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Judicial Precedent as a Source of Law

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This article aims to clarify what is meant by the source of law in which we will look at the meaning of one of the most important sources of law i.e precedent, its nature, types, importance, merits, and demerits, as well as theories of precedents and a comparison of different legal systems around the world with the examples of case laws. Precedents are essential in the legal system for a variety of reasons. Precedents serve as a reminder and a foundation upon which to build cases. It not only saves judges' time and effort, but also ensures predictability, certainty, and consistency in the administration of the law. This approach aids in the interpretation of the law and the implementation of modifications in accordance with societal needs and requirements.

Keywords: *judicial precedent, common law, obiter dicta, ratio decidendi, british legacy.*

INTRODUCTION

In present day jurisprudence, the expression "Source of law" is not confined to a single meaning as was tried to be done by different schools of law. Dr. Allen opined that "the true sources of law are agencies through which the **rules of conduct acquire** the character of law

because of the certainty, uniformity, and binding force."[1] One of the most important and independent sources of law is judicial precedent. The doctrine of judicial precedent is a distinguishing aspect of English and Common Law. Judges had a crucial influence on the development of English law in England. As a result, adjudication in England made a significant contribution to the development and formulation of English law. It further stated that English law is mostly made by judges.

According to Salmond, the theory of precedent has two meanings: (1) recorded case law that can be referenced and followed by courts, and (2) stringent legal precedents that are not just highly binding but must be followed. Holdsworth is a proponent of the theory in its broadest interpretation. The importance of precedent has been a disputed topic in recent years. There is no problem with the practise of referencing instances and assigning weight to them; the issue is with the current practise of recognising precedents as totally binding. It is true that new laws and legislative revisions in common law countries are increasingly being driven by parliamentary, largely inspired, actions that reflect the government's current stance, but case law remains a powerful source of legislation. A legal statement made by a judge in a case may become obligatory on subsequent judges and lower courts, and therefore become the law that everyone must follow. It makes no difference the decision is concrete, precedent becomes binding is determined by two key factors[2]:

1. It must have been made by a court of appropriate seniority; and

2. Only the ratio decided, or reasoning behind the decision is binding.

MEANING OF JUDICIAL PRECEDENT

The term "precedent" literally refers to a previous incident or action that is used as an example or guide in subsequent or comparable situations. When considering later cases involving comparable issues or facts, a precedent is a concept or rule established in a previous legal case that is either binding or persuasive without the necessity for a reference to a court or other

[1] *Law in making* (7th edition., Oxford University Press 1964)
[2] Fitzergerald P.J., *Salmond on Jurisprudence* (12thed., Universal Law Publishing Co.) 175

tribunal. Judges are bound by precedent under the principle of stare decisis (a Latin expression meaning "*to stand in the things that have been decided*").

Precedent, according to Jeremy Bentham, is judge-made law, but Austin refers to it as judicial law. Keeton defines precedent as "judicial statements of the court that carry with them some authority and have binding force." In a nutshell, precedent refers to earlier judgements that serve as advice or authority in future cases. Judicial precedent refers to decisions made by superior courts such as the High Court and the Supreme Court in the past. It is a significant legal source, but it is neither as new as legislation nor as old as tradition.

DOCTRINE OF PRECEDENT IN INDIA: BRITISH LEGACY PRE-INDEPENDENCE

The law established by the Federal Court, as well as any Privy Council verdict, was obligatory on all courts in British India, according to Section212 of the Government of India Act 1919. As a result, the Privy Council served as the highest judicial authority.

POST-INDEPENDENCE

The Supreme Court (SC) was founded as the highest judicial authority, and a streamlined court system was constructed.

Supreme Court: Article 141 of the Indian Constitution[3] makes it binding on all Indian courts. It is not bound by its own decision, the judgement of the Privy Council, or the decision of the Federal Court.

High Court:

- Its decisions are binding on all courts within its jurisdiction.
- Only outside-jurisdiction courts have persuasive power.
- If a ruling of the same court and a bench of equivalent strength is in conflict, the case is

[3] Constitution of India, 1950, art. 141

referred to a higher bench.

- The Privy Council's and federal court's decisions are binding as long as they do not clash with the Supreme Court's ruling.

Lower Court: Obligated to follow the decisions of its state's higher courts over the decisions of otherstate's high courts.

NATURE OF JUDICIAL PRECEDENT

A judicial precedent can make law but cannot abolish it. Therefore, they are purely constitutive and never abrogative. They can only fill in the holes in the legal system and fix flaws in existing legislation. Judicial decision-making might be deductive or inductive. The deductive technique is linked to the legal system. This means that the judge's ruling is derived straight from general to specific in the context of the case at hand.

The inductive technique, which is common in English law, begins with the same fundamentalgoal of determining the general principle that applies to the particular case, but it does not consider the rule to be directly applicable by a simple procedure of deduction[4].

