

Doctrine of judicial binding precedent essay sample

Law



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This question raises the issue of the role of precedent. In order to examine the statement, scrutiny of the doctrine of the judicial precedent is required. Case law is used to describe the collection of reported decisions of the courts, and the principles which stem from them. Lord Macmillan made this observation that the case by case development is superior to those based on hypothetical models. “..... any fixed theory and that principles always fail because they never seem to fit the case in hand, and so prefers to leave theory and principle alone.” The doctrine of judicial binding precedent, concerns itself with the importance of case law. When cases are examined, the facts of the case are considered. More importantly, how the law applies to these facts is scrutinised. It is the latter that produces precedent, based on the maxim of stare decisis. Precedent can only operate, if the legal reasons for past decisions are known. The ‘reason for deciding’ or ratio decidendi, as a general rule is binding on all lower courts. It is important to distinguish between the different types of precedent. Original precedent concerns a point of law that hasn’t been decided. What is derived from this is, a new precedent for future use.

Binding precedent stems from earlier case law and must be followed. Persuasive precedent is not binding, but courts may take it in to consideration when considering a particular principle. The statement suggests that precedent does not develop different principles ‘into a coherent whole’. This is supported by the fact that the sheer volume of decided cases, increases all the time. Judgements are often long, and not necessarily ‘coherent’ in nature. This continuous nature of the judgements makes it very difficult to distinguish between the ratio decidendi and obiter

dicta, as seen in *Donoghue v Stephenson*. In order to avoid binding precedents, judges have sought to distinguish cases on differing facts. This has resulted in a series of illogical distinctions, creating very complex areas of law. The two cases which demonstrate distinguishing are *Balfour v Balfour* and *Merritt v Merritt*. Both cases were regarding breach of contract between spouses. It was held in *Balfour* that there was no legally binding contract between them. In *Merritt*, the couple who were estranged at the time of the agreement had a legally enforceable contract.

Furthermore, the unsystematic progression of case law adds to the imprecise nature of the development of case law. Another point to consider is the development of the law goes only as far as the cases brought forward, which has implications for growth in certain areas of the law. If an area of law is undeveloped or unclear, a decision cannot be made until a case is decided. Yet it is also argued that the current system of precedent is coherent, in the respect to the certainty of decisions. The English system of precedent is based on the Latin maxim *stare decisis*, which translated is 'stand by decisions'. Lawyers are able to advise clients based on what had gone before, so can speculate to the likely outcome of cases. This certainty in the law also promotes consistency and fairness in the law. Case law demonstrates that the development of different principles can be very precise and detailed. It can be disputed that the law, in fact, is well illustrated through gradual development.

For example there are many areas of law that owe their existence to judicial law making, such as contract or tort law. Contract in particular still has rules

that date back to the nineteenth century. Tort law has been largely shaped by precedent. In the case of *Donoghue*, the very significant 'neighbour principle' was created. The role of precedent, according to the statement is about 'disciplining particular judges'. This is based on the idea that perhaps judges need to be controlled or restricted with regards to their law making power. In so doing, raising the controversial issue, do judges make law? Historically, the legal system has evolved from sifting through local customs and judicial decisions, thus creating what we now know as the common law. The traditional view is that judges merely clarify what the law is, rather than make law. The opposing view, that judges do to a certain extent make law seems to be a more accurate description. As will be demonstrated, judges use precedent to create new law and extend old principles.

Application of judicial precedent is always subject to interpretation if the terminology is vague or ambiguous. When interpreting statutes if the wording is not clear then its meaning will need to be interpreted. The same occurs if it does not cover for all eventualities. This suggests that there is no certainty in the law, as the application of law (case or statute) in instances like this is not automatic. Despite this difficulty, judges nevertheless have to make a decision. This is illustrated in the case of *Re A (Children)* regarding the legality of an operation on Siamese twins. This upholds the view that judges do have to make law in these situations. The controversy arises as many believe that the judges should not have the power to make new laws, but they are to apply it. Perhaps this is what it means to discipline judges via precedent? As already mentioned, the effect of *stare decisis* is that the judge

is bound by previous decisions. So what do we make of instances, where judges have overruled old case law, thus creating new law.

