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Stare Decisis in Singapore and Malaysia: A sad tale of the use and abuse of statutes

Andrew B.L. PHANG
Singapore Management University, andrewphang@smu.edu.sg

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ANDREW PHANG

I. Introduction

A study of the cases and literature with regard to *stare decisis* in Singapore and Malaysia will reveal at least one salient characteristic – the propensity, primarily of the Courts, to misread statutes and twist them (whether inadvertently or otherwise) in order to justify a particular conclusion. Ironically enough, at the end of the day, similar (though not identical) conclusions could have been reached without the need to resort to any particular statutory provision. In this short article, I shall not endeavour to retrace ground already well covered by others, but will set out, in rather summary form, further reflections on the use (or abuse, rather) of statutory provisions in the context of our doctrine of precedent.

II. Mah Kah Yew v. P.P.[1] and Section 88 of the Malaysia Act, 1963[2]

In *Mah Kah Yew* itself, the issue before the court was simple – the High Court of Singapore had to determine which of two decisions (*viz. P.P.* v. *Mills*[3], a decision of the Court of Appeal of Sarawak, North Borneo and Brunei; and *Cheow Keok* v. *P.P.*[4], a decision of the Court of Appeal of the Federated Malay States) it was bound by. Most readers will be acquainted with the conclusion reached therein, *viz.*, that by virtue of section 88(3)[5] of the Malaysia Act, the Federal Court must be regarded as being one and the same court as all the courts mentioned therein (*i.e.* the Courts of Appeal of the Federation of Malaya; Sarawak, North Borneo and Brunei; and Singapore, and the Court of Criminal Appeal of Singapore), and that therefore decisions of these courts will be binding on our present courts.[6] In the event, the Court held itself bound by *P.P.* v. *Mills* as the Court of Appeal of Sarawak, North Borneo and Brunei was expressly mentioned in section 88(3) whereas the Court of Appeal of the Federated Malay States was not. This reasoning had in fact earlier found

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A sad tale of the use and abuse of statutes

1. [1971] 1 M.L.J. 1: a curious case since the Singapore High Court sitting on a *criminal* appeal was laying down general rules of *stare decisis* for all courts on the Singapore hierarchy for civil and criminal cases alike.
2. No. 26 of 1963.
3. [1971] 1 M.L.J. 4.
4. (1940) 9 M.L.J. 103.
5. Section 88(3) reads as follows: "Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal in Singapore, shall on and after that day be of the like effect as if that court were one and the same court with the Federal Court."
6. It has been assumed throughout that the Federal Court was a prior predecessor court of co-ordinate jurisdiction of our present Court of Appeal. This, it is submitted, is a valid assumption.

favour in *Re Lee Gee Chong, Deceased; Tay Geok Yap & Ors.* v. *Tan Lian Cheow*,[7] which was itself endorsed in *Mah Kah Yew*.

This reading of section 88(3) has been criticised[8] and it has been asserted,[9] albeit too briefly, that the provision is really addressed to the problem of the "pending case", with another writer going further in supporting this line of approach by referring to the fact that section 88(3) is included in Part IV of the Malaysia Act, which is entitled "Transitional and Temporary".[10] Indeed, a perusal of the rest of section 88 (quite apart from subsection (3) thereof) merely indicates a desire on the part of the Legislature to ensure the continuing validity[11] of various procedural steps taken in the courts (mentioned in section 88(3) and (4)) in pending proceedings prior to merger, so as to obviate needless duplication. This construction is supported by section 88(8) which, while providing for "any process, pleading, recognizance or other document" to be amended to conform with its operation under section 88, makes it clear that it nevertheless "shall have effect in accordance" with section 88 "whether or not it is so amended". This general approach to ensure procedural continuity

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7. (1965) 31 M.L.J. 102 (a decision of the Federal Court sitting in Singapore), which is a weak decision because of the lack of judicial analysis following a concession by counsel for the appellants. In any event, the Court could have reached the same decision *via* our traditional doctrine of precedent, since the prior decision was that of the former Singapore Court of Appeal, clearly a prior predecessor court of co-ordinate jurisdiction. See, also, *infra*, n. 17. Its uncritical acceptance in *Mah Kah Yew* justifies one of the frequent criticisms of the doctrine of precedent, *viz.*, that the kernel of the precedent itself is not examined in a principled manner by the later court.

