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Precedent: A Study

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ABSTRACT

“One precedent creates another and they soon accumulate and constitute law. What yesterday was a fact, today is a doctrine.”

-Junius

Judicial Precedent is an indispensable source of law in the common law legal system. In the paper, we have discussed its origin and the history through which it came into being. It was initially established in England under the rule of Henry II, under which central court judges were assigned to resolve district level issues and disputes, relying on their interpretations of the customs in prevailing at the time. This was all later discussed in the central courts, written down and recorded in books. The doctrine of judicial precedent is defined by a Latin term ‘*stare decisis*’ which interprets as ‘to stand by things decided’. Further in the paper, the binding force of precedent is discussed with putting light upon the limiting factors of such precedents. Moreover, for better illustration of Latin phrases ‘*Ratio Decidendi*’ and ‘*Orbita Dicta*’, case laws such as that of *S.R. Bommai v. Union of India*, *Bridges v. Hawkesworth*, *Armory v. Delamirie* are taken into consideration. At last, discussing the merits and demerits of judicial precedent and hence concluding the paper.

Introduction

The doctrine of precedent can be put into words in two different aspects according to Salmond,

- 1) in layman terms, doctrine of precedent solely includes case laws that are cited and followed by the court in future judgement making
- 2) whereas in technical term, case laws that merely do not have strong binding authority but as well as case laws that followed come under judicial precedent

Judicial Precedent is an integral part of the English legal system as majority of common laws are not written rather based on laws created by judges on account of similar dispute that have already been resolved in previous judgments,

Hence the court in most cases is bound to follow the reasoning used in the prior judgments.

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Precedent can either be instructive as well as may not be authoritative in some countries viz. Germany, France or Italy whereas in other countries like where English legal system is being followed it does not only hold authoritative powers but also serves as legal source of law which has to be followed by the courts in the country.

A statement of law once passed by a judge, in a particular case, will have a binding authority all the lower courts in such a manner that it turns out to become a law made by a judge. The binding authority of precedent also depends on 2 major factors that can influence it, which are: -

1) The superiority of the court that pronounced it

The court must be senior enough for the judgement to be binding to other levels

2) Ratio Decidendi

It is not the judgment that is binding but rather only the ratio decidendi that is the reasoning behind the judgement that has the binding authority

Under common law legal system, precedent plays an important role in judgement of cases with the help of some set rules that are based on the concept that, cases with similar facts are most likely to give same or similar outcomes. '*Stare Decisis*' is the principle under which judges are subject to precedent, this principle is a Latin phrase which when translated to English means

“To stand in the-things that have been decided.”

The doctrine of precedent acquired a lot of acceptance and importance in the English legal system due to the fact that it leads to certainty of law which guides a judge to predict the decision, as well as it is always favourable to have an approximate idea of where the case might lead to, but on the same hand the rules under precedent should be discarded if there is contradiction with laws or if it might harm the social welfare of the society as a whole.

A judicial precedent has the power to establish laws but cannot abolished the ones existing already not only that but judges are not also allowed to put their views in place where there already principle of law exists. Judicial precedent can only be used in places where is a void

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that needs to be filled in the legal system and try to abolish or eliminate the imperfectness that might exist in the existing principle of law.

History of Precedent

The doctrine of Precedent was developed in England under the rule of Henry II, in was under his rule that a unified common law legal system was also established thereby eliminating the local control and remedies and henceforth uplifting the jury system. In contrast to the present court system, under his rule, the jury reached its decision by measuring common local knowledge rather than just relying on evidences presented.

The development of this doctrine stated when Henry II started the practice of sending his central court judges to various districts in order to hear all the various disputes that are going on in the country. The judges further resolved these issues and disputes on the basis of what they interpreted the customs, prevailing at that time, to be. These judges were then called back to the central courts in London and all the judgments that were passed by them to resolve the issues and disputes were discussed with other judges and all these were written down and recorded in books.

This system was followed for a long time and it slowly gave birth to the principle of '*stare decisis*', where judges were subject to follow the ruling of earlier judgments that were passed by judges in upper courts, if two cases had similar facts, thereby the judge was expected to accept the interpretation of the law by an earlier judge and apply the same principle in the current judgement.

