

LL.M IIInd Sem
Jurisprudence II (L- 2002)
Precedent

Introduction

precedent as a source of law. Precedent in the sense of employment of past decisions as guides in the moulding of future decisions is in no manner peculiar to common law systems, but has been found in almost all the developed systems of law. The chief merit of common law systems lies rather in a particular mode in which this device is employed, that is, that precedents are in certain circumstances binding, which means, that they have either to be followed or distinguished. These circumstances are mainly that the decisions of the higher courts bind lower, never vice versa, and that in the chant language of Jessel M R “the only thing in a judge s decision binding as an authority upon a subsequent judge is the principle upon which the case was decided”. Thus, if a judicial precedent speaks with authority and that the principle which it contains would be binding in future cases, precedent then becomes an important source of law, but not the sole source of law.

Definition

Salmond: -Precedent is, ‘in a loose sense, it includes merely reported case law which may be cited & followed by courts.’ In a strict sense, that case law which not only has a great binding authority but must also be followed.

Grey: - Judicial precedent covers everything said or done which furnished a rule for subsequent practice.

Bentham: -‘precedents are judge made laws’.

Keeton: - Judicial precedent is a judicial decision to which authority has in some measure been attached.

Austin: -precedent is “judiciary s law”.

Doctrine of Precedent in England

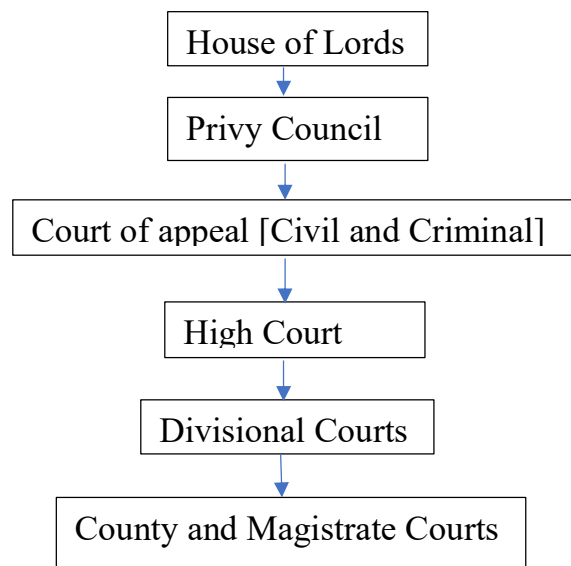
This doctrine is known as “the doctrine of Stare decisis “ it means “to stand by things decided “it implies that a judicial decision should be allowed to stand in its rightful place .when a judicial decision lays down a new principle ,it is binding on the subordinate courts .the main base of this doctrine are:-

1. Every court is bound to follow the decisions of the superior courts.
2. Supreme court of India is not bound by its own decisions. However, a smaller bench is bound by the decision delivered by a larger bench.
3. The decisions of one particular high court are not binding on any other high court. They only have persuasive value in other high courts.

