Evolution of Precedent in Indian Society: How, Where and by Whom?

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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 where precedent serves as aid to some set of guiding patterns in the future conduct. The term precedent is nothing but an evolution of the guidance and authority of past decision on the landmark cases in order to serve as a helping hand to the society while dealing with the pros and cons of the Indian legal system. Through this paper presented the author wants to explain about the evolution of the precedent emerging from the ancient law, to medieval and also British rule, and now to the present scenario of the Apex, Supreme Court and the High Court. The paper also lays down the emphasis on the importance of the precedent and covers its constitutional validity. Paper indeed explains English law concept of Stare Decisis and application of the "Doctrine of the Precedent". These and more are the concern of this paper which in the all in all concerns the advancement, modification and adaptation of the precedent system in India.

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Precedent Defined: In the 'Oxford Dictionary' precedent is defined as '*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*'.

A number of jurists have also defined precedent in their own definitions:

a) Gray- '*A precedent covers everything said or done, which furnishes a rule for subsequent practices'*.[1]
b) Keeton- '*A judicial precedent is judicial to which authority has in some measures been attached*'.[2]

In the general use, the term 'Precedent' means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions for future cases. Only such decisions which lay down some new principles are called judicial precedents. It is the attribution of the authority that makes a judicial decision a judicial precedent. The application of the judicial precedent is governed by the different principles in different legal systems. These principles are called the "Doctrine of Precedent".

Two things are required to understand the value of precedents: first that such precedents are reported, may be cited and may probably be followed by courts and second, that precedents under certain circumstances must be followed. The doctrine of precedent, in its first sense, prevails in the continent and prevailed in England also before the 19th of century. The application of the doctrine in

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the second sense is a special- feature of the English legal system. With some modifications it is followed in many countries including our own.

Importance of precedents: Law in India has evolved from religious prescription to the current constitutional and legal system we have today, traversing through secular legal systems and the common law. The doctrine of precedent has evolved from the English law and is *pari materia* to India. Though being a concept of the judicial decisions and philosophies 'precedent' is considered as an important aspect for emergence of setting examples by following the judge made laws in the country. Therefore it has following impo,; rtance in the legal system such as:

In Ancient law: The importance of the decisions as a source of law was recognized even in very ancient law times. Though there are texts which suggest, that "that path is the right one which has been followed by the virtuous men" to say, on the basis, that there was theory of precedent in India in ancient times, would be going too far. There are no records of cases or any other reliable evidence upon which anything can be said definitely. There seems no possibility of any doctrine of precedent as it is understood in the modern times. The Law, in the most part, was codified (textual law) and the rest was customary law. The cases in those days were not of such complicated nature as they have become in the modern times. Therefore the arbitrator or the judge was not required to lay down novel points and show originality. The court were generally local which, decided most of the things orally. The ancient courts were ***kula, sherni, puga, and shashan*** of which the former three were the tribal, professional, and local tribunals respectively. The decided the cases falling within their respective jurisdiction. Though in ancient texts we find the classification and the title of the suits and a very comprehensive procedure[3], there being no record of cases, it is not fully known to how it practically worked. There were no printing machines, and hence no reporting system and for want of reporting, there was little possibility of developing a doctrine of precedent.

Medieval Times: In the medieval period also, we find no traces of any theory of the precedent. Though Mohammedan rulers established courts and had appointed Qazis to administer justice, most of the disputes in villages were decided by ***panchayats.*** In the absence of a well organized judicial system, no doctrine of precedent developed in India as it developed in England. It is after the establishment of the British rule that present theory of precedent stared developing and from that time onwards, we can trace gradual development of the theory.

During the British Rule: After establishment of British rule in the country for some time, the English people administered justice according to the 'personal law' of the parties with the help of pandits and maulvis. By the 'Regulating Act' a Supreme Court was established at Calcutta. Later on, Supreme Court was established in other Presidency towns also. After sometime, High Courts were established in provinces. There was no relationship between the Supreme Court and the High Court and they were independent of each other. When many of the branches of the law were codified, both kinds of courts started administering the same law. When the judicial committee of the Privy Council became the final appellate tribunal, a new chapter was added in the Indian Legal History.

