

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 1

2020

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Precedent: A Principle Source of Law

NIKHIL GANGAPPA MANTUR¹

ABSTRACT

Every developed legal system possesses a judicial organ. The main function of the judicial organ is to adjudicate the rights and obligations of the citizens. In the beginning, in this adjudication, the courts are guided by customs and their own sense of justice. As society progresses, legislation becomes the main source of law and the judges decide cases according to it. Even at this stage, the judges perform some creative function. In the cases of the first impression, in the matters of interpretation, or in filling up any lacuna in the law made by legislation the judges, to some extent, depend on their sense of right and wrong and in doing so, they adopt the law to the changed conditions. The Doctrine of judicial precedent is concerned with the importance of case law in our system. Really it is the lawyer's term for legal experience. The American jurist and Supreme Court Judge Oliver Wendell Holmes. Jr famously said that the life of the law was not logic but experience. Miles Kington put it another way in Punch, "Judicial precedent manes a trick which has been tried before, successfully."

Key words: Precedent, Legislation, Judicial, Interpretation, case law

Judges have to have the humility to recognise that they operates within a system of Precedent, shaped by other judges equally striving to live up to judicial oath.

-John Robert.

I. INTRODUCTION

Precedent is a statement of law enunciated by the superior court in the course of rendering a judgement which has to be followed by that court and by the inferior courts. This brings in certainty in legal matters and the litigant has an idea of how the court will act in similar situations and facts. In the course of rendering decisions on actual disputes the courts explain and expound the law; they clarify and clear the ambiguities in the Legislation; in the process they make statements of law which operates as a source of law. Thus, the theory of precedent plays an important role in the development of jurisprudence of the country. In India, under Article-143 of the Constitution, law laid down by the Supreme Court is binding on all the

¹Author is a student at BLDE Law College, Jamkhandi, India.

courts in India².

II. DEFINITION OF PRECEDENT³:

In general English, the term precedent means, ‘a previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified.’

According to Gray, ‘Precedent covers everything said or done, which furnishes a rule for subsequent practice.’

According to Keeton, ‘a judicial precedent is judicial to which authority has in some measure been attached.’

According to Salmond, ‘in a loose sense, it includes merely reported case law which may be cited & followed by courts.’

In general, in the judicial field, it means the guidance or authority of past decisions for future cases. Only such decisions as lay down some new rule or principle are called judicial precedents. The application of such judicial decisions is governed by different principles in different legal systems. These principles are called ‘Doctrine of Precedent’. For this case to be held, first such precedents must be reported, maybe cited and may probably be followed by courts. Secondly, the precedent under certain circumstances must be followed.

Thus it can be inferred that Precedents are:

- Guidance or authority of past decisions for future cases.
- Precedents must be reported, maybe cited and may probably be followed by courts.
- Precedents must have opinio-juris.
- These must be followed widely for a long time and must not violate any existing statue law.

III. NATURE OF PRECEDENT

A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. Their function is limited to supplying the vacancies of the legal system, filling up with new law the gaps that exist in the old and supplementing the imperfectly developed body of

² Dr.Veena Madhav Tonapi, “Textbook On Jurisprudence”, universal law publishing co.Pvt.Ltd,edt 2010,pg-104

³ <https://www.lawctopus.com/academike/precedents-as-a-source-of-law/>

legal doctrine⁴.

IV. IMPORTANCE OF PRECEDENTS⁵:

Ancient Legal System:

The importance of the decisions as a source of law was recognized even in very early times. In the past, there have been numerous instances of this. Sir Edward Coke, in the preface of the sixth part of his report, has been written that Moses was the first law reporter. ‘In the case of the daughters of Zelophehad, narrated at the beginning of the twenty- seventh chapter of the book of numbers, the facts are stated with the great clearness and expressly as a precedent which ought to be followed.’ Even in the Mahabharata, it has been stated that ‘The path is the right one which has been followed by virtuous men.’ This may be interpreted as giving a theory of precedent. In ancient legal systems of Babylonia and China, the judicial decisions were considered to be a great authority, and later on, they were embodied in code law.

Modern Legal System:

Among the modern legal systems, the Anglo – American law is judge made law. It is called ‘Common Law’. It developed mainly through judicial decisions. Most of the branches of law, such as torts, have been created exclusively by judges. The Constitutional Law of England, especially the freedom of the citizens, developed through judicial decisions. According to **Tennyson**, “where freedom slowly broadness down, from precedent to precedent.”

