greater detail a few technical issues on the common law method such as the determination of the *ratio decidendi*, *obiter dicta,* distinguishing a case precedent and the *per incuriam* rule as well as other broader issues relating to judicial discretion and justifications in common law reasoning.

A. Determining the ratio decidendi

11.24 In judicial decision-making, judges will often narrate the facts of the case, state what they consider to be relevant legal principles, comment on past precedents and give their decision on the outcome. Unfortunately perhaps from the perspective of the law student, judges do not normally state in an explicit manner: "the *ratio decidendi* of this case is ….". The lawyer's task of deciphering the

33 See Andrew Nicol, "Prospective Overruling: A New Device for English Courts?" (1976) Modern Law Review 542 ("The courts in common law countries play a dual role. They decide particular disputes which are brought before them, and they participate in the development of the law as it will apply on future occasions. In every judicial system where a decision can be justified by reference to past decisions, each pronouncement is descriptive of what the judge believes the law to be, and prescriptive of what it should be in the future").

34 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) at pp 75–76.

35 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at p 413.

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ratio decidendi requires both legal skills and experience. Though the *ratio decidendi* do not usually come with explicit labels, they can be discerned in many cases upon the proper application of case method and analysis.

11.25 As a preliminary issue, it is noted that there are different theories or definitions as to the concept of *ratio decidendi*. For example, Goodhart defines it as a "statement of the material facts and the conclusion based on them".[36] This appears to be an objective interpretive approach from the perspective of an outsider towards the case precedent itself. Cross, on the other hand, seems to view the concept of *ratio decidendi* from the internal perspective of the judge deciding that prior case. He refers to it as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him".[37] Stone makes a useful distinction between two notions of *ratio decidendi*. The first describes the process of reasoning by which the decision was reached (the "descriptive" *ratio decidendi),* and the second is that which identifies and delimits *the* reasoning which a subsequent court is bound to follow (the "prescriptive" or **"**binding" *ratio decidendi).* Thus, the latter involves a "normative judgment requiring us to choose a particular *ratio decidendi* as legally required to be drawn from the prior case, that is, as the binding *ratio decidendi"*.[38] The word "choose" would imply that, for Stone, *judicial discretion* is involved in the task of finding the *ratio decidendi*, an issue which we would return to below.

11.26 To further complicate matters, the *ratio decidendi* may be described at various levels of generality or specificity. Though the guide must be the words used by the judge in the case precedent, they are not conclusive as to the identification and scope of the *ratio decidendi*. Furthermore, the intended breadth of the *ratio decidendi* is not always made explicit in the judgement. For example, would you describe *Donoghue v Stevenson* as a case about a retailer's liability for the presence of dead snails in the ginger beer, the

36 A L Goodhart, "The *Ratio Decidendi* of a Case" (1959) 22 Modern Law Review 117 at 120.

37 Cross on *Precedent in English Law* (3rd Ed, 1977) at p 76 (cited in *Indo Commercial Society (Pte) Ltd v Ebrahim and another* [1992] 2 SLR(R) 667 at [14]).

38 *Supra* note 5 at 600.

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manufacturer's liability for beverages generally, the liability of any person responsible for the production or dissemination of defective products or all of the above? To the extent that the judge frames the legal principle as applying to the class of manufacturers or consumers generally, he or she is shaping the boundaries of the *ratio decidendi* (subject to re-interpretation by subsequent courts). Sometimes, the *ratio decidendi* described by the judge may be stated more widely than what the facts of the case require, and subsequent courts may seek to narrow the scope.

11.27 Furthermore, the interpretation of a *ratio decidendi* of a particular case may be affected by the judicial interpretation of another prior case or a host of other prior cases. Interpreting the *ratio decidendi* based only on the isolated case may not give a precise description of the scope of the legal principle or rule. On occasions, the *ratio decidendi* of a case precedent might be thought to be vague or even non-existent at the point when it was decided, but is only clarified by subsequent cases. For example, when the House of Lords decided *Bell v Lever Bros*,[39] it was not clear whether a doctrine of common mistake at common law existed due to some vagueness and inconsistencies in the judgement.[40] It was only in certain subsequent cases[41] that the existence of the doctrine of common mistake was confirmed and this was done, in part at least, by reference to that earlier precedent (*ie, Bell v Lever Bros*)!

11.28 Given that facts may be stated at varying levels of generality, disagreements can arise in the determination of the material facts of the case and the analogical relevance of the prior holding.[42] As noted by Twining and Miers, the ascertainment of *ratio decidendi* "typically involves an element of choice from a range of possibilities".[43] There may therefore be "a number of potentially binding *rationes* competing *inter se* to govern future cases of

39 [1932] AC 161.

40 Andrew Phang Boon Leong and Goh Yihan, "Mistake", Chapter 10 in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 10.029, 10.035 (re Lord Atkin's inconsistent expressions of the legal test in *Bell v Lever Bros*) and 10.037.

41 *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 per Steyn J; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679.

42 *Supra* note 5 at 603–605.

43 *Supra* note 10 at p 306.

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which the facts may fall within one level of generality, but not within another".[44] As Stone suggests, "only future decisions will show which [ratio decidendi] is binding".[45] Further, where there are separate judgements issued by multiple judges, each of them may disagree with or interpret differently the *ratio decidendi* in the case precedent thereby compounding the difficulties of determining the *ratio decidendi* with certainty. In addition, the case precedents may have been erroneous, weak or overly broad or narrow such that judges in subsequent cases are driven to "rectify" or refine them, for instance, by confining the case precedent to the specific facts of the case. In this way, the *ratio decidendi* of a case may change over time due to judicial interpretations. Hence, at the point when a new case is decided, it is not always easy to predict how the case would be interpreted by subsequent courts (*eg,* would the *ratio decidendi* be applied narrowly to the specific facts or used as an analogy for a fairly different factual scenario?). MacCormick refers to the subsequent court's "explanative discretion"[46] in this regard.

