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OPERATION OF PRECEDENT IN INDIA AND **JUDICIAL CREATIVITY IN RECONCILING** **CHANGE WITH STABILITY**

AUTHORED BY - FRANCIS K V

The operation of precedent in India place a crucial role I the judicial process under the doctrine of 'stare decisis' which means "to stand by what has been decided". A precedent which is long-standing should not be disturbed. This is the actual understanding of this doctrine. This principle ensures consistency, stability and predictability in the legal system. It requires court to follow established precedents and not to deviate from them without strong reasons.

Meaning and Concept of Precedent

Judicial precedent is the important source of law. A precedent means previous decision of court of law which contains legal principle of law. It is a judicial decision that serves as an authority for deciding similar cases in the future. In India it is based on the principle that court should follow previous rulings to ensure uniformity in legal interpretations. Like England, in India also judicial precedent have been recognized as a source of law. The subordinate courts follow the previous decisions of Supreme Court and the High Court.

Article 141 of the Constitution of India declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus all the courts in India are bound by the law declared by the Supreme Court. The decisions of our High Courts are being followed by subordinate courts not because of any statutory sanction, but because our legal system accepts precedent as a source of law.

While deciding cases, Supreme Court of India may declare a new law or give an interpretation to a legislation. The law declared by the Supreme Court and the interpretation given to the legislation shall be binding on all High Courts and Subordinate Courts within the territory of India.

The doctrine of precedent was evolved towards a necessary fulfillment of the goal of law, viz. stability, certainty, and continuity. The doctrine is relatively modern in its origin. The

avoidance of disastrous inconvenience of subjecting each question for re-argument and rendering the dealings of litigants doubtful, has been the usual justification for this doctrine. The practical inconvenience is the pragmatic ground on which the doctrine stands. Occasional re-argument of a rule is a small matter compared with the perpetuation of manifest injustice.

In tracing the reception of the British Doctrine of precedent into the judicial system in India, it is not necessary to encumber the discussion with an account of precedent in the Hindu legal system. Hindu law which primarily consist of la doctrine as opposed to la jurisprudence or enacted law could have never evolved a consistent and coherene doctrine of precedent comparable to the modern doctrine of precedent which is in itself a pragmatic response to the compulsions and components of English Legal History and hence cannot be universalized in its scope and ambit. The tradition of following prior rulings given by “sistas” who were well acquainted with Vedas, the Dharmasastras and Dharmasutras was however, well entrenched in the minds of the Hindu law givers. This apart the authors of Smritis attach the highest importance to sistacharas (righteous conduct as commanded and approved by Vedas) as constituting a recognized source of law. Frequently disputed questions of law had to be resolved by reference to established usage and practice even though authoritative opinions of Brahmanas would often be decisive evidence of the questions concerning approved usage. Manu Samhita does recognize precedent in an analogous sense when it says that on disrupted question of law the opinion of Brahmanas who are sistas shall have legal force proceeds that four persons who know the Vedas and charmas or who know only the three sciences constitute a legal assembly. What the assembly says is Dharma. The legal assembly here undoubtedly blended legislative and adjudicatory functions. Hence from the decision of such an assembly one should not be tempted to draw a parallel that would attribute to them the legal status of precedent as we understand it today. Manu says, “He who investigate Dharma must use the aid of reason and no other”. Be that as it may, Manu is also cited as an authority for the preposition that “In his decision the judge is to attend to lacial usage, established practice, the decision of former judges” and written codes of law (Sastra)- or examples.

The Theory of Precedent in British India.

With the advent of British Rule and the consequent reception of common law into our legal system, significant development followed both with regard to the use and the theory of precedent in British India. The doctrine of precedent whatever be the sophistications that it has gathered on the forensic level, evokes an atmosphere and a mood to follow ancient decisions,

follow old ways and adhere to existing practice. With the increasing role of law as an instrument of development the task of modern judge is becoming increasingly complex. The goals at which the law aspires stability and certainty; and change and progressiveness are continuously in conflict with each other. No decision can be taken without a careful evaluation of the conflicting values and interest which the modern society demands.

