Precedents as a source of law

*The judiciary adjudicates the rights and obligations of the citizens, as per legislation, customs as well as a sense of justice. Judges often also take guidance from previous decisions and rely on past interpretations of questions of law. Such instances or cases which may be taken as an example of rule for subsequent cases are known as precedents. The importance of precedents is recognized in almost all legal systems across the world, since the ancient eras. While the degree of persuasiveness may vary as per the court delivering the judgment, the doctrine of stare decisis binds courts to stand by their decisions and not disturb the undisturbed.*

Introduction

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.

Inductive and Deductive methods

In the inductive method, there is a great reliance placed upon the decisions of the judges. Before deciding a case, the judges look into previously decided cases of a similar nature by their own court or by the superior court. From particular cases, they deduce general rules, and apply them on the cases before them and decide accordingly. This is known as Inductive method.

In the deductive method, there is a great reliance placed legislatures and enacted statues. In such a system, the cases are decided on the basis the enacted legislature and statue that are codified and the judges decide cases on the basis of these codes and not on the basis of previously decided cases. This method is called the Deductive method.

Authority of previously decided cases

In almost all legal systems, the judges take guidance from the previous decisions on the point, and rely upon them. But the authority of such decisions is not the same in all the legal systems. In most of the countries including India, acquire their knowledge of the law through decisions of higher tribunals than from anything else. Such decisions are compiled and published in reports. These reports are considered to be very valuable from the legal literature perspective. These decisions are very efficient in deciding cases of subsequent cases of similar nature. They are called judicial precedents or precedents.

Definition of precedent

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.*’[1]

According to Keeton, ‘a *judicial precedent is judicial to which authority has in some measure been attached*.’[2]

According to Salmond, ‘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.

According to Bentham precedents are ‘Judge made Law.’

According to Austin precedents are ‘Judiciary’s Law.’

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.

Nature of precedents

They must be ppurely constitutive and not abrogative at all. 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.

The function is limited to supplying the vacancies of the legal systems, filling up with new law the gaps that exist.

Importance of precedents

In the 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.

In the 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.

Types of precedents

Persuasive precedents

Persuasive precedent (also persuasive authority) is precedent or other legal writing that is related to the case at hand but is not a binding precedent on the court under common law legal systems such as English law. However, a persuasive authority may guide the judge in making the decision in the instant case. Persuasive precedent may come from a number of sources such as lower courts, “horizontal” courts, foreign courts, statements made in dicta, treatises or law reviews. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is taken into account by the courts.

Lower Courts

A lower court’s opinion may be considered as persuasive authority if the judge believes they have applied the correct legal principle and reasoning.

Higher Courts in other Circuits

A court may consider the ruling of a higher court that is not binding. For example, a district court in the United States First Circuit could consider a ruling made by the United States Court of Appeals for the Ninth Circuit as persuasive authority.

Horizontal Courts

Courts may consider rulings made in other courts that are of equivalent authority in the legal system. For example, an appellate court for one district could consider a ruling issued by an appeals court in another district.

Statements made in obiter dicta

Courts may consider obiter dicta in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts.

The *obiter dicta* is usually, as its translation “other things said”, but due to the high number of judges and several personal decisions, it is often hard to distinguish from the ratio decidendi (reason for the decision).

For this reason, the obiter dicta may usually be taken into consideration.

A Dissenting judgment

A judgment heard by a tribunal, and one judge dissented from the decision. The judge in the next case can decide to follow the dissenting judge’s obiter and rationale. The judge can only opt to overturn the holding of a court lower or equivalent in the hierarchy, however. A district court, for example, could not rely on a Supreme Court dissent as a rationale for ruling on the case at hand.

Treatises, Restatements, Law Review Articles

Courts may consider the writings of eminent legal scholars in treatises, restatements of the law, and law reviews. The extent to which judges find these types of writings will vary widely with elements such as the reputation of the author and the relevance of the argument

Courts in other countries

An English court might cite judgments from countries that share the English common law tradition. These include other commonwealth states (for example Canada, Australia, or New Zealand) and, to some extent, the United States.

It is controversial whether it is appropriate for a U.S. court to consider foreign law or precedents. The Supreme Court splits on this issue. In ***Atkins v. Virginia***, for example, the majority cited the fact that the European Union forbid death penalty as part of their reasoning, while Chief Justice Rehnquist denounced the “Court’s decision to place weight on foreign laws.” The House of Representatives passed a nonbinding resolution criticizing the citing of foreign law and “reaffirming American independence.”

Binding precedents

In law, a binding precedent (also mandatory precedent or binding authority) is a precedent which must be followed by all lower courts under common law legal systems. In English law, it is usually created by the decision of a higher court, such as the Supreme Court of the United Kingdom, which took over the judicial functions of the House of Lords in 2009. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is taken into account by the courts.

Binding precedent relies on the legal principle of *stare decisis*. A stare decisis means to stand by things decided. It ensures certainty and consistency in the application of the law. Existing binding precedents from past cases are applied in principle to new situations by analogy.

There are three elements needed for a precedent to work. Firstly, the hierarchy of the courts needs to be accepted, and an efficient system of law reporting. ‘A balance must be struck between the need on one side for the legal certainty resulting from the binding effect of previous decisions, and on the other side the avoidance of undue restriction on the proper development of the law

Binding Precedent in England

Judges are bound by the law of binding precedents in England and Wales and other common law jurisdictions. This is a distinctive feature of the English legal system. In Scotland and many countries throughout the world, particularly in mainland Europe, civil law means that judges take case law into account in a similar way, but are not obliged to do so and are required to consider the precedent in terms of principle. Their fellow judges’ decisions may be persuasive but are not binding.

Under the English legal system, judges are not necessarily entitled to make their own decisions about the development or interpretations of the law. They may be bound by a decision reached in a previous case. Two facts are crucial to determining whether a precedent is binding:

The position in the court hierarchy of the court which decided the precedent, relative to the position in the court trying the current case.

Whether the facts of the current case come within in the scope the principle of law in previous decisions.

*Stare Decisis*

*Stare decisis* (Latin: [ˈstaːre deːˈt͡s1iːsiːs], Anglicisation: [ˈsteɹɪ dɪˈsaɪsɪs]) is the legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim *Stare decisis et non quieta movere*: “to stand by decisions and not disturb the undisturbed.” In a legal context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.

This doctrine is basically a requirement that a Court must follow the rules established by a Court above it.

The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law. Most such systems, however, recognize the concept of *jurisprudence constante*, which argues that even though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges’ right to interpret law does not preclude the adoption of a small number of selected binding case laws.

Authority of Precedents

The authority of a decision as a precedent lies in its Ratio Decidendi.

Ratio Decidendi and Obiter Dictum

There are cases which involve 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. The principle that comes out as a result of such case is not applicable only to that case, but to cases also which are similar to the decided case in their essential features. This principle is called Ratio Decidendi. The issues which need the determination of no general principles are answered on the circumstances of the particular case and lay down no principles of general application. These are called Obiter Dictum.

It is the Ratio Decidendi of a case that is binding and not the Obiter Dictum that has a binding effect of a Precedent. But it is for the judge to determine the Ratio Decidendi of the decision and to apply it on the case which he is going to decide. This gives an opportunity to him to mould the law according to the changed conditions by laying emphasis on one or the other point.