Thus, one would see that the deductive method of judicial law-making prejudices assumes that the law is static when in reality court decisions can rewrite the law by overriding precedents pronouncing new legal norms. For this reason, says that "the deductive method can explain legal stability, but cannot accumulate it for changes in the law." In **State of Haryana v Ranbir[5],** the Supreme Court determined that a decision is an authority for which it makes decisions and that we cannot be rationally deduced from this.

KINDS OF PRECEDENTS

Original and Declarative Precedent: According to Salmond, An original precedent establishes a new rule, whereas a declaratory precedent just applies an existing legal

[4] George Whitecross Paton, *A Text Book of Jurisprudence* (Oxford University Press 2007) 173
[5] *State of Haryana v Ranbir Alias Rana* (2006) 5 SCC167

standard. If there is a declaratory precedent, the rule takes precedence because it is already the law. Because it is currently in effect, the original precedent is a law for the future. There are many more precedents in advanced countries. Although the number of original precedents is tiny, their significance is enormous. They are the only ones who develop the country's law. They can be used as future legal proof. A declaratory precedent is just as good as an original precedent as far as legal authority is concerned. The authority and source of a new law is an original precedent, however, both original and declaratory precedents have value.

Authoritative and persuasive precedents: An authoritative precedent, according to Salmond, is one that judges must follow whether they agree with it or not. Relevant precedents enact laws in the application of a specific legal principle that gives them that effect. Persuasive precedent is precedent that the courts are not obligated to follow, but which they are free to consider and weigh heavily. Persuasive precedents can only persuade the judge; it is up to the judge to decide whether or not to follow them. Persuasive precedents are purely historical, whereas authoritative precedents are legal sources of law. If persuasive precedent succeeds in establishing law at all, it does so by serving as the historical foundation for subsequent authoritative precedent. They don'thave any legal standing.

Persuasive precedents can take numerous forms, including (i) foreign judgements, (ii) Privy Council judgements for the Supreme Court of India, and (iii) court statements (obiter dicta) (iv) Authoritative textbooks, commentaries, legal writings, etc. The decisions of the High Court are authoritative precedent, but outside of that jurisdiction, the decisions of this High Court are only indicative or persuasive. The decisions of the Supreme Court that are binding on the Subordinate Court are known as authoritative precedents.

THERE ARE TWO TYPES OF JUDICIAL DECISIONS

1. Ratio Decidendi (reason of the decision): "Ratio Decidendi" literally means "cause for the decision." It's a broad principle developed from a specific situation. In other words, Ratio Decidendi is the legal basis for the decision. It varies from res judicata, which refers

to a judgement made in a specific matter that serves as the last word between the parties. Sir Salmond demonstrated the distinction between the two by using the following example: "If A sues B for negligence in connection with a car accident, both will do it the other to be bound by the finding in the matter and third Parties not involved in the case are not bound, nor will either original parties may be bound by a subsequent dispute with a third party.

When B is later not prosecuted by him or the public prosecutor for negligent driving bound by findings of fact in the original lawsuit. But in some circumstances, the findings in a lawsuit may even be conclusive to third parties. This is the case with actions affecting status, where the judge acts in rem, i.e. against the whole world. So in the case of an application for a declaration of nullity of a marriage, the decision of the court applies not only against the petitioner and the respondent but against all third parties"[6]

The **Donoghue v Stevenson**[7] case exploded the privity of the contract concept, holding that the manufacturer is accountable to the consumer for his carelessness in making items that are incapable of intermediary examination by the retailer. As a result, the plaintiff was found to beentitled to damages as a result of the decomposed snail found inside the ginger beer sold in an opaque bottle. Ratio decidendi, according to Keeton, is a legal theory that serves as the foundation for a decision in a specific case. The Court can use stare decisis to force the legislature to modify the law by making the case more difficult. According to Professor HLA Hart, the stare decisis doctrine is the second rule, a power conferring rule, or a recognition rule.

2. Obiter Dicta: Obiter dicta is a word that refers to statements that are spoken in passing. Obiter dicta, by the way, are inadvertent statements made by the judges. Judges frequently provide legal opinions on matters on which they are not asked to rule. Many judges have a practise of using hypothetical situations to illustrate their reasoning, making remarks on them, and so on. The judge can also pose a hypothetical point and explain how he would have resolved it. It all comes down to Obiter Dictation. Obiter dicta are almost certainly

[6] Fitzergerald P.J. (n 2)
[7] *Donoghue v Stevenson* (1932) AC 562

irrelevant to the decision.

Obiter Dictum, according to Keeton, is observations made by a judge during the course of a decision that is based on the facts of the case but is not required for the verdict. The term obiter dictum was defined in the Halsbury Laws of England as statements that are notnecessary for a decision and that go beyond the occasion to establish a rule that is unnecessary for the purpose at hand, leaving no binding authority before another court, despite having a limited power of persuasion.

