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## WHEN *OBITER DICTUM* AND MINORITY VIEW BECOME *RATIO DECIDENDI*

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### Abstract

The doctrine of judicial precedent or *stare decisis* forms the important foundation of the common law system of Malaysia. To ensure the proper operation of this doctrine, it is crucial to identify the *ratio decidendi* of a judgment by a superior court as it is binding on courts at the lower or same level, as opposed to the *obiter dictum* which is of persuasive value. However, this may not be an easy task. There were instances, although rarely, that a court misread an *obiter dictum* or even a minority view in a superior court's decision as a *ratio decidendi* and treated it as a binding precedent.

This article seeks to demonstrate such confusion and how a non-binding minority view in a judicial decision may be so influential that it turned into a *ratio decidendi* after being affirmed by a superior court, which in turn binds subsequent cases.

### Introduction

The doctrine of judicial precedent or *stare decisis* forms the important foundation of the common law system of Malaysia. A precedent in this context refers to a court judgment which is cited as an authority for its legal principles in subsequent judicial decisions. The Latin maxim '*stare decisis et non quieta movere*' may be translated as 'to stand by precedents and not to disturb settled points'. Therefore, a court other than the highest court is obliged to follow the decisions of the courts at a higher or same tier in the court structure subject to certain exceptions.<sup>1</sup> When

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<sup>1</sup> *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, 12 (Federal Court, Malaysia). The exceptions to the rule that a court is bound to follow previous decisions of its own and those of courts of co-ordinate jurisdiction are: (a) The court is entitled to choose which of the two conflicting decisions of its own it will follow; (b) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its

two decisions of the superior court conflict on a point of law, then by necessary implication, the later decision prevails over the earlier decision.<sup>2</sup>

However, the part of the decision which constitutes authority and has binding effect is the *ratio decidendi* and not the *obiter dictum*. The *ratio decidendi* is the reason for a judicial decision. There are two leading views in relation to the *ratio decidendi* of a case. The first view is the classical theory which treats the *ratio* as the principle of law which the judge considered necessary to the decision.<sup>3</sup> Another view is the Goodhart's theory, which states that *ratio decidendi* is to be determined by taking into account of (a) the facts considered to be material by the judge; and (b) the decision based on those material facts.<sup>4</sup>

On the other hand, *obiter dictum*, which means something said by the way or said in passing, is considered as superfluous or not crucial. It refers to a judicial comment made when a judge thinks it is desirable to give his opinion on some points which is not necessary for the decision of the case.<sup>5</sup> For instance, it may be a statement of law based on hypothetical facts or facts which are not in issue in the case; it may be a pronouncement of what a judge would have decided had he not been bound by the doctrine of *state decisis*; or it may be a rule of law stated by way of analogy or illustration. Therefore, *obiter dictum* does not form the binding part of a judicial precedent but they can be persuasive authority.

In practice, a case may contain more than one *ratio*. If a judge's decision is based upon two reasons, both *rationes* will be binding. The subsequent court is not allowed to choose one and disregard the other.<sup>6</sup> Besides that, where there is more than one judge hearing a case in an appellate court, each judge may deliver a separate and fully reasoned judgment. Sometimes, all judges will reach the same conclusion but based on different reasoning. In such circumstance, the reasoning agreed by the majority of judges who hear the case should be the *ratio* of the case. In other words, the overall *ratio* of the case is derived from the *rationes* of the majority judgments.<sup>7</sup>

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opinion stand with a decision of the higher court; (c) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. See *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293, 300.

<sup>2</sup> *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, 14 (Federal Court, Malaysia). This can be illustrated by two Malaysian Federal Court's decisions in *Adorna Properties Sdn. Bhd. v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1. Both cases gave different interpretation to the concept of 'indefeasibility' of title under s 340 of the National Land Code 1965 (Act 56 of 1965). While the earlier case in *Adorna Properties* held that s 340 of the National Land Code provides for 'immediate indefeasibility' of title, the subsequent *Tan Ying Hong* case held otherwise that 'deferred indefeasibility' of title applies under s 340. The current preferred view is the 'deferred indefeasibility' concept. Subsequent cases after 2010 have followed *Tan Ying Hong* case. Among others are *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 (Federal Court, Malaysia), *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645 (Court of Appeal, Malaysia), *Jasa Keramat Sdn. Bhd. v Monatech (M) Sdn. Bhd. & Ors* [2014] 11 MLJ 422 (High Court, Kuala Lumpur).

<sup>3</sup> J.L. Montrose, 'Ratio Decidendi and the House of Lords' (1957) 20 *Modern Law Review* 124.

