

LAW OF PRECEDENTS

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- A precedent is a previous instance or case which furnishes an example or rule for subsequent conduct, and a pattern upon which subsequent conduct is based. – *Dias, Jurisprudence, 2nd Edn.*
- Elements of a precedent –
 - (a) Concrete decision – binding upon parties
 - (b) Abstract Principle – binding as an authority on a subsequent judge.
- Precedents may be divided in the following manner, according to Salmond –
 - > Authoritative precedents – a judge is bound to follow.
 - legal sources of law.
 - > Persuasive precedents – judgments of foreign courts, *judicia dicta* and decisions of the Privy Council when it decides appeal cases from colonies.
 - historical sources of law.

HISTORICAL GROWTH OF THE SYSTEM OF PRECEDENTS IN ENGLAND

- Initially began because medieval judges considered themselves charged with the duty of ascertaining and declaring and enforcing contemporary customs and usages.
- By the 18th century, it became an integral part of the common law system. *Lord Mansfield* had consolidated and reaffirmed the doctrine of judicial consistency, and declared – ‘Law does not consist of particular cases, but of general principles’.
- By the 19th century, *Lord Tenterden C.J.* – “Decisions of our predecessors, the judges of former times, ought to be followed and adopted unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of law.”
- *Prof. Holdsworth* in the 20th century, “A certain element of conservation is needed, and the reservations with which the English system of case law is received, enable the judges within fairly wide limits to apply to old precedents, a process of selection and rejection which brings the law into conformity with modern conditions. This is often expressed as the golden mean between too much flexibility and too much rigidity.”

HIERACHY OF AUTHORITY FOR OPERATION OF PRECEDENTS IN ENGLAND

- House of Lords
- Bound by its own decisions.
- Its decisions bind all courts below it.
- Not bound when decision is made in ignorance of statute, or where the principle is obscure, or where it is out of line with established principles and other authorities. [Decided in **Scruttons Ltd. V. Midland Silicones Ltd. – (1962) AC 446 (HL)**]
- Privy Council
- Not bound by its own decisions, but great respect is paid.
- Court of Civil Appeal
- Binds all inferior civil courts.
- Bound by its own decisions (Decided in 1944)
- Not bound when –
 - conflict between its own decisions – it has to chose.
 - When decisions though not overruled, cannot stand with the decisions of the House of Lords.
 - If given in ignorance of a statute or rule having statutory effect.[Held in the **Bristol Aeroplane Case – (1944) 1 KB 718)**]

- Court of Criminal Appeal
- Bound by its own previous decisions
- Bound by those of its predecessors.
- Not bound by decisions of the Court of Appeal
- Not bound by its own decisions when -
 - A decision not argued on both sides
 - A decision that involves liberty of the citizens which is of utmost importance.
- High Court
- Creates a binding precedent for all lower courts.
- In case of an earlier decision of the same High Court by a bench of equal strength, determination should be by bench of greater strength.
- Present High Courts not bound by decisions of old courts of co-ordinate jurisdiction, although they have persuasive value.
- Divisional Court
- Carries greater weight than the decisions of a puisne judge, but cannot overrule that.
- Since recently, bound by its own decisions.

DOCTRINE OF PRECEDENT IN INDIA – A BRITISH LEGACY

- Pre-Independence
- According to S.212 of the Govt of India Act, 1935 - Law laid down by Federal Court and any judgment of the Privy Council is binding on all courts of British India – Privy Council was supreme judicial authority – **AIR 1925 PC 272.**
- Post-Independence
- SC became the supreme judicial authority – streamlined system of courts established.
- Supreme Court
- Binding on all courts in India.
- Not bound by its own decisions, or decisions of PC or Federal Court – **AIR 1991 SC 2176**
- High Courts
- Binding on all courts within its own jurisdiction
- Only persuasive value for courts outside its own jurisdiction.
- In case of conflict with decision of same court and bench of equal strength, referred to a higher bench.
- Decisions of PC and federal court are binding as long as they don't conflict with decisions of SC.
- Lower courts
- Bound to follow decisions of higher courts in its own state, in preference to high courts of other states.

CONSTITUTIONAL PROVISIONS REGARDING PRECEDENTS OF THE SC – SCOPE OF Art. 141

- Art. 141 states, “The law declared by the SC shall be binding on all courts within the territory of India.
- The SC judgements as between the litigants are decisions, as to the nation, they are declaratory of the law – **AIR 1980 SC 286**
- However, Art. 141 does not mean or imply that the law once declared by the SC cannot be altered by a competent legislature – **AIR 1951 Bom. 438**. If, by an amendment the law is changed, the amendment would not affect Art. 141 because the declaration itself would come to an end with the change of the law.
- In **1995 (6) SCC 614**, the SC declared, ‘The court, as a wing of a state, is itself a source of law. The law is what the SC says it is’. This famous statement of the court has been greatly criticized as it gives excess power to the courts, and neglects the concept of separation of powers.
- The objective of this provision is to ensure that the SC may declare law or pass necessary measures that are necessary to do complete justice – **AIR 1967 SC 1643**.
- A minority judgment of the SC is not a binding precedent, but being a judgment of a judge/judges of the highest court, it has great persuasive value – **AIR 1968 Guj 124**