It is quite relevant to interpret that, judge made laws have served as a source of law for hundreds of years even before parliaments had the legislative power to make such laws, which tells us about its importance in it serving as a source of law.

Binding force and its weakening factors

Binding Force of Precedent

The binding force of judicial precedent depends on majorly on the legal system of a particular country and the level of court it was passed by. For instance, in America or England, it has as much binding force as an act passed by the Parliament whereas in other continental countries it may not carry much binding force, and the judges may deny to look from the same perspective as it was earlier.

In India, the judgments made by Supreme Court have the binding and authoritative power,

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unless it has not overruled its own judgment.

The authoritative and binding force of precedent and its importance has also been highlighted in *Hari Singh v. State of Haryana*¹, in which the apex court, states that in absence of this binding force of precedent, litigants will attempt to take forward every case to the highest possible court with the hope to have judgement in their favour. In such a situation, the very purpose of establishing such harmony court system will be destroyed and will also further lead to disorganisation and chaos in the judicial system.

Weakening factors of the binding force of precedent

Not only overruling of a judgement, but there are other factors and circumstances that weaken the judicial precedent binding force and thereby losing the binding authority. These circumstances are as followed:

1) Ignorance of Statute

The binding force of precedent is lost if it's done with an ignorance of any law or any rule that has legal status. It is also loses its binding force if, by ignorance or negligence, the court had the knowledge of such law but did not acknowledge its relevance.

2) Contradiction with decision of higher court

A precedent is considered null and void if it is contradicting a decision or judgment passed by a higher court, hence a judicial system is subject to follow its own previous decisions as well as follow decisions of courts of higher jurisdiction. However, a court may refuse to follow its previous decision due to inconsistency in the previous one.

3) Contradiction of judgement at same level

In the judicial system a court is not subject to follow its previous decisions or judgments rigidly, there can be contradictions between the current and earlier decisions, and these contradictions might arise unintentional or by ignorance during citing the previous decision. During such circumstances, the binding force of precedent loses its authority.

4) *Due to sub silencio*

¹Hari Singh V. State Of Haryana,1993 SCC (3) 114

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Sub silento is a Latin term that when translated to English means ‘in silence’ or ‘under silence’, this term is used in reference when something is not expressed properly or not argued about. In precedent, the binding force is held null and void when a particular point in the previous decision is *sub silento*, that is, it is not argued upon and the decision was silent about that particular point.

5) Decision made by equally divided bench

There might be cases where a bench may be equally divided, in such cases, it is common practise to dismiss the appeal and hold that the decision under appeal was properly made and correctly decided upon. This problem is less likely to occur nowadays as the bench usually consists of odd number of judges, but in India still the high court bench is equally divided and at times the case is referred to a third Judge, whose decision will be final and binding unless and until it is overruled by Supreme Court.

6) Dissenting Judgement

Most judicial decision related to a case are taken with agreement of all the judges, but there are times when a couple of judges may have a slightly different perspective that might be contrary to the majority. The judges are always free to form their own opinion about a case in hand even though their opinion is contrary to the majority but efforts are always made to minimise this difference in perspective related to law or rules that hold statute. These dissenting judgments do not question the authority of law but rather gives a scope to correct or improve errors that might have occurred rather than just blindly sticking to the binding force of doctrine of precedent. Under such dissenting judgement the binding authority of precedent is held null and void.

7) Incorrect decisions

Decisions which are found to be in contrary to the fundamental laws or decisions which are understood or interpreted in a wrong way, loose their binding force.

8) Invalidated Decisions

A decision loses its binding power if there is an inconsistency of statutes by followed enactments. A decision also loses its binding power if it is overruled or reversed. A decision is also held invalidated if a discrepancy is noticed, it can be invalidated by enactments or by decision of a higher-level court.

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9) Ratification or reversal on distinct grounds

A higher court may reverse or ratify a decision passed by a lower on a distinct ground which was not touched by the lower court in the original judgement. In such cases, the original judgement does not lose all the authority but rather the higher court takes distinctive view about the points that were not touched upon so that the following courts consider it rightly decided.

Ratio Decidendi and Obiter Dicta

Ratio Decidendi

A general rule under doctrine of precedent is that a court is subject to follow the decision by its higher courts, like in India according to Article 141, a law or judgement declared by a Supreme court are bound to all level of courts in the country.