11.29 At times, when multiple judges in a particular case disagree on the bases of the judicial decision, there may not be a legal principle or rule that is substantially agreed to by the majority of the judges. For instance, Judge X holds that the material facts as applied to a particular legal principle are A and B, Judge Y holds they are A and C and Judge Z holds that they are A and D. In such a case, there is no discernible *ratio decidendi* that can be drawn from the case.[47] Some courts are more prone to judgements without a clear *ratio decidendi* than other courts.[48] For example, certain English[49] and Australian decisions may not give rise to a discernible *ratio decidendi* particularly where there are multiple judgments with no majority opinion. This is not commonly the case for Singapore

44 *Supra* note 5 at 607.

45 *Ibid,* at 608.

46 *Supra* note 34 at 85.

47 See *Actavis UK Ltd v Merck & Co Inc* [2009] 1 WLR 1186 at [79].

48 Martin Davies, "Common law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee*" (2000) 8 TLJ 133 (that the High Court of Australia produces decisions with no clear *ratio decidendi* far more often than the House of Lords or the Supreme Court of the United States).

49 *Eg*, *MFM Restaurants Pte Ltd and another v Fish and Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 at [90] (commenting on the lack of a precise *ratio decidendi* from the judgements in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61).

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Court of Appeal decisions which normally contain unanimous or majority opinions.

11.30 Notwithstanding the potential difficulties enumerated above, the determination of *ratio decidendi* does not always provoke fierce disagreements in practice. In fact, it is fairly common to find, save for cases involving controversial issues of law, general agreement amongst Singapore lawyers and judges in the interpretation of *ratio decidendi*. This depends, to a considerable extent, on the judicial intentions as expressed or implied in the precedents and the clarity of language. Indications of the *ratio decidendi* may be found in a judgement on a point of law which the judge considers necessary in order to justify the particular decision.[50] If the judge in the case precedent has carefully used the specific language of the *ratio decidendi* and cautioned against extending the legal principle beyond the facts of the case, that is another good indication of the *ratio decidendi*.

B. The relevance of obiter dicta

11.31 In the course of a judgement, the judge may, in addition to deciding on the dispute with reference to legal principles, make hypothetical statements as to what the legal principle might be if the facts were different, state a principle by way of illustration or analogy or may even make comments on the appropriateness of past precedents. These judicial statements are merely *obiter dicta*. This term 'o*biter dicta'* refers to statements made in a judgement which are incidental to or go beyond the main points necessary for deciding the case at hand. They have only persuasive effect, and are not binding on subsequent courts. Where there are multiple judgements in a case, the statements made by the minority judges on a particular legal issue which are not shared by the majority would be regarded as *obiter dicta*.

11.32 One should not, however, be too quick to dismiss *obiter* statements. It has often been said that the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[51] that a bank would owe a duty of care in the tort of negligence for its negligent misstatements to a person with whom the bank has a special relationship, is itself a

50 *Supra* note 34 at p 83.
51 [1964] AC 465.

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major *obiter dictum.* This principle concerning the duty of care for negligent misstatements based on the special relationship between the parties would arguably have been regarded as the *ratio decidendi* if not for the special facts of the case (namely, the bank disclaimed responsibility prior to issuing the allegedly negligent statements, a fact which negated the existence of a duty of care). Regardless of its *obiter* status, the legal principle in *Hedley Byrne* has been central to the development of negligence law particularly in the areas of negligent misstatements, claims for economic losses and the impact of the contractual matrix on duty of care in negligence.[52]

11.33 Strictly speaking, the "neighbour principle" enunciated by Lord Atkin in *Donoghue v Stevenson*[53] may also be regarded as a *obiter dictum* since it was not explicitly endorsed by the other law lords in the case. Nonetheless, the neighbour principle has had enormous impact in the subsequent development of the tests for duty of care in the tort of negligence in Singapore, England and the other common law jurisdictions.[54]

11.34 Judicial statements emanating from decisions of the foreign courts such as the UK Supreme Court (formerly House of Lords), the Federal Court of Malaysia, Supreme Court of India, the High Court of Australia, the New Zealand Supreme Court and the Supreme Court of Canada are not binding on all Singapore courts, merely *obiter dicta*. This does not detract from the fact that some of these judicial statements have significant persuasive value for Singapore courts faced with similar disputes or legal issues. The same applies to post-1994 Privy Council decisions which are not binding on local courts.

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52 *Egs, Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (extending the principle of *Hedley Byrne* to the provision of services generally); *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [32]–[35] (concept of assumption of responsibility in *Hedley Byrne* as applied to a bank's duty to its customers based on the contractual matrix as well as outside the contractual framework); *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [63] (duty owed by clerk of works of construction project based on assumption of responsibility in *Hedley Byrne*).

53 [1932] AC 562.

54 For a general historical background to the development of duty of care in negligence since *Donoghue v Stevenson*, see Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at paras 03-018-03.036.

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C. Distinguishing a precedent based on materiality of facts

11.35 A lawyer faced with case precedents that run contrary to his client's case will seek to distinguish them on the facts before the court. The judge may be persuaded to disregard the *ratio decidendi* in the case precedent if he is satisfied that the material facts before him may be distinguished from those found in the precedent.

11.36 How does the judge distinguish a precedent? All precedents are after all dissimilar in some way whether in terms of the factual matrix or the legal issues presented. No two cases are identical. Where the present dispute and precedent are substantially similar (*ie,* the factual differences are insignificant or minor), the precedent would be binding on the lower court when deciding the dispute. However, where the differences are material, the precedent may be distinguished and treated as non-binding on the court. The operative word here is "material". One would have to examine the case precedent closely to find out what the judge regarded as the material aspects that underlie the legal outcomes or consequences in that case precedent.

11.37 The issue of materiality of the facts depends, as a starting point, on the cause of action (in a civil case) or elements of a charge (in a criminal case). Where the dispute concerns a claim in the tort of negligence, and the legal issue relates to whether a duty of care is owed by the defendant to the plaintiff, those parts of the case precedent that relate to the factors or requirements of duty of care would be potentially material. If it is a criminal case, material judicial statements would be those relating to the elements of the charge (*eg,* the act of killing or the possession of drugs for the purpose of trafficking and the *mens rea*). In this regard, one pertinent question to ask is: "would it make a significant difference to the decision if a specific fact were not present?" If the answer is in the affirmative, then the fact is likely to be material to the case.