8. See 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 pp. 15 and 16; and Max Friedman, "Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia", (1980) 22 Mal. L.R. 227 at p. 231. I shall not here be overly concerned with the other main criticism of *Mah Kah Yew*, *i.e.* that it is at variance with *China Insurance* v. *Loong Moh Co. Ltd.*, (1964) 30 M.L.J. 307 although, as a point of interest it may be noted that the language in the case itself is despite the citation of Greer L.J. in *Leond. Ors.* v. *Casey*, [1932] 2 K.B. 576 at p. 587, sufficiently ambiguous as to leave doubts as to whether the court was in fact pronouncing on the doctine of binding precedent. The case may also be reconciled with *Mah Kah Yew* simply by viewing the situation as a superimposition of the Courts mentioned in section 88(3) of the Malaysia Act over the traditional court structure as Max Friedman, *ibid.* (at pp. 321 and 236) seems to suggest. The remarks in the later decision of *Maria Chia Sook Lan* v. *Bank of China*, [1976] 1 M.L.J. 49, at p. 58, although authority against the former observation, are bare assertions and, significantly, contains no reference to the *China Insurance* case.

9. Max Friedman, *op. cit., supra*, n. 8, at p. 231.

10. Walter Woon, *op. cit., supra*, n. 8, at p. 15.

11. Section 88(2) does in fact appear to be the *general* provision in this regard and reads as follows: "The *validity* on or after Malaysia Day of anything done before that day in or in connection with or with a view to any proceedings in a court in those territories [Borneo States and the State of Singapore] shall not be affected by the court becoming on that day a court of the Federation, but anything so done shall be of the like effect as a thing done by or in relation to the court in the exercise of its jurisdiction as a court of the Federation." (emphasis added)

is further reflected in section 88(5) which accords any judge who is involved in an *actual hearing* of a case in any court mentioned in section 88(3) or (4) on Malaysia Day the same powers he had prior to merger if he has not already become a judge of the new court. One also notes section 88(7) which deals with the automatic change in the status of court *records.*

It is thus submitted that this construction of section 88(3) is an eminently suitable one, especially if we bear in mind the fact that all the courts mentioned in section 88(3) are in fact the very courts in existence at the point of merger to form Malaysia.[12] Further, as has been shown above, this reading of section 88(3) accords with the well recognized rule of statutory construction that requires the particular provision concerned to be construed not in isolation, but rather, in the *context* in which it is found[13]. The court in *Mah Kah Yew* was therefore correct in deducing an assimilation of the Federal Court with the other courts mentioned in section 88(3), but was incorrect in drawing the further inference that the assimilation was for the purpose of *stare decisis.*

Let us, however, assume that *Mah Kah Yew* was correct in its construction of section 88(3), and proceed to review section 88(4) which we find is virtually identical to section 88(3), but for the fact that the various High Courts are mentioned instead. By parity of reasoning with *Mah Kah Yew,* the logical conclusion is that the High Courts mentioned in section 88(4) have been assimilated for the purpose of *stare decisis.* However, there is no support whatsoever for the proposition that High Courts are bound by their own decisions. Whatever authority that exists points in fact in the *other* direction[14] Even if it be argued that by virtue of the word "respectively" in section 88(4), the High Court of Sarawak, North Borneo and Brunei, for example, was only assimilated with the present High Court in Borneo, the objection just mentioned would still stand. If nothing else, the wording of section 88(4) suggests, with even greater force than the language in section 88(3), that it was meant to deal with the problem of the "pending case". Could it then be argued that section 88(3) deals both with *stare decisis* as well as the "pending case" whereas section 88(4) deals only with the latter? It is submitted that this would be a weak argument as it would entail a straining of the language of both subsections, attributing to the Legislature an intention to draw a rather fine distinction which is rather improbable.

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12. Max Friedman, *op. cit., supra,* n. 8 at p. 231. This would explain why only a specific selection of courts was mentioned in section 88(3).