Not only in the municipal law but in international law also, the precedents have their importance. The decisions of the International Court of Justice are an important source of International law. These precedents have been recognized by the International Court of Justice by **Article 38 (2) (d)** of the Statue of the International Court of Justice. Further, **Article 59** of the same holds that the decisions of the court only have persuasive value for future cases and hence the International Court of Justice is not bound by its own decisions in deciding similar cases in future. It holds that the decision is only binding the parties to the case. The above brief discussion indicates the role and importance of decisions on precedents in the development of law and their importance as a source of law at the municipal as well as the international level.

⁴ V.D. Mahajan, “Jurisprudence & Legal Theory”, eastern book company, fifth edition, pg no-217

⁵ <https://www.lawctopus.com/academike/precedents-as-a-source-of-law/>

V. TYPES OF JUDICIAL PRECEDENT⁶:

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.

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.

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.

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.

VI. PRECEDENT AS A SOURCE OF LAW:

A judicial precedent when speaks with authority, the underlying principles becomes binding for future cases and it thus becomes a source of law. Blackstone mentioned that it is an established rule to abide by the former precedents where the same points come again in litigation. Authoritative precedents are a legal source of law, in so far as they are binding on the judges. And persuasive precedents are a historical source o law, in so far as they have only a persuasive or guiding but not a binding efficacy, and thus provide a historical basis on which a law may be built by the judge if he is favourably inclined to that precedent and

⁶ <https://www.toppr.com/guides/business-laws/introduction-to-law/principle-sources-of-indian-law-judicial-decisions/>

accepts it. Each original precedent set a new pillar of law and helped in the growth and development of the law. Each declaratory precedent further strengthen and confirm each original precedent, thereby making the law certain and safe to be followed. The role of precedent in the making of law is laudable. In India, Article 141 of the Constitution lays down that the,“ Law declared by the supreme court is binding upon all the courts with the territory of India.” The law declared has to be construed as a principle of law that emanates from a judgement or an interpretation of a law or judgement by the Supreme Court, upon which the case is decided. Hence, it flows from the above that the law declared is the principle culled out on the regarding of a judgements as a whole in the light of the questioned raised upon the case is decided. The supreme court has consistently held that a decision is not found on reasons nor proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the constitution. In **Satish Kumar Gupta vs. State of Haryana**⁷ case the court held that, “case decided by the court without any consideration on principle of law, cannot be treated as precedent.” The cardinal principle of uniformity is basic principle of jurisprudence that promotes equity, equality, judicial integrity and fairness. Predictability is a powerful tool in the modern law literature.

- Precedents from foundation of administration of justice.
- Precedent keeps the law predictable.
- Follow it to mark path of justice.

A decision made by a higher court is binding and the lower court cannot over turn it. The court not to overturn its own precedent unless there is a strong reason to do so. In **Union of India vs. Raghubir Singh**⁸ case Supreme Court held that the binding precedent is necessary to be followed in order to maintain consistency in judicial decision and enable an organic development of the law. It also provides an assurance to an individual as to the consequences of transactions forming part of his daily affairs.

The benefit of this doctrine is to provide certainty, stability, predictability and uniformity. It increases the probability of judges arriving a correct decision on the assumption that collective wisdom is always better than that of an individual. It also preserve the institutional legitimacy and Adjudicative integrity. It is flexible in nature, as there are ways to avoid precedents. It provides equality in treatment and thus prevents bias, prejudice and

⁷ Civil Appeal Nos. 1587-1636 of 2017

⁸ 1989 AIR 1933, 1989 SCR (3) 316

arbitrariness and avoids inconsistent or divergent decisions. It prevents uncertainty and ambiguity in law.

In **Sri Gopabandhu Biswal vs Krishna Chandra Mohanty & Ors**⁹ court held that the use of precedent is an indispensable foundation upon which to decide what is the law and its application in individual case. It provides that a basis for orderly development of legal rules. The theory of precedent is generally understood in two ways:

- a) It means that precedents are reported may be cited and will probably be followed by the courts. This is the loose meaning of the doctrine which was prevailing in England up to the end of 19th century and that still prevails in the continental legal system.
- b) The precedent has great authority it must be followed. This is strict application of the doctrine, developed during the 19th century and it was fully evolved during the 20th century.

The operation of precedent is based on the legal presumption of the correctness of judicial decision. A matter once decided is final for all. That has been delivered in a judgement must be taken to be established truth. For in all probability, it is true in fact and even not, it is expedient that it should be held as true nonetheless. Unless and until reversed by a higher or superior court, a precedent stands unchallenged and cannot be questioned either than an appeal to a higher court.

