

Lecture-40



THEORY OF PRECEDENTS

In common law legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts. The general principle in common law legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which that goal is attained. Black's Law Dictionary defines "precedent" as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases." Common law precedent is a third kind of law, on equal footing with statutory law (statutes and codes enacted by legislative bodies), and regulatory law (regulations promulgated by executive branch agencies).

Stare decisis is a legal principle by which judges are obliged to respect the precedent 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 precedent and not disturb settled matters.

Case law is the set of existing rulings which have made new interpretations of law and, therefore, can be cited as precedent. In most countries, including most European countries, the term is applied to any set of rulings on law which is guided by previous rulings, for example, previous decisions of a government agency - that is, precedential case law can arise from either a judicial ruling or a ruling of an adjudication within an executive branch agency. Trials and hearings that do not result in written decisions of a court of record do not create precedent for future court decisions.

Principle

The principle of stare decisis can be divided into two components.

The first is the rule that a decision made by a superior court, or by the same court in an earlier decision, is binding precedent that the court itself and all its inferior courts are obligated to follow. The second is the principle that a court should not overturn its own precedent unless

there is a strong reason to do so and should be guided by principles from lateral and inferior courts. The second principle, regarding persuasive precedent, is an advisory one that courts can and do ignore occasionally.

In the common law tradition, courts decide the law applicable to a case by interpreting statutes and applying precedent which record how and why prior cases have been decided. Unlike most civil law systems, common law systems follow the doctrine of *stare decisis*, by which most courts are bound by their own previous decisions in similar cases, and all lower courts should make decisions consistent with previous decisions of higher courts. For example, in England, the High Court and the Court of Appeal are each bound by their own previous decisions, but the Supreme Court of the United Kingdom is able to deviate from its earlier decisions, although in practice it rarely does so.

Generally speaking, higher courts do not have direct oversight over the lower courts of record, in that they cannot reach out on their own initiative (*sua sponte*) at any time to overrule judgments of the lower courts. Normally, the burden rests with litigants to appeal rulings (including those in clear violation of established case law) to the higher courts. If a judge acts against precedent and the case is not appealed, the decision will stand.

A lower court may not rule against a binding precedent, even if it feels that it is unjust; it may only express the hope that a higher court or the legislature will reform the rule in question. If the court believes that developments or trends in legal reasoning render the precedent unhelpful, and wishes to evade it and help the law evolve, it may either hold that the precedent is inconsistent with subsequent authority, or that it should be distinguished by some material difference between the facts of the cases. If that judgment goes to appeal, the appellate court will have the opportunity to review both the precedent and the case under appeal, perhaps overruling the previous case law by setting a new precedent of higher authority. This may happen several times as the case works its way through successive appeals. Lord Denning, first of the High Court of Justice, later of the Court of Appeal, provided a famous example of this evolutionary process in his development of the concept of estoppel starting in the *High Trees* case: *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130.

Judges may refer to various types of persuasive authority to reach a decision in a case. Widely cited non-binding sources include legal encyclopedias such as *Corpus Juris Secundum* and *Halsbury's Laws of England*, or the published work of the Law Commission or the American Law Institute. Some bodies are given statutory powers to issue Guidance with persuasive authority or similar statutory effect, such as the Highway Code.

In federal or multi-jurisdictional law systems there may exist conflicts between the various lower appellate courts. Sometimes these differences may not be resolved and it may be necessary to distinguish how the law is applied in one district, province, division or appellate department. Usually only an appeal accepted by the court of last resort will resolve such differences and, for many reasons, such appeals are often not granted.

Any court may seek to distinguish its present case from that of a binding precedent, in order to reach a different conclusion. The validity of such a distinction may or may not be accepted on appeal. An appellate court may also propound an entirely new and different analysis from that of junior courts, and may or may not be bound by its own previous decisions, or in any case may distinguish them on the facts.

Where there are several members of a court, there may be one or more judgments given; only the ratio decidendi of the majority can constitute a binding precedent, but all may be cited as persuasive, or their reasoning may be adopted in argument. Quite apart from the rules of precedent, the weight actually given to any reported judgment may depend on the reputation of both the reporter and the judges.