<sup>4</sup> Arthur L. Goodhart, 'Determining the Ratio Decidendi of A Case' [1930] 40 *Yale Law Journal* 161, 182. See also Arthur L. Goodhart, 'The Ratio Decidendi of A Case' (1959) 22 *Modern Law Review* 117, 119.

<sup>5</sup> *Flower v EBBW Vale Steel, Iron & Coal Company, Limited* [1934] 2 KB 132, 154 (King's Bench Division and Court of Appeal, UK).

<sup>6</sup> *Behrens and Another v Bertram Mills Circus Ltd* [1957] 1 All ER 583, 593-594 (Queen's Bench Division, UK).

<sup>7</sup> James Holland and Julian Webb, 'Learning Legal Rules' (Oxford University Press, 7<sup>th</sup> ed, 2010), 223.

If there is agreement to the result of the case but two judges base their judgments on grounds which vary in width, and the third judge concurs in the reasoning of both, then the narrower ground which is confined to the necessities of the decision as opposed to the wider propositions than is necessary for the decision should be treated as the *ratio decidendi*.<sup>8</sup> If a judge dissents to the conclusion reached by the majority judges, the dissenting judgment will not be binding and it cannot be considered as the *ratio decidendi* of the case.<sup>9</sup> If there is no discernible *ratio decidendi* common to the majority judges in the superior court, then the court of the lower level is free to reach its own decision, provided that the decision and reasons are consistent with or support the actual decision of the superior court.<sup>10</sup>

### **Distinguishing *Ratio Decidendi* and *Obiter Dictum***

Identifying and distinguishing *ratio decidendi* and *obiter dictum* may not be an easy task. Sometimes, a court at the lower level may fail to distinguish the *ratio decidendi* and the *obiter dictum* in the decision of a superior court and as a result, err in applying the doctrine of *stare decisis*. This can be best illustrated with the five-paragraph judgment delivered by the Kuala Lumpur High Court for the case which is popularly known as the ‘SIB’ case.<sup>11</sup>

In this case, the SIB church and its President applied for leave to commence judicial review. The reliefs sought were an order for certiorari to quash the Minister of Internal Security’s decision which refused the importation and delivery of three boxes of Malay language Christian educational books that contained the word ‘Allah’, an order for mandamus to direct the Minister to return the publications to them, and for several declarations which concern their constitutional right to use the word ‘Allah’ in the Malay language translations of the Bible as well as other religious publications. These Malay language Christian educational books or Sunday school materials were imported from Indonesia for the religious education of the children of the church. The books were detained at the Low Cost Carrier Terminal (LCCT) at Sepang on 15 August 2007 while in transit but they were returned to the church on 25 January 2008.<sup>12</sup> The application for the reliefs for certiorari and mandamus was thus withdrawn, leaving only the declarations pertaining to the use of the word ‘Allah’ on all other publications. The Kuala Lumpur High Court dismissed the application for leave and ruled that it was bound by the Court of Appeal’s decision in *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*,<sup>13</sup> which held that the term ‘Allah’ is not an integral part of the Christian faith and

<sup>8</sup> *Gold and Others v Essex County Council* [1942] 2 All ER 237, 240 (Court of Appeal, UK).

<sup>9</sup> See *In re Harper and Others v National Coal Board* [1974] 1 QB 614, 617 (Court of Appeal, UK) which held that ‘*rationes decidendi* cannot be sought in the opinions of those who dissented.’

<sup>10</sup> *Ibid.*

<sup>11</sup> ‘SIB’ is the abbreviation for Sabah Injil Borneo church, which is incorporated under the Trustees Incorporation Ordinance (Sabah Cap 148). The High Court’s decision for this case, which was delivered on 5 May 2014, was not reported but was reproduced in the Court of Appeal’s judgment when this case was appealed against. See *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675, [7] (Court of Appeal, Malaysia).

<sup>12</sup> ‘SIB Ruling A Glimpse of Far-Reaching Effects of “Allah” Judgment, Say Lawyers’, *The Malay Mail Online*, 6 May 2014 at <<http://www.themalaymailonline.com/malaysia/article/sib-ruling-a-glimpse-of-far-reaching-effects-of-allah-judgement-say-lawyers>>.

<sup>13</sup> [2013] 6 MLJ 468 (Court of Appeal, Malaysia).

practice. The High Court regarded this to be the *ratio* of the Court of Appeal's decision and applied the doctrine of *stare decisis* since the Court of Appeal is a more superior court than the High Court.<sup>14</sup> However, it was subsequently shown that the finding of the Court of Appeal in *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* was a mere *obiter*<sup>15</sup> which obviously does not constitute a binding precedent.