Similarly, all decision by High court is bound on its lower court but a decision passed by a High court or courts at similar levels are not binding on other courts at the same level.

There are majorly 2 different aspects of a decision to look at, those are:

1. The principle or reasoning that the decision establishes on the rule of law and that principle or reasoning gains an authority that is binding on all third party and this is generally known as the ratio decidendi of the case
2. The decision made between the litigants upon which a judgement has been passed and may not be pursued thereon by the same litigants, this has no effect on third party in major cases and this is usually know as *res judicata* between the parties

The term '*ratio decidendi*' is a Latin phase which translates to the meaning 'reason of the decision'.

The *ratio decidendi* of a judgement needs to be selected or taken from the entire judgement after reading the judgement as a whole. A judgement by a court should not be treated as a statute as the judges interpret the statutes rather the observation about principle used and reasoning behind the judgement should hold the position of statute.

Case Law

For illustration purpose we can take the case of **Armory v. Delamirie**²

² Armory v. Delamirie, 93 ER 664, Volume 93

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In this case, the plaintiff, who is chimney sweeper boy, finds a piece of jewellery whose value is unknown to him and therefore he takes it to the defendant, who is a goldsmith, to know the exact value of the jewellery. The defendant then takes the piece of jewellery from him and acted as if he was going to weight the jewellery to determine the exact value of it, and after a while the defendant asked his employee to convey to the plaintiff that it is worth three halfpence. After knowing that the value, the plaintiff asks the defendant to return it. The defendant even offered money to the plaintiff but the plaintiff denied. Then the defendant returns the piece of jewellery but without the jewels in it, that actually holds the main value. The boy(plaintiff) then sues the goldsmith(defendant).

The **issue** that rises in this case is that is there a right of possession for a finder of an item that may claim against someone, other than the rightful owner, that would be recognised by the court?

The **rule states** that the finder of an object holds title to the object subject to no claims except that of the rightful owner.

The court held that the Plaintiff has a cognizable right of possession, but it is not absolute. The Plaintiff who discovered the jewel has a right of possession that allows him to hold it against any claim other than that of the rightful owner. In terms of loss, the Court ordered the jury to award an amount equal to what a comparable jewel would be worth in the absence of the real jewel and the defendant was held responsible for it.

In the above case the ratio will be the rule of finder keeper that states that ‘the finder of an object holds title to the object subject to no claims except that of the rightful owner.’ This will be binding on all future decisions.

The same ratio was applied in the case of **Bridges v. Hawkesworth**³, where the plaintiff finds money on the floor of the defendant’s shop and request him to hand it over to the respectful owner. After 3 years, when the money was held unclaimed, the plaintiff requests the money which the defendant denied and therefore the plaintiff sues the defendant.

In this case, the jury ruled in favour of the plaintiff under the ratio of the case **Armory v. Delamirie** and the jury saw no need to consider this case differently from the rule defined in **Armory v. Delamirie**, which specifies that the finder of an object holds title to the object subject to no claims except that of the rightful owner.

3 Bridges v. Hawkesworth, Court of Queen’s Bench 21 L.J. Q.B. 75 (1851)

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Obiter Dicta

Obiter dicta is a Latin word which when translated in English means "by the way" and is commonly used in law to refer to a judge's remark about it which, unlike ratio decidendi, is not binding. It is just an expression by the jury which has no binding power or weight added to it. These are the jury's additional thoughts, comments or perspective on various topics that were seen throughout the case. These also clarify the court's reasoning for its decision, but they are not binding and can provide precedent on related cases in the future.

These *Dicta* are of various kind of and carry different weight to them. At times they may be just a casual expression by the judges whereas some dicta are intentionally made after a point being cleared and argued upon in the court.

The difference that exists between obiter dicta and ratio decidendi as, obiter dicta is just an opinion on fact that may or may not be related to the case in hand whereas ratio decidendi revolves around the facts and rule that are essential for the case and judgement.

Case Law

In the case of *S.R. Bommai v. Union of India*⁴

The governor of Karnataka received several letters from the council member withdrawing their support from the ruling party, which would lead to loosing of majority. A report about the same matter was forwarded to the President and called upon to impose Article 356(1) of the Constitution.

