

Doctrine of judicial precedent



**ASSIGN
BUSTER**

The Extent the Doctrine of Judicial Precedent Allows for Judicial Law Making

In a legal parlance, judicial precedent is referred to as the tradition of judges who are bound to follow the decisions laid down in previous cases which exhibit similarity of facts. Arguably, *stare decisis* forms the basic tenet of judicial precedent. Ideally, the principle would mean that in practice the decisions rendered by the superior courts are supposed to bind the lower courts in subsequent cases. As a result, legal scholars have argued that this legal tradition ensures that the law promotes fairness and consistency. A good example of judicial precedent is elaborated in *Donoghue v Stevenson* [1] where the House of Lords reasoned that consumers were owed a duty of care by manufacturers. Subsequently, the decision laid down, bound the court in *Grant v Australian Knitting Mills* [2]. For the record, as a source of law, judicial precedent offers judges a reference point in future cases.

On the first premise, it is important to note that a binding precedent would occur only where the factual features of the previous case resemble the current one. This decision is what's known as the *Ration Decidendi*, and should not be confused with the *Obiter Dicta*, which is persuasive in nature only. Arguably, it is from this point of view that legal scholars have concluded that the doctrine is complex in practice and open to misinterpretation. In the UK court hierarchy, courts at the bottom are bound by judgments entered by the higher courts. At the summit, lies the European Court of Justice (one should take notice that the UK has voted to leave the EU), second in superiority is the House of Lords whose decision mandatorily bounds every court below it. A second tier appeal enables the HOL to redirect law when taken a wrong turning. This is found in The Court of Appeal

which possesses two divisions. Arguably, the rulings of the European Court of Justice and the House of Lords bind these two divisions. Also, the two divisions, are bound by their own decisions[3], although there is flexibility with respect to how the criminal division handles cases involving person's liberty[4]. The High Court together with the Divisional Courts is supposed to follow the decisions rendered by the House of Lords. However, it is worth noting that the lower courts cannot overturn these rulings, often diminishing the role of judges when in disagreement[5].

Appreciative of the facts discussed above, between the year 1898 and 1966, it was an already established tradition that the House of Lords should mandatorily follow their previous decisions. As a result, this made the law to be very consistent in their applications due to judgments rendered in *London Street Tramways v London County Council* [6]. Ideally, it was from this observation that Lord Gardiner LC in 1966 delivered a Practice Statement[7], noting that “ the rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law”. [8]Arguably, this opinion by Lord Chancellor illustrates the doctrine's limitations and lack of flexibility. A recent example of this can be found in *R v R* [9]who's decision only reiterated what we already know.

However, be that as it may, the doctrine allows a small opportunity for judicial lawmaking through the prism of distinguishing, overruling and reversing. The two techniques appeared to be endorsed by the statements of the Lord Chancellor where he opined that the House of Lords would be permitted to “ depart from a previous decision when it appears right to do so”. [10]This would mean that departing from previous decisions would

lessen the rigidity of the principle and expand the scope of judicial precedent as a lawmaking tool.

Distinguishing is used in situations where the judge draws a distinction between the current case and a previous case which ordinarily he or she would be bound by, they would then proceed by showing that the facts differ and not suffice to bind them. As a result, the judge departs from being bound by the previous decision thus allowing a new law to be created. The differences in *Balfour v Balfour* [11] and *Merritt v Merritt* [12] were so pronounced. Although the two cases pertained a wife and a husband, in *Balfour v Balfour* it had the characteristic of a domestic arrangement implying that legal intention did not exist. However, in *Merritt v Merritt* it was clear that the so-called agreement was created after the two had separated, which meant that the agreement was binding legally. Keenly looking through this window, the doctrine allows minimally for judicial lawmaking. Another scenario is overruling, where the judge rules that the judgment rendered in a past case is erroneous. Through the Practice Statement, the House of Lords has the leeway to overrule their decisions. For example, in *Davis v Johnson* [13] and also in *Pepper v Hart* [14], the House of Lords opined that parliamentary Hansard could be consulted to decipher the meaning of particular words in a legislation however this is only when so called legislation is riddled with ambiguity or absurdity [15]. Finally, reversing is where the decisions by the lower courts are overturned by a higher court. For example, the High Court rulings or judgments can be overturned by the Court of Appeal.

In conclusion, the doctrine of judicial precedent has been mostly referred to as a “fetter” [16] in the English legal system. As demonstrated, it is this rigidity which has limited its scope to acting as a judicial lawmaking tool. Certainty in law is very critical. However, that being said, rigidity in judicial precedent negatively affects the development of the law. Looking at this perspective, one would agree with Lord Halsbury’s wisdom that there is more to the law than a mere process of logical deduction. [17]

Table of Authorities

Balfour v Balfour [1919] 2 KB 571 (CA)

Davis v Johnson [1978] AC 264 (HL)

Donoghue v Stevenson [1932] AC 562 (HL)

Grant v Australian Knitting Mills [1936] AC 85 (PC)

London Street Tramways v London County Council [1898] AC 375 (HL)

Merrit v Merrit [1970] 1 WLR 1211 (CA)

Pepper v Hart [1992] AC 593 (HL)

R v R [1992] 1 A. C. 599 (HL)

Young v Bristol Aeroplane Co Ltd [1944] KB 718 (CA)

Books

Barker D and Padfield C, *Law* (1st edn, Made Simple 2002)

Denning A, *The Discipline Of Law* (1st edn, Butterworths 1979)

Walsh-Atkins P, *AS UK Government & Politics* (1st edn, Philip Allan Updates 2010)

Wilson S and Storey T, *English Legal System* (2nd edn, Oxford University Press 2016)

Journals

McCormick D, 'Can stare decisis be abolished?' (1966) 11 *Juridical Review* 196

Pickett C, 'Precedent in the Court of Appeal' (1980) 43 *Modern Law Review* 136

[1][1932] AC 562 (HL).

[2][1936] AC 85 (PC).

[3]As seen in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA) 719 (Lord Greene MR).

[4]Wilson SR and others, *English Legal System* (2nd edn, Oxford University Press 2016) 148

[5]Patrick Walsh-Atkins, *AS UK Government & Politics* (1st edn, Philip Allan Updates 2010).

[6][1898] AC 375 (HL).

[7]Practice Statement (Judicial Precedent) [1966] 1 WLR 1234

[8]Alfred Thompson Denning, *The Discipline of Law* (1st edn, Butterworths 1979).

[9][1991] 1 AC 599 (HL).

[10]Neil MacCormick, 'Can stare decisis be abolished?' (1966) 11 *Juridical Review* 196.

[11][1919] 2 KB 571 (CA).

[12][1970] 1 WLR 1211 (CA).

[13][1978] AC 264 (HL).

[14][1992] AC 593 (HL).

[15]ibid [617] (Lord Griffiths), [621] (Lord Brown Wilkinson).

[16]D. L. A Barker and Colin F Padfield, *Law* (1st edn, Made Simple 2002).

[17]McCormick (n 9).