In the case of *R v R* a man was charged with raping his wife. The judges in this case had to decide whether to stand by the old law that a married woman automatically consented. By arguing that the precedent was outdated, it was held that if the wife did not consent to sex, her husband could be guilty of rape. The statement goes on to suggest that precedent is about 'maintaining the hierarchy of the courts'. Certainly the rigidity of the doctrine does have this effect. This is because generally every court is bound to follow decisions made by courts above it. Also appellate courts are bound by their past decisions. The idea that each court has a definite standing in relation to other courts is what will be examined below. The highest court affecting legal system in England and Wales is The European Court Of Justice. (ECJ) A decision made by the ECJ on European law or its institutions, is binding on all UK courts.

However, the ECJ is not bound by its previous decisions, nor does it have the concept of *stare decisis*. This very flexible approach to past precedents is a stark contrast to the more rigid approach of national courts. As the ECJ's primary concern is European Union law, the remaining domestic law is governed by the House of Lords, which is now the Supreme Court. Until 1966, the House of Lords was bound by itself, unless the decision had been made *per incuriam* or in error. This was the rule as demonstrated in *London Street Tramways v London County Council*. This had obvious drawbacks with regards to the flexibility, the law couldn't be changed and illogical decisions

stood. At that time the only way to change a “ wrong” decision by the House of Lords, was by a new Act of Parliament.

This can be seen in DPP v Smith. The rule in London Tramways was abolished when the Lord Chancellor issued a Practice Statement. Affecting, that the House of Lords was no longer bound by previous decisions, but there is a reluctance to use it as seen in R v Kansal. This reluctance can also be concluded via a statement made by Lord Cross. The Practice Statement ‘ does not mean that whenever...a previous decision was wrong, we should reverse it’. The Court of Appeal has two divisions of court, the Civil and Criminal division resulting in varying rules for precedents. However, both divisions are bound by the ECJ and the Supreme Court. The decision in Young v Bristol Aeroplane Co Ltd laid down the principles relating to whether the Court of Appeal (Civil Division) is bound by previous decisions. Generally the Court of Appeal is bound by its past decisions, but there are three exceptions. 1. Conflict of previous decisions.

2. Where a previous decisions have been overruled by the House of Lords. 3. Decision was made per incuriam. Another area of debate is whether the Court of Appeal should be bound by the decisions made by the higher courts. There have been attempts by Lord Denning to enforce that the Court of Appeal should not be bound by the Supreme Court. For example in Broome v Cassell & Co Ltd Denning refused to follow a House of Lords decision in Rookes v Barnard. This has raised much debate, the main argument favouring Lord Dennings’ view is that very few cases reach the Supreme Court, so errors may take many years to correct. In the case of Miliango, the

parties could have suffered great injustice if the Court of Appeal followed the House of Lords decisions in *Havana Railway*. The Divisional and High Court are bound by their own decisions; however High Court decisions are not binding over Divisional Courts.

The Magistrates Court is not bound by any of its previous decisions, but is strongly persuaded by them to promote certainty in criminal law. There is evidence to suggest that the role of precedent is to discipline judges, as cases stand in relationship to other cases. The concept of *stare decisis* could in theory limit the judges' ability to make law. However as we have seen, judges find ways of avoiding awkward precedent, thus nullifying the system of 'standing by decisions made'. This also does not apply when judges make original precedent. As we have seen the underlying principle of the doctrine of judicial precedent, is that the courts form a hierarchy. With the top being of greater importance as to their legal value. The hierarchy of the courts are well defined to achieve legal certainty. For example the Court of Appeal could be relevant in many directions, but it is the doctrine of precedent which dictates to us in which courts the decision could be relevant in. Word count -1770 gg57

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