It will be instructive to refer to the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*<sup>16</sup> (popularly known as 'the *Herald* case') to examine how the judgment was misread by the High Court in the SIB case. In the *Herald* case, a Catholic weekly newsletter known as the *Herald* was published pursuant to a publication permit issued by the Minister of Home Affairs. The dispute arose sometime in January 2009 when the publication permit was approved subject to the conditions, *inter alia*, that the publisher was prohibited from using the word 'Allah' in the Malay language publication. Dissatisfied with the Minister's decision, the publisher filed an application for judicial review to challenge the said decision. The High Court allowed the publisher's application for judicial review and made an order of certiorari to quash the Minister's decision which prohibited the usage of the word 'Allah' in the *Herald*. The High Court also granted various declarations regarding the publisher's constitutional right to profess and practise its religion. Hence, the Minister, the Government of Malaysia, the Islamic Councils of several states and the Malaysian Chinese Muslim Association appealed. The Court of Appeal ruled that the Minister's decision to impose the conditions was *intra vires* the Printing Presses and Publications Act 1984.<sup>17</sup> The three judges also accepted that the word 'Allah' has 'the potential to disrupt the even tempo of the life of the Malaysian community' or is possible to cause public disorder, confusion or misunderstanding between the Muslims and therefore, 'the welfare of an individual or group must yield to that of the community'.<sup>18</sup> However, having concluded that there was no plausible reason for judicial interference on the Minister's decision, Apandi Ali JCA gave his Lordship's opinion that the word 'Allah' is not an integral part of the respondent's faith. Likewise, after concurring with the judgments of Apandi Ali JCA and Abdul Aziz Ab Rahim JCA, Zawawi Salleh JCA added that the word 'Allah' is not the essential part of the religion of Christianity, relying upon the materials gathered *suo moto* or on its own motion from the Internet. The three judges of the Court of Appeal unanimously reversed the judgment of the High Court.

Subsequently, the publisher of the *Herald* applied to the Federal Court for leave to appeal against the Court of Appeal's decision. In *Titular Roman Catholic Archbishop of Kuala Lumpur v*

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<sup>14</sup> See *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675, [7] (Court of Appeal, Malaysia) which reproduced the High Court's decision, which itself was not reported.

<sup>15</sup> *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 (Federal Court, Malaysia).

<sup>16</sup> [2013] 6 MLJ 468 (Court of Appeal, Malaysia). For the details of the background of the case, see the High Court's decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78 (High Court, Kuala Lumpur).

<sup>17</sup> *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468, 488 [27], 499 [69], 513 [112] (Court of Appeal, Malaysia).

<sup>18</sup> *Ibid* 493 [42], 503 [79] and 513 [112].

*Menteri Dalam Negeri & Ors*,<sup>19</sup> four of the seven-member bench in the Federal Court dismissed the publisher's application for leave to appeal, holding that the Court of Appeal applied the correct test, which was the objective test for judicial review in arriving at its decision. It was held that the High Court ought not to have entertained the challenge on the constitutionality of the impugned provision due to procedural non-compliance of the publisher and for want of jurisdiction. Therefore, the Court of Appeal had rightly set aside the declarations made by the High Court. The Federal Court also held that the views expressed by the Court of Appeal on the theological issues, of which the Minister's decision was never premised on, were mere *obiter*.<sup>20</sup>

Interestingly, about a week after the Federal Court's decision in the *Herald* case, the case of *Jill Ireland Lawrence Bill v Menteri Bagi Kementerian Dalam Negeri Malaysia dan Kerajaan Malaysia* was heard.<sup>21</sup> Jill Ireland is a Malay speaking Sarawakian Bumiputera Christian of Melanau ethnicity. On 11 May 2008, Jill's eight audio CDs containing the word 'Allah' were confiscated by a custom officer at the LCCT at Sepang pursuant to s 9 of the Printing Presses and Publications Act 1984<sup>22</sup> when she returned from Indonesia. Jill filed an application for a certiorari order to quash the decision of the Minister of Home Affairs and for the return of her CDs as well as certain declarations relating to her constitutional rights. The case was before Justice Dato' Zaleha Yusof, the same judge who presided over the SIB case where her Lordship refused to grant the leave for judicial review to the SIB church.<sup>23</sup> Jill's counsel, who was also the lead counsel in the SIB case highlighted, *inter alia*, that the Federal Court in the *Herald* case had ruled that the Court of Appeal's finding on the use of the word 'Allah' is not binding since it is merely an *obiter*.<sup>24</sup> The High Court ruled in favour of Jill as the officer did not have the power under the Printing Presses and Publications Act 1984 to refuse the importation of the audio CDs. Thus, the eight audio CDs were ordered to be returned to Jill. However, no ruling was made on the constitutional issues. Both parties filed appeals against the High Court's decision. On 23 June 2015, the Court of Appeal affirmed the High Court's decision and ordered the Minister of Home Affairs to return the eight audio CDs to Jill within a month from the date of the court's judgment. The case was also remitted to the High Court on the issues of Jill's constitutional rights to use the word 'Allah'.<sup>25</sup>