13. See, *e.g.,* Cross, *Statutory Interpretation* (1976) at p. 99 *et seq;* Maxwell on *The Interpretation of Statutes* (12th edition, 1969) at p. 58 *et seq.*

14. See *Sundralingam* v. *Ramanathan Chettiar,* [1967] 2 M.L.J. 211 which is surprisingly cited by Harbajan Singh in his article *"Stare Decisis* in Singapore and Malaysia – A Review", [1971] 1 M.L.J. xvi in view of his application of the reasoning in *Mah Kah Yew* to provisions of the Malayan Union Courts Ordinance, 1946, *infra.* See, also, *Re Chop Nam Chiang Long (Teo Teng Choon, Proprietor), Ex parte the Official Assignee,* [1927] S.S.L.R. 28 at p. 33 (per Murison C.J.), and *Mah Kah Yew* itself (a High Court decision) which implied that it was not bound by *Woo Sing & Anor.* v. *R.,* (1954) 20 M.L.J. 200, another Singapore High Court decision. *Quaere:* does the fact that both these latter decisions were heard on appeal by a full bench of three judges make any significant difference?

Section 13(1) of the Republic of Singapore Independence Act, 1965[15] is also relevant. It reads:

> "Subject to the provisions of this section, all existing laws shall continue in force on and after Singapore Day, but all such laws shall be construed as from Singapore Day *with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity* with this Act and *with the independent status of Singapore upon separation from Malaysia."* (emphasis added)

The construction of section 88(3) of the Malaysia Act (an "existing law")[16] in *Mah Kah Yew* seems to run completely counter to the true purport of the quoted provision. Such a construction would mean that our courts would be bound by decisions of the Court of Appeal of Sarawak, North Borneo and Brunei (as *Mah Kah Yew* indeed held)[17], a court which never was and never can be within our traditional hierarchy of courts. How being bound by courts from another jurisdiction accords with our independent status as a city state escapes me completely. On the contrary, if section 88(3) is in fact construed with "such modifications, adaptations, qualifications and exceptions as may be necessary to bring [it] into conformity ... with the independent status of Singapore", it should be relegated to being a provision dealing with the problem of the "pending case" as mentioned above. This point clearly deserves more attention than it has hitherto received, although one writer does allude to the point in the briefest of fashions.[18]

III. The Extension of Mah Kah Yew In P.P. v. Joseph Chin Saiko[19]

Had there been no further development, the decision in *Mah Kah Yew*

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15. No. 9 of 1965.

16. The Malaysia Act was part of our laws when Singapore was part of Malaysia.

17. Indeed, all the other courts mentioned in section 88(3) would fall within the traditional Singapore hierarchy of courts in any event and this overlap and consequent artificiality generated by this relationship between section 88(3) and the traditional doctrine of precedent supports the criticisms of the *Mah Kah Yew* construction of section 88(3), although, admittedly, the situation *vis-a-vis* the Malaysian courts would be different.

18. Max Friedman, *op. cit., supra,* n. 8 at p. 236. It could, of course, be argued that section 13(1) of the Republic of Singapore Independence Act was not directed solely at the construction of section 88(3) of the Malaysia Act as such, but at its construction *as embodied in Re Lee Gee Chong, Deceased, supra,* n. 4, this case being the "existing law" that was continued in force by section 13(1) of the Republic of Singapore Independence Act. This construction, however, raises a whole host of problems. Could one argue, *e.g.,* that *Re Lee Gee Chong* should be "modified" or "qualified" so as to bring it into conformity with the independent status of Singapore upon separation from Malaysia. This is theoretically possible because section 14(7) of the Republic of Singapore Independence Act, 1965 defines "existing law" as meaning "any law including written law having effect as part of the law of Singapore prior to Singapore Day". Such an approach would, however, be tant-amount to abrogating the entire decision itself, which is inconsistent with our doctrine of binding precedent since the case, being a decision of the Federal Court on appeal from Singapore, is binding on our courts.