- However a decision is a precedent only when it decides a question of law and not otherwise – **1992 (1) SLR 335(SC)** Decisions of the SC as to as to facts cannot be cited as precedents – **AIR 1960 SC 195**
- The HC in the name of interpreting the judgement of the SC cannot sit in appeal and modify it – **AIR 1986 SC 1455**
- The SC should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case before it - **AIR 1959 SC 149**
- In the case of **AIR 1980 SC 2147**, the SC recommended the framing of guidelines in the exercise of power under Art. 72 and 161. It was held that the court laid down a mere recommendation, not a ratio decidendi, and therefore did not mind the Constitution bench in a subsequent case. Although the Court may recommend the framing of guidelines, such a recommendation is not binding upon the Govt.
- In case of a conflict between two SC judgments by benches of equal strength, it has been held that the later decision has to be followed, it having impliedly overruled the earlier decision – **AIR 1980 SC 1955**. However, if one of the decisions more lucidly explains the situation, while the other leaves it open, the lucid decision has to be taken into account - **AIR 1987 Pat. 53**. This however, would depend upon the facts of each individual case.
- When the SC, with deliberate intent of settling the law, pronounces upon a question, it would be law under Art. 141. Once the law is declared, it is not possible to hang onto a contrary view of the HC merely because it has not been specifically overruled by the SC.

ELEMENTS OF A JUDGEMENT – RATIO DECIDENDI AND OBITER DICTA

- RATIO DECIDENDI
- The dictionary meaning of this Latin expression, is the ‘rule of law on which a judicial decision is made’, or ‘reason for deciding’.
- Every decision has 3 basic postulates –
 - iv. Findings of facts both direct and inferential
 - v. Statement of principles applicable to the legal problems as disclosed by facts
 - vi. Judgement based on the combined effect of the above.
- To consider the ratio decidendi of a case, the SC has to ascertain the principle upon which it was decided. This is sometimes difficult in cases where divergent views are expressed by different judges, but eventually the final decision is taken.
- A decision is binding not because of its conclusion, but in regard to its ratio and the principle laid down therein. General statements made beyond the ratio decidendi have mere persuasive value only. This was held in **(1996) 6 SCC 44**.
- A case is only an authority for what it decides, and not from what logically follows from it – held in **AIR 1967 SC 1073**
- Although the decidendi can be applied to similar cases on basis of fact and law, the SC has said that care must be taken to ensure that it is not applied mechanically.

- OBITER DICTA
- *Obiter dicta* is ‘a judge’s expression of opinion uttered in court, or while giving judgement, but not essential to the decision and not part of the *ratio decidendi*.’
- It also means an incidental remark, or something said in passing.
- Normally, even an obiter dictum is expected to be obeyed and followed. The obiter dicta of the SC are entitled to considerable weight – **AIR 1995 SC 1729, AIR 1959 SC 814.**
- However, the weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, no matter how eminent cannot be treated as a having the weight of authority. In some cases, the obiter dicta of the court will have mere recommendatory effect, and the government or parties to the case are not bound by them.
- In India, it has been held by the Bombay HC, that the obiter dicta of the PC were binding on all courts in India, on the ground that if the highest court of appeal had applied its mind and decided a question, judicial discipline required that the decision should be followed – **56 Bom L.R.1156.**
- In England obiter dicta are not binding on any court – **Halsbury, Vol 22, p. 797.**

PER INCURIAM

- *'Incuria'* literally means *'carelessness'* and the phrase *'per incuriam'* is used to describe judgments that are delivered with ignorance of some statute or rule.
- It is well-settled in the English doctrine of precedents that a judgement rendered in ignorance of a statute, or a rule having statutory force, which would have affected the result is not binding on a court otherwise bound by its own decisions. In **London Street Tramways Co. v. London County Council – (1898) AC 375**, the House of Lords recognized that such a judgment was an exception to the rule that the House of Lords was absolutely bound by its own judgments.
- The same exception was recognized by the Court of Appeal in the **Bristol Aeroplane case – (1944) 1KB 718**. The court gave the explanation “It cannot be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.”
- The Court of Appeal in **Morelle Ltd v Wakeling [1955] 1 All ER 708, [1955] 2 QB 379** stated that as a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong.