Now a clear hierarchy of the courts was established. There were Presidency Courts (in Presidency towns) and Mofussil courts (in districts) and above these courts was the High Court. The Privy

Council was the final appellant tribunal. Every court was bound by the decisions of the superior court. This helped in bringing uniformity and certainty in law because the decisions of the Privy Council were binding on all the courts in British India. Thus, the Doctrine of Precedent, in the modern sense took its birth in India.

Act of 1935: By the Government of India Act, 1935, a Federal Court was established in India. This was an interposition in the hierarchy of the courts. This Act provided that the decisions of the superior courts will have the binding effect on the courts below.

Section 212 of the Act made the following provision:- "*the law declared by federal court and by any judgment of the Privy Council shall, so far as applicable, be recognized as binding on and shall be followed by all the courts in British India, and so far as respects the application and interpretation of the Act or any Order in Council there under or any matter with the respect to which the Federal Legislature has power to make law in relation to the State, in any Federal State.*"

Indian Constitution 1950: After independence of the country, the Privy Council ceased to be the appellant court in India and Federal Court was abolished. By the Indian constitution, 1950, a Supreme Court was established which is the final appellant tribunal.[4] In states there are High Courts and in districts there are District Courts.

The Supreme Court and its Applicability: The Supreme Court has been established by the Indian Constitution, 1950. It is the highest judicial tribunal of the Indian Union. It has very wide ***appellant, writ, revisional and in some cases original jurisdiction***. The law declared by it as stated above is binding on all the courts of the country. When the Supreme court, 'as the apex adjudicator declaring the law for the country and invested with the constitutional credential under Article 141 clarifies a confused juridical situation, its substantial role is of legal mentor of the nation.'

Not bound by its own decisions: the expression 'all courts', used in Article 141 refers only to courts other than the Supreme Courts. Thus, the Supreme Court is not bound by its own decisions,[5] except to the extent of that a smaller Bench is bound by the decisions of a larger Bench and that of a Co-equal Bench.[6]

The place of the precedent in English Law- Stare *Decisis* – In the English legal system, precedents have got great authority and the *doctrine of stare decisis* is its singular feature. The principle of Stare Decisis is nothing more than, as observed by the Dowrick, in Justice[7]. According to the English Common lawyers,[8] it is a '*precipitate of the notion of legal justice*'. In other words, it is the principle that judicial decisions have a binding character.[9]

Thus the doctrine of the Stare decisis is not applicable in the Supreme Court. However, in practice, the earlier decisions of the court command great respect in the Court. It has been held that long standing legal positions should not be disturbed.[10]

The Supreme Court has observed that the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinarily or special reasons to do

so.[11] In one case [12] it has stated that "*it is only when the Supreme Court finds itself unable to accent the earlier view that it would be justified in deciding the case before it in a different way*". Thus the Supreme Court will not ordinarily depart from its earlier decision. However if an earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it.

In **Sajjan Singh v. State of Rajasthan,**[13] "It is true that the constitution does not place any restriction on our power to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decisions of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of the public good. The doctrine of the stare decisis may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.

In such a case the test should be, is it absolutely necessary and essential that the question already decided should be reopened? The answer of the question would depend on the nature of the infirmity alleged in the earlier decision, its impact on the public good and the validity and compelling character of the considerations urged in support of the contrary view. If the said decision has been followed in large number of cases, then that is again a factor which must be taken into account."

Again in **Bengal Immunity Company ltd. v. State of Bihar,**[14] it was reiterated when Justice Das, the acting C.J. observed: "References is made to the doctrine of finality of judicial decisions and is pressed upon us that we should not reverse our previous decisions except in cases where a material provisions of law has been overlooked or where the decisions has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decisions merely because a contrary view appear to us to be preferable. It is needless for us to say that we should not lightly dissent from a previous pronouncement of this court. Sometimes frivolous attempts may be made to question our previous decisions, but if the reasons on which our decisions are founded are sound, they will by themselves be sufficient safeguard against such frivolous attempts. Further, the doctrine of stare decisis has hardly any application to an isolated and stray decision of the court very recently made and not followed by a series of decisions based thereon. The problem before us does not involve overruling a series of decisions but only involve the question as to whether we should approve or disapprove, follow or overrule a very recent previous decision as a precedent. In the case, the doctrine of stare decisis is not a flexible rule of law and cannot be permitted to perpetuate our errors to the detriment, general welfare of the public or a considerable section thereof."