19. [1972] 2 M.L.J. 129.

might possibly have been corrected. However, no sooner had the dust settled than a more monstrous progeny was created, with the Court in P.P. v. *Joseph Chin Saiko*[20] utilizing not only the actual decision in *Mah Kah Yew* itself but also the same statutory method criticised above to construe the provisions of the Malayan Union Courts Ordinance, 1946[21]. The issue before the Court in *Saiko's* case was essentially the same as that before the Singapore High Court in *Mah Kah Yew*. This time round, it was the turn of the Malaysian High Court to determine whether *P.P* v. *Mills* (a decision of the Court of Appeal of Sarawak, North Borneo and Brunei) or *Cheow Keok* v. *P.P.* (a decision of the Court of Appeal of the Federated Malay States) was binding on it. Using essentially the same reasoning process as in *Mah Kah Yew,* Lee Hun Hoe J. proceeded to hold that section 14 of the Malayan Union Courts Ordinance read with the Third Schedule thereof meant that the Court of Appeal of the Malayan Union assimilated the courts mentioned in the said Third Schedule, of which the Court of Appeal of the Federated Malay States was one. He thus concluded that the Court of Appeal of the Malayan Union was bound by the Court of Appeal of the Federated Malay States. Constructing further links in an elaborate "chain"[22], he ultimately held that the Federal Court was bound by the Court of Appeal of the Federated Malay States, and that *Cheow Keok* v. *P.P.* was thus binding on the Court. However, he held that *P.P.* v. *Mills* was also binding on the Court by virtue of the decision in *Mah Kah Yew.* In the event, he chose *P.P.* v. *Mills* in preference to *Cheow Keok* v. *P.P.* The reasoning in Joseph Chin Saiko may be reasonably traced to a seminal article by Harbajan Singh[23].

The criticisms levelled against *Mah Kah Yew* apply here with even greater force, for sections 11, 18 and 24 of the Malayan Union Courts Ordinance, 1946 (read with the Second, Fourth and Fifth Schedules respectively) are virtually identical with section 14 of the selfsame Act, but, and this is the important point, these provisions refer to various High Courts, District Courts and Magistrates' Courts (or their equivalents) respectively.[24] The

20. *Ibid.* This case, being a Malaysian High Court decision, is, strictly speaking, not binding on our courts.

21. No. 3 of 1946.

22. Utilizing *Hendry* v. *De Cruz,* [1949 M.L.J. Supp. 25, to hold that the Court of Appeal of the Federation of Malaya (a prior predecessor court of co-ordinate jurisdiction of the present Malaysian Federal Court) was bound by decisions of the Court of Appeal of the Malayan Union and that the Federal Court was therefore bound by decisions of the Court of Appeal of the Federated Malay States.

23. *Op. cit., supra,* n. 14. And see the comments on the ludicrous results that could be obtained if this decision was sound: Walter Woon, *op. cit., supra,* n. 8 at p. 21.

24. The various provisions are set out below. The similarity is self-evident.
Section 11: "Subject to the provisions of this Ordinance the High Court shall be deemed to have taken the place of the Courts set out in the Second Schedule to this Ordinance."
Section 14: See the main text, *infra.*
Section 18: "Subject to the provisions of this Ordinance the District Courts shall be deemed to have taken the place of the Courts set out in the Fourth Schedule to this Ordinance."
Section 24: "Subject to the provisions of this Ordinance Courts of a Magistrate shall be deemed to have taken the place of the Courts set out in the Fifth Schedule to this Ordinance."

criticisms of *Mah Kah Yew* as set out in Part II above would thus apply comprehensively since it is clear that subordinate courts have never been subject to the doctrine of *stare decisis* in its "horizontal" sense. The situation is even more curious since section 11 (dealing with High Courts) is referred to both in the judgment of Lee Hun Hoe J. in *Joseph Chin Saiko*[25] and Harbajan Singh's article.[26]

There is the further point that section 14 of the Malayan Union Courts Ordinance is different in wording from section 88(3) of the Malaysia Act; section 14 reads as follows:

> "Subject to the provisions of this Ordinance the Court of Appeal of the Malayan Union *shall be deemed to have taken the place of* the courts set out in the Third Schedule to this Ordinance." (emphasis mine)

The words emphasised above do not necessarily imply an assimilation of courts. It may in fact be argued that the words concerned can equally imply a "clean break" in which case the opposite result would occur, *i.e.* one link (and an important one at that) in the "chain" so carefully constructed by Lee Hun Hoe J. would in fact be broken.[27]