D. Disregarding a precedent based on per incuriam rule

11.38 Another method by which a court can avoid applying a precedent is where the earlier decision was made *per incuriam* (*ie,* in ignorance of a binding precedent or applicable statutory provision). In *Chin Seow Noi v Public Prosecutor*,[55] the Court of Appeal opined,

55 [1993] 3 SLR(R) 566.

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with respect to the interpretation of section 30 of the Evidence Act,[56] that the prior Court of Appeal decision of *Ramachandran a/l Suppiah v Public Prosecutor*[57] was decided *per incuriam*.[58] It cited the English decision of *Young v Bristol Aeroplane Company, Limited*[59] in which Lord Greene MR had given the example of cases where "the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute".[60]

11.39 In the subsequent English case in *Limb v Union Jack Removals Ltd,*[61] it was stated that the doctrine of *per incuriam* applies only where the court has reached the prior decision in ignorance or forgetfulness of a decision binding on it or of an inconsistent statutory provision[62] and in either case, it must be shown that if the court had this material in mind, it would have reached a contrary decision. Thus, where a court has made a decision in ignorance of *lower* (and hence, *non-binding*) court decisions, it cannot be said that the former decision was given *per incuriam*.[63]

11.40 The *per incuriam* rule can only be invoked by a court at the same horizontal level as the court whose decision is in question and not a superior court.[64] For example, the Singapore High Court cannot

56 (Cap 97, 1990 Rev Ed).

57 [1993] 2 SLR(R) 392. The Court of Appeal in *Ramachandran* ruled that the "confession of a co-accused can only play a supportive role in a criminal prosecution. It cannot by itself form the basis of a conviction".

58 See also *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [99] to [102] (applied the *per incuriam* rule against a Federal Court of Malaysian case that was decided during the period from 9 August 1965 to 9 January 1970 when appeals from the High Court of Singapore continued to lie to the Federal Court of Malaysia).

59 [1944] 1 KB 714.

60 *Supra* note 55 at [59].

61 [1998] 1 WLR 1354 at [34] (English Court of Appeal).

62 See *dicta* in *Azman Bin Jamaludin v Public Prosecutor* [2012] 1 SLR 615 at [32]–[33] that the Singapore Court of Appeal in *Public Prosecutor v Bridges Christopher* [1997] 3 SLR (R) 467 may have to reconsider its decision in future as the latter court had overlooked a statutory provision in reaching the conclusion that the procedural rule on the admission of rebuttal evidence was the same in criminal proceedings and civil proceedings).

63 *PMA Credit Opportunities Fund and others v Tantono Tiny (representative of the estate of Lim Susanto, deceased)* [2011] 3 SLR 1021 at [33]; *Chiltern Park Development Pte Ltd v Ong Pang Wee and Others* [2003] SGMC 20 at [10].

64 *Cassell & Co v Broome* [1972] AC 1027 at 1054 per Lord Hailsham (that the principle in *Young v Bristol* Aeroplane Co Ltd [1944] KB 718 only applies to decisions of courts at the same level in the hierarchy, not decisions by higher courts).

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invoke the *per incuriam* rule with respect to a prior Singapore Court of Appeal decision with a view to rejecting the latter decision.[65]

E. Judicial precedents, discretion and justifications in common law reasoning

11.41 Ascertaining the *ratio decidendi* of a case precedent, as highlighted above, may sometimes involve an element of choice amongst competing interpretations. Judicial discretion is present in inductive reasoning and reasoning by analogy where there is often some leeway in determining the similarities amongst the case precedents and the dispute at hand as well as in ascertaining the scope of the purported legal principle that seeks to encompass the shared characteristics in the prior cases. Clearly, distinguishing a precedent based on the materiality of facts also entails some discretion in the comparison of the factual matrices between the case precedent and the dispute at hand.

11.42 Insofar as "guiding standards"[66] as opposed to strict rules are utilised in decision-making, judicial decision-making involves inevitably a weighing process. One example is the sentencing of a particular offender by reference to factors such as the age of the offender, the gravity of the offence, and the past record of the offender. These factors do not specify the type and extent of the punishment. Eckhoff observed that the "guiding standards" have been used in various ways: as part of a framework of rules such as the abovementioned principles of sentencing, as independent guides for judging broad categories of behaviour such as maxims of equity and as standards concerning sources of law such as judicial precedent and statutory interpretation. Whilst these guiding standards serve to control judicial decision-making, they also leave room for judicial discretion.[67]

11.43 Judicial discretion arises where there are no known or clearly established statements of the law that are applicable (*ie,* there are gaps in the existing law). Hart argued that in such "hard cases",

65 *Indo Commercial Society (Pte) Ltd v Ebrahim and another* [1992] 2 SLR(R) 66 at [16]; *Goh Cheng Chuan v Public Prosecutor* [1990] 1 SLR(R) 660 at [18]; *Chiltern Park Development Pte Ltd v Ong Pang Wee and Others* [2003] SGMC 20 at [10].

66 Torstein Eckhoff, "Guiding Standards in Legal Reasoning" (1976) Current Legal Problems 205.

67 *Ibid*.

