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# FACULTY OF JURIDICAL SCIENCES

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**LECTURE: 1**

**NAME OF FACULTY: Ms. Anjali Dixit**

**Assistant Professor**

# Lecture-23

# Lecture 23: Precedent as a Source of Law

## Precedent as a Source of Law

**Creative role of the judges** - 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 the cases according to it. Even at this stage, the judges perform some creative function. In the cases of first impression, in the law made by the legislature, the judges depend on their own sense of right or wrong.

**Inductive and Deductive methods**: In the English legal system, a great reliance is places upon the decisions of the judges. Before deciding a case, the judges look into the previously decided cases of the similar nature by their own court or by superior court. From particular cases they deduce general rules and apply them on the cases before them and decide them accordingly. This is known as 'Inductive Method'.

There are legal systems where most of the law is embodied in legislation (known as 'Civil Law Systems'). The judges decide the cases according to the law laid down in the code, and they are not to look for the previously decided cases of the similar nature. This is called the 'Deductive Method'.

### Nature of Precedent

A precedent is purely constitutive and in no degree abrogative. 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.

### The Importance of Precedents

**Ancient Law** –The importance of the decisions as a source of law was recognized even in very ancient times. In theological books we can find numerous instances of it. Sir Edward

Coke, in the preface to the sixth part of his report, has written that the Moses was the first law reporter. In ancient legal systems of Babylonia and China, the judicial decisions were considered to be of great authority and later on, they were embodied in the code law.

**Modern Legal System** – Among the modern legal systems, the Anglo-American law is judge made law. It is called 'common law'. It mainly developed through judicial decisions.

**Precedents in Various Legal Systems**

**Res-Judicata; Justinian's Declaration –** In Roman Law, there was never any theory of binding precedents. Though the orators have included res-judicata among the sources of law, it was not a precedent in the modern sense of term. Under the Roman system, much of the development of law took place by the Bar and not by the Bench. However, an attempt was always made for judicial uniformity and there was much uniformity. In the substantive law, decisions were not considered as an authority for the subsequent cases. Justinian declared that the decisions will not have any obligatory force except that which were given by the Emperor himself 'Non exemplis, sed-legibus indicandum est' (Decisions should be based on laws, not on precedents)

**New Researches –** The researches made in the recent years, especially the study of Papyri, have disclosed that in Egypt, in the period corresponding to the classical era of Roman jurisprudence, the use of precedents was made in the courts in daily practice.

**Gray's View –** In Gray's opinion, the idea of judicial precedent was familiar in the Roman Law, at least in some periods of its development and most of the decisions of the judges and the opinions of the juris consultas were incorporated and embodied in the code.

**French Law** – In France, courts are not bound by decisions of the superior courts. Even the decisions of the 'Court de cassation' the highest court of appeal, are not binding on the courts of the first instance, nor that court is bound by its own decisions.

**German Law** – The lower courts are bound with the decision of the highest court.

**The English Theory of Precedent**

**Great Authority of Precedents-** The great importance attached to the judicial precedents is a distinguishing feature of the English legal system. The edifice of the common law is made up of judicial decisions. Though the present English doctrine of the precedent came into being in the 19 century, its history goes many centuries back. The power and authority of judges, legal

thought, and the publication of the law reports all helped in the growth of the doctrine of precedent in English Law.

**Precedent as a Source of Law**

Judicial precedent when it speaks with authority, the embodied principle becomes binding for future cases and it thus becomes a source of law. Blackstone has pointed out that it is an established rule to abide by the former precedents where the same points come again in litigation. Authoritative precedents are a legal source of law, in so far as they are binding on the judges and persuasive precedents are a historical source of law, in so far as they are only a persuasive or guiding efficacy, and thus provide a historical basis on which law may be built by the judge if he is favorably inclined to that precedent and accepts it.