In **Jaiwant Rao v the State of Rajasthan**[8], the court observed a dictum that does not form an intrinsic element of the chain of arguments directed to the question may be treated as obiter. In summary, any statement of the law, no matter how carefully considered, which is neither required nor the basis of the decision and goes beyond the requirements of the individual case isobiter.

In **S.R. Bommai v UOI**[9], The Supreme Court's 9-judge bench unanimously concluded that secularism is one of the Indian Constitution's essential components. Social pluralism, according to Justice Sawant and Justice Kuldeep Singh, is conclusive to third parties. While Justice Ramaswamy stated that socialism, social justice, and fraternity are inherent in the Constitution'sfundamental framework. Articles 15, 16, and 25 of the Constitution, according to Justice Ahmadi, are part of the Constitution's core framework. As they were not immediately relevant to the case, the learned judges' observations are obiter dicta. The case's ratio is that secularism is an integral part of the constitution's basic structure.

THE DOCTRINE OF STARE DECISIS

In Indian law, the doctrine of stare decisis has been adopted. (**Article 141 of the Indian constitution**[10]). The doctrine of Stare Decisis means "let the decision stand in its rightful place. When a decision contains a new principle, it is binding on lower courts and has

[8] *Jaiwant Rao v the State of Rajasthan* AIR 1961, Raj 250
[9] *S.R. Bommai v Union of India* (1994) 3 SCC 1
[10] Constitution of India, 1950, art. 141

persuasive authority for equivalent courts. This rule is based done expediency and public policy. Although this doctrine is generally followed by the courts, it need not be the case that may be applicable when the court is satisfied that the previous wrong is likely to continue andresult in an erroneous decision. The functioning of the doctrine of stare decisis presupposes the existence of a judicial hierarchy. For example in India the lower-most courts or the courts the first instance are thesubordinate, courts, above that the high courts and the Supreme Court are at the apex. The Supreme Court is the highest judicial court in India. The Supreme Court in **Maktul v Manbhari**[11] held that if the correctness of a decision has beenchallenged time and again, the rule of stare decisis need not be applied.

However, the Supreme Court in Supreme Court **Advocates on Records Association v Union of India**[12], held that the doctrine of stare decisis is not an inflexible rule and it has little relevance in constitutional cases. The court observed that there is no doubt that the rule of stare decisis brings about consistency and uniformity but at the same time in exercising its inherentpower the supreme court should ask itself whether, in the interest of public good or any valid reason, its earlier decision must be revised. In **Bachan Singh v the State of Punjab**[13] the Supreme Court held that "If the norm of stare decisis were applied blindly and mechanically, the progress of law would be stifled and slowed, and its capacity to respond to changing societal requirements would be harmed." Despite its demerits, judicial precedent continues to be a significant source of law. The merits and demerits of precedent as summarized briefly:

MERITS

- Precedents allow courts to alter legislation in response to social requirements while alsoacting as an effective check on the judge's arbitrary discretion.
- It provides helpful guidelines for the judges in deciding cases before them.

[11] *Maktul v Mst, Manbhari* **(**1958), AIR 918
[12] *Advocates on Records Association v Union of India* AIR 1994, SC 268
[13] *Bachan Singh v the State of Punjab* AIR 1980, SC 898

- It helps to substantiate the arguments without wasting unnecessary time andenergy.

- It gives the law the ability to adapt to new scenarios and social conditions. The case law relating to property in India, from **Shankari Prasad**[14] to **Minerva Mills**[15], as well as decisions and changes in judicial tendency in this area, adequately illustrate thispoint.

- As a result of the particular problems that developed in the case, the precedent gives riseto practical and perfect laws.

DEMERITS

- According to Federick Polock, the law based on case law is complete because judges analyse just the facts that are relevant to the issue at hand. As a result, the law as it has evolved is never complete or comprehensive.

- Bentham holds that precedent is arbitrary. Unlike the legislature, the judges are not solely responsible to anyone hence, they are likely to bear arbitrary in using their discretion

- It ignores the basic norm of natural justice, which states that law must be known before itcan be enforced. Case law is always ex post facto.

- Precedent, it is commonly claimed, is the result of rushed judicial pronouncements.

- It is Intelligible only to competent lawyers. The decisions of the judges are not intelligible to the common man. Law reports are not accessible to the man in the street. An ordinary man can't illustrate or understand the meaning of it.

[14] *Sankari Prasad Singh Deo v Union Of India* (1951), AIR 458
[15] *Minerva Mills Ltd. & Ors v Union Of India & Ors* (1980), AIR 1789

CONCLUSION

We can deduce from the foregoing that precedents play an important role in filling gaps in thelaw and other statutes. It also boosts public trust in the judiciary and makes the legislation more morally acceptable. When the case before them is a mirror of previously decided law, the presence of judicial precedent makes it easier for the courts to make decisions. This method guarantees that the justice system's uniformity and certainty create a quick, efficient judicial process that functions efficiently and fairly for everyone.