On the very same day called a meeting to prove a majority of his government, and this information was also reported to the President but on the same day itself another report was sent that stated *Mr. S.R. Bommai* was failed to prove the majority of his government in the assembly and therefore requested the President to declare an emergency under article 356, on the basis of this report the President declared emergency in the state.

A writ was filled there after seeking validation of the declaration in the High Court, seeing similar issues in other states as well, a 9 judges' bench of Supreme Court heard the issue together.

During the course of the judgment, Justice *Sawant and Kuldeep Singh* observed that social pluralism comes under the basic structure of the constitution as well as Justice *Ramaswamy*

⁴ S.R. Bommai v. Union of India, AIR 1994 SC 1918

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observed that socialism, social justice and fraternity are also a part of the basic structure of the Constitution. Whereas Justice *Ahmadi* stated his opinion that rights under Article 15, 16 and 25 also form a part of the basic structure.

These observations or opinions of the judges will not be considered ratio but rather will be part of obiter dicta that was given during the course of the case, since these were not directly in connection with the case.

The Judgement of the case held that the authority of the president to impose emergency hold certain limitations, and the emergency whenever imposed should be on the basis of the reports and opinion stated by governor of the state. As well as the Honourable court holds the power to judicially review the declaration of the state of emergency and can state it null and void if it is found to be deceiving not only that but the honourable court also assessed that the essence of Federalism, Secularism, and the proclamation being subject to judicial review.

Merits and Demerits

Merits

1. Modernisation

Precedent helps the law keeping up with needs of the society as it gives some authority to the judge to modernise the law as per the requirement of the society and needs of the society. It is also based out of the years of experience of the judge that helps him interpret the law in a better and mature manner that serves as a guidance for other judges in decision making and giving final verdict.

2. Practical Result

Since precedent is based out of the problems that were being faced during the course of the judgement they deal with problem on a practical ground where as laws that were enacted are mostly formed on the basis of assumptions which can lead it to being loopholes in rules and laws enacted.

3. Certainty

Once a judgement has been passed, the statutes involved are easier to understand and it creates a sense of certainty about future cases having similar facts, therefore precedent help the people understand the law in a simpler form to a considerable extend.

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4.Guidance

Precedent provides guidance to judges in deciding case and simplifying the process.

5. Increase Effectiveness

It helps judges and the lawyers of the litigants save time and energy by exempting them from finding the relevant laws from law books thereby making possible decision making on time that is increase the effectiveness of the judgement.

6.Flexibility

Precedent increases the flexibility of the law so that making it possible to adapt to the changing situation in the country as well as legal world.

Demerits

1.Difficulty in finding

Since these case laws are posed in law reports in such a vast number it gets difficult to keep a tab of all cases and gets very tough to find a particular case related to a particular law. Case laws are just like finding silver in the mine whereas law and legal rules are silver coins ready to be used.

Due to the digitalisation of these law reports this issue is getting minimised by a considerable amount.

2. In the view of Bentham, precedent cannot be considered as law as it is not backed by the authority of the State whereas in the perspective of Austin, since the judges are the agents of the sovereign, hence any judgement given by them with respect to the law is similar to that of a state enforcement of law

3. Incomplete

As per Frederick Pollock, a law that is formulated on the bases of a case cannot be considered to be complete as a judge will only look at the facts presented to him that were involved in the case.

4. Overlook fundamental rules

Judicial precedent tends to not take into account the fundamental rule of natural justice that are necessary to be known before implementing a law.

5.Inaccurate judgments

There are times when a higher court may pass an inaccurate judgement which then the subordinate court will have to follow irrespective of it being inaccurate, which might create a

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problem for the subordinate court and hinder the development of law in the right direction

6.Hurried decision making

It is often considered that precedents are a result of decisions that were made in a hurry but the reality is different as all decisions are made with careful analysis of facts and upon listening to both the sides.

7. A precedent is only created when a litigation has been done on that issue but there might be chances that there might not be any litigation of an important issue under which a law can be created, therefore development of law through case law will majorly depend on chance.

8.Responsibility and accountability

Since judges are not accountable to anyone about the judge they pass, they might misuse this power which may develop an inaccurate judgement and create hindrance in the development of case laws. This issue is not relevant enough as, even though they might not be accountable to the legislature but are held responsible by public and guide by their opinion.