In tracing the history of the recordings of the judicial precedents in British India, mention must be made of Sir Francis Mac Naghten, formerly a judge of the erstwhile Supreme Court of Calcutta who began the tradition of inserting report of cases illustrative of his dissertation on Hindu Law. Sir Mac Naghten's work was published in 1824. Printed reports of the cases in the reign of the East India Company were published by Sir William Mac Naghten when he was the registrar of Sadar Diwani Adalat at Calcutta. It is significant that most of the case reports up to the year 1844 were written, or approved, by the judges who decided the cases. Since then these reports came to be known as Select Reports and were published as "Approved by the Court". These reports were adapted to serve as precedents to the inferior courts.

The era of authentic law reporting began with the Indian Law Reports Act, 1875 and the India Law Reports Calcutta series appeared in the same year. Significantly the 1875 Act nowhere states that a decision of a High Court is binding to itself or the inferior courts within its jurisdiction. It is important that this enactment itself came closely in the wake of the adoption of the Indian High Courts Act, 1861 which led to the demise of dual judicature that had existed previously and facilitated the subscription of all courts lower in the hierarchy under the unified jurisdiction of the provincial High Courts. Thus a hierarchy of courts with provision for appeal to the higher courts came to be established. Therefore the two indispensable requirements for the emergence of viable doctrine of judicial precedent – organization of courts in a hierarchical structure and the emergence of authentic law reports- were fulfilled only around 1875. This is about the time when the doctrine of precedent in its contemporary version got a firm foothold in England. The landmark decision in *Beamish v. Beamish*, the forerunner of the doctrine of precedent, coincided with the passing of Indian High Courts Act, 1861.

Influence of Decisions of the Privy Council on the Evolution of Precedents in Indian Judicial Practice.

The Privy Council played a crucial role in shaping Indian Judicial Practice during British rule. As the highest appellate authority for colonial India until 1949, its decision significantly

influenced the development of legal precedents in the India Judicial System. The impact of the Privy Council's rulings can be observed in several ways.

1. **Establishment of Judicial Precedents:-** The Privy Council's decision provided authoritative interpretation of Indian laws creating a structured body of precedents that Indian Courts followed. These rulings laid the foundation for the doctrine of Stare Decisis (binding precedent), ensuring uniformity and consistency in judicial decisions.
2. **Development of Common Law Principles:-** Indian judicial practice was deeply influenced by English Common Law due to the Privy Council's role. Many principles such as rule of law, natural justice, equity and good conscience were reinforced through its decisions. The adaptation of these doctrines shaped the procedural and substantive aspect of India Law.
3. **Interpretation of Personal and Customary Law:-** The Privy Council adjudicated cases involving Hindu and Muslim personal laws, helping to develop principles for their interpretation. In many instances, it provided clarity on issues like inheritance, marriage, and succession which Indian Courts continued to follow even after independence.
4. **Uniformity and Stability in Judicial Decisions:-** As a final court of appeal, the Privy Council ensured uniformity in legal interpretation across different provinces of British India. This led to consistency in judicial practice and helped to establish a common legal framework that Indian Courts adhered to.
5. **Influence on Constitutional and Administrative Law:-** Several landmark Privy Council decisions influenced the evolution of Constitutional and Administrative law of India. Its ruling on fundamental rights, the powers of executive and judicial review laid the groundwork for many constitutional doctrines later adopted by Supreme Court of India.
6. **Transition to Supreme Court of India:-** After India gained Independence, the Supreme Court of India replaced the Privy Council as the highest judicial authority in 1950. However many Privy Council precedents continued to be relevant, especially in interpreting statutory provisions and constitutional matters.

Notable Cases and Their Impact

Rani Annapurni v. Swaminatha Ayyar (1889)—Established principles regarding Hindu women's property rights.

Maharaja Shibessouree Debia v. Mothooranath Acharjo (1869):- Influenced the interpretation

of religious endowments in Hindu law.

Eshugbayi Eleko v. Officer Administering the Govt. of Nigeria(1931):- Upheld personal liberty and due process, influencing Indian habeas corpus jurisprudence.

