

Legal System

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Batch 03

- 4.1. Discuss and illustrate how the doctrine of judicial precedent was used to pre uniformity in English common law and in Sri Lanka legal system.
- 4.2 An adversarial system requires the extended assistance of lawyers in maintaining fair system of justice.
- (a) State your agreement with the above and elaborate on your answer.
 - (b) Advance your suggestions as to how regulations relevant to legal profession should to be upgraded.
- (4.1) The source of law in Sri Lanka has been influenced by the two great legal traditions, the common law system based on the English law and the civil law system from which the Roman-Dutch law. The doctrine of judicial precedent is emerged from the English common law and it is very important to preserve the uniformity in English common law and in Sri Lanka legal system then essentially we should discuss about what is the judicial precedent, what are the example of using it in both legal system and what is the importance of the doctrine.

Doctrine of judicial precedent has always played pre-eminent role in English law. It is a living and continually developing feature of English legal system which is to work in the future as well as it did in the past. Precedent may be defined as a previous instance or case which is or may be taken as an example or rule for subsequent cases or by which some similar act or circumstance may be supported or justified. Judicial precedent refers to the law where past decisions made by judge create law for future judges to follow. Every court is bound to follow any reported case decided by a court above it and some appellate courts are bound by their own decisions. Superior courts are not bound by the decision of the lower court but the decision of any court is entitle to some measure of respect.

For any doctrine of binding precedent to apply in a legal system two conditions are necessary. First one is hierarchy of courts. A decision is generally binding only on a bench of lesser authority and therefore it is necessary that a nicely graded hierarchy of authority is established. Second one is there must be a system of law reporting. Reports need not be official.

The English system of precedent is based on stare decisis which translated from Latin loosely means “ To stand by what has been decided. “ Stare decisis provides fairness and certainty in the law. It is divided in to two parts as ratio decidendi and obiter dicta.

The ratio decidendi of a case is the principle of law on which a decision is based when a judge delivers judgment in a case he outlines the facts which he finds have been proved on the evidence. Then he applies the law to those facts and arrives at a decision for which he gives the reason.

The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an obiter dictum. The binding part of a judicial decision is the ratio decidendi. An obiter dictum is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However an obiter dictum may be of persuasive authority in later cases.

A binding precedent is a decided case which a court must follow. But a previous case is only binding in a later case if the legal principle involved is the same and the facts are similar. Distinguishing a case on its facts, or on the point of law involved, is a device used by judges usually in order to avoid the consequences of an earlier inconvenient decision which is in strict practice binding on them. What is reasonably distinguishable on particular cases and the particular court, some judges being more inclined to “distinguish” disliked authorities than others. In Jones V secretary of State for social services (1972) AC 944, Reid stated “it is notorious that where an existing is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty.”

A higher court can overrule a decision made in an earlier case by a lower court. An example is the Court of Appeal can overrule an earlier High Court decision. Overruling can occur if the previous court did not consider that the rule of law contained in the previous ratio decidendi is no longer desirable.

Reversing is the overturning on appeal by a higher court below that hearing the appeal. The appeal court will then substitute its own decision.

Essentially the doctrine of judicial precedent has given a contribution to establish a uniform legal system in English common law and Sri Lanka legal system and we can quote some examples to explain it. The doctrine of judicial precedent is based on stare decisis. That is standing by of previous decisions. Once a point of law has been decided in a particular case that law must be applied in all future cases contain the same material facts.

For example in the case of Donoghue v Stevenson (1932) AC 562 the house of lords held that a manufacture owed a duty of care to the ultimate consumer of the product. This set a binding precedent which was following in Grant V Australian Knitting Mills (1936) AC 85. Also in Shaw V DPP (1962) AC 220 the House of Lords held that a crime of conspiracy to corrupt public morals existed. This was followed in Knulier V DPP (1973)AC 435. In order for the doctrine of judicial precedent to work, it is necessary to be able to determine what a point of law is. In the course of delivering a judgment, the judge will set out their reasons for reaching their decision amount to the ratio decidendi of the case. The ratio decidendi forms the legal principle which is binding precedent meaning it must be followed in future cases containing the same material facts. It is important to separate the ratio decidendi from the obiter dicta.

The obiter dicta is things stated in the course of a judgement which are not necessary for the decision. For example in R v Howe and Bannister (1987) 2 WLR 568. The House of Lords held that the defence of duress was not available. To those who attempt murder and stated obiter dicta that the defence of duress should not be available to attempted murder.

In addition to binding precedents there exists persuasive precedents. They consist of judicial statements which are not binding but may be taken in account. For example, the obiter dicta from R V Howe and Bannister was followed by the house of lords in A V Gotts (1992) 2AC 412 which held that the defence of duress was not available to attempted murder. A form of persuasive precedent is obiter dicta. Persuasive precedent also include case law from other jurisdictions and traditionally the privy Council decisions have been merely persuasive in English courts. However exceptionally Privy council may be binding. Queen V Leatham (1901) 495 is a case on economic tort and is an important case historically for British labour law. It concerned the tort of " conspiracy to injure ". The case was significant departure from previous practice and was reversed by the Trade Dispute Act 1906. However the issue of secondary action was later restricted from the Employment Act 1980 and now the Trade Union and Labour Relations (consolidation) Act 1992. The case was heavily controversial at the time and generated a large amount of academic discussion notably by Wesley Newcomb Hohfeld with continued long after it was overturned.