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judges should fill the gaps by exercising a "limited law-creating discretion".[68] However, these judicial powers are "interstitial"[69] and are subject to substantive justifications by reference to the principles and reasons found in the existing law.[70] Dworkin, on the other hand, emphasises the use of principles to achieve what he refers to as the best interpretation of the law.[71]

11.44 Apart from principles, policy considerations have been used to fill the legal gaps. The Singapore courts have recourse to moral norms and social welfare goals[72] in judicial decision-making. The question of whether it is appropriate for judges to decide a case based on public policy and, if so, to what extent, is a long-standing one. On one hand, judges should not make policy decisions due to the apolitical appointment of judges and the nature of judicial decision-making which is based largely on information from counsel taking adversarial positions and confined to a controversy or dispute submitted to the courts.[73] Yet in cases where logic and legal principles can only reach so far, the need to refer to extra-legal policy becomes imperative.[74] That said, judicial restraint will be called for when deciding a dispute based on policy considerations and the extent thereof.[75] As stated by the Court of Appeal in *Lim Meng Suang and another v Attorney-General*,[76] a constitutional law case, the recourse to "extra-legal considerations" would be very limited. The courts should not "arrogate to themselves *legislative powers*" since they do not have the "mandate whatsoever to create or amend laws in a manner which permits recourse to *extra-legal*

68 HLA Hart, *The Concept of Law* (Oxford University Press, 2nd Ed, 1994) at p 272.
69 *Ibid,* at p 273.
70 *Ibid,* at p 274.
71 See discussion in para 11.49 below.
72 *Supra* note 17 at [85].
73 MDA Freeman, "Standards of Adjudication, Judicial Law-Making and Prospective Overruling" (1973) Current Legal Problems 166 at 174–177.
74 See PS Atiyah, "Judges and Policy" (1980) 15 Israel L Rev 346 at 348 ("when the judge finds the law to be unclear on any point, it is his task to make new law to fill in the gap. He must, whether he likes it or not, act like a legislator. To refuse to innovate is as much a legislative act, as the boldest of decisions. To pretend that the judge can "find" the law is idle: he does not find it, he makes it. And for this purpose, he must consider arguments of policy, and arguments of morality and justice, just as he would if he were a legislator.")
75 *Supra* note 17 at [84] ("The danger is *not* with judges deciding cases based on policy considerations but rather with judges deciding cases based *solely* on them.")
76 [2015] 1 SLR 26 at [6].

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policy factors as well as considerations".[77] Further, should policy considerations be engaged, the Singapore approach has been to express and weigh them as explicitly as possible in the judgement so as to avoid the impression of "unexpressed motives" for the decision.[78]

11.45 In the common law system such as Singapore, a judge has to give reasons for his decision.[79] One source of reasons may be found in authoritative case precedents and the logical application of the law to the facts. Apart from rules embodied in the precedents, judges also examine the underlying reasons for the case precedents where the rules *per se* do not provide a decisive answer. These reasons may be found in broader principles and, arguably, in policy considerations to arrive at a workable solution. This overall approach of combining precedent, principle, policy and pragmatism in judicial decision-making was adopted in *Lau Siew Kim v Yeo Guan Chye Terence and another*[80] concerning the development of equitable principles. VK Rajah JA (as he then was) stated succinctly that:

> When a judge is presented with a legal problem, the judge is bound to look first to statutory law and judicial *precedent* for a solution, but if it appears to the judge that there is no clear solution in precedent, the judge should in theory seek to produce a solution consistent with *principles* derived from precedent. Judges do not, however, reach their decisions in a logical vacuum; they are very often acutely aware of the impact that their decisions might have upon the wider community or society at large, and are therefore sensitive to *policy* considerations. Last, but by no means least, above all considerations of principle and policy, and sometimes even above precedent, judges are concerned to achieve a solution which works in practice and one that will not bring the whole process into disrepute; the judicial process must be *pragmatic* and sensitive to public interests.

11.46 In summary, the judge exercises discretion in judicial decision-making but the discretion is clearly limited. As colourfully described by Benjamin Cardozo,[81]

77 *Ibid,* at [77] (emphasis in original).
78 Supra note 17 at [85].
79 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676. See discussion in chapter 5 on "The Judiciary".
80 [2008] 2 SLR(R) 108 at [32].
81 *The Nature of the Judicial Process* (Yale University Press, 1949) at 141.

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> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'

11.47 At the end of the day, we are concerned with justifications for common law reasoning. What justifies the common law reasoning process? This is a weighty issue inviting, not surprisingly, controversy and disagreements. What follows is merely a brief summary of particular common law approaches. Summers, for instance, opined that "a judge in our system must give substantive reasons and must make law. Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment."[82] These substantive reasons include the predicted beneficial results or achievement of social goals such as public health and economic growth ("goal reasons"), norm guiding conduct such as fairness and culpability of conduct ("rightness reasons") and reasons tied to the proper institutional roles or processes of the judiciary as compared to the legislature ("institutional reasons"). In applying a precedent, the judge should ascertain which application is "most consistent with the substantive reasons behind the precedent".[83] These substantive reasons may be incorporated in the law (such as in the precedents themselves) or they could be found outside the law.[84]

11.48 MacCormick[85] argues that, apart from the fact that the justification for the common law method must produce beneficial results, it should make sense within the legal system. This means that the norms must not contradict binding legal rules and cohere with recognised principles and analogies drawn from them. The use of logical reasoning may lead to a number of rational options for judicial decision-making. Ultimately, judges have to choose a

82 Robert Summers, "Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification" (1977–78) 63 Cornell L Rev 707 at 710.

83 *Ibid,* at 730.

84 Robert Summers, "Form and Substance in Legal Reasoning" in *Essays on the Nature of Law and Legal Reasoning* (Duncker and Humblot, 1992) at p 140.

85 *Supra* note 34 at p 250.

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decision that is *coherent* with the tradition and the values the judge regards as implicit in the existing explicit rules.[86]

11.49 Dworkin's theory, in comparison, is premised largely on judges making decisions based on principles (such as "no man shall profit from his wrongdoing").[87] According to Dworkin, "principles" are standards which carry weight that point towards a particular outcome but do not dictate the results. Hence, a particular result may well be contrary to a principle if the principle is outweighed by other relevant factors. The use of judicial precedent is a matter of procedural due process.[88] Similar to MacCormick, Dworkin is also interested in coherence in the law. He said that judges should aim to achieve the best interpretation of the law by considering which interpretation best fits the system by examining its past legislative, judicial decisions and institutional practices. Further, in hard cases, Hercules, Dworkin's ideal super-judge, has to choose the interpretation that "shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality".[89]

IV. Specific issues on judicial precedent in Singapore

11.50 This section discusses specific issues relating to judicial precedent in Singapore's context. It includes an examination of the declaratory theory, the decisions of predecessor courts, the 1994 Practice Statement (Judicial Precedent) and its application to case method and analysis, and the doctrine of prospective overruling in Singapore.