In fact, as has already been alluded to above, section 14 of the Malayan Union Courts Ordinance, 1946 and the other sections of the Ordinance relied on in the judgment have nothing whatsoever to do with *stare decisis*. Admittedly, unlike section 88(3) of the Malaysia Act, it does not deal with the problem of the "pending case". It is, however, submitted that section 14 is, in fact, a mere declaratory provision, confirming that the Malayan Union Court of Appeal is indeed the *sole* appellate court in the *now unified* Malayan Union. Analogous functions may also be attributed to section 11, 18 and 24[28] of the same Ordinance. To argue that only section 14 has the additional function of dealing with *stare decisis* is, it is submitted, a patent straining of the language of the aforementioned provisions, attributing to the Legislature an intention to draw fine distinctions which is rather improbable. The same argument, it will be remembered, has already been mentioned in connection with section 88(3) and (4) of the Malaysia Act.

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25. [1972] 2 M.L.J. 129 at p. 131. Curiously enough, even section 88(4) of the Malaysia Act is mentioned in *Saiko, ibid.*, at p. 130!

26. *Op. cit., supra,* n. 14 ap p. xix.

27. Witness Lee J.'s holding in *Saiko* itself that there was no equivalent of section 14 of the Malayan Union Courts Ordinance, 1946 in the Federation of Malaya Courts Ordinance, 1948 (No. 43 of 1948) and that section 110 of the latter ordinance had a "severing" effect. He clearly relied on the word "repealed" in section 110 of the 1948 Ordinance, but, as argued above, the phrase "deemed to have taken the place of" in section 14 of the 1946 Ordinance could equally connote a repeal so that, at bottom, it is the substance and not the form that counts. It is also interesting to note that Harbajan Singh himself actually asserts, as an alternative ground, that the Court of Appeal of the Federated Malay States and the Malayan Union Court of Appeal are appellate courts of co-ordinate jurisdiction, but this merely begs the question (*op. cit., supra,* n. 14 at p. xix).

28. Indeed, immediately after each provision, there follows an elaboration of the jurisdiction of the respective courts concerned.

Perhaps one last but subsidiary observation may not be amiss. Both Lee Hun Hoe J.[29] and Harbajan Singh[30] criticise *Mah Kah Yew,* but nevertheless rely on it for their final conclusions, much in the style of a "confession and avoidance", to use the parlance of criminal procedure. This approach is odd, not least when we note that *Mah Kah Yew* was in fact essential not only in itself (thus making the decision in *P.P.* v. *Mills* binding) but also because it provided the analogous reasoning that was applied to the construction of section 14 of the Malayan Union Courts Ordinance, 1946, so as to render the decision in *Cheow Keok* v. *P.P.* binding .

IV The Effect of Federal Court Decisions from Malaysia on Singapore Courts Between the years 1965 to 1970

Courts are not the only ones which misconstrue statutes in the context of *stare decisis.* In an article referred to earlier,[31] Harbajan Singh has argued[32] *via* the construction of various statutory provisions that Federal Court decisions on appeal from Malaysia after the independence of Singapore but before we had our own courts of appeal by virtue of the Supreme Court of Judicature Act[33] (*i.e.* between 9 August, 1965 and 9 January, 1970) are binding on all Singapore courts. He argues that the Federal Court in Malaysia was, for that particular period, part of our hierarchy.

With respect, the arguments utilized by the learned writer are strained and comprise highly technical as well as formalistic propositions that may be rebutted. His reliance, for example, on the phrases "continue to lie" and "Federal Court of Malaysia" in section 11 of the Republic of Singapore Indenpendence Act, 1965[34] is a little difficult to follow. He argues that the phrase "continue to lie" has the effect of retaining the past practice of appeals. A moment's reflection will reveal how flimsy this bare assertion is. He further argues that the "Federal Court of Malaysia" must, in the absence of any elaboration as to where the Federal Court is sitting, refer to the Federal Court sitting not only in Singapore but in Malaysia as well. This highly literal approach is unsatisfactory and results in a patent absurdity whereby a court sitting in a foreign country from which independence has recently been attained still continues to make binding law for us![35] I shall not dwell further on this point

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29. [1972] 2 M.L.J. 129 at p. 131.