Thus the Privy Council's decision played a fundamental role in shaping Indian JUDICIAL practice by establishing legal precedents ensuring uniformity, and reinforcing the doctrine of stare decisis. Even after independence, its influence persisted in Indian legal jurisprudence, with many rulings continuing to guide judicial reasoning in Indian Courts.

Since the Judicial Committee of Privy Council was the highest appellate court for appeal from British India, its view on the stare decisis doctrine was naturally of interest to High Courts and later to the Federal Court under the Government of India Act, 1935. Further in view of the fact that Supreme Court historically succeeded the Federal Court and the Judicial Committee, it is the view adopted by the former that was the sheet-anchor of the Supreme Court when its turn came to determine its attitude to stare decisis.

Since early times the Judicial Committee did not consider that it was bound absolutely by the doctrine of precedent. In Read v. Bishop of London, the judicial Committee asserted its freedom to consider previous decisions on merits.

Federal Court and the Government of India Act, 1935.

Section 212 of Government of India Act, 1935 states that "the law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable be recognized as binding on, and shall be followed by all courts in British India, and so far as respects the application and interpretation of this Act or any order in council there under or any matter with respect to which the Federal Legislature has power to make laws in relation to the state in any Federal states". As for the Federal Court, the constitutional predecessor of the Supreme Court, there was academic authority for the view that sec.212 of Government of India Act,1935 which corresponds to Article 141 of the constitution of India did not oblige the Federal Court to holding itself bound by its own decisions. The expression, "All Courts in British India" was construed to exclude the Federal Court from its ambit. This was done on the basis that the constitution is the Supreme Law of the land and that the ultimate court should not be fettered by the rule of Stare Decisis and prevented from giving effect to what it considers to be the most

authentic and appropriate interpretation of the constitution in consonance with changing and progressive ideas.

The Government of India Act, 1935 established the Federal Court of India which functioned from 1937 to 1950 and was the highest judicial authority in British India before the Supreme Court of India was established in 1950.

Federal Court and Application of Precedent.

The Federal Court of India had appellate jurisdiction over decisions of High Courts and original jurisdiction in certain constitutional matters. The doctrine of precedent was followed by the Federal Court which was influenced by common law system, but the court also exercised discretion to depart from past rulings when precedents are found to be wrongly decided. A new interpretation was required due to changing circumstances. Conflict arose between English precedents and Indian condition.

Here are some notable cases where the Federal Court departed from previous judicial rulings. Emperor. v. Benoari Lal Sharma(1945)47 BOMLR 260.

In this case Court held that the British Parliament had the power to enact martial law regulations without violating constitutional provisions. It deviated from earlier privy Council rulings that had restricted the use of martial law in peace time.

Laxman Rao. v. State of Bombay (1949) 51BOM LR859, AIR-1950 BOM 294, AIR 1952 SC324.

The Court reconsidered and departed from earlier High Court decision on the interpretation of fundamental rights and preventive detention

In re CP& Berar Sales of Motor Spirit and Lubricant Taxation Act (1939)

The Court addressed the limit of provincial autonomy under the Government of India Act,1935 and overruled previous interpretation that have given excessive power to the Governor General.

United Provinces. V. Atiqa Begum (1940) 2FCR110

The court reinterpreted the legislative competence of provinces deviating from earlier English legal principles that strictly limited provincial powers.

Kesav Madhav Menon.v. State of Bombay (1947)

The court questioned whether English criminal law precedents should always be applied in India, leading to a more independent approach to criminal jurisprudence.

Governor General in Council v.Raleigh Investment Co. Ltd. (1943) 11 ITR393 (cal)

The Federal Court ruled against the absolute Supremacy of the Privy Council, setting a

precedent for India's later judicial independence.

Significance of These Deviations

These departures laid the groundwork for the Indian Supreme Court's assertion of judicial review and independence from English precedents.

The Government of India Act, 1935 provided the basic framework for India's constitution of 1950, and many of the Federal Court's decision influenced post-independence constitutional interpretation.

Precedent in Post-Independent India: Constitutional Context.

