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Short Communication

Precedent as a Source of Law: Follow or not to Follow!

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Abstract

The doctrine of Precedent has an exalted pedigree and forms the unique entry in the hallmark of the common law ethos as a primary source of law. It represents the common law precept that judges are to follow the decisions in prior cases and are not to revisit issues of law that have already been settled after careful deliberations. This discussion note programmes to peek this hallmark across the ethos and quality of a precedent as a primary source of law. In this context, it is rather adumbratively observed that if a policy motivated judge distorts the law away from efficiency then diversity of judicial activism often prods legal evolution and increases the emancipation of legal certainty & precision. During the interpretation of the law, the courts are generally bound by a prevailing benchmark of staredecisis or bunch of precedents. This capsule discussion is carried along the jurisprudential and legal context and the metric affirms that greater the similarity between the cases the stronger the precedent, however a flip-flop can be considered to secure the notions of Justice.

Keywords: Precedent, Courts, Ratio, Dicta and Law.

1. Introduction

Awesome! Every law student knows, nothing comes out of a blue. The doctrine of precedent has its genesis in the common law. These law students, with relative ease are very familiar with the topic of precedent, which forms the edifice and fundamental plinth across the English, American and Indian Jurisprudence of decision-making. A chivvied reamer of the burgeoning literature on the topic already exists and the templates should not subside. It has logic of its own, according to which it can be applied vertically whereby if a precedent is established in a higher court it is automatically binding upon all lower ranking courts. Its ripe fruits could be tasted in both kinds of its usage: vertical as well as horizontal, since, it has also a corollary horizontal application.

As against a legislative enactment, it develops out of a judicial outcome and plays a significant role in the interpretation, understanding, presentation, and resolution of some fresh cases. It literally means "to stand by things decided." It gives greater precedential weight to past decisions so that uniform principles applied to similar situations yield similar positives in the new cases vis-a-vis old teachings. To illustrate the legal context and the central jurisprudential notion of precedent more precisely, we should also peek the sister corollaries of vertical and horizontal application of this exalted principle.

It deals with the implications of a binding ratio and a non-binding dictum. It follows that a binding precedent has to be followed whereas a persuasive precedent does not have to be followed, but might be taken into account by the judiciary in making its decisions and it is the discretion of the court to follow or not to follow it. Keenly relying on the lessons of the past to solve the newer problems at hand and handle future situations is a fundamental spirit and message of this doctrine.

Follow or not to Follow! The reliance placed on the following or not following a precedent is pervasive in our society, and not only in the legal circles. In the basic frame of our day to day life we often consider what we have already done in the past, to help us make decisions with conviction and to bring an approach of consistency to our do's and don'ts with our fellow workers, students, colleagues and many more people, so that we do not adrift unfairly and tweak in a non-transparent manner in our affairs with others at all alike situations. Another positive implication would be that we would be recognized as right doing people because a switch to

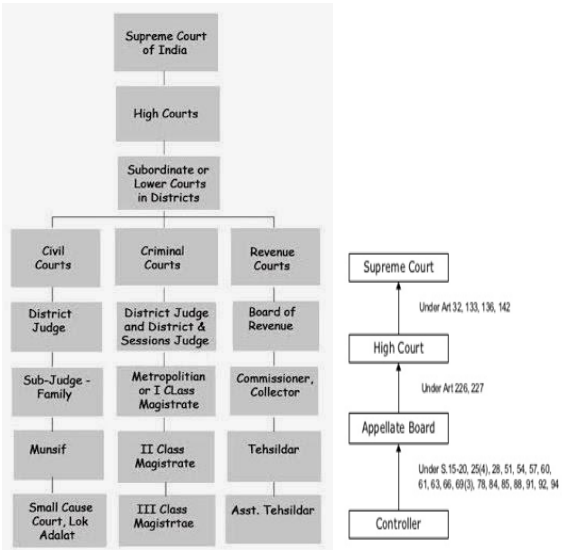
unnecessary flip-flop creates uncertainty and instability for the parties involved in the matter.