When consider about Sri Lanka law we can consider about some cases and realize the contribution of judicial to preserve the uniformity of Sri Lanka legal system. The recent decision of Supreme Court of Sri Lanka in Abesundere V Abesundere dealt with the question whether a man who had entered into a monogamous marriage prior to embracing Islam would be guilty of bigamy if he thereafter contract a marriage under the Muslim law with a

person professing Islam, during the subsistence of first marriage. The issue was a new one and had been previously considered by the privy council in Attorney General V Reid. But the supreme court took may by surprise when is perported to overrule the latter decision and held that the man was guilty of bigamy. The decision of the supreme court has provoked a great deal of discussion in Sri Lanka and abroad.

In the most famous Sri Lankan case Prof. Priyani Soyea V Rieneie Arsakularathna refered many cases and we can consider about some cases to understand the using of judicial precedent. The supreme court refered few decided cases that illustrate the principle of causation. In the case of Fish v Kapur it was held that there was no loss which flowed from the defendant dentist's failurs to diagnose a broken jaw, because even if he diagnosed it there was no proof of any damages following on the failure to diagnose. In Barnett Vs Chelsea and Kensington Hospital Management Committee it was held that the hospital's casualty officer was negligent in his failure to see and examine the deceased, but even if the deceased was examined, medical evidence showed on the balance of probabilities that he would still have died and negligence was not cause of death.

Throughout the centuries the English legal system has been built up by creating and applying precedent after precedent and even today when parliament keeps passing more and more statutory rules the judge made law has not lost its importance and it effect to preserve the uniformity in English common law and Sri Lanka legal system too.

(4-II) I can agree with the given statement and “ An adversarial system requires the extended assistance of lawyers in maintaining a fair system of justice” In this question we should understand what is the adversarial system, What is the role of the lawyers in that system, what are the regulations and how them relevant to legal profession should to be upgraded.

The adversarial system is a legal system used in Sri Lanka where two advocate represent their parties position befor an impartial person or group of peoples usually a jury or judge who attempt to determine the truth of the case. It is in contrast to the inquisitorial system where a judge or group of judges investigates the case. Adversarial system certainly requires the skills of counsel on both sides to debate the issues before them. This debate would foster a critical look at the issues and the calling of evidence to be examined by both parties. Cross examination is also a prominent feature of adversarial system and the lawyer's function is very important in examination in chief, cross examination and Re-examination of the adversarial system.

In that system the lawyers role is very important and they have more responsibilities in their function. A lawyer as a member of the legal profession a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice on the other hand. When they enter in to his duty he should obey to sow special regulation in his profession.

In Sri Lanka lawyers are governed by the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules 1988. These rules were made by the Supreme Court under the powers conferred on it by the constitution and they were based on a draft code composed by the Bar Association. They have the same effect as written law. There are furthermore international standards which have been set to be observed by lawyers who practice law internationally. There are contained in the international cord of Ethics adopted by the International Bar Association which is a federation of national Bar Association and law societies. Sri Lanka is a member of the International Bar Association.

The Sri Lanka Rules contain general obligations which prohibit Attorneys- at- law from behaving disgracefully, dishonorably or in such way as to render him or her unfit to remain an Attorney- at- law and “in my manner unworthy of an Attorney- at- law”. This regulations pave way to law years to give their contribution to maintaining a fair system of justice and we can consider about some rules in our discussion.

According to that rule “An attorney- at- law shall not accept any professional matter unless he can attend to in with due diligence “In all professional faction a lawyer should maintain communication with a client concaving the representation of a client except so far as disclosure is required or permitted by the rules of professional conduct or other law

According to the rule “An attorney- at- Law shall not accept any professional matter in respect of which he knows or has reason to believe that he would be required as a witness. The same principle would apply where an Attorney- at- Law after accepting any professional matter finds that he would be required as a witness in the same matter provided, however an Attorney- at- Law may accept any professional matter in which he may be required only as a witness in respect of any formal or non contentious matter.” Above rule is very important to protect the fairness of the system.

The confidential information are very important in that system. The 31th rule said “ An Attorney- at Law shall keep in strict confidence all information whether oral or documentary acquired by him from or on behalf of his client in any matter in respect of and concerning the

business and affairs of his client ” This is a strict requirement of confidentiality with regard to information obtained from clients and regulation of advertising. According to Rule 56 an Attorney – at- Law must always show “ courtesy, respect and fairness” towards other lawyers in professional matters and refrain from dealing with the opposite party except in the presence and with the consent of such party’ s lawyer.

The relationship with court and other members of the professions also very important. Rule 55 says “An Attorney- at-Law shall not discuss the merits of a case with the judge or presiding officer before whom he, appears in the absence of the opposite party”. When consider about the relationship with other members of the profession Rule 57 is special example. It says “It shall be improper for An - Attorney - at Law to deal with the opposite party except in the Presence and with the consent of the Attorney-at-Law representing such party”.

Then we can understand that the lawyer should demonstrate respect for the legal system and for those who serve it including judges, other lawyers and public officials.

Then we can say that the legal Profession’s relative autonomy carries with it special responsibilities of self government.. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of partial or self-interested concerns of the bar. Every lawyers is responsible for observance of the Rules of Professional conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which is serves. According to above discussion we can express that an adversarial system requires the extended assistance of lawyers in maintain a fair system of justice and following the professional regulations is very important to build up a fair system of justice.

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