A. The declaratory theory is no longer influential

11.51 In the past, the declaratory theory (*ie,* the theory that judges merely declare the pre-existing law) was the mainstream theory in the common law. It was generally accepted that judges do not create the law. As explained by Sir William Blackstone, under

86 Martin Krygier, "Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law" (1986) 9 University of New South Wales Law Journal 26 at 38.

87 The principle was enunciated in *Riggs v Palmer* 115 NY 506, 22 NE 188 (1899): *supra* note 35 at pp 15–20.

88 *Ibid,* at p 405.

89 *Ibid,* at pp 255–6.

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this declaratory theory, "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*".[90]

11.52 The influence of the declaratory theory has waned in modern times. Shortly before the beginning of the new millennium, Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council*[91] opined that the declaratory theory is a "fiction" and that "we should look at the declaratory theory of judicial decision with open eyes and reinterpret it in the light of the way in which all judges, common law and equity, actually decide cases today".[92] Subsequently, Lord Nicholls in *Re Spectrum Plus Ltd (In Liquidation)*[93] remarked that the declaratory approach is "inapt" and "at odds with reality".

11.53 In 2010, the Singapore Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong*,[94] a defamation case, endorsed the view that the declaratory theory is a "fiction",[95] and quoted Lord Reid's opinion:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more[96]

11.54 The Singapore Court also regarded the declaratory theory as "inapt to explain the evolution of common law principles that are based on policy considerations which change over time".[97] It rejected

90 Commentaries on the Laws of England (1st Ed, 1765) vol 1, p 70.
91 [1999] 2 AC 349 at 378 (House of Lords) (allowing recovery of monies paid under a mistake, whether a mistake of fact or law, notwithstanding that the payment had been made under a settled understanding of the law which was subsequently departed from by judicial decision).
92 [1999] 2 AC 349 at 377.
93 [2005] 3 WLR 58 at [34].
94 Supra note 2.
95 *Ibid,* at [241]. See also Beverley McLachlin, Chief Justice of Canada, "Judicial Power and Democracy" (2000) 12 Singapore Academy of Law Journal 311 at 317–318.
96 *Supra* note 24.
97 *Supra* note 2 at [243].

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the counsel's argument that the *Reynolds* privilege,[98] a defence that was applicable in English defamation law,[99] is and has always been part of the common law in Singapore. The Court noted that *Reynolds* was, in fact, influenced by the subsequent developments via Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the UK Human Rights Act 1998. Hence, the defence cannot possibly be said to have existed from time immemorial.[100]

11.55 In another case, *Bachoo Mohan Singh v Public Prosecutor*,[101] which concerned criminal liability, the declaratory theory was again doubted and the significance of judicial law-making emphasised:

> It is a legal fiction to say that the courts simply expound the law as it has always been. Existing statements or declarations of legal principle ought not to be considered as being invariably set in stone. Precedents are the servants and not the masters of the judicial process. In ascertaining and applying the law, a court is, of course, bound by the decisions of higher courts. But absent the shackles of *stare decisis*, a court may undertake its own enquiry into the state of the law and depart from earlier decisions. It is then for the court to make a final determination on any question of law. If it were otherwise, the law would never be able to progressively adapt and advance.

B. The 1994 Practice Statement (Judicial Precedent) and departures from case precedents

11.56 Prior to the abolition of appeals to the Privy Council, its decisions on appeal from Singapore were binding on all the Singapore courts.[102] Since 1994, it was no longer possible for aggrieved litigants to lodge appeals to the Privy Council sitting in London. As the English courts would be progressively influenced by European law, the Minister for Law felt that it would not be tenable for

98 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (House of Lords).
99 The UK has since enacted the Defamation Act 2013 which effectively abolished the *Reynolds* privilege.
100 Supra note 2 at [244].
101 [2010] 4 SLR 137 at [86].
102 *Supra* note 7 at [12].

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Singapore to continue to rely on Privy Council rulings.[103] He also opined that the abolition of Privy Council appeals would "give our local jurisprudence an opportunity to develop along indigenous lines and in a direction more attuned to local and regional realities".[104] Henceforth, the Singapore Court of Appeal became the highest court of the land. It has been judicially determined that the Singapore Court of Appeal is no longer bound by Privy Council decisions.[105]

11.57 In tandem with the abolition of the appeals to the Privy Council, the Court of Appeal issued the Practice Statement (Judicial Precedent)[106] to clarify the position as to its power to depart from its own prior decisions and Privy Council decisions:

> … … We recognize the vital role that the doctrine of stare decisis plays in giving certainty to the law and predictability on its application to similar cases. However, we also recognize that the *political, social and economic circumstances* of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the *fundamental values of Singapore society.*
>
> Accordingly, it is proper that the Court of Appeal should not hold itself bound by any previous decisions of its own or of the Privy Council, which by the rules of precedent prevailing prior to 8 April 1994 were binding on it, in any case *where adherence to such prior decisions would cause injustice in a particular case or constrain the development of the law in conformity with the circumstances of Singapore*.
>
> Therefore, whilst this court will continue to treat such prior decisions as normally binding, this court will, whenever it appears right to do so, depart from such prior decisions. Bearing in mind *the danger of*

103 Singapore Parliamentary Reports, Judicial Committee (Repeal) Bill, Vol 62, 23 February 1994 per Minister for Law ("our local legal, economic, social and political developments have placed Singapore on a path that in many ways is different from that being followed by the United Kingdom. This has become especially pronounced with the United Kingdom's entry into the European Community").

104 Singapore Parliamentary Reports, Judicial Committee (Repeal) Bill, Vol 62, 23 February 1994.

105 *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, third party*) [2006] 2 SLR(R) 268 at [15].