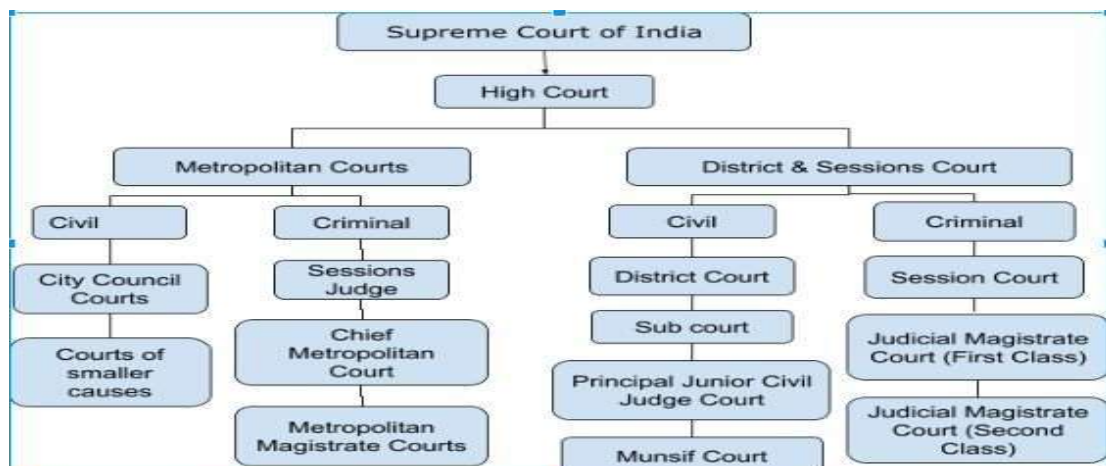
Authoritative and persuasive precedents

The precedent is authoritative and binding. Authoritative precedents have binding force. The judge has to follow them irrespective of the fact whether he approves them or not. In India a decision given by the supreme court becomes an authoritative precedent for the high courts and all subordinate courts below the high courts. Persuasive precedents only have persuasive value. The judge is not bound to follow them

Classification Court in England: -



Classification Court in India: -



Doctrine of Precedent Under Indian Law: -

The doctrine of precedent is established in India .All subordinate courts are bound by the decisions of the superior courts .

Origin and development of the precedent in India :-

1. Doctrine of precedent in dependent India.
2. Doctrine of precedent in independent India.

The Position of Precedent in Supreme Court

The supreme court of India came into existence in January 1950 it is the highest court in the country. It comprises of 31 judges. The senior most judge is designated as the Chief justice. According to article 141 of the constitution ,the law declared by it shall be binding on all courts within the territory of India .The expression “all court “used in this article obviously means court other than the supreme court .The decision of the supreme court is binding on the high court and cannot be ignored by it on the ground that relevant provisions were not brought to the notice of the supreme court ,and hence its decision is not binding . The doctrine of precedent in the supreme court of India can be better understood by reference to the following point: -

- 1) The supreme court is not bound by its own previous decisions. However, a smaller bench is bound by the decision given by a larger bench.
- 2) The supreme court is not bound by the decisions of the Privy Council and the federal court of India. They only have a persuasive value in the supreme court. However, they command great respect in the supreme court.
- 3) The supreme court is not bound by the decisions of foreign court like the supreme court of USA or UK

Some Important Cases: -

- Bengal Immunity co ltd VS state of Bihar ,AIR 1955 SC.
- Sajjan Singh VS State of Raj, AIR 1965,SC.
- Golak Nath VS State of Punj, AIR 1967 SC
- Kesavananda Bharati VS State of Kerala 1973 ,4 SCC.

The Position of Precedent in High Court: -

There are 25 high court in India for 29 state and 7 Union Territories .Every high court is headed by a chief justice .The National Capital territory of Delhi is the only Union Territory to have a separate High court .Article 141 states ,”the law declared by the Supreme court shall be binding on all courts within the territory of India “.The term “law declared” means not only the ratio decidendi of a decision but it includes an obiter dictum also ,”provided it is upon a point raised and argued .” judicial propriety dignity and decorum demand that being the highest judicial tribunal in the country even the obiter dictum of the supreme court should be accepted as binding .

- 1) Every high court is absolutely bound by the decisions of the supreme court of India.
- 2) The subordinate courts within the jurisdiction of a high court are bound by the decisions of that high court for ex. All district courts in Punjab Haryana and Chandigarh are bound by the decisions of the Punjab and Haryana high court.
- 3) The decisions of one high court only have a persuasive value before other high court and the subordinate courts falling within the jurisdiction of other high courts.
- 4) A single judge bench of the high court is bound by the decisions of a division bench (2 judge bench) a full bench (3 judge bench) of the same high court.
- 5) The high court in India are not bound by the decisions of foreign courts.

The Position of Precedent in Subordinate Court: -

There are various subordinate court in India at state level like district and session court, magistrate’s court, civil court, etc. These subordinate court are bound by the decisions of the supreme court.