The Article 141 of the Constitution of India declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus all the courts in India are bound by the law declared by the Supreme Court. Faced with the freedom of choice between the traditional doctrine of precedent and the American doctrine of review of precedents, Supreme Court of India inevitably lent its preference to a flexible use of the doctrine of precedent without imposing the fetters of Stare Decisis on itself. Rumbling of disenchantment with the doctrine were first heard in Supreme Court in *Dwarakadas Srinivas. v. Sholapur Spinning and Weaving Co.* in which Das.J. expressed the view that the Supreme Court is not bound by its own decisions especially when they focus on constitutional issues but that the court will be slow to review that power unless the previous decision is obviously erroneous.

But it was in the *Bengal Immunity Co. Ltd. v. State of Bihar*, that the question was raised in the forum of the sharp controversy, and the court set the highest priority to the question of considering the status that should be accorded to the doctrine of precedent in its application by the Supreme Court. Significantly, the Court unanimously- and this is significant from the point of view of the doctrine of precedent- held that Article 141 of the Constitution cannot be so construed as to make the prior decisions of the Supreme Court binding on it. "Courts" as used in Article 141 was held not to include the Supreme Court. The court was unanimous in overruling the decisions in *State of Bombay v. United Motors (India) Ltd.*

Supreme Court unanimously overruled its earlier decisions holding that state could not levy sales tax on interstate transaction until parliament enacted a specific law under Article 286(2). When facts and attendant circumstances do not compel review the doctrine of precedent

would still be the governing rule in the Supreme Court.

In post-INDEPENDENT India, Indian courts followed several precedents to shape the legal framework and judicial decisions. The primary sources were:

Colonial Judicial Precedents: - Indian courts continued to follow judicial precedents set by British courts during the colonial period, especially those laid down by the Privy council and Federal court of India. Precedents established by these courts remained binding unless they conflict with the Indian Constitution or overruled by the Supreme Court of India.

Evolution of Precedents in Post Independent India. A.K.Gopalan. V. State of Madras (1950) AIR 27 SCR 88.

In this case the Supreme Court ruled that Article 21 of the Constitution did not require Indian Courts to apply a due process of law standard. In doing so, Supreme Court upheld the validity of Preventive Detention Act, 1950 with the exception of Section 14 which provided that the grounds of detention communicated to the detainee or any representation made by him against these grounds cannot be disclosed in a court of law, and ruled that citizens could be detained without trial if they were considered to be a threat to National Security. In this case court restricted the meaning of Article 21 to the extent that personal liberty only means freedom of personal body and nothing else. In this case Supreme Court followed the British concept of personal liberty as interpreted in *Liversidge v. Anderson* (1942 AC 206) where preventive detention laws were upheld by prioritizing the procedure established by law rather than substantive due process.

State of Madras v. V. G. Row [(1952) AIR 196, SCR 597]

In this case the court relied on British principle of restricting fundamental rights, referencing cases like *Rex v. Halliday* [(1917) UKHL662, 54 SLR 662] which justified preventive detention laws.

Menaka Gandhi v. Union of India (1978) 1SCC 248, AIR 1978 SC 597; - In A.K.Gopalan case Fazl Ali, J. gave a dissenting opinion in the matter and stated that Article 19 and 21 are inner-connected, and the court by ignoring the principle of natural justice, is paving the way for situation of dictatorship. This criticism was upheld and the decision of A.K.Gopalan case overruled in *Menaka Gandhi* case where the court held that procedure established by law must be a fair and reasonable procedure.

Landmark cases on Constitutional Amendments.

The general rule is that the Supreme Court is not bound by its earlier decisions and in appropriate cases it may overrule its earlier decisions. The following decisions would establish the proposition that the Supreme Court is not bound by its own decisions.

Sankari Prasad. V. Union of India. (1952) SCR 89,AIR 1951 SC 458.

The Supreme Court held that in exercise of Constituent power of parliament under Article 368 of the Constitution, any part of the Constitution can be amended including Fundamental rights. Sajjan Singh. V. State of Rajasthan (1965) AIR 845, 1965(1) SCR 933,1965(1)SCWR 593.

The Supreme Court approved majority judgment given in Sankari Prasad's case, and held that the parliament can amend any part of the Constitution.