106 [1994] 2 SLR 689.

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> *retrospectively disturbing contractual, proprietary and other legal rights*, this power will be exercised sparingly… … (emphasis added)

11.58 One preliminary issue concerns the juridical basis of the Practice Statement. Can it modify the rules of *stare decisis* which existed prior to the issuance of the Practice Statement? If the rules of *stare decisis* are treated as rules of practice as opposed to rules of law, they can be modified by the Practice Statement.[107] In this regard, Lord Denning MR (as he then was) in *Davis v Johnson*[108] had opined that "a rule as to precedent … is not a rule of law at all". Arguably, the specific use of a Practice Statement (Judicial Precedent)[109] issued by the House of Lords seems to imply that *stare decisis* is a matter of judicial practice,[110] rather than a rule of law.

11.59 The Practice Statement states that the Court of Appeal will depart from its prior decisions "whenever it appears right to do so". When would it be "right" to do so? Subsequent court decisions suggest that the main criteria for determining whether a decision to depart from precedents should be taken are as follows: (1) general logic and reasoning of the precedent; and (2) the local circumstances and conditions. In 2005, a decade after the issuance of the Singapore Practice Statement (Judicial Precedent), Andrew Phang JC (as he then was) in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board*[111] remarked that:

> English law, having been "exported" to so very many colonies in the past, has now to be cultivated with an acute awareness of the soil in which it has been transplanted. It must also be closely scrutinised for appropriateness on a more general level - that of general persuasiveness in so far as logic and reasoning are concerned. This is the essence of the ideal of developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society of which it is a part. Only thus can the society concerned develop and even flourish.

11.60 His Honour went on to observe that "English law is no longer accepted blindly" and that "there ought to be departures where

107 *Supra* note 10 at p 289.
108 [1978] 2 WLR 182 at 197.
109 [1966] 1 WLR 1234.
110 Walter Woon, "Precedents That Bind – A Gordian Knot: Stare Decisis in the Federal Court of Malaysia and the Court of Appeal, Singapore" (1982) 24 Mal L R 1 at 3.
111 [2005] 4 SLR(R) 604 at [27].

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either local conditions and/or reason and logic dictate otherwise",[112] a tenet that is consistent the Application of the English Law Act ("AELA").[113] In *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David*,[114] a contract law case, Andrew Phang JA succinctly stated the criteria:

> This court is, *a fortiori*, free not to follow prior *English (or other foreign)* decisions if finds the analysis and reasoning therein unpersuasive, or if the prior foreign decision in question is not applicable to the circumstances of Singapore … alternatively, the prior foreign decision concerned can be subject to the necessary modifications, if so required by the circumstances of Singapore …

11.61 Where the precedent is "not satisfactory or is plainly wrong", the court should be prepared to depart from it even if the interpretation of the precedent had been established for a long time. In *Lee Chez Kee v Public Prosecutor*,[115] VK Rajah JA (as he then was) stated that the Court of Appeal is "constitutionally charged with the responsibility of departing from any existing interpretation if such interpretation no longer assumes the currency of accuracy or correctness". Indeed, there have been other notable departures[116] from existing interpretations of statutory provisions or principles of common law. The judge also stated that such departures are important so that:

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112 *Ibid,* at [28].

113 Section 3(2) AELA states: "The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require"; see also *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883.

114 [2008] 1 SLR(R) 663 at [172].

115 [2008] 3 SLR(R) 447 at [122].

116 *Egs,* Lai Kew Chai J in *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1992] 3 SLR(R) 638 departed from the English Court of Appeal decision of *Lister & Co v Stubbs* (1890) 45 Ch D 1; the Court of Appeal in *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R) 181 declined to follow its own decision in *Khushvinder Singh Chopra v Mookka Pillai Rajagopal* [1999] 1 SLR(R) 130 (which had followed the House of Lords' decision in *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449). For departures from existing interpretations of statutory provisions, see *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566 at [82] (departing from Privy Council decision of *Bhuboni Sahu v The King* AIR (36) 1949 PC 257 on the interpretation of section 30 of the Evidence Act).

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> …the *law can maintain its relevance and coherence*. Judges should not be prepared to condone mistakes (if so shown) only because such law has been promulgated for time eternal. The law as we all know, being primarily formulated by the imperfections of the pen wielded by legislators and interpreted by the equally not invariably infallible minds of the judicial officer, cannot unfailingly paint a picture of perfection, nor can it pretend to be. However, through the willingness and openness of the courts in *re-examining the legal principles and precedents* from time to time, such imperfections can be limited and, in appropriate circumstances, *re-moulded and corrected*.[117] (emphasis added)

11.62 The above statement was clearly consistent with the important considerations stated in the Practice Statement (Judicial Precedent), namely the need to ensure the proper development of the law in a manner befitting the socio-economic and political circumstances and the fundamental societal values in Singapore.

C. Decisions of predecessor courts and their precedential effect

11.63 Due to her constitutional and legal history, Singapore's position as to binding precedents has had to take into consideration the erstwhile existence of several predecessor courts. These include the decisions of the Supreme Court of the Straits Settlements (1868–1946), Supreme Court of Singapore Crown Colony (1946–1963), Federal Court of Malaysia (1963–1970) and the Privy Council hearing appeals from Singapore prior to its abolishment in 1994. On several occasions, the Singapore High Court has considered itself bound by the decisions of the above predecessor courts and the Privy Council.[118] In *Mah Kah Yew v Public Prosecutor*,[119] the Singapore High Court held that it was bound by *stare decisis* to follow a decision of the Court of Appeal of Sarawak, North Borneo and Brunei.[120] In *Ng Sui Nam v Butterworth & Co (Publishers) Ltd and others*,[121] the Court of Appeal stated that it was bound by the decisions of the Federal Court sitting in appeals from the

117 *Supra* note 115 at [124] per VK Rajah JA (as he then was).

118 Walter Woon, "The Doctrine of Judicial Precedent" in Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press, 2nd Ed, 1999) at 317.

