PRECEDENT AND STARE DECISIS: A CRITICAL APPROACH

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ABSTRACT

In light of the article of Professor Jeremy Waldron titled "Stare Decisis and Rule of Law: A Layered Approach" published in Michigan Law Review in 2012. He observed, and then mentioned in the article about Professor Frederick Scheauer article published in 1987. Professor Waldron writes with adding the suggestion of Professor Scheauer's article. This provides a better understanding of stare decisis. He said this: "An argument from precedent seems at first to look backward. The traditional perspective on precedent . . . has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decision makers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday."[i] Professor Waldron said on this that it was worth trying and ought to be a promising perspective. His perspective helps in figuring out the basis of precedent[ii] without already assuming the principle.

In the consequent part Professor Waldron put forward a perspective to explain the relations between stare decisis and the rule of law. For that we should understand the Precedent as a source of law and stare decisis[iii].

PRECEDENT AS A SOURCE OF LAW

According to Salmond: "The great body of the unwritten law is almost entirely the product of outside cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the 13th century...In practice". If theory does not work, then the common law of the concerned country has been created by the decisions of the court. This is known as Judicial precedent which is an important source of law. They have enjoyed high authorities at all times and in all countries. However, there are some writers who believe that the judicial precedent is not a source of law and are just evidence of customary law[iv]. Blackstone writes: "For it an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment".

NATURE AND AUTHORITY OF PRECEDENT

A precedent can make a law through judicial decision but cannot alter it. Its main purpose is to fill up the gap with new law in the gap existing in the old and add up the imperfectly developed body of legal doctrine.

Authority of the precedent is on the judiciary that judgment delivered must be taken for established truth. Also, the practice of following precedent creates confidence in the minds of litigants.

Circumstances which destroy or weaken the binding force of precedent

1. Repealed decision: A decision ceases to be binding under lower court if a rule is inconsistent with its after enacted, in case if its reversed or overruled by a higher court. For example, In the Indian case name of *Golak Nath*, the Twenty-fourth Amendment of the Constitution of India was passed to null and void the decision of the Supreme

Court of India. Similarly, In the *Bank Nationalisation* case the Twenty-fifth Amendment of the Constitution sought to remedy the situation resulting from the decision of the Supreme Court.

2. Approve or Reverse on a different Ground: Suppose a case is decided in the court of appeal on ground A and then appeal goes to the higher court which decides on the ground of B and then it is affirmed or reversed. The true view is that a decision either affirmed or reversed on other grounds is not an absolute binding force but remains an authority which may be followed by a court that thinks the particular ground to have been rightly decided.
3. Ignorance of Statute: If a precedent is against the statute or rule having the force of a statute that is delegated legislation, it will be relevant to the matter and the court can refuse to follow a precedent on this ground.
4. If there is inconsistency with earlier decisions of Higher Court and of the same rank: If a High court of state, decides a case in ignorance of a decision of the Supreme Court of India, the decision of the High court is not a precedent and hence is not binding on any lower court. Such a decision is said to be per incuriam (Judgment without due regard to the law and facts). Where there is inconsistency between the authorities of equal standing, a lower court has the same freedom to pick and choose between them. The lower court may refuse to follow the later decision on the point that it was arrived at per incuriam. The court adopts the decision between the course in which the law ought to be.
5. Precedents not fully argued: It states that a precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned. A random line has to be drawn between the "total absence of argument on a particular point which reduces the efficiency of the precedent and inadequate argument which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable".
6. Erroneous decisions made: Decision may be founded on the conflicting fundamental principles of common law which is erroneous. In that case the "court may overrule it which involves injustice to the citizen or which concern an area of law such as taxation law where it is important for the citizen that the courts should establish what the correct law is".

7. Decisions of Equally Divided Court: Where an appellate court with uneven number of judges is equally divided, the practice is to dismiss the appeal.

Circumstances which increase the authority of a precedent

Two viewpoints of the judge make the law and declare the existing law.

Declaratory theory: This is supported by the first view which says that judges can discover the law of a particular point and declare it. This view has been supported by many writers, jurists and judges.

In *Rajeshwar Prasad v. State of West Bengal,* Justice Hidayatullah observed that: "No doubt, the law declared by this court (Supreme Court of India), binds courts in India, but it should always be remembered that this court does not enact". The declaratory theory has been criticised by Jeremy Bentham. He writes that "a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not, openly claim it".

Salmond writes: "Both at law and in equity, however, the declaratory theory must be totally rejected if we are to attain any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and authoritative declaration of the law. Doubtless, judges have many times altered the law while endeavouring in good faith to declare it. But we must recognise a distinct law-creating power vested in them and openly and lawfully exercised. Original precedents are the outcomes of the international exercise by the courts of their privilege of developing the law at the same time they administer it".

Blackstone's theory that judges can make no new law but "merely declare it, is only a *fiction*". The judges, being naturally conservative seem to adopt this fiction to guard against unwise innovations and to preserve the element of certainty in law. If there would be a sound theory of the nature of judiciary law and the "true operation of precedents", it is necessary to reject the fiction as the duty of the judge is only to expound the pre-existing law.

KINDS OF PRECEDENTS

1. Authoritative and Persuasive: The judge has to follow both authoritative which judges must follow) and persuasive judges under no obligation to follow but will take into consideration and to which they will attach great weight as it seems to them to deserve. In *Attorney General v. Dean and Canons of Windsor,* Lord Campbell observed: "Observations made by members of the House… beyond the *ratio decidendi*[v] which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed insofar as they may be considered agreeable to sound reason and to prior authorities".