I.C.Golaknath v. State of Punjab (1967) AIR1643,1967 SCR(2)762.

The above two decisions were overruled by the Supreme Court in Golaknath case. Supreme Court by prospective overruling held that the parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental on rights in future. In this case court relied on British Judicial Review Principles regarding constitutional amendments similar to Attorney General v. De Keyser's Royal Hotel (1920)

Kesavanantha Bharathi. V. State of Kerala (1973) AIR 1461, SCR(1)1.

The Supreme Court overruled the decision in Golaknath's case which denied parliament's power to amend the fundamental rights of the citizens. It was held that parliament can amend any part of the Constitution including fundamental rights without offending the basic features of Constitution. The basic structure doctrine was influenced by the privy council's decision in I R Coelho v. State of Tamil Nadu and the British principle that some fundamental aspects of Constitution cannot be altered.

Minerva Mills v. Union of India(1980)

In this case Supreme Court held that parliament cannot under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy the basic and essential features.

Indira Nehru Gandhi.v. Raj Narain(1975)

Supreme Court affirmed judicial review of electoral disputes. This case established that judicial review, separation of power, and "free and fair elections" are part of the basic structure of the Constitution.

Vishaka v. State of Rajasthan AIR(1997)SC 3011.

Supreme Court delivered a landmark judgment laying down guidelines to be followed by establishments in dealing with complaints about sexual harassment at work place. The Court

decided that the consideration of “ international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14,15,19(1)(g) and 21 of the Constitution and the safeguard against sexual harassment implicit therein”. Court provided the basic definitions of sexual harassment at the work place and laid down guidelines to deal with it. Supreme Court also stated that these guidelines were to be implemented until legislation is passed to deal with the case. It is seen as a significant legal victory for women’s groups in India.

Precedents maintain a balance between legislative actions and judicial review. Courts have used precedents to expand human rights such as in Navtej Singh Johar v. Union of India (2018) decriminalizing homosexuality. (Section 377 of IPC).

Judicial Techniques of Using Precedent.

Dissent/Refusal to follow a Precedent:-Dissent is a mere refusal to follow a precedent. It arises when one judge refuses to accept the ruling of another judge having equal jurisdiction.

Vijay Laxmi Sadho v. Jagdish(2001) AIR SCW223,AIR2001 SC 601.

In this case Supreme Court held that a single judge of High Court is bound by earlier decision of another judge of that High Court. If a single judge is not in agreement with the view expressed in the earlier decision of another single judge of that High Court, it would be proper to refer the matter to the larger bench rather than to take a different view.

Distinguishing a Precedent.

The doctrine of precedent is based on the principle that like cases should be decided alike. Once a case is decided by a judge by applying a principle, a case on similar facts which may arise in future must also be decided by applying the same principle. Thus applying precedent is a process of matching the fact of the precedent and ruling thereon with the facts of the instant case. If the facts of both cases match, the ruling in the precedent is applied. If not, it is distinguished.

Reversing a Precedent.

Reversal of decision takes place on appeal/review. The effect of reversal is normally that the first judgment ceases to have any effect at all. It amounts to a nullification of the decision as well as the principle which form the basis of decision.

Overruling the Precedent.

Overruling involves disapproval of the principle laid down in a decision of the lower court or a bench of lesser strength. The decision of two judge bench in P Retnam .v. Union of India (1994) was overruled by the five judges bench in Gain Kaur v. State of Punjab(1996)

Prospective Overruling.

Overruling of a decision means declaring a precedent as invalid. When a decision is overruled it will have retrospective effect. Overruling a decision with retrospective effect may cause injustice. To avoid hardships resulting from retrospective overruling Justice Cardozo of Supreme Court of America enunciated the doctrine of Prospective Overruling while deciding the case.

The Supreme Court of India has for the first time applied the principle of Prospective Overruling in deciding the case I C Golaknath v. State of Punjab (1967). Supreme Court held that amendment of fundamental rights which were made before the judgment is valid but prohibited the parliament from amending the fundamental right in future.