119 [1968–1970] SLR(R) 851 (Wee Chong Jin CJ, FA Chua J and AV Winslow J).

120 That is, the decision in *Public Prosecutor v Mills* [1971] MLJ 4. The ruling in *Mah Kah Yew* was premised on s 88(3) of the Malaysia Act 1963 and s 13 of the Republic of Singapore Independence Act 1965.

121 [1987] SLR(R) 171 at [50].

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High Court of Singapore. Furthermore, Privy Council decisions on appeal from other jurisdictions have been treated as practically binding on Singapore courts particularly where the issue is one of statutory interpretation of similar provisions.[122]

11.64 Subsequent developments suggest that the precedential ties with the above predecessor courts should be severed. For instance, in 1992, Hwang JC in *Indo Commercial Society (Pte) Ltd v Ebrahim and another*[123] indicated a preference for the position that only Privy Council decisions on appeal from Singapore would be binding on Singapore courts, albeit without taking a firm stand. Professor Woon had argued in a book chapter published in 1999 that decisions of the Privy Council hearing appeals from *other* jurisdictions should theoretically only be regarded as persuasive since the Privy Council no longer hears appeals from Singapore.[124] In 2012, the High court in *Re Lehman Brothers Finance Asia Pte Ltd*[125] ruled that decisions of other appellate courts, namely the Court of Appeal of the Federated Malay States, the Court of Appeal of the Malayan Union, the Court of Appeal of the Federation of Malaya, the Court of Appeal of Sarawak, North Borneo and Brunei are not binding on the Singapore High Court. As a practical argument, these courts have not exercised jurisdiction in Singapore and should therefore be treated as foreign courts.

D. Prospective overruling of precedents

11.65 When a judicial precedent is overruled by a court, the new rule established will normally affect the rights and obligations of the litigants before the overruling court as well as those of potential

122 *Egs, Wo Yok Ling v Public Prosecutor* [1977–1978] SLR(R) 559 at [11] (Singapore Court of Criminal Appeal); *Jacob v AG* [1968–1970] SLR(R) 694*; Public Prosecutor v Cheng Ka Leung Edmond* Criminal Case No 14 of 1986 (unreported).

123 [1992] 2 SLR(R) 667 at [15] per Michael Hwang JC. The judge stated he did not know of any decision of the Singapore Court of Appeal decided after 9 August 1965 which required him to follow a Privy Council decision when that decision was on appeal from another jurisdiction. Moreover, the Singapore Court of Appeal had followed a more recent House of Lords' decision which was contrary to the Privy Council decision.

124 Supra note 118 at 309.

125 [2013] 1 SLR 64 at [22]. Quentin Loh J endorsed the views expressed in the article by Walter Woon, "Review of Judicial and Legal Reforms in Singapore between 1990 and 1994" in *The Doctrine of Binding Precedent: Cutting the Gordian Knot* (Butterworths, 1996) at 179–180.

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litigants in the future.[126] However, if a court were to overrule *prospectively*, a distinction will be made between events or disputes arising before the court decision and those arising after the date of the decision. For example, the court which overruled a prior precedent X may replace it with the new rule Y. The events or disputes which took place before the new ruling will be decided according to X whilst those which take place after, according to Y.[127] Thus, when a court overrules prospectively, it is placing an explicit limit on the retrospective effect of its decision.[128]

11.66 The Singapore High Court in *Public Prosecutor v Hue An Li*[129] has taken the position that whilst "judicial pronouncements are, by default, fully retroactive in nature", the Singapore appellate courts have the "discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements". In deciding whether to permit prospective overruling in a particular case, courts should take into consideration the following factors:[130]

(a) The extent to which the law or legal principle concerned is entrenched: The more entrenched a law or legal principle is, the greater the need for any overruling of that law or legal principle to be prospective. ……

(b) The extent of the change to the law: The greater the change to the law, the greater the need for prospective overruling.……

(c) The extent to which the change to the law is foreseeable: The less foreseeable the change to the law, the greater the need for prospective overruling……

(d) The extent of reliance on the law or legal principle concerned: The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling.……

126 *Eg, Birmingham Corp v West Midland Baptist (Trust) Association Inc* [1970] AC 874 at 898–899 per Lord Reid ("We cannot say that the law was one thing yesterday but is to be something different tomorrow").

127 See Andrew Nicol, "Prospective Overruling: A New Device for English Courts?" (1976) Modern Law Review 542 at 543.

128 Mary Arden, "Prospective Overruling" (2004) 120 LQR 7.

129 [2014] 4 SLR 661 at [124]; applied in *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892. See generally, Gary KY Chan, "Prospective Overruling in Singapore: A Judicial Framework for the Future?" in Eva Steiner, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Springer, Ius Comparatum – Global Studies in Comparative Law, Vol 3 2015, XI, 382 p.

130 *Ibid*.

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11.67 Further, "no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted in a particular case".[131] In the case, the accused was charged with causing death by a negligent act, an offence under section 304A(*b*) of the Penal Code.[132] The High Court decided to depart from a precedent[133] relating to sentencing benchmarks. The precedent essentially prescribed a default sentence of a fine for negligent driving. The High Court differed on this issue, taking the view that custodial sentences can be imposed even for negligent driving.[134] Significantly, with respect to this departure from the precedent, the High Court felt that prospective overruling would be appropriate because: (1) the shift from a default sentence of a fine to a default sentence of a term of imprisonment is a significant change in the law; (2) numerous offenders would have pleaded guilty to or conducted their defences on the basis of advice that the starting point for sentencing in such cases would likely be only a fine; and (3) the change in the law was not foreseeable.

11.68 In comparison with other common law countries, whilst Australia[135] has rejected the doctrine, certain countries such as England,[136] the United States,[137] Canada,[138] India[139] and Malaysia[140] have recognised and/or applied the doctrine in some form. With respect to England, in 2005, the House of Lords in *Re Spectrum Plus Ltd (In Liquidation)*[141] observed that there is room for prospective overruling to apply in circumstances where a decision on a point of law was unavoidable and the decision would have seriously unfair and disruptive consequences for past transactions or events.

