

The definition of the doctrine of judicial precedent law general essay

Law



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Introduction:

The doctrine of judicial precedent is mainly stand for the certainty of the law. Usually the judges are bound to follow the previous decisions. The decisions which they should follow may have been passed by a higher court or adjudicate court itself. Sometimes we hear that judges make law. We know that making law is the prerogative of parliament; there are several areas in which they clearly do make laws. But we have supporting example (Lord Reid define realistic theory)[1]and contrary example (William Black Stone define declaratory theory)[2]about this logic that judges are making law in some circumstances.

The definition of the doctrine of judicial precedent

Judicial precedent is a process through which the judges follow previously decided cases where the facts or point of law are sufficiently similar. It also means that like cases are treated alike. The decided cases will become the ‘stare decisis’[3]for the future case decisions. The lower courts are usually bound to apply the legal principle set down by the superior courts in earlier cases where the facts or point of law are sufficiently similar. The important part of the judgments which is binding for the future courts are known as ‘ratio decidendi.’[4]Michael Zander states that the principle of law which decides a case in the context of or in the light of material fact is known as ratio decidendi (R v Dudley and Stephens)[5]. And all other remarks by the

judges or comments by the judges which is not a part of the judgment are generally known as 'obiter dicta'[6](R v Gotts).[7]

Declaratory theory provided by William Blackstone

William Blackstone provided his declaratory theory and stated that judges do not create or change the law, but they usually declare that what the law has always been, but not "discovered. The declaratory theory[8] relates to the fact that judges do not make laws they simply discover and declare what the law has always been. That is why case law operates retrospectively. So when a precedent is overruled, the earlier court found the wrong law and the overruling court found the right one. This is often seen as a mere fiction and the reality is that judges do make and change the law (Kleinwort Benson v Lincoln CC)[9] Lord Esher stated in (Willis v Baddeley)[10] that there is no such thing as judge made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.

Realistic theory provided by Lord Reid

Lord Reid defines a realistic theory[11] that we do not believe in fairy tales anymore, so we must accept the fact that for better or worse judges do make law. The main thing is that the judges are making law but silently. The modern view is that judges do make law. Lord Radcliffe said that there was never a more sterile controversy than that upon the question whether a judge makes law. Of course they do. How can they help it? The reality is that judges are continually applying the existing rules to new fact situations and thus creating new laws.

Operation of the judicial precedent in Supreme Court

The judicial precedent function in the Supreme Court before [1996]: in the case of (London Tramways Ltd v London County Council)[12]the highest appeal court should be final in the public interest, to create certainty in law. The rule did not produce the desired certainty in the law and it had become too rigid. Situation in Supreme Court after the Practice Statement [1996]: The practice is changed. They modify their present practice and now they can depart from a previous decision where they think right to do so. Now the Supreme Court is not bound by any legal principle which is set down by themselves or the other lower courts.

Operation of the judicial precedent on Court of Appeal

The decision of the Court of Appeal is binding for High Court and other lower courts but not for the Supreme Court. The Court of Appeal need not to follow the previous binding precedent on three circumstances. Firstly, when the previous decision conflict, the Court of Appeal must decide which has to follow and which has to reject (Law v Jones).[13]Secondly, where previous decision conflict with Supreme Court (Street v Moundford).[14]Thirdly, When the previous decision was given carelessly or recklessly (Rickards v Rickards).[15]There is no difference on the application of stare decisis as between the civil and criminal division of the Court of Appeal.

Method of avoiding the doctrine judicial precedent

A previous decision is distinguishable. A previous case is only binding in a later case if the legal principle involved is the same and the facts and point of law is sufficiently similar. Distinguishing a case on its facts, or on the point

of law involved, is a device used by the judges to usually in order to avoid the consequences of an earlier inconvenient decision which is in strict practice, binding on them. The case where the defendants had stabbed the victim who received negligent medical treatment cases: (R v Smith)[16]in which (R v Jordan)[17]where the victim died of pneumonia and the chain of causation is broken, was distinguished. (Balfour v Balfour-1919)[18]was distinguished in (Merritt v Merritt-1971)[19]Overruling a decision, a higher court can overrule a decision made in earlier case by a lower court. As like the Court of Appeal overrule an earlier High Court decision. Overruling can occur if the previous court did not correctly apply the law, for example, (R v Clarence)[20]overruled by (R v Dica-2004)[21]or because the later court considers that the law contained in the previous case is no longer desirable. Reversing is the overturning on appeal by a higher court, of the decision of the court below that hearing the appeal. The appeal court will then substitute its own decision. In (R v Kingston)[22]where the House of Lords reversed the decision of the Court of Appeal and held that involuntary intoxication will not be a defense unless it prevents the defendant forming mens rea for the crime charged even though the defendant was not at fault for becoming intoxicated.

