

The role and importance of the doctrine of judicial precedent in english legal sy...

[Law](#), [Justice](#)



Discuss the role and importance of the doctrine of judicial precedent in English legal system. What are the advantages and disadvantages of the doctrine?

Introduction

The doctrine of judicial precedent is based upon the principle of stare decisis, which means the standing by of previous decisions. This means that when a particular point of law is decided in a case, all future cases containing the same facts and circumstances will be bound by that decision as signified in *Donoghue v Stevenson*[1] and *Grant v Australian Knitting Mills*. [2] Whilst the doctrine of judicial precedent helps to maintain the interests of justice, many have argued that it restricts the laws ability to keep abreast with the changes in society and that much restriction thereby exists. [3]

Consequently, there are advantages and disadvantages to the doctrine of judicial precedent which will both be discussed in this study. This will be done by firstly considering the role and importance of the doctrine, followed by a review as to its advantages and disadvantages. Once the relevant information has been gathered and analysed, an appropriate conclusion will then be drawn.

Role and Importance of the Doctrine of Judicial Precedent

The doctrine of judicial precedent is a general principle of common law that is established in a case to help Courts decide upon similar issues in subsequent case law. [4] Judicial precedent is defined in the Oxford Dictionary of Law as a “ judgement or decision of a Court used as an

authority for reaching the same decision in subsequent cases.”[5] There are two different kinds of judicial precedent that exist which are; authoritative and persuasive. Authoritative precedent binds all lower Courts, whilst persuasive precedent does not actually have to be followed and is intended to merely persuade the Court into making a particular decision. It is necessary that Courts always follow the judicial precedent doctrine[6] so that any discrepancies’ can be avoided. This will provide greater certainty to the judicial system, which is vital in maintaining the interests of justice.[7] Not all agree that judicial precedent is that effective, however, and have instead argued that many of the principles are weak and outdated.[8] This is due to the fact that judicial precedent is ageless and so a decision that was made a long time ago by a Court of Appeal, for instance, will still have to be followed until “ it is distinguished by another Court of Appeal or overturned by the Supreme Court.”[9] Judicial precedent’s that have been set by higher Courts will therefore be binding upon all lower Courts unless the same Court or the Supreme Court has overturned the previous decision as identified in *Young v Bristol Aeroplane Co Ltd.*[10] Therefore, whilst judicial precedent does have some drawbacks, it is still an important part of the judicial system and is necessary in the interests of justice.

Advantages

There are many advantages to the doctrine of judicial precedent with one of the main advantages being the ability to save time when making a decision on a case.[11] If a Court is already provided with an answer to a problem in which they face, it will not take as much time to reach a reasoned

conclusion. This is because the Court will not be required to analyse the case and make a decision as they will already have the answer before them, which is a significant benefit within the judicial process. An example how effective judicial precedent can be is exemplified in the case of *Hunter and Others v Canary Wharf Ltd and London Dockland Development Corporation*.

[12] Here, the Court did not have to form an original precedent as it could merely apply a previously established principle to the issue at hand. Another advantage, which has already been mentioned, is the consistency between cases. This strengthens the system and is also likely to reduce crime since those who are aware of the consequences will be less likely to commit a criminal offence. [13] Greater fairness is also provided as cases with similar facts will be treated the same. This is of course unless there is some further fact which is material to the decision as the Court will then be capable of reaching a different conclusion. [14] The existence of a judicial precedent may also prevent a Court from making a mistake as guidance will be provided as to how a case ought to be dealt with. Therefore, a judge will be less likely to make a mistake when reaching a conclusion and a decision will be deemed to be a lot stronger. It will make it difficult for a Court's decision to be contested as there will be case law in place that will back up the Court's decision as shown in *Kadhim v Brent London Borough Council*. [15] This is important in preserving the integrity of the justice system and maintaining Judges' confidence. [16]

Injustice will also be prevented as it would certainly be unjust for different outcomes to be reached in two cases with similar facts. This would be unfair

and society would most likely lose confidence in the justice system. Judicial precedent also prevents judges from producing prejudicial decisions since a judge will often be bound to follow a previous decision even if he disagrees with it.[17] This is important in ensuring that the rulings of judges remain as consistent as is reasonably possible so as to prevent confusion and unfairness.

Another advantage that exists is the ability to develop the law even further. Making law in decided case provides an opportunity for growth and legal development and ensures that the law is able to keep abreast with the continuous advances in society.[18] Courts are able to lay down legal rules and principles a lot quicker than Parliament and because there are constant societal and technological advances, it is necessary that new legal rules and principles can be established more conveniently. The doctrine of judicial precedent can also be flexible in that judges are able to make decisions on a case by case basis according to the individual facts and circumstances.[19] However, this flexibility is restricted by the judges obligations to follow previously decided cases. Because there is a centralised legal system, it is much easier for judges to follow.[20] This is especially so in the UK where there are only a small number of Courts. Arguably, there are many advantages to the doctrine of judicial precedent, yet it is unclear whether these outweigh the disadvantages which will be discussed in the next section.