Approving this statement, the Supreme Court in **State of West Bengal v. Corporation of Calcutta,**[15] further said: "If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our policy, we must more readily do so than in other branches of law, as perpetuations of a mistake will be harmful to public interest.

While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviation will retard its growth".

The High Court and Its Applicability: The decisions of the High Court create binding precedents for the first instances, i.e. the County Courts and the Magistrate's Courts. One high court judge is not bound by the decisions of another judge of the same high court. A judge may refuse to follow his own decisions given earlier.

In discussing the operation of the doctrine of the precedent in High Courts, for the sake of clarity, the topic may be dwelt on in the form of answers to the following questions:

i) How far are the decisions of a high court binding on the Courts below?
ii) How far is a high court bound by its own decisions?
iii) What is the authority of one high court's decisions in another high court?
iv) What is the authority of federal court decisions in the high court? (federal court was a court of appeal from the high court's 1935 to the coming into force of the Indian constitution, that is 1950)
v) What is the authority of Privy Council decisions in the high court? (privy council was a court of appeal from the high court before 1935 to federal court came in between the two)
vi) What is the authority of Supreme Court decisions in high courts?

While understanding the concept of the applicability of the high court: these questions are to be taken into consideration:

- **The decisions of the high court are binding** on all the subordinate courts and tribunal within its jurisdiction. The decisions of the High Court have only a persuasive value in a court which is within the jurisdiction of another high court. But if such decision is in conflict with any decisions of the high court within whose jurisdiction that court is situated, it has no value and the decision of that high court is binding on the court.[16]
- **How far is the High Court bound by its own decisions?** In High Courts, generally appeals are heard by a single judge (some appeals, such as murder special appeals, etc. are heard by a two judges. Different high courts have their different rules in this respect). When an appeal involves some important and complicated questions of law, it is referred to a larger Bench. A single judge constitutes the smallest bench. A bench of two judges is called Divisional Bench. Three or more judges constitute a Full Bench. The decisions of bench are binding on a smaller or co-ordinate Bench.
  Thus, if a single judge or a division bench disagrees with the decisions of Bench of coordinate jurisdiction it should refer the matter to a larger Bench.[17] To summarize, when a Bench of a high court gives a decision on a question of law, it should, in general, be followed by other benches unless they have reasons to differ from it, in which case the proper course to adopt would be to refer the question for the decision of a full bench.[18]

- **What is the authority of the High Court decisions in another High Court?** The High Court is the courts of co-ordinate jurisdiction. Therefore, the decision of one high court is not binding on the other High Courts. However, in the practice, they are cited in the other High Courts and they have persuasive value. The Full Bench decisions of one High Court command great respect in other High Courts. The decisions of older High Courts carry more weight.

- **What is the authority of a Federal Court decision in the High Courts?** The decisions of the Federal Court were made binding by Section 212 of the Government of India Act,1935 which has been cited earlier and they continue to be so even after 1950 by the authority of the article 225 of the Indian Constitution, 1950 which shall be discussed later on. However, they are binding only so long they have not been overruled by the Supreme Court.

- **What is the authority of Privy Council decisions in High Courts?**
  Pre-constitution (1950) decisions of the Privy Council are binding on all the courts unless they conflict with any decision of the Supreme Court. Article 395 of the Indian Constitution, which saves the abolition of Privy Council Jurisdiction Act, 1949 makes the decision of the Privy Council authoritative.
  Section 8 of the Act runs:-
  "Any order of his Majesty in Council made on an Indian appeal or petition whether before, on or after the appointed day, shall for all purposes have effects, not only as an order of Majesty in Council, but also as if it were an order or decree made by the Federal Court in the exercise of the jurisdiction conferred by this Act."