VII. THE APPLICATION OF THE DOCTRINE¹⁰:

The application of the Doctrine lies in its **ratio decidendi**. It is therefore, necessary to know what this ratio decidendi is and how it is determined. Ratio decidendi and Obiter dictum: there are cases which involves questions which admit of being answered on principles. Such principles are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements. And the result- the principle that comes out, is not applicable only to that case, but to other cases also which are similar to the decided cases is their essential features. This principle is known as ratio decidendi. The issues which need determination of no general principles are answered on the basis of the circumstances of the particular case and lay down no principles of general application. These are called obiter dictum. It the ratio decidendi or the general principle not the obiter dictum that has the binding effect as a precedent.

⁹ C.A. Nos. 3456-3457 of 1996

¹⁰ <http://ijlljs.in/wp-content/uploads/2016/02/19.pdf>

VIII. THE ROLE OF RATIO DECIDENDI IN JUDICIAL PRECEDENT¹¹:

Ratio decidendi plays a vital role in judicial precedents as it is the legal guideline underlying the choice in a specific case. Thus, it makes the judicial precedent for future cases and is thought about the most imperative part of a judge's discourse. A judicial precedent, which is case law, has been and still is a noteworthy source of law. The decisions from past cases make law for future judges to take after. The English law framework is based on the Latin principle of stare decisis, which signifies 'stand by what has been decided and don't try to change it,' i.e. follow the common law, don't attempt to change it. There are extraordinary sorts of precedents- original, binding and pervasive.

IX. HIERARCHY RULE:

The choice made by the Supreme Court, Specifically the ratio decidendi must be followed by every single inferior court (stare decisis). The Supreme Court does anyway have the privilege to leave from its past choice when it seems acceptable to do as such. The Supreme Court has the privilege to overrule or turn around any choice made in the English lawful framework. Overruling would, for the most part, happen when the past court applied the law or incorrectly on the grounds that the later court finds the rule of law utilized in the ratio decidendi no longer alluring. Switching would happen in case of a higher court upsetting on interest of the choice made by a lower court hearing the appeal. The court would then substitute its own particular choice.

X. DIFFERENCE BETWEEN RATIO DECIDENDI AND OBITER DICTUM¹²:

The term 'ratio decidendi' contains the law in the precedent. 'Obiter dicta' are of little legal authority. At best they amount to persuasive precedents. The 'obiter dicta' of the English Courts in the State may command a high persuasive effect at the subordinate Courts, still, it has only a persuasive effect, and no, binding effect. But the 'ratio decidendi' are binding authorities.

RATIO DECIDENDI

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

OBITER DICTUM

1. An obiter dictum is an announcement made by a judge in course of his judgment which may not be

¹¹ <http://racolblegal.com/ratio-decidendi-and-obiter-dictum/>

¹² <http://racolblegal.com/ratio-decidendi-and-obiter-dictum/>

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| rule which the court regarded as governing the case. | unequivocally applicable to the issue before him. |
| 2. Ratio decidendi is more authoritative than obiter dictum. | 2. Obiter dictum has no such binding authority. |

XI. CIRCUMSTANCES DESTROYING OR WEAKENING THE BINDING FORCE OF PRECEDENTS:

The rule of finding force of the decision is however subject to a number of exceptions. The exceptions are as follows:

- Abrogated Decisions
- Affirmation or reversal on a different ground
- Ignorance of Statute
- Inconsistency with earlier decision of higher court
- Inconsistency with earlier decision of same rank
- Precedents Sub-Silentio or not fully argued.
- Decisions of equally divided courts
- Erroneous decisions

APPLICATION OF PRECEDENTS IN CRIMINAL CASES:

In **Parsaraja Manikyala Rao vs State of Andhra Pradesh**¹³ supreme court held each criminal case depends on its own facts. Thus one should avoid the temptation to decide cases by comparing one with another colour of case. To render speedy and effective justice, it is required to avoid the tendency and rely upon precedents to arrive findings of facts in criminal cases.

XII. ADVANTAGES OF PRECEDENT¹⁴:

Advantages of precedents are follows:

Judicial precedent offers the legal system access to consistency and predictability.

The goal of any justice system should be to create a level of legal fairness throughout society.