30. *Op. cit., supra,* n. 14 at p. xix.

31. *Op. cit., supra,* n. 14.

32. *Ibid.,* at pp. xx to xxi.

33. Cap. 15, Singapore Statutes, 1970 Revised Edition.

34. Section 11 reads as follows: "Until other provision is made by the Legislature, the jurisdiction, original or appellate, and the practice and procedure of the High Court and the subordinate Courts of Singapore shall be the same as that exercised and followed immediately before Singapore Day, and appeals from the High Court shall continue to lie to the Federal Court of Malaysia and to the Privy Council."

35. The same criticism applies equally to his construction of the provisions of our Judicial Committee Act. Cap. 8, Singapore Statutes, 1970 Revised Edition. In fact, section 13(1) of the Republic of Singapore Independence Act, 1965, can be utilized.

since it has received adequate and succint treatment elsewhere[36]. What I hope to have shown is that even rather special areas of local *stare decisis* such as this are not immune from persons who wish to read into statutes matter which they were not intended to govern. Fortunately, this particular opinion has not been embodied in any local decision.[37]

In fact, in the Malaysian High Court case of *P.P.* v. *Lim Ching Chuan*[38], Mohamed Azmi J. observed:[39]

> "... although decisions of a Singapore High Court have a persuasive authority in the courts of this country, in cases where there are conflicting authorities between the two High Courts after "Singapore Day" (August 9, 1965), magistrates and presidents are bound to follow the decisions of our High Courts."

The above approach, though simple, is based on principle and practice rather than straining the words of Acts, and should apply equally in the Singapore context.

V. Conclusion

It is no secret that our doctrine of *stare decisis* with regard to the decisions of local appellate courts of co-ordinate jurisdiction is in a tangled mess. This is, as I have sought to show, due in no small way to the manner in which crucial decisions have construed various statutory provisions that, in effect, have nothing whatsoever to do with the doctrine of precedent. Needless to say, a re-evaluation of these authorities is urgently required, but, after well over a

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For an elaboration of this argument, see, *supra,* notes 15 to 18 and the accompanying main text. See, also, Koh Kheng Lian, *Criminal Law* (Singapore Law Series No. 3, 1977).

36. Walter Woon, *op, cit., supra,* n. 8, at p. 19. The writer utilizes as his 'tools' of criticism Part VIII of the Supreme Court of Judicature Act, and an analysis of the actual practice of the courts between August 9, 1965 and January 9, 1970. As far as the former argument is concerned, special reference should be paid to sections 82 and 84 which in fact reveal the other side of the "statutory coin"; the material parts are as follows:
"82. – (1) Nothing in this Act shall affect the validity of any proceedings instituted or continued prior to the date of coming into operation of this Act in ... the Federal Court *in Singapore* by virtue of the Courts of Judicature Act, 1964, but the same shall be carried on in accordance with the provisions of this Act ...
"84. – (1) Any written law relating or referring to the High Court or the Federal Court *in Singapore* ... shall be construed with such modifications or adaptations as may be necessary to bring it into conformity with the provisions of this Act."
(2) ... all forms and methods of procedure and practice which ... were formerly in force in ... the Federal Court *in Singapore* and which are not inconsistent with the provisions of this Act or with Rules of Court, may continue to be used ..." (all emphasis added)

37. Unlike, *e.g.,* the opinion discussed earlier Part III of this article that found expression in *P.P.* v. *Joseph Chin Saiko.*

38. [1972] 1 M.L.J. 27.

39. *Ibid.,* at p. 28.

decade of inactivity[40], there is the all too real danger of an ossification that would do no credit to our legal system. The irony, of course, is that the decisions do not in fact lead to any satisfactory result. It appears that we have taken the wrong route to an altogether erroneous destination. We are, I suggest, now rested enough to attempt to find the correct route.