2. Absolute and conditional precedents: Authoritative precedents are of two types: absolute and conditional. In the case of absolute they had to be followed whether the judge approved or not. In conditional authority precedents, the court can disregard under special circumstances, and they can be disregarded either by dissenting or by overruling. In the case of overruling, the precedent overruled is authoritatively pronounced to be wrong so that it cannot be followed by courts in the future. In the case of *Ningappa v. Emperor,* Chief Justice Beamont expressed the view that the decision of a full bench, until it is overruled by the Privy Council, is absolutely authoritative. In the case of *K.C. Nambiar v. State of Madras,* Chief Justice Subba Rao observed that: "A single judge is bound by a decision of a division bench exercising appellate jurisdiction. If there is a conflict of bench decisions, he should refer the case to a bench of two judges who may refer it to a full bench. A single judge cannot differ from a division bench unless a full bench or the Supreme Court has overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a bench decision on the ground that some observations of the Supreme Court made in a different context might indicate a different line of reasoning. A division bench must ordinarily respect another division bench of coordinate jurisdiction; but if it differs, the case should be referred to a full bench".
3. Original and Declaratory precedents: According to Salmond, a declaratory precedent is one which is application of an already existing rule of law and original precedent is law for the future, which is now applied and their numbers are small but importance is very

great. Both of them have the same legal authority. An original precedent is a source of new law and declaratory precedent is also as good as a source of law like original precedent but both the precedents have their own value.

Stare Decisis: The theory of *stare decisis* was firmly established after the Judicature Acts of 1873 and 1875. It has been recognised by the Constitution of India in the Article 141 that provides that law declared by the Supreme Court of India shall be binding on all courts in India. Under the *stare decisis* rule, a principle of the law which has become settled by a series of decisions is generally binding on the courts and should be followed in similar cases but it is not applicable on all cases. Its application must be "determined in each case by the discretion of the court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result." In the case of *Maktul v. Manbari,* If the decision has been considerably impaired by a Privy Council decision, the doctrine of *stare decisis* is not applicable. A similar point was taken by the Supreme Court of India in *Bachan Singh v. State of Punjab*[vi]. The death sentence given by the Supreme Court was questioned on its constitutional validity and was concluded against the petitioners by the decision of a Constitution Bench of 5 judges of the Supreme Court in *Jagmohan Singh v. State of U.P.* [vii] and further could not be allowed to reagitate before a bench consisting of the same number of judges.

Ratio Decidendi: *Ratio decidendi* is a part of the *precedent* which has to be followed by the court in the subsequent court decisions. In literal meaning, it is the rule of law and reason on which the judicial decision is based. According to Salmond, *Ratio decidendi* is the underlying principle which thus forms its authoritative element. It is expressly or impliedly treated by the judge as a necessary step in reaching his conclusion said by Rupert Cross. *Ratio decidendi* has both praise and criticism or positive and negative elements. Positive: "It can be discovered by reversing the proposition of law put forward by the court and inquiring whether the decision would be the same notwithstanding the reversal. If it is the same, then the proposition of law is no part of the ratio was said by Professor Wambaugh". Negative and conclusion: According to M.R. Cohen: "You cannot pass from past decisions to future ones without making assumptions. From the statement that the court has ruled and so in certain cases nothing follows except in so

far as the new cases are assumed to be like the old cases. But this likeness depends on our logical analysis of classes of cases". In short, the outcome of this depends on what later tribunals have declared to be the *ratio decidendi*.

Obiter Dictum: In the Latin phrase, this means "by the way". All that is said by the way by the court or statements of law which go beyond the requirements of the particular case and lay down a rule that is not necessary or irrelevant for the good purpose, are called obiter dicta. Although *obiter dictum* is not essential for a decision and are not binding on precedents, but have greater weight on the persuasiveness which may often be for practical purposes.

Stare decisis and rule of law: There are two things from a perspective of *stare decisis.* Firstly, the rule of law justification depends on the large extent of law. Second, the impact of the rule of stare decisis is on two principles. One principle is of constancy, counsels against lightly overturning the precedent once it has emerged. Another principle is of the principle of generality, which requires all the judges to base their decisions on general norms not leaving them freestanding. Subsequent principle is of institutional responsibility, which requires the judges not to give the lie to the use by precedent judges of certain general norms to make their decisions. Last principle is of fundamental principle of fidelity, in which the judges figure out the bearing of law, they formulate into a general norm, a next judge takes note of the general norms that previous judge had used, and then the current judge plays a part in establishing the general norms which is more than mere notional. Judges tried to maintain stability and constancy of the body of the law that comes out from all this and not overturning precedent lightly or too often. In this way the layers of the rule of law bears the question of *stare decisis.*

ENDNOTES

[i] Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 MICH. L. REV. 1 (2012). Available at: https://repository.law.umich.edu/mlr/vol111/iss1/1.

[ii] It refers to a court decision that is based on the authority of the previous case which involves similar or identical facts or legal issues in the current case.

[iii] It is a legal doctrine that obligates the court in determining points according to the historical cases or precedent which is similar to present case.

[iv] It is a set of practices, customs and beliefs that are accepted as binding rules by the indigenous peoples.

[v] It is a point of a case that determines the judgment. In other words, it is the rationale for the decision.

[vi] (1982) 3 SCC 24.

[vii] AIR 1973 SC 947.