131 *Ibid,* at [125].
132 (Cap 224, 2008 Rev Ed).
133 *Public Prosecutor v Gan Lim Soon* [1993] 2 SLR(R) 67.
134 There were amendments made to s 304A of the Penal Code provision in 2008 which rendered the impugned precedent "no longer tenable" at [60].
135 *Ha v New South Wales* (1997) 189 CLR 465 (High Court of Australia).
136 *Re Spectrum Plus Ltd (In Liquidation)* [2005] 3 WLR 58.
137 *Great Northern Railway v Sunburst Oil and Refining Company* 287 US 358 (1932); *Linkletter v Walker* [1965] 381 US 618.
138 *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and* s *133 of Constitution Act, 1867* (1985) 19 DLR (4th) 1 (Supreme Court of Canada).
139 *IC Golaknath v The State of Punjab* [1967] 2 SCR 762 (Supreme Court of India).
140 *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311.
141 *Supra* note 136.

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The majority[142] stated that the same could apply not only with respect to the state of common law but also a statute.

11.69 For criminal cases, the Singapore courts have referred to Article 11 of the Singapore Constitution, a provision directed against retrospective criminal laws. Article 11 embodies the principle of *nullum crimen nulla poena sine lege*:

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

11.70 Prospective overruling in criminal cases in Singapore is premised on various rationales: the notion of fairness (to allow citizens to foresee the consequences of their own conduct and to have fair notice of what to avoid and to limit the discretion of law enforcers with clear and explicit standards)[143] as well as the protection of the reasonable and legitimate expectations of the citizen.[144] The Singapore Court of Appeal in *Public Prosecutor v Manogaran s/o R Ramu*,[145] which involved a drug trafficking case under the Misuse of Drugs Act,[146] decided to depart from the prior decision in *Abdul Raman bin Yusof*[147] on the interpretation of a statutory provision.[148] The new statutory interpretation would favour the prosecution rather than the accused person. However, the Court in *Manogaran* decided against applying the change in the law to the accused person before it. The accused was therefore acquitted of the charge. The Court of Appeal explained the principle of prospective overruling as follows:

142 Lord Nicolls, Lord Hope, Lord Walker, Lord Brown and Baronese Hale (Lord Steyn and Lord Scott dissenting). On the minority view, see *R v National Insurance Commissioners, ex p Hudson* [1972] AC 914 at 1026 per Lord Simon of Glaisdale.

143 *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [62]. See also *Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530 per Chan Sek Keong J (as he then was) on the need for publication of laws ("under our legal system, a person is at liberty to do as he wishes except that which is prohibited by law or which encroaches upon the rights of others. It is therefore only reasonable that this liberty should not be indirectly curtailed by laws and regulations unknown or inaccessible to him").

144 *Ibid*, *Manogaran* at [74].

145 [1996] 3 SLR(R) 390.

146 (Cap 185, 2008 Rev Ed).

147 [1996] 2 SLR(R) 538.

148 *Supra* note 143, *Manogaran* at [45] and [47].

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> By judicial overruling of a previous decision, new law may be pronounced for the first time. … [I]f a person organises his affairs in accordance with an existing judicial pronouncement about the state of the law, his actions should not be impugned retrospectively by a subsequent judicial pronouncement which changes the state of law, without his having been afforded an opportunity to reorganise his affairs. This seeks to protect his reasonable and legitimate expectations that he did not act in contravention of the law.

11.71 The subsequent decision in *Abdul Nasir bin Amer Hamsah v Public Prosecutor*[149] extended the doctrine of prospective overruling to a case concerning the effect of a judicial ruling on an existing *practice*, rather than an existing legislative or judicial ruling. The appellant was charged for kidnapping, convicted and sentenced to life imprisonment and 12 strokes of the cane. The central issue was whether a sentence of "life imprisonment" meant imprisonment for the remainder of the prisoner's natural life, or 20 years' imprisonment. According to the then prevailing practice in Singapore, the sentence meant 20 years' imprisonment. However, the court decided to depart from the prevailing practice, stating that "life imprisonment" should refer to imprisonment for the remaining natural life of the prisoner. Moreover, as is consistent with *Manogaran*, the court applied prospective overruling based on the concept of legitimate expectations.[150] Under the doctrine of prospective overruling, the old practice of 20 years' imprisonment would therefore continue to apply to the accused person.

V. Conclusion

11.72 An understanding of the doctrine of judicial precedent and case method and analysis is crucial for a lawyer's appreciation of the common law development in Singapore. At a micro level, the technical rules and practice of finding the *ratio decidendi*, identifying *obiter dicta* and distinguishing precedents on the facts serve as indispensable tools for the lawyer and judge in order to determine the content of the existing law. At the same time, one must not ignore the macro view of the law involving the interlocking legal principles, extra-legal policies, the notion of pragmatism and their contributions towards shaping and

149 [1997] 2 SLR(R) 842.
150 *Ibid,* at [51].

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reforming the law. Singapore has made significant progress in developing an autochthonous jurisprudence in the last two decades based on the rule of law. In particular, the Singapore courts have made important pronouncements in rejecting the declaratory theory, made significant departures from case precedents pursuant to the 1994 Practice Statement (Judicial Precedent), severing precedential ties with predecessor courts and clarifying the approach towards the doctrine of prospective overruling of precedents. Judging from the recent developments, there are reasons to be optimistic about common law development in Singapore in the near future.

Further readings

1. Goh Yihan & Paul Tan, "An Empirical Study of the Development of Singapore Law" (2011) 23 SAcLJ 176.
2. Reid, "The Judge As Law Maker" (1972–1973) 12 Journal of the Society of Public Teachers of Law *(NS)* 22.
3. Julius Stone, "The Ratio of the *Ratio Decidendi*" (1959) 22 Modern Law Review 597.
4. Walter Woon, "The Doctrine of Judicial Precedent" in Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press, 2nd Ed, 1999).