Disadvantages

Whilst there are many advantages to having a doctrine of judicial precedent in the, it often said that the doctrine introduces unnecessary restrictions into the law.[21] Because of the fast pace at which society advances, it is necessary for the law to keep abreast with any changes that are made. However, the existence of judicial precedent often prevents judges from developing legal doctrine in accordance with societal developments.[22] This demonstrates how the judicial system is somewhat outmoded as reliance upon date case law decisions will be made. This may not be appropriate in modern society and it seems as though further advancements may need to be made. This has a negative impact upon the role of judicial precedent and highlights the complexity of the system. This is because a certain area of the law may have developed over time, yet judicial decisions may not reflect the changes that have been made.

Another disadvantage is that the volume of cases may result in too many precedents, causing confusion.[23] Because there are significant amount of case law decisions, it can be extremely difficult and time consuming to understand the law. It has also been put forward that judges may look for reasons not to follow a decision and therefore produce an illogical decision. [24] This can have dangerous consequences and is not what the doctrine intended. Judicial precedent may also cause injustice as the overruling of an earlier case may spark outrage if individuals have conducted their affairs in accordance with a decision.[25] This weakens the importance of the judicial precedent doctrine and seems to counteract its original objectives.

Since the Human Rights Act 1998 was enacted, the doctrine of judicial precedent has in fact been weakened. This is because legal rules and principles must be read and given effect in a way that is compatible with the rights that are contained under the European Convention of Human Rights 1951. Any legal rules or principles that appear to conflict with such rights must therefore be amended to ensure adequate protections are being provided to individual human rights.[26] This has a significant impact upon the judicial precedent doctrine since lower courts may be able to overturn previous decisions if it can be shown that they are incompatible with the rights under Convention. As noted by Betten; “ when confronted with the Convention, British judges will in many respects have to put themselves into a different interpretative frame of mind.”[27] This was recently exemplified by the case of *Culnane v Morris & Anor*[28] when Eady J had to consider the effect section 10 of the Defamation Act 1952 had upon the rights contained under the Convention. Under the judicial precedent doctrine the Court would have been required to follow the decision in *Plummer v Charman*. [29] However, because the decision in *Plummer* was incompatible with the Convention rights, Eady J was capable of side-stepping the decision. Therefore, it could be said that judicial precedent is not effective in cases concerning human rights.

Subsequent to the enactment of the HRA, it therefore seems as though the judicial precedent doctrine is largely being undermined since the judiciary are no longer required to follow previous decisions if they are incompatible with the Convention. It could be said that the doctrine is no longer important

since the Court in *Miller v Bull*[30] departed from the decision in *Ahmed v Kennedy*[31] regardless of the fact that the Ahmed decision was made subsequent to the HRA's enactment. It has been suggested in view of these cases that a "gaping hole in the precedent wall"[32] exists as "new human rights points can be taken at whatever level they first arise, notwithstanding previous cases which would otherwise be binding." [33] Consequently, it is evident that judicial precedent will not always be followed if it can be shown a decision is incompatible with Convention rights. This has also been recognised by Zander who put forward that; "under the Human Rights Act 1998, the operation of the doctrine of precedent may be set aside." [34] Therefore, Courts may be free not to follow the decisions of higher courts. This will only be applicable in cases concerning human rights and so the judicial precedent doctrine will still be upheld in the majority of instances.

Furthermore, once a human rights issue has been recognised subsequent Courts will then be required to follow the position that has been taken. This re-instates the judicial precedent doctrine further and maintains consistency in the judicial system.[35] As identified by Fafinski and Finch; "section 2 of the HRA requires future courts to take into account any previous decisions of the ECHR." [36] These decisions will not, however, be formally binding, though they will be highly persuasive. In effect, any human rights issues that have been dealt with will be subject to the precedent doctrine. In general, Courts will be required to follow any the jurisprudence of the ECHR, provides that it is clear and consistent yet "it should never be suggested that a court is bound by Strasbourg decisions." [37] It could be said that the precedent

doctrine was essentially put on hold when the HRA was enacted to enable the Courts to deal with human rights issues effectively. However, the doctrine is now being restored as human rights decisions are being made post HRA. Arguably, whilst the HRA had a significant impact upon the judicial understanding of judicial precedent the underlying features of the doctrine remain unchanged and it is only a matter of time before all human rights issues have been dealt with by the Courts and the doctrine is fully restored.

Conclusion

The doctrine of judicial precedent primarily assists Courts when making decisions via previously decided case law. This certifies that certainty and consistency is being provided within the judicial system and enables a speedier judicial process to be effectuated. Greater fairness also exists as cases with similar facts will be treated the same, which prevents any injustice from occurring. Legal rules and principles can also be developed under this process and a more flexible judicial system is established. On the other hand, there are many inherent drawbacks that exist under the doctrine, such as the unnecessary restrictions that are placed upon judges to follow previous decisions. This could prevent the law from keeping up-to-date with advances in society as many of the principles may be somewhat outmoded. Furthermore, it may also be time-consuming and difficult to understand the law as a result of the amount of cases that exist. Since the HRA was enacted, the doctrine of judicial precedent also appears to have been weakened, yet as new case law decisions are established, the doctrine will in fact be restored. This is essential given the importance of judicial

precedence and although there are many disadvantages, these appear to be outweighed by the advantages.

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