9.Validity

One of the major concerns in precedent is what test procedure be done to assess the validity of the case made law. It is still a question that on what basis should these be validated, whether it should be dependent number of cases on which this precedent was followed or on the reputation of the judge who came up with the precedent. Therefore, the validity and the feasibility of these laws still remains a questionable topic.

Irrespective of the merits and demerits of precedent, it is considered to be an important part of legal system in many countries like India, U.K., U.S. and many more countries. The doctrine of precedent is unique in itself as it considers the judge as the creator, interpreter as well as the modifier of law as well as it helps the legal system in keeping up the law with the social changes that occur in the society.

Doctrine of *Stare Decisis*

Stare decisis is a legal doctrine that requires judges to obey precedent when making decisions in cases with similar facts. It is a Latin phrase which means “let the decision stand in its rightful place.” Whenever there is a judgement passed on the basis of a new principle, it creates a binding authority over its lower courts as well as it forms a persuasive authority over the courts at the similar level. Under this doctrine it is pre assumed that there exists a hierarchy of courts for example, In India, there is subordinate or district court at the very basic level, above them is the Higher court and at the apex is the Supreme court of the country.

There are some general principles on the basis of which the doctrine of *stare decisis* is established, which are as followed:

- 1) All the judgement by the higher courts have binding authority over the lower courts
- 2) The court at the apex level, Supreme court in the case of India, is not bound by its own judgement that was passed earlier.
- 3) The judgments passed by the High court does not have a binding authority over other Higher courts but rather holds persuasive value.
- 4) A judgement passed by a division bench of a High court has binding authority over a single bench judge whereas a judgement passed by a Single bench judge of same High court is not binding over the division bench.

Difference between *Stare decisis* and *Res judicata*

The doctrine of *res judicata* means “a matter decided” which here refers to that both the parties in a litigation or their successors cannot indulge in any further legal proceedings upon the same matter once the final judgement has been given.

The crucial points which differentiate these two doctrines are stated as followed:

- 1) The doctrine of *res judicata* is would be applied to the judgement of the lawsuit whereas the doctrine of *stare decisis* revolves around the reasoning of the case rather the judgment.
- 2)The binding force that *stare decisis* hold is for all the people indulge in any future cases, on the other hand *res judicata* is only binding to the litigants involved in a particular lawsuit
- 3) *Stare decisis* is commenced with regards to decision passed only by High Court or Supreme Court in India whereas *res judicata* applies to all level of courts.

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4) *Stare decisis* is commenced right after the judgement by the court whereas *res judicata* is applied once the period for appeal has passed.

Overruling

Overruling refers to the act of nullifying, done by a superior court with respect to a prior ratio set by a lower court, in a prior judgement. Irrespective of the fact that overruling disapproves a prior ratio, it does not affect any previous judgement given by any court, therefore any matter that has already been settled will not be affected.

Overruling can be done due to few reasons that might include the following:

- 1) In case of original judgement being faulty or inconsistent
- 2) In case of discrepancy between the older precedent and a new judgement or statute

An overruling which has an effect in future lawsuits, that is an effect that takes place “from now” is called prospective over ruling. This type of overruling will not have retrospective affect but rather will only affect future judgments.

This doctrine of prospective overruling was adopted in India in the case of *GolakNath v. State of Punjab*⁵ in which the Supreme Court Overruled its previous decision passed in the case of *Sankari Prasad v. Union of India*⁶ and *Sajjan Singh v. State of Rajasthan*⁷ making the 1st and 17th Constitution Amendment valid.

Conclusion

We may conclude from the above examination of the legal significance of precedents that they serve a critical role in filling in the gaps in the law and other statutes. These also aid in the maintaining of ethnic norms, resulting in morally acceptable judgments for the people. As a result, their trust in the judiciary grows, which supports judicial growth.

That being said, precedent also helps in passing judgments with similar facts and *ratio* at a faster pace thus, giving justice at the easiest. Furthermore, this saves both the judges and the attorney a lot of time, which is a major issue in today's legal system with so many cases that

5 GolakNath v. State of Punjab, AIR 1967 SC 1643

6 Sankari Prasad v. Union of India, AIR 1951 SC 458

7 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845

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have been sitting for years, as well as due to the application of precedent in the judicial world
Law is made more definite.

Reference

Dr. N.V. Paranjape, Studies in Jurisprudence and Legal Theory, pg number 357-378



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