Forms of Precedents: -

- A) Ratio Decidendi
- B) Obiter Dicta

A) Ratio Decidendi: -the literal meaning of term “ratio decidendi “is reasons for the decision. It is the rule of law upon which a judicial decision Is

based. In other world, it is the operative part of a judgement. According to Salmond ratio decidendi as the rule governing a particular case, as determined by the court. The main theory of Ratio Decidendi are: -

- 1) **Classical Theory**
- 2) **Good Hart's Theory**
- 3) **Salmond Theory**
- 4) **Stone's Theory**

B) Obiter Dicta: - Obiter dicta are additional observations, remarks, and opinions on other issues made by the judge. These often explain the court's rationale in coming to its decision and, while they may offer guidance in similar matters in the future, they are not binding.

Difference between Ratio Decidendi and Obiter Dicta

Ratio decidendi	Obiter dictum
1.Salmon defines: “the ratio decidendi may be described roughly as the rule of law applied by and acted on by the court, or the rule which the court regarded as governing the case.	1. An obiter dictum is an announcement made by a judge in course of his judgment which may not be unequivocally applicable to the issue before him.
2.Ratio decidendi is more authoritative than obiter dictum.	2. Obiter dictum has no such binding authority.

Kinds of Judicial Precedent: -

1. Declaratory and Original Precedents

As John William Salmon explained, a declaratory precedent is one where there is only application of an already existing rule in a legal matter.

Whereas, an original precedent is one where a new law is created and applied in a legal matter. Original precedents are responsible for the creation of new laws.

2. Persuasive Precedents

A persuasive precedent is a type of precedent where the judge is not required to follow the precedent in a legal matter but will take the precedent heavily into consideration.

So a persuasive precedent is not a direct source of law but is considered a historical source of law. In India, the decisions of one high court can act as persuasive precedents in other high courts.

3. Absolutely Authoritative Precedents

In an absolutely authoritative precedent, the judges have to compulsorily follow the judicial decision of the precedent in a case of law.

In other words, even if the judge finds the precedent to be a wrong judgment, he is legally bound to give the same judicial decision.

For e.g. – Every court in India is absolutely bound by decisions of courts superior to itself because of hierarchy.

4. Conditionally Authoritative Precedents

A conditionally authoritative precedent is one where generally the precedent is absolutely authoritative but in certain special circumstances, like a supreme court decision, it can be disregarded. The court can disregard the decision if it is a wrong decision, or goes against the law and reason.

Importance of judicial precedent as a source of law

1) Declaratory Theory

2) Judges made law

1) Declaratory Theory: -According to this theory, the main function of judges only declaration of law not made the law. The main jurist of this theory are Black stone, Coke, Baddeley. This theory provides that, Judges only discover law. They discover and declare.

Black Stone:-The function of judges is declaration of the law, not make the law.

Coke: Judicial decisions are not a source of law but the best proof of law is.

Baddeley: There is no such thing as *judge-made* law.

This theory was criticised on a number of grounds

Bentham and Austin: legislative power is not with Courts and they can not even claim it.

Salmond: both at law and in equity, however the declaratory theory must be totally rejected.

2) Judges Make Law: - According to this theory, judges, not only declare the law but also, they make the law. The main jurists of this theory are Lord Bacon, Gray, and Dicey.

Lord Bacon: the points which the judges decide in cases of first impression are a "distinct contribution to the existing law".

Gray: Judges alone are the makers of Law.

Dicey: -judges made law

Where a statute clearly laid down the law, the judge has to enforce it.

The judge is confined to the facts of the case while enunciating legal principles. Within those limits alone it can be said that judges make law.

Merits of Precedent: -

- 1) Respect for ancestors.
- 2) Saving of time.
- 3) Certainty in Law.
- 4) Satisfy the needs of the society.
- 5) Helps people to understand the Law.
- 6) Flexibility in Law.
- 7) Practical in nature.
- 8) Development of Law.

Demerits of Precedent: - The demerits or disadvantages of precedent as a source of precedent of law mentioned below

- 1) Very large number.
- 2) Development of law depends upon litigation
- 3) It is incomplete law
- 4) Wrong precedent may be established
- 5) Overruled case may be quoted before the court

Circumstances Destroying the Binding Force Of Precedents

- 1) Ignorance of Statute.
- 2) Legislation.
- 3) Ignorance of decision of superior court
- 4) Precedent Sub Silentio

For further clarification you may reach us via

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