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<sup>19</sup> [2014] 4 MLJ 765 (Federal Court, Malaysia). The decision was delivered by the Federal Court on 23 June 2014.

<sup>20</sup> Ibid [45].

<sup>21</sup> [2014] 1 LNS 1279 (Unreported, Kuala Lumpur High Court, Dato' Zaleha Yusof J, 21 July 2014). The case was heard on 30 June 2014 and the decision was delivered by the High Court on 21 July 2014.

<sup>22</sup> Act 301.

<sup>23</sup> See *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675, [7] (Court of Appeal, Malaysia) which reproduced the High Court's decision, which itself was not reported.

<sup>24</sup> See 'Allah Lawyers Tell Court: Religious Freedom & Right to Equality Cannot Be Set Aside Even in Emergency', *Malaysia Chronicle*, 30 June 2014 at <[http://www.malaysia-chronicle.com/index.php?option=com\\_k2&view=item&id=312051:allah-lawyers-tell-court-gtee-of-religious-freedom-right-to-equality-cannot-be-set-aside-even-in-emergency&Itemid=2#axzz368MRKU6p](http://www.malaysia-chronicle.com/index.php?option=com_k2&view=item&id=312051:allah-lawyers-tell-court-gtee-of-religious-freedom-right-to-equality-cannot-be-set-aside-even-in-emergency&Itemid=2#axzz368MRKU6p)>.

<sup>25</sup> See Ida Lim, 'After 7 years, court orders return of 'Allah' CDs to Sarawakian Christian', Malay Mail Online, 23 June 2015 at <<http://www.themalaymailonline.com/malaysia/article/after-7-years-court-orders-return-of-allah-cds-to-sarawakian-christian>>.

The Federal Court's decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* has also been cited in support of the SIB church's appeal in respect of their application for leave for judicial review. As reported in the Court of Appeal's judgment in *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor*,<sup>26</sup> since the Court of Appeal's finding in the *Herald* case that the word 'Allah' is not an integral part of the faith of Christianity had been ruled as a mere *obiter* by the Federal Court, the basis of the High Court's decision in the current case could no longer be sustained as such *obiter* was not a binding precedent for the current case. Therefore, the three judges of the Court of Appeal unanimously allowed the appeal.

Another case which some may misread the *obiter dictum* as the *ratio decidendi* is the Federal Court's decision in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and Other Appeals*.<sup>27</sup> In this case, both the husband and wife were originally Hindus. Their marriage was registered in accordance with the Law Reform (Marriage and Divorce) Act 1976 ('LRA').<sup>28</sup> They have two children from the marriage. Subsequently, the husband converted himself and his eldest son to Islam. The husband filed for proceedings in the Syariah Court and he managed to obtain an interim custody order in respect of his eldest son. The wife, on the other hand, filed for a petition for divorce under s 51 of the LRA. Meantime, the wife obtained an *ex parte* injunction against the husband, restraining him from converting their children to Islam and commencing or continuing any proceedings relating to their marriage and children in the Syariah Court. During the *inter partes* hearing, the wife's application for an injunction was dismissed while the husband's application to set aside the injunction was allowed.<sup>29</sup> However, an interim Erinford injunction was granted pending the appeal. The Court of Appeal by a majority upheld the High Court's decision and at the same time set aside the Erinford injunction as appealed by the husband.<sup>30</sup> As a result, the wife made two appeals against the Court of Appeal's decisions. Subsequently, on a motion by the wife, an Erinford injunction pending her application for leave to appeal to the Federal Court was granted.<sup>31</sup> The husband appealed against this decision. Thus, there were three appeals before the Federal Court, two by the wife and one by the husband.

The Federal Court's three-member panel in a 2–1 decision dismissed the wife's appeal on the *inter partes* injunction but allowed her appeal for the Erinford injunction by the High Court. The husband's appeal against the granting of the Erinford injunction pending appeal to the Federal Court was dismissed. It was held that the wife's petition for divorce was invalid as it was filed prematurely before the expiration of three months after the husband's conversion, as required by the LRA. In view of the invalid petition for divorce, it was not necessary for the court to answer the other questions posed for the Federal Court to decide. Nevertheless, the Federal Court proceeded to answer those questions as they were important questions and its decision would be

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<sup>26</sup> [2015] 1 MLJ 675 (Court of Appeal, Malaysia).