- "A decision is given per incuriam when the court has acted
- In ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction while covered the case before it, in which case it must decide which case to follow, or
- When it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or
- When the decision is given in ignorance of the terms of a statute or rule having statutory force.
- A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake".
- The law is the same in India, and a judgment rendered in ignorance of a relevant constitutional or statutory provision is not binding upon any court in India. This principle has been accepted by the SC in several cases including (1988) 2 SCC 602, AIR 1955 SC 661, 1985 Sup SCC 280, (2000) 4 SCC 262 and recently in (2007) 7 SCC 667.

DOCTRINE OF STARE DECISIS

- The dictionary meaning of this phrase is “the legal principle of determining points in litigation according to precedent”
- The doctrine of stare decisis is invoked when the reversal of a decision, followed for a considerable length of time, is likely to seriously embarrass those who had, relying upon its particular interpretation of a statute, would find themselves frustrated by a different interpretation.
- The court should as far as possible stick to the doctrine of stare decisis. One of the chief reasons is that a matter that has once been fully argued and decided should not be allowed to be reopened.
- However, this is not a universal command. If the rule were to be followed blindly, it would stunt change, and the growth of society. Where public interest is invoked, and where the question is one of constitutional construction, the doctrine may be departed from— **AIR 1953 SC 252.**
- The important principles in reconsidering the decisions of the SC were set out in the **Bengal Immunity case – AIR 1955 SC 661**. The SC said there is nothing to prevent the SC from departing from a previous decision if it is convinced of its error and its baneful effect on the general interest of the public. However, this power of review must be exercised with due care and caution and only for advancing public well-being.

IMPORTANCE OF DISSENTING JUDGEMENTS

- The importance of dissenting judgements was discussed in detail in the English case of **Smith v. Central Asbestos Co. Ltd – (1973) AC 518** (also called the Dodd's case), and later in the case of **In Re Harper v. NCB – (1974) 2 WLR 775**. In the Dodd's case, Lord Denning stated that 'We can only rely upon the reasoning which the majority relied upon to deliver the judgment. We cannot use the reasoning of the minority, because it must be wrong, as they have come to the wrong judgment'. The reason behind this is that, a dissenting judgment valuable and important, though it may not count as part of the ratio, for it played no part in the court's reaching their decision. This opinion of Lord Denning has been greatly criticised.
- We adopt a different principle in India, regarding the importance of dissenting judgments. Art. 145 of the Constitution clearly gives judges the power to differ from the majority and deliver their own judgment, while a number of cases through the years have established that although dissenting judgments are not binding upon the court, they have great persuasive value.
- When there is only one question before the Court, where the judges agree on a general principle of law, but differ as to its specific application in the case, the ratio of the case must be identified and that alone is binding.

- In the **Delhi Laws case – (1955) 1 SCR 298**, several kinds of delegation was upheld by the judges, but no principle could be deduced from it as all the judges delivered different opinions. If a pattern could be identified from such a case, that alone would be binding in subsequent cases.
- The importance of dissenting judgments is best summed up by the following lines in the case of **AIR 1976 SC 1207**, where the court held, “While it is regrettable that judges may not always agree, it is better that their independence should be maintained and recognized, than that unanimity should be secured through sacrifice. A dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error which the dissenting judge believes the court to have made.” Dissenting judgments thus can always be used for persuasive value.

LANDMARK CASES WHERE THE SUPREME COURT HAS LAID DOWN NEW GUIDING PRINCIPLES

- **Vishaka case – AIR 1997 SC 3011**

The SC laid down guidelines for the prevention of sexual harassment of women at the workplace and recommended that the govt enact a law for the same. Such law having not yet come into force, till date, the guidelines given by the court in this case are being considered as having the force of legislation.

- **M.C.Mehta v. UOI – AIR 1987 SC 1086**

The court laid down a new rule of strict and absolute liability in respect of hazardous and inherently dangerous activities. This concept was initially born in England in the case of **Rylands v. Fletcher – (1868) LR 3 HL 330.**

- **Vineet Narain v. UOI - (1998) 1 SCC 226.**

The SC laid down 'Seven principles governing public life'. The Court also gave directions for the setting up of the Central Vigilance Commission to govern the working of the CBI.

- **PUCL v. UOI and others – still going on.**

The SC has till date passed several orders directing the proper enforcement of the various schemes relating to food distribution. It has also given a set of guidelines for the regulation of these schemes.

- In July 2007, the court passed an order detailing the principles laid down by the Hon'ble Supreme Court in relation to Copyright in derivative works; and its own judgement publications. The test for originality in derivative works having been clearly laid down, the judgment would serve as a guiding force in the area of copyrights.

CIRCUMSTANCES WEAKENING THE BINDING FORCE OF PRECEDENTS

1. Reversal
2. Overruling
3. Refusal to follow
4. Distinguishing
5. Ignorance of Statute – Per incuriam
6. Precedent sub silentio or not fully argued
7. inconsistency with earlier decisions of higher courts
8. Inconsistency with earlier decisions of the same rank
9. Decisions of equally divided courts
10. Erroneous Decisions