The chief element of the major legal systems, whether common law systems or civil law systems, employ different doctrines to determine the emphasis placed on the reliance of precedent. Among the two major legal systems, common law system has been associated with the doctrine of staredecisis, under which courts are bound by the precedent, and civil law system which has been associated with the doctrines such as the french law of *Jurisprudence Constante.*

It is not a gobdaw. Judges do prod the application of the law which has been set out in prior line of cases. However, the only part of the decision that is binding in the hierarchical organisation of the courts is the *ratio decidendi or rationes* and not the adumbrations of obiter dicta. Precedent after precedent, imagine, even then the doctrine of precedent has not lost its importance and ethos as a primary source of law. The "common metric" or "hallmark" has been also fixed from time to time. Cardozo's yardstick adheres to precedent vis-a-vis various considerations like, whether the court is deciding a constitutional case or statutory case, whether the underlying decision is consistent or inconsistent with the notions of justice and whether the sufficient reliance could be placed on the doctrine of precedent that refrains the court from overruling it or making an unfair flip-flop.

It represents a 'common metric' among a variety of approaches and a good philosophical rule as to why the courts should generally follow precedents in the light of expediency and fairness. In order to compare the strengths of different facts for or against an outcome, the court must employ a "common metric" that assigns equivalent weight to the facts in question and question of law. If there is no such lexical hallmark or "common metric", then obviously the comparison might not be genuine.

To understand how the doctrine of precedent or stare decisis works, it is necessary to have some understanding of the court hierarchies below. Under the hierarchical court system, the position of a court in a hierarchy indicates the types of cases that it will hear, as well as providing an appellate redressal. Discussion continues….now we get down on how the doctrine of precedent or stare decisis works by the following graphics.



Graphic: Graphic of Indian Judicial System (An Illustration).

The authority to make a binding precedent is found in Article 141 of the Grundnorm of India. It rests with the Apex Court. It signifies that the law declared by it, shall be binding on all the hierarchy within the territory of India. This rule of law is binding on all the hierarchical judicial courts in India. Thus, what is binding is the ratio of the decision and not any passing comment or adumbration.

The determination of precedent is straightforward. It is quite distinct from the more inherent form of rulemaking power by the parliament. A hypothetical helpful formula of the fact situation in which X, Y and Z exist, and it is assumed that the court finds that facts Y and Z are material and fact X is immaterial, it usually reaches conclusion M. Then the same finding or doctrine of precedent helps us to conclude that in any similar future case in which facts Y and Z exist, or in which facts X and Y and Z exist, the conclusion must be M. If in a future case X, Y, Z, and N exist, and the fact N is held to be material, the first decided instance will not be considered directly, or might be overruled or it may be of some analogy. This is the substance of Goodhart's doctrine of precedent.

If anything good hath been done before, it may legally be done again. It is not foregone, that legal analysis of judicial decisions by lawyers, courts, and academics typically begins and ends with the objective finding of ratio decidendi vis-a-vis obiter dicta and the high role of the precedent.

2. Conclusion

It is of paramount importance to keep the rationes decidendi of past cases intact because it establishes the compact methodology by which the applicable legal principles are drilled from earlier judicial decisions. At one end of the spectrum of sources of law, significance of statute law was realized by Hobbes who laid emphasis on the adherence of precisely formulated principles of pervasive rule, and at the other end, the advocates of case law such as Burke have stressed the need of the precedents as a source of law to interpret and follow it. Nothing comes out of the blue. Precedent supplements the casus omissus of the statute law. Good pearls should be followed and anything, against the grain should be rendered defunct. In case-law it is the *ratio or rationes* that matters. Thence, a "case-law is gold in the mine-a few grains of the precious metal to the ton of useless matter…"

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