  Secondly, Article 225 of the Indian Constitution says- "subject to the provisions of this Constitution and to the provision of any law of the appropriate legislature…..the law administered in any existing High Court….shall be the same as immediately before the commencement of this Constitution". The expression "**law administered"** includes case laws also.
  Thus, according to these provisions, the decisions of the Privy Council given before 1949 shall be binding on High Courts unless they have been overruled by the Supreme Court. If there if there is any conflict between a pre-constitution Privy Council decisions and federal court decisions, it is decisions of the Privy Council that would prevail. The Supreme Court can overrule any pre-constitution Privy Council decisions and in that case it would lose its authority.

- **What is the authority of Supreme Court decisions in High Courts?** As observed earlier, the Supreme Court is the highest judicial tribunal. Therefore decisions given by the Supreme Court are binding on all the tribunal of the country. This authority to the Supreme Court decisions is given, in unequivocal words, by the constitution.
  Article 141 runs:- "The Law declared by the Supreme Court shall be binding on all courts within the territory of the India."

Thus, a Supreme Court decision binds the High Court. The High Court cannot take the view that it does not bind it.[19] The term '**Law declared'** means not only the ***Ratio decidendi*** of a decision but it includes an ***Obiter dictum*** also provided it is upon a point raised and argued.[20]

The Application of the Doctrine: 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.

Conclusion:

Now it is desirable that some light should be thrown on the future precedents. As observed above, the court is performing a very valuable creative function in modern times. This role of the courts is assuming importance and their field of activity is rapidly widening. On the other hand, the trend of opinion is in favor of freedom from the binding effect of precedents. At the first place these two trends may appear divergent but they are not so, and are perfectly consistent. It is the creative spirit that desires the removal of the shackles of the binding precedents. There is a move for modification in the doctrine of precedent. In England, the doctrine of stare decisis has been modified. It may be hoped that some device would be invented to get rid of it. However, the decisions of higher tribunal shall remain binding on subordinate courts. There is no possibility of departing from this rule in the near future, nor are there very strong reasons for it. In India also, the doctrine is not likely to undergo any considerable modification. The federation, as envisaged by the Indian Constitution, requires it. It will help in bringing about national integration and uniformity in the law, and will cause a uniform development of law. But some techniques or method will have to be evolved to save the lawyer and the judge from the labour and wastage of the time in finding out the law from the rapidly multiplying volumes of reports and the constant danger of overlooking authorities.

[1]**John Gray, *The Nature and Sources of Law*, Pg. 121, 1909, Columbia University Press**
[2] **G W Keeton, *The Elementary Principles of Jurisprudence,* (1949) 225-452.**

[3] See G. N. Jha, *Hindu law in its Sources*, 2 Vols, Allahabad, 1930, 1933.
[4] In some cases it has original jurisdiction also. See Articles 32 and 131 of the Indian Constitution.
[5] I.T. Commr. Madras v. R.M.C. Pillai, AIR 1997 S.C. 489 (496-97)
[6] Indian Oil Corporation v. Municipal Corporation, AIR 1995 S.C. 1490
[7] *per se* referred in Vidyacharan Shukla vs Khubchand Baghel And Others on 20 December, 1963
[8] *Id,* p. 27.
[9] See Vidya Charan v. khubchand, AIR 1964 S.C. 1691.
[10] B. L. Naidu v. Distt. Educational office, AIR 1992 S.C.; Indra shawnay v. U.O.I, AIR, S.C. 447.
[11] Manganese Ore (India) v. R. Asst. Commr. AIR, 1976 S.C. 410, 413.
[12] T.I Officer, Tuticorin v. T. S.D. Nadar, AIR 1976 S.C. 623, 627.
[13] AIR 1965 S.C. 845, 855.
[14] AIR 1955 S.C. 661.
[15] A.I.R 1967 S.C. 997.
[16] M. Abdul Sattar v. H.A. Hakeem, AIR 1976 Andhra Pradesh 84.
[17] S.K. Bhathija v. Collector Thane, AIR 1991 S.C. 1893.
[18] Jaisri v. Rajdewan, AIR 1962 S.C. 83.
[19] Indian Oil Corporation v. Municipal Corporation, in AIR 1995 S.C. 148
[20] Bina Devi v. Chaturidevi, AIR 1953 Allahabad, 613 at p. 616.