Each original precedent laid a new pillar of law and helped in the growth and development of the common law of England. Each declaratory precedent strengthened and confirmed each original precedent, thereby making the law certain and safe to be followed. The doctrine of precedent as pointed out by Salmond, two meanings-a strict sense and a loose sense. In the strict meaning, precedents have a great value and should be regarded as authoritative and should be followed except under certain circumstances. In the loose sense, the doctrine of precedent implies that precedents are reported judgements of law courts meant to be cited, and that these judgements will probably be followed by the judges. Precedents carry some legal principles. The legal principle on which a case is decided is called the ratio decidendi of that case. The ratio decidendi means the reasoning factor behind the decision. The ratio decedendi refers mainly to questions of law-abstract questions. Ratio decidendi is that principle of law on which a judicial decision is based. A precedent has a ratio decidendi, i.e. the basic principle on which it rests. The ratio decedendi is the very heart of a precedent. This abstract principle laid down in a particular case is followed by judges thereafter on such issues.

**A decision generally has two aspects**

1. A concrete decision binding on the parties to the litigation and therefore having practical consequences and

2. A judicial principle which is general in nature and which is the basis of the practical and concrete decision operates as a precedent which has the force of law.

The case of Bridges V. Hawkescoonth is a good illustration of ratio decidendi. In this case, a customer found some money on the floor of a shop. The court applied rules of "finderskeepers" and awarded possession of the money to him rather than to the shopkeeper. The ratio decidendi of this case is that finder of goods is the keeper i.e. has the right of possession over it. However, in 1896, in South Staffordshire Water Company V. Sharman where the defendant found two gold rings in the mud in a pool owned and occupied by the plaintiffs, the court refused to apply the "finders-keepers" rule expressed in Bridge's case on the ground that in that case money was found in a public place i.e. on the shop floor but in this case it was found in a pool which was private.

**Authority of Precedent**

The reason why a precedent is recognized in that a judicial decision is presented to be correct. That which is delivered in judgment must be taken for established truth. Decisions are given by judges who are expert in the study of law.

**Circumstances Which Destroy or Weaken the Binding Force**

**Of Precedent -** The operation of precedent is based on the legal presumption that judicial decisions are correct. A matter once decided is decided once and for all. What has been delivered in a judgement must be taken to an establishment truth. There are circumstances which destroy or weaken the binding force of a precedent. These are exceptions to the rule of the binding force of precedent.

**1. Abrogated Decision –** A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court. Overruling occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed. Overruling is the act of a superior authority.

2. In India, the Twenty-Fourth Amendment of the constitution of India was passed to nullify the decision of the Supreme Court of India in the case of Golak Nath. Likewise, the Twenty-Fifth Amendment of the Constitution sought to remedy the situation resulting from the decision of the supreme court in the Bank Nationalization case.

3. Affirmation or reversal on a different ground – It sometimes happens that a decision is affirmed or reversed on appeal on a different point. Suppose a case is decided in the Court of Appeal on ground A and then goes on appeal to the House of Lords which decides in on ground B, nothing being said upon A. the view of Jessel, M.R. is that where the judgement of the lower court is affirmed on different grounds, it is deprived of all authority.

4. Ignorance of Statute – A precedent is not binding if it was rendered in the ignorance of a statute or a rule having the force of a statute i.e. delegated legislation. Similarly, a court may know of the existence of the statute or rule and yet not appreciate its relevance to the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

## SELF-TEST QUESTIONS

| S.NO | Question | Option (a) | Option (b) |
|---|---|---|---|
| 1. | Every developed legal system possesses a judicial organ | True | False |
| 2. | In the English legal system, a great reliance is places upon the decisions of the judges. | True | False |
| 3. | The judges decide the cases according to the law laid down in the code, and they are not to look for the previously decided cases of the similar nature. | True | False |
| 4. | A precedent is purely constitutive and in no degree abrogative. | True | False |
| 5. | In Roman Law, there was never any theory of binding precedents. | True | False |

**Answers: 1-(b),2-(a), 3-(a),4-(a), 5-(a)**