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# JUDICIAL PRECEDENT IN EMERGING CONSTITUTIONAL JURISDICTIONS: FORMULATING A DOCTRINE OF CONSTITUTIONAL *STARE DECISIS* FOR SINGAPORE

Kenny Chng\*

**Abstract:** The binding effect of judicial precedents in constitutional law — constitutional *stare decisis* — raises unique considerations. Being authoritative pronouncements on the proper interpretation of the Constitution, judicial precedents are essential for the effective working of constitutional governance as components of constitutional law: but they are merely judicial precedents and as such susceptible to being overturned. These considerations have been the subject of significant attention in mature constitutional jurisdictions. For instance, in the US Supreme Court, there is a well-established doctrinal framework within which *stare decisis* operates. However, there does not appear to be in younger constitutional democracies the same serious consideration of how the doctrine of *stare decisis* should operate in the area of constitutional law. This article aims to investigate how younger constitutional jurisdictions, such as Singapore, can draw upon the experience of other jurisdictions in this regard, and will seek to propose a principled constitutional *stare decisis* framework that builds upon such experience and is normatively justifiable in the Singapore context.

**Keywords:** *Singapore; constitutional law; stare decisis; precedent; Planned Parenthood v Casey; US Supreme Court*

## I. Introduction

In constitutional democracies of the common law tradition governed by a written constitution, such as the United States of America (United States), judicial precedents play a crucial part in the interpretation and enforcement of the constitution. Because of “their importance to the architecture of government and their impact on the fundamental relationship between sovereign and citizen” in a constitutional democracy, constitutional judicial precedents have a unique prestige and authority.<sup>1</sup> By virtue of this close relationship between constitutional judicial precedents and the constitution, the rule of law concerns of legitimacy and

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1 Randy J Kozel, *Settled versus Right: A Theory of Precedent* (Cambridge University Press, 2017) p.27.

stability apply with particular force to such precedents, since the overruling of such precedents can potentially “transform entire areas of law as well as fundamental social relationships”.<sup>2</sup> Yet, constitutional precedents, just like precedents in any other areas of law, can be overturned. Notwithstanding their importance and proximity to the fundamental law of the land, constitutional judicial precedents are distinct from the Constitution itself and are certainly not equal in standing to the text of the Constitution. Indeed, Richard Fallon has observed that while constitutional precedents are highly authoritative and influential sources of constitutional law, even long-standing constitutional precedents can be overruled based on differing interpretations of the relevant constitutional provisions.<sup>3</sup>

These considerations present difficult and interesting questions for courts faced with an argument that a particular constitutional precedent should be overruled. How should judges strike a balance between these considerations in coming to a decision? What kinds of factors can judges legitimately take into account? These questions have been the subject of a well-developed body of literature in mature constitutional jurisdictions. For example, in relation to US Supreme Court constitutional precedents, a well-established doctrinal framework exists to govern judicial consideration of such issues. However, these issues may not have received the same attention in relatively younger constitutional democracies, such as Singapore. Yet, constitutional *stare decisis* will inevitably become increasingly important in such jurisdictions as their constitutional jurisprudence matures with the passage of time.

This article aims to investigate how younger constitutional jurisdictions can draw upon the experience of mature jurisdictions in developing a principled approach to constitutional *stare decisis*. As a matter of methodology, it will proceed in three sections. Section II of this article will study the theory and doctrine of constitutional *stare decisis* in mature constitutional jurisdictions, drawing upon both academic literature and case law. Section III will identify the principles that Singapore judges have taken into account as a matter of fact in their analysis of constitutional precedents, even though they may not have articulated such considerations expressly as *stare decisis* principles. This will provide a useful example of how a relatively young common law jurisdiction has dealt with constitutional *stare decisis* issues. Section IV will synthesise the findings of the preceding parts of this article into a principled constitutional *stare decisis* framework that builds upon the experience of mature constitutional jurisdictions and is at the same time normatively justifiable in the Singapore context.

This article will propose that a factor-based approach to *stare decisis* analysis is best-suited for Singapore constitutional law. Whether a judicial precedent is wrong in law should be the primary consideration in this analysis. The procedural workability of the precedent and the reliance interests it has engendered should

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2 Note, “Constitutional Stare Decisis” (1990) 103(6) *Harvard Law Review* 1344, 1350.

3 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Harvard University Press, 2018) pp.80–81.

It is submitted that courts should not adopt an overly interventionist approach to rectify what is alleged to be a morally wrong decision. However, taking onboard Kozel's argument, while the morality of the precedent should be generally irrelevant, it should be taken into account in truly exceptional circumstances where the demands of justice are clearly established. Gustav Radbruch's formula, as it has been termed by legal theorists, may provide some useful normative guidance in this regard.<sup>125</sup>

## V. Conclusion

This article has sought to study the theory and doctrine of constitutional *stare decisis* as developed in mature constitutional jurisdictions, and to apply the insights that can be gleaned from them to Singapore, a relatively young constitutional jurisdiction that has not paid significant attention to this issue. To that end, this article has briefly surveyed case law and academic commentary from mature constitutional jurisdictions on the proper approach to *stare decisis* in constitutional law, identified the principles that Singapore judges have applied on a *de facto* basis in their consideration of constitutional precedents, and synthesised these principles and insights into a framework that can guide and shape a principled *stare decisis* analysis for Singapore.

To summarise, it is suggested that *stare decisis* analysis in Singapore constitutional law should proceed in accordance with the following framework. The procedural workability of the relevant precedent should be examined as a threshold matter — such that if the rule laid down by the precedent is found to be too vague, convoluted, or arbitrary, a strong presumption in favour of overruling the precedent will arise. Two additional factors, qualified appropriately, should also be considered: (a) factual accuracy of the precedent, confined to facts relevant to doctrinal analysis or facts forming the premises of the prior decision; and (b) a prudential consideration of the reliance interests that have been generated by the decision, with due regard to the judiciary's institutional limitations. The primary factor that should shape the court's *stare decisis* analysis is whether the prior precedent is incorrect as a matter of law, encompassing coherence with other precedents, correctness of legal reasoning as a matter of logic or constitutional interpretation, and consistency with fundamental constitutional principles. Incorrectness as a matter of the precedent's morality should generally not play a role in *stare decisis* analysis, except in exceptional circumstances.

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125 Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, UK: Oxford University Press, 2009) p.40. See also Tan Seow Hon, "Between Judicial Oligarchy and Parliamentary Supremacy: Understanding the Court's Dilemma in Constitutional Judicial Review" (September 2016) *Singapore Journal of Legal Studies* 307.

One should be realistic about the value of such a framework. Indeed, one should not expect that the application of this framework would magically lend precision to *stare decisis* analysis, capable of churning out solutions to difficult issues with mathematical accuracy. References made in this framework to the need for prudence and restraint should have made this quite clear: the time-honoured judicial wisdom and prudence will continue to be critical. Nevertheless, it is hoped that this framework will lend substance to the Singapore courts' future analyses of *stare decisis* issues and facilitate principled constitutional decision-making.