However, it should be noted that even if section 88(3) of the Malaysia Act cannot be utilized for the purpose of *stare decisis*, as has been argued above, the problem with regard to local courts of co-ordinate jurisdiction remains, simply because the Court of Appeal of Singapore will still have to decide which prior appellate courts it would consider itself bound by, the only difference being that it will be without the reassuring comfort of a statutory provision to fall back upon. It is not often recognized by the Courts that the questions whether the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*[41] should be imported and, if so, what prior predecessor courts should be considered as courts of co-ordinate jurisdiction whose decisions would thus have binding effect, are essentially questions of practice for the appellate court concerned.[42] The Courts, in fact, have appeared less reluctant to import the rule in *Young's* case as a matter of practice,[43] although even with regard to this point, there has been at least one case, *Hendry* v. *De Cruz*[44], that has sought the entirely unnecessary

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40. Due probably to the absence of a suitable opportunity for review as a case raising the issues squarely for decision is often a "rare" creature, especially in the field of *stare decisis*.

41. [1944] 1 K.B. 718, C.A.

42. See, *e.g.*, Lord Denning M.R. in *Davis* v. *Johnson*, [1978] 1 All E.R. 841 at p. 855 who received some support on this point at least by Lord Salmon on appeal (see [1978] 1 All E.R. 1132 at p. 1153). See, also, Rupert Cross, "The House of Lords and the Rules of Precedent" in Hacker & Raz (Eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (1977); C.E.F. Rickett, "Precedent in the Court of Appeal", (1980) 43 M.L.R. 136; and P.J. Evans, "The Status of Rules of Precedent", (1982) 41 C.L.J. 162. The doctrine of binding precedent has, however, sometimes been given statutory form, although these have been very explicit and have significantly enough, given rise to a whole host of problems of construction. See, *e.g.*, Art. 42(4) of the 1960 constitution of Ghana and Antony Allott, "Judicial Precedent in Africa Revisited" in Chapter Three of his book, *New Essays in African Law* (1970) and the related literature cited therein. As far as the Malaysian Federal Court is concerned, it will also be concerned, *inter alia*, with section 14 of the Malayan Union Courts Ordinance, 1946, which, as has also been argued above, cannot be utilized for the purpose of *stare decisis*. But, the tasks before the Court are essentially the same as those for the Singapore Court of Appeal.

43. *Mah Kah Yew* v. *P.P.*, *supra*, n. 1. See, also, *Mesenor* v. *Che Teh & Anor.*, (1953) 2 M.C. 208.

44. *Supra*, n. 22. Whilst I agree with Walter Woon, *op. cit.*, *supra*, n. 8, that section 34(2) of the Malayan Union Courts Ordinance, 1946 does not, like section 16(ii) of the Federated Malay States Courts Enactment (Cap. 2, Laws of the Federated Malay States, 1935 Revised Edition), in itself import the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*, *supra*, n. 41, it does refer one back to section 16(ii) of the Federated Malay States Enactment, and thus supports the Court's construction in the case itself. Section 16(ii) of the Federated Malay States Courts Enactment reads as follows: "In any case not provided for by this . . . Enactment or by rules in force thereunder the practice and procedure for the time being of the Court of Appeal in England shall be followed as nearly as may be."

(in this writer's view, at least) justification of a statutory provision.[45]

Needless to say, the abovementioned remarks apply equally to the problem centring around whether Federal Court decisions on appeal from Malaysian courts between 9 August, 1965 and 9 January, 1970 are binding on our courts.

Section 34(2) of the Malayan Union Courts Ordinance, 1946, reads as follows: "In the Malay States the practice and procedure to be observed in Courts established under this Ordinance shall subject to any rules made by the Chief Justice under section 35 of this Ordinance accord with the provisions of the existing laws of the Federated Malay States regulating the practice and procedure of the Courts of the Federated Malay States and shall be applied with such modifications as are necessary to make them applicable to the Courts established in the Malay States under this Ordinance and to any Judge, Magistrate and Office thereof." One notes, however, that in determining that the Malayan Union Court of Appeal was a prior predecessor court of co-ordinate jurisdiction, *no* statutory provision was used.

45. *I.e.*, section 16(ii) of the Federated Malay States Courts Enactment, *supra*, n. 44.

* This article is, in the main, a more formal articulation of ideas first expressed during the course of my lectures on *stare decisis* in the last academic year, and is dedicated to my students who displayed commendable perseverance and interest in what is a rather difficult area of local law.