<sup>27</sup> [2008] 2 MLJ 147 (Federal Court, Malaysia).

<sup>28</sup> Act 164.

<sup>29</sup> *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2007] 2 MLJ 798 (High Court, Kuala Lumpur).

<sup>30</sup> *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 705 (Court of Appeal, Malaysia).

<sup>31</sup> *Subashini Rajasingam v Saravanan Thangathoray (No 2)* [2007] 4 MLJ 97 (Court of Appeal, Malaysia).

to public advantage. The Federal Court did so based on the hypothetical fact that if the wife had filed her petition in compliance with the prescribed time.<sup>32</sup>

One of such questions was whether it is an abuse of process for a spouse of a civil marriage to unilaterally convert the religion of a minor child without the consent of the other parent. It was against this backdrop that the Federal Court opined that the word 'parent' in Article 12(4) of the Federal Constitution which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. As the wife's petition was filed prematurely and it was invalid in the first place, the judicial opinion expressed was a mere *obiter* and it is not a binding precedent for future cases. This has been highlighted by the Malaysian Bar.<sup>33</sup> Nevertheless, the High Court judge in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*<sup>34</sup> reminded that even if that decision is an *obiter*, that decision emanating from the Federal Court has to be respected.<sup>35</sup>

Therefore, the Federal Court's decision in the *Subashini* case does not constitute a binding precedent on subsequent courts when an *obiter* opinion was expressed to construe the word 'parent' in Article 12(4) of the Federal Constitution as referring to either one of the parents.

### **Ratio of the Majority Judgment and the Minority View**

It is observed that there were instances where judges failed to distinguish the *ratio* of the majority judgment and a minority view of a superior court. As a result, instead of adhering to the *ratio decidendi* in the majority judgment of a superior court, the later court followed the minority view. One obvious example was the minority view in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Ors*<sup>36</sup> which some courts had treated as the *ratio decidendi* of the case. In this case, the appellant applied for a declaration that her son was a non-Muslim or had renounced the Islamic faith at the time of his death and that she was entitled to claim the deceased's body. However, the learned judicial commissioner found that the signature on the deed poll which was tendered as the evidence of the deceased's renouncement of Islam was forged and did not belong to the deceased. The evidence with regard to the deceased's rebaptism into Sikhism and his attendance at the congregation at the Sikh temple were also rejected. The appellant appealed. The Supreme Court remitted the case to the High Court and certain questions of the Islamic law were referred to the fatwa committee by consent of all parties. Upon receiving

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<sup>32</sup> *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and Other Appeals* [2008] 2 MLJ 147, 167 [14], [15] (Federal Court, Malaysia).

<sup>33</sup> Christopher Leong, 'Remarks Reportedly Made by Minister in the Prime Minister's Department Regarding Unilateral Religious Conversion of Children are Erroneous, Unfortunate and Regrettable' (Press Release, 19 June 2014) at <[http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_remarks\\_reportedly\\_made\\_by\\_minister\\_in\\_the\\_prime\\_ministers\\_department\\_regarding\\_unilateral\\_religious\\_conversion\\_of\\_children\\_are\\_erroneous\\_unfortunate\\_and\\_regrettable\\_.html](http://www.malaysianbar.org.my/press_statements/press_release_%7C_remarks_reportedly_made_by_minister_in_the_prime_ministers_department_regarding_unilateral_religious_conversion_of_children_are_erroneous_unfortunate_and_regrettable_.html)>.

<sup>34</sup> [2013] 5 MLJ 552 (High Court, Ipoh).

<sup>35</sup> *Ibid* 574-575 [46], [47].

<sup>36</sup> [1992] 1 MLJ 1 (Supreme Court, Malaysia).

the fatwa from the fatwa committee, the High Court confirmed its earlier findings and decision. The appellant again appealed.