In SBI V. Kuttappan (1998) the Kerala High Court held that the power of Prospective Overruling is vested only with the Supreme Court and that too only in constitutional matters. It is therefore clear that High Courts have no jurisdiction or authority to declare that its decision will have only prospective operation.

Decision Per-Incuriam.

Decision per-Incuriam means a decision of a court in ignorance of an authoritative precedent or binding law. If a precedent is a per-incuriam decision it is not binding on subordinate courts. A per- Incuriam decision can be overruled by superior authority with justification.

Decision Sub-Silentio

When a particular point law involved in a decision is not perceived by the court or present to its mind the decision is said to be sub-silentio. A decision sub-silentio is a decision arrived at by the court without considering all points. A precedent sub-silentio or not fully argued is not binding on subordinate courts.

Classification of Precedents.

Binding Precedents: - There are decisions that must be followed by lower courts within the same jurisdiction. For example, Supreme Court's rulings are binding in all lower courts in India (Article 141 of the Constitution)

Authoritative Precedent: - An authoritative precedent is one which the judges must follow whether they approve of it or not. A decision of House of Lords of England is an authoritative precedent as far as subordinate English Courts are concerned. Decision of Supreme Court of India are authoritative precedent as far as other courts in India are concerned. Authoritative Precedents are legal source of law.

Authoritative Precedents are of two types. They are:

1. Absolutely Authoritative Precedent.
2. Conditionally Authoritative Precedent.

Absolutely Authoritative Precedent is one which is absolutely binding and must be followed at all circumstances, even though it is unreasonable or erroneous. A precedent of Supreme Court of India is to be followed by the lower court even though it is unreasonable.

In *P. Ramachandra Rao v. State of Karnataka* (2002)3 SCR 60, seven judge bench of Supreme Court held that a bench of lesser strength is bound by the view expressed by the bench of larger strength and cannot take a view in departure or in conflict with the decision of larger bench.

In *Pandurag Kalu Patil V. State of Maharashtra* (2002) AIR SCW 366, AIR2002SC 733, 2002(2) SCC 490. The Supreme Court held that a High Court in India is bound to follow a ratio laid down by the privy council, unless a contrary decision of Supreme Court is shown to it.

A Conditionally Authoritative Precedent is one which is normally binding on the judge, but he may disregard it in limited circumstances. When he disregards it he has to show reason for rejecting it. A Madras High Court decision is conditionally authoritative precedent for sessions judge of Kerala. He can reject the decision of Madras High Court after showing reason for it.

In order to reject a conditionally authoritative precedent the judge has to show that the decision is wrong either at law or reason. The maxim "*cessanti ratione legis cessant ipsa lex*" (which means, "when the reason for a law ceases, the law itself ceases.") helps the judge to reject a conditionally authoritative precedent.

Persuasive Precedent.

Persuasive precedent is one which the judges are under no obligation to follow. Foreign judgments have only persuasive effect in India. Decision of Supreme Court of America or House of Lords need not be followed by Indian judges, but can be considered for guidance.

Original Precedent and Declarative Precedent:- Original Precedents are those which lay down original or new principle of law. The original precedent light for the original development of law. The original precedent is a source of law for subsequent conduct.

The rule declared in *Donogue V.Stevenson* (1932) is an example of original precedent. In this case the court held that the manufacturers of consumable items are under a duty to see that the consumable items which they manufacture, in forms intended to reach the ultimate customer without the possibility of intermediate inspection, should not contain noxious substance. If the manufacturer violate this principle, he is liable to compensate the ultimate consumer.

Declarative Precedents are those which merely reiterate a recognized principle of law. In *Mohri Bibi v. Dhamadas Ghosh* [(1903) ILR 30 IA 114, 7CWN441, AIR 1903 PC88] the privy council held that a minor's contract is ab initio void. The very same principle has been reiterated by different courts in India in different cases. All those decisions are only declaratory precedents.

Conclusion:-

Indian judiciary plays a crucial role in maintaining legal stability while ensuring that laws evolve with changing times. Through judicial creativity, courts have successfully interpreted the Constitution and statutes to uphold justice and social progress. The balance between precedent and innovation remains essential for dynamic and just legal system.

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