By providing value to the concept of judicial precedent, then there is an element of

¹³ Appeal (crl.) 49 of 2003

¹⁴ <https://connectusfund.org/6-advantages-and-disadvantages-of-judicial-precedent>

consistency and predictability that everyone can rely on when there is an issue that they face personally or professionally in court. It provides a guaranteed that every case will be treated and decided in a manner that is similar to past decisions. Because of the presence of judicial precedent in global legal systems, lawyers are able to advise their clients with some certainty as to the position that they should take in their situation, and whether it is beneficial to take such a problem to the court system.

It also offers the judicial system a certain measure of flexibility. Judicial precedent may create a standard that applies to similar cases and situations, but it is not a binding result. Higher courts do mandate that lower ones follow rules to the letter, but then they reserve the right to change their mind when an appeal occurs or issues in society change. Judges may not write the laws, but it is their job to interpret them as accurately as possible in every situation. This system creates a series of checks and balances which influences other levels of government to serve and protect the population in the best possible manner every time.

There is always the potential in place to set a new precedent. If a legal case is being heard for the first time in history, then whatever outcome occurs will set a judicial precedent for any upcoming issues that have similar circumstances. New situations arise all of the time in society, and they are not always covered by statutory rules or previous decisions. This concept in legal systems makes it possible for a judge to consider past similar cases that are not 100% exact or even take issues from other countries to make a ruling based on the available information. In some countries, this process can then create rules which serve as a precedent for future situations.

Judicial precedent helps the court system to save time on future rulings. When the legal system has already provided an answer for a similar situation, then the past rulings can become the foundation of the current decision that is necessary for case resolution. That means judges can spend less time in deliberation because they already have access to the decision-making processes of others. This process makes it possible to come to a recent outcome that is fast and fair for all parties involved. Because judicial precedent allows for consistency from case-to-case, the legal system at any level has more strength because it provides predictable outcomes for justice. This advantage can even reduce the crime rate in some communities because there is more awareness of what the consequences for specific actions will be if caught.

It creates a system which focuses on fairness.

The United States recently experienced an outcome in a case which did not follow judicial

precedent, so the sentencing process did not feel fair from an outside perspective. In 2018, a wealthy businessman in California was sentenced to 90 days of house arrest after pleading no contest to the rape of a five-year-old child. The 79-year-old man did not even need to register as a sex offender as part of the settlement. Normally the sentence involves state prison, and then when you are released, you must register as a sex offender. We need judges to follow judicial precedent because when the law is consistent, then it gives future victims a chance for protection. Although the family is filing a civil lawsuit in this matter, receiving money is not the same thing as receiving justice.

The structure of judicial precedent works to prevent mistakes from occurring.

When there is an unusual ruling as described in the point above, the general population understands that such an outcome is a mistake made by the system. Because we create a structure which provides consistency that everyone can follow, there are fewer mistakes that happen when everyone stays on the same page. This advantage should not be confused with minimum mandatory sentences, because the goal of a justice system should be to make right in the best way possible what was made wrong. Judges who follow judicial precedents can use the guidance of their peers in the past to create a resolution that can help all parties find a way to move forward through justice. That makes the outcome feel more robust that it would be if a ruling seems to come out of left field.

Judicial precedents reduce likelihood of a successful appeal:

When a judge follows the existing judicial precedent, then it gives the outcome of the case a stronger foundation for future appeals as well. Because the ruling given follows the same thought processes of previous cases with similar circumstances, the higher courts are more likely to allow the original willing to stand. This advantage is possible because the case laws which govern the decision-making process for the current judge are treated as a rightful interpretation of what the original statutes were meant to convey. With judicial precedent, you are preserving the integrity of the justice system from the local level to the national one¹⁵.

XIII. DISADVANTAGES OF JUDICIAL PRECEDENT:

Disadvantages of precedents are follows:

Judicial precedent adds multiple layers of complexity to the legal system:

The judicial system in the United States offers three layers of federal courts to consider, and then there are another three layers at the state level. Every ruling from every court creates the

¹⁵ <https://connectusfund.org/6-advantages-and-disadvantages-of-judicial-precedent>

possibility of setting a judicial precedent. That means a case that starts in state court, and then moves to the federal system, could generate up to six different potential precedents for future situations. The complexity does not stop there. When there is a judgment from an appeals court in the United States, then it may contain between 3 to 5 separate judgments that differ from one another. You can even find situations where the Supreme Court of a state or the country has each judge issuing their own perspective on a matter to create even more precedents. Judgments can be exceptionally long, and it is for the future of lawyers and judges in these cases to work out what is applicable and what is not.