There were two written judgments from the three judges who heard this case in the Supreme Court. One was written by Hashim Yeop A Sani CJ and the other was from Mohamed Yusoff SCJ. Harun Hashim SCJ did not write any judgment but it can be inferred that the learned judge concurred with Hashim Yeop A Sani CJ since the word 'we' was used throughout the judgment written by Hashim Yeop A Sani CJ while the word 'I' was used in Mohamed Yusoff SCJ's judgment. All three judges reached the same decision by dismissing the appeal but on different grounds. The majority judgment was that the deed poll was crucial to determine the religious status of the deceased as the fatwa stated that a Muslim becomes an apostate if he executes a deed poll renouncing Islam. The Supreme Court refused to interfere with the findings of fact of the judicial commissioner who had the benefit of seeing and hearing the witnesses. Since there was forgery on the deed poll, the appeal was therefore dismissed. The majority judgment revealed that there was no express provision in the Administration of Muslim Law Enactment 1962 of Kedah at that time for a Muslim to renounce Islam. The majority judges were of the view that the state enactments should incorporate clear provisions to avoid difficulties of interpretation by the civil courts. The majority judges further clarified that Article 121(1A) of the Federal Constitution has sought to delineate the jurisdiction of the Syariah Courts from the civil courts but it does not affect the civil courts' jurisdiction to interpret written laws including the state enactments for administration of the Islamic law. However, Mohamed Yusoff SCJ was of the view that the issue of apostasy required substantial consideration of Islamic law. It should be dealt with by 'eminent jurists who are properly qualified in the field of Islamic jurisprudence' and 'the only forum qualified to do so is the Syariah court'.<sup>37</sup>

Obviously, the appeal in *Dalip Kaur* was dismissed on the merits of the case. The minority view of Mohamed Yusoff SCJ that the proper forum having jurisdiction to hear the case was Syariah Court did not form part of the *ratio decidendi* of the case since his Lordship's view did not prevail. This is because if the civil court did not have the jurisdiction, the appeal should have been dismissed directly on the ground of lack of jurisdiction instead of being dismissed based on the merits, as what was held by the majority judgment.<sup>38</sup> Furthermore, it seems that the jurisdiction of the civil court was not challenged because at the High Court level, the parties had consented to have the questions on the Islamic law referred to the fatwa committee but decision was to be made by the civil court. Jurisdiction of court was not even the issue to be determined in the appeal.<sup>39</sup> Therefore, an opinion expressed on an issue not raised by the parties clearly did not constitute a binding authority; moreover, it was a minority view in the whole judgment. On the

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<sup>37</sup> Ibid 10.

<sup>38</sup> Per Dato' Abdul Hamid Mohamed J (as he then was) in *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain* [1996] 3 CLJ 231, 249 (High Court, Kuala Lumpur) when his Lordship referred to *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

<sup>39</sup> The issues to be decided by the Supreme Court were (a) whether the learned judicial commissioner was correct in not allowing the case to be reopened after receiving the fatwa from the fatwa committee; and (b) the existence or otherwise of a genuine deed poll. Even Mohamed Yusoff SCJ himself admitted that the question to be determined was whether the deceased had effectively renounced Islam. The question was not framed as one in regards to the jurisdiction of the court. See *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, 6, 8.



contrary, *Dalip Kaur* seems to suggest that the civil court had jurisdiction to hear an application to determine a person's religious status and to decide the case based on the merits, having taken into account the fatwa from the fatwa committee.

However, *Dalip Kaur* was misread by the High Court judge in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor*.<sup>40</sup> In this case, the plaintiff applied for a declaration that he is a non-Muslim. Apparently, he had converted to Islam before attaining the age of 18 without his mother's knowledge. A few years after he had ceased to be a minor, he reconverted to Sikhism and he executed a deed poll to renounce Islam. The second defendant raised a preliminary issue on the jurisdiction of court, contending that only Syariah Court could make such a declaration and not the civil court. The Kedah Syariah Court Enactment 1983 did not state the jurisdiction of the Syariah Court to make a declaration on the status of a Muslim who had renounced Islam. The High Court judge referred to *Dalip Kaur* and found support in the minority view of Mohamed Yusoff SCJ, notwithstanding his Lordship's own admission that the question of jurisdiction was not raised in *Dalip Kaur*.<sup>41</sup> It was held that the civil court did not have the jurisdiction to hear the case and the application was dismissed with costs.

The same problem occurred in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*.<sup>42</sup> The plaintiff who was born a Buddhist converted to Islam. Subsequently, he renounced Islam by a deed poll and a statutory declaration. He sought the High Court's declaration that his renunciation of Islam was valid. One of the issues to be determined was whether the civil court had jurisdiction to hear this application. The Kuala Lumpur High Court held that the matter was not within the jurisdiction of the civil court and it 'followed' or relied on the principle which was embodied in the minority judgment of Mohamed Yusoff SCJ in *Dalip Kaur* and also *Mohamed Habibullah Bin Mahmood v Faridah Bte Dato Talib*.<sup>43</sup> The Kuala Lumpur High Court also held that the jurisdiction of the Syariah Court can be implied from paragraph 1 of List II (State List) in the Ninth Schedule of the Federal Constitution even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993.<sup>44</sup>