Judicial law making example

In (Gillick v W. Norfolk Area Health Authority – 1985)[23]the House of Lords was asked to consider whether an under sixteen needed her parent consent before she could be given contraceptive services. One side claimed that teenage pregnancies would increase if the courts ruled that parental consent was necessary, and the other side claimed that the judges would be

encouraging under-age sex if they did not. The House of Lords held, by a majority of three to two, that a girl under sixteen did not have to have parental consent if she was mature enough to make up her own mind. (Note: since Parliament had given no lead to the House of Lords, so it had no option but to make a decision one way or the other.) In the case of *Re S (Adult: refusal of medical treatment)*[24] a health authority applied for a declaration to authorize the staff of a hospital to carry out an emergency caesarian section operation upon a seriously ill 30 year old woman patient. She was six days overdue beyond the expected date of birth and had refused, on religious ground, to the operation. The evidence of the surgeon in the charge of the patient was that the operation was the only means of saving the patient's life and that her baby would not be born alive if the operation was not carried out. Stephen Brown P, made the declaration sought, in knowledge that there was no English authority directly on the point. There was however, some American authority which suggested that if this case was heard in the American courts the answer would likely have been in favor of granting a declaration in these circumstances. In the case of *R v R (marital rape)*[25], the House of Lords abolished altogether a husband's 250 year old immunity from criminal liability for raping his wife. Here judges made a new legal principle and the decision has to be followed by other judges in other future cases. This supports the idea of fairness and certainty in law and making new principle. Where precedent do not spell out what should be done in a case before them, judges nevertheless have to make a decision. They cannot simply say that the law is not clear and refer it back to the parliament; even though in some cases they point out that the decision

before them would be more appropriately decided by those who have been elected to make decisions on charge in the law. In the case of *Airedale Hospital Trustees v Bland* [1992][26] the House of Lords recognized there was the intention was to cause death. But the court had decided it was lawful. Withdrawal of treatment was, however, properly to be characterized as an omission. An omission to act would nonetheless be culpable if there was a duty to act. There was no duty to treat if treatment was not in the best interests of the patient. Since there was no prospect of the treatment improving his condition the treatment was futile and there was no interest for Tony Bland in continuing the process of artificially feeding him upon which the prolongation of his life depends. So here the judges make a new principle.

Criticisms of Judicial law making

There are many criticism of the judicial law making. Some of them describe below intern; Perpetuation of bad decisions: There is the weakness that once a decision has been made, if there is no change and the same decision is followed again, a bad decision will be perpetuated. And common law systems are all about following precedents so changes take an extended time to happen. In the interim, a bad decision continues to be upheld. The objective recklessness required in (*R v Caldwell*)[27] was removed in the case of *R v G and Another*, [2003][28] Because injustice when precedent is strictly followed: The overruling of earlier cases may cause injustice those have ordered their affairs in reliance on this. Sometime it become too rigid and cause injustice. In (*R v Berriman*)[29] the party did not have remedy and cause injustice for the binding precedent. Where the precedent is not set out

properly: Judgments are made on the basis of precedent and when there is no precedent the system comes to a standstill. Many problems arise and people are "lost". Need for records: Because these precedents are to be followed by all other courts or in many cases, extended, detailed records have to be maintained. And to make easy the accessing of these cases and previous decisions, consistent indexing methods have to be created and followed attentively.

Owen Fiss Article

According to American Scholar Owen Fiss there is some limitation on the judicial law making process. Judges do not control their agenda but they used to face disputes of the litigants. Judges do not have full control over the proceedings, according to the rules judges are bound to listen the disputes. Judges are bound to respond the disputes, because it is their responsibility to respond. The judges must have justified reason behind their judgment. Fiss means that roles and function to the judges are defined in the constitution. The judges are contributing our social life. That's why we need to develop those points more in depth.

Conclusion:

In conclusion it may be argued that judges should not be legislator. Judges cannot take into account the range of materials that's the lawmakers can. Judges has not mandate to claim a general law making power and they are not accountable as lawmakers are to electorate. Judicial law making is necessary interstitial and limited. Ultimately there is no clear line drawn between judicial law making and the legislator.