People may not agree on what the judicial precedent actually is in a case: Even when a judicial precedent set a clear line on the expectations involved in a case for future consideration, there is no guarantee that another judge will see the law in the same light. There can be differing opinions on what the actual purpose of a ruling happens to be, creating a measure of uncertainty that can never be resolved until the next ruling is issued. Once that occurs, another charge can step in and interpret for the situation in a third way. Judicial precedent might offer some cases a measure of consistency and support, but it can also be worthless when the opinions of those involved differ by a significant margin.

Every case must face uncertainty until a final ruling is made: Because our court system is not bound by any previous rulings in a current case (unless it is a lower court ruling on what a higher court decided already), the results of any given situation will remain uncertain until the final ruling or appeal judgment is made. There are some judges who are more than willing to depart from a precedent because they wish to do what is right for the individuals involved in the case they are hearing. Then there are others who treat judicial precedent as it is part of the laws passed by the legislature, unwilling to depart from it to make changes in the law.

Judicial precedents create rigidity in systems that sometimes need flexibility: The rules which are created from judicial precedents can remain in place for a significant amount of time. It is not unusual for these written or unwritten rules to apply even when they are outdated. Many judges will not make any changes to the perspective of the law until a case comes through which requires such an action. Some changes require a case to come to a higher appeals court before new rules can come about because of this system.

It forces the justice system to look backwards instead of looking toward the future: A judicial precedent must always be looking backwards for it to create a standard in the first place. If someone finds themselves violating a rule based on what a judge has ordered in the past, that it creates an unfair system of justice because the offense comes from the judgment

instead of legislation. This type of system does not occur in the United States, but it is possible to have it happen in other developed countries. That is why a system of statutory laws which look for future acts as criminal offenses is usually considered to be a fair system of justice. Instead of searching through thousands of different legal rulings to see if someone has done something wrong, statutory ask create legislation which become part of the public record¹⁶.

This process can introduce unnecessary restrictions into the law: Judges can rule on specific cases in ways that a legislative body would never anticipate. If such a situation occurs, then the process of judicial precedent can introduce unnecessary restrictions into the law. Although it is necessary for legal systems to stay up-to-date with the changing circumstances in society, this disadvantage often makes it difficult, if not impossible, for judges to develop the legal doctrine that is necessary to provide a justifiable outcome. Instead of looking at the present circumstances of a case, this philosophy can cause judges to rely on previous decisions which may not apply under the current circumstances.

Judicial precedents can create more applicable decisions for a case than is necessary: One of the significant disadvantages of judicial precedent is that the total volume of cases which exist in the law may result in too many of them being available to consider. This issue can cause confusion because attorneys on both sides could potentially offer a precedent from case law that justifies their position to the court. It would then be up to the judge to determine which side has firmer ground to stand on when making their arguments in an adversarial system.

Some judges might look for reasons why the judicial precedent shouldn't be followed: There are times when a judge gets so frustrated with the circumstances in society or the legal system in general that they look for ways to get around the judicial precedent that is in place. You can tell when this issue occurs in the court because the decision or ruling which is rendered seems illogical. When the doctrine is not enforced as intended, then there can be dangerous consequences to such an action. Overruling previous cases to set a new precedent can do more than spark outrage. It could potentially set aside convictions or verdicts.

Outside rules can change how the doctrine of judicial precedent applies: Since the Human Rights Act of 1998, the doctrine of judicial precedent has seen significant weakening because of the way that principles and rules must now apply. They must be read in such a way that they are compatible with whatever rights are contained in the European Convention

¹⁶ <https://connectusfund.org/6-advantages-and-disadvantages-of-judicial-precedent>

of 1951, which means amendments are necessary to change any issues which may create a conflict. This outcome makes it possible for the lower courts to overturn higher court rulings because of the outside legislation mandating domestic change.

XIV. CONCLUSION:

The brief discussion about the legal value of precedents we can clearly infer that these play a very vital role in filling up the lacunas in law and the various statutes. These also help in the upholding of customs that influences the region thereby making decisions morally acceptable for the people. This thereby increases their faith in the judiciary which helps in the legal development. The doctrine of judicial precedents primarily assists courts when making decisions via previously decided case law. This certifies that certainty and consistency is being provided within the judicial process to be effectuated. Legal rules and principles can also be developed under this process and a more flexible judicial system is established. At last precedents brings certainty in the judicial system. It is one of the important sources of legal system.