However, it is to be noted that *Mohamed Habibullah Bin Mahmood v Faridah Bte Dato Talib* was not a case relating to apostasy. It was a case filed in the civil court where both parties are Muslims and the wife claimed damages and injunction to restrain her husband from assaulting her. At that material time, her divorce petition was pending to be heard at the Syariah Court. The Supreme Court held that Article 121(1A) has taken away the jurisdiction of the High Court in regards to the matters falling within the Syariah Court's jurisdiction. The Supreme Court then pointed out that the acts complained by the wife were expressly governed by s 127 of the Islamic Family Law (Federal Territories) Act 1984 and the Syariah Court had power to grant an injunction under s 107 of the same Act. It was on this basis that the Supreme Court ruled that the High Court did not have the jurisdiction to adjudicate the wife's claim.

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<sup>40</sup> [1994] 1 MLJ 690 (High Court, Kuala Lumpur).

<sup>41</sup> Ibid 693-694.

<sup>42</sup> [1998] 1 MLJ 681 (High Court, Kuala Lumpur).

<sup>43</sup> [1992] 2 MLJ 793 (Supreme Court, Malaysia).

<sup>44</sup> Act 505.

It is observed that the High Court decisions in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* and *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* had erred in so far as they followed the minority view of Mohamed Yusoff SCJ.<sup>45</sup> In both instances, the minority judgment of the superior court had been embraced as if it was a binding precedent. Apparently, the majority judgment in *Dalip Kaur* had not been appreciated or construed correctly and was disregarded by the High Court in these two cases.

### **Non-Binding Minority View Turned Into *Ratio Decidendi***

However, a non-binding minority view may be so highly influential that it is subsequently approved by a superior court and turned into a *ratio decidendi*. This happened when the Federal Court in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*<sup>46</sup> approved the decision of the trial judge of the High Court which relied on the minority view in *Dalip Kaur*. One reason proffered to justify the jurisdiction of Syariah Court on apostasy cases was that it involved inquiry into the validity of the purported renunciation of Islam in accordance with Hukum Syarak. Relying on the case of *Md Hakim Lee*, the Federal Court also held that although there was no expression provision in the state enactments to confer jurisdiction to the Syariah Court to deal with apostasy matters, it could be read into them by implication derived from the provisions regarding conversion into Islam. The Federal Court's decision in *Soon Singh* has a far-reaching effect on the subsequent cases. In fact, this decision was followed in a rash of cases which involved the issue of renouncement of Islam.

In *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*,<sup>47</sup> the plaintiffs sought for various declarations, which included a declaration that the first plaintiff is no longer a Muslim as she professes herself to be a Hindu and practices the Hindu religion. Furthermore, she had been convicted for apostasy and she had paid the fine imposed by the Teluk Intan Syariah Court. The Ipoh High Court held that its jurisdiction was ousted from determining the merits of the application since it was bound by the Federal Court's decision in *Soon Singh*.

Likewise, in *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors*,<sup>48</sup> the main declarations sought by the first plaintiff was that she is a Christian and she is not subject to the Islamic laws of Johor. The defendants raised a preliminary objection that the court had no jurisdiction to grant the relief. The Muar High Court held that the Federal Court's decision in *Soon Singh* has most conclusively settled this issue and the Syariah Court has implied jurisdiction to deal with the conversion out of Islam in the absence of expression provision in the State Enactments. The preliminary objection was upheld and the application was struck off with costs.

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<sup>45</sup> See also Mohammed Imam, 'Syariah/Civil Court's Jurisdiction in Matters of Hukum Syara: A Persisting Dichotomy' [1995] 1 CLJ lxxxix who commented that the High Court in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1994] 1 MLJ 690 had erred in following the separate opinion of Mohamed Yusoff SCJ.

<sup>46</sup> [1999] 1 MLJ 489 (Federal Court, Malaysia).

<sup>47</sup> [2003] 2 MLJ 302 (High Court, Ipoh).

<sup>48</sup> [2004] 5 MLJ 40 (High Court, Muar).

The facts in *Zubeydah Bte Shaik Mohd lwn Kalaiichelvan a/l Alagapan dan Lain-lain*<sup>49</sup> were slightly different. In this case, the second defendant had made a statutory declaration declaring that she had converted from the Islamic faith to Hinduism. At that material time, the second defendant was already an adult. The plaintiff, who is the second defendant's natural mother, commenced an action for certain declarations, *inter alia*, that her daughter, the second defendant is still a Muslim. The Kuala Lumpur High Court followed the High Court's decision in *Soon Singh* and *Md Hakim Lee*. It was held that the second defendant had not obtained confirmation from the Syariah Court that she had renounced Islam and therefore, she is still regarded as a Muslim and the plaintiff's application was allowed with costs.

In the widely publicised case of *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain*,<sup>50</sup> the appellant initially applied to the National Registration Department ('NRD') to have her name changed on the ground that she had renounced Islam and had become a Christian. The application was not approved. In her second attempt, she applied to change to another name and she stated in her statutory declaration the same ground as the first application. However, upon the advice of an officer from the NRD that she should not give the ground of change of religion to avoid any difficulty in processing her application, she made another statutory declaration stating that the reason for the change of name was a mere choice and not change of religion. Subsequently, the appellant was given a new identity card with her new name but the word 'Islam' and her former name appeared on the card too. She then applied to delete the word 'Islam' and her original name from her identity card on the ground that she had renounced Islam. The NRD refused on the ground that her application was incomplete since an order of the Syariah Court to the effect was required. The appellant applied to the Kuala Lumpur High Court for several declarations including her right to freedom of religion and an order that her name be entered in the Registry Book as having converted out of Islam. The High Court dismissed her application with costs. She appealed to the Court of Appeal. The parties by consent narrowed down the issues so that the appeal focused purely on an administrative law question, that is, whether the NRD was legally correct in rejecting the appellant's application to delete the word 'Islam' from her identity card and in requiring an order from the Syariah Court. The Court of Appeal by majority answered in affirmative and dismissed her appeal. She further appealed to the Federal Court. One of the issues to be determined by the Federal Court was whether the Federal Court's decision in *Soon Singh* was correctly made when it adopted the implied jurisdiction theory propounded in *Md Hakim Lee*. The three-member panel in the Federal Court gave a 2-1 majority judgment and held that *Soon Singh* was decided correctly. Therefore, the appeal was dismissed with costs.

The Federal Court's decision in *Lina Joy* was followed in *James v Government of Malaysia*.<sup>51</sup> In this case, the plaintiff sought for a broad declaration that the definition of 'Muslim' in s 2 of the Administration of Islamic Law (Federal Territories) Act 1993, except for definition (a), contradicts the Federal Constitution and is therefore void. He also contended that he could not be regarded in law as a person professing the religion of Islam. The Kuala Lumpur High Court

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<sup>49</sup> [2003] 2 MLJ 471 (High Court, Kuala Lumpur).

<sup>50</sup> [2007] 4 MLJ 585 (Federal Court, Malaysia).

<sup>51</sup> [2012] 1 MLJ 721 (High Court, Kuala Lumpur).

viewed this action as essentially a case of the renunciation of Islam and held that it was bound by the Federal Court's decision in *Lina Joy*, which decided that apostasy is a matter within the exclusive jurisdiction of the Syariah Court. The defendant's appeal was allowed and the plaintiff's action was struck out with costs.

A study of the above cases reveals that the tide may shift and change the landscape of the judicial precedents. What was originally a non-binding minority view in the *Dalip Kaur* case has later turned into the *ratio decidendi* of the Federal Court's decision in *Soon Singh*, which was further fortified by the Federal Court in *Lina Joy*. Both *Soon Singh* and *Lina Joy* have a significant impact on subsequent cases due to the doctrine of *stare decisis*, since both were decided by the Federal Court, the highest court in Malaysia.

## **Conclusion**

Judicial precedents form part of the sources of law in Malaysia. The doctrine of *stare decisis* which assures equality of treatment by having like cases to be decided alike has to be strictly adhered to. This will enable the legal system to attain certainty, predictability and uniformity of law. To ensure the proper operation of the doctrine of *stare decisis*, it is crucial to identify the *ratio decidendi* of a judgment by a superior court as it is binding on all later courts. This can be a difficult task as shown by some cases, which the judges have erred in embracing the *obiter dictum* or minority view of the earlier cases and treating it as a *ratio decidendi* and adherence to the doctrine of *stare decisis*.

On the other hand, the persuasive value of the *obiter dictum* should not be underestimated. There is a possibility that an *obiter dictum* or a minority view may evolve into an influential *ratio decidendi* in subsequent cases, particularly if it is affirmed by a superior court. This was demonstrated by the minority view in the *Dalip Kaur* case, which was affirmed by the Federal Court in *Soon Singh* and *Lina Joy* and has thereafter turned into a *ratio decidendi* followed by many subsequent cases. Nevertheless, the application of doctrine of *stare decisis* remains the general rule and any justifiable departure from the doctrine should be made sparingly and as an exception only.