**THE DOCTRINE OF STARE DECISIS AND THE FREEDOM TO DEPART FROM PREVIOUS DECISIONS, IN THE COMMON LAW**

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The doctrine of Stare Decisis i.e. the Principle of Binding Precedent of Judgments of Superior Courts over Lower Courts, is deeply rooted in the English Common Law.

The fact that the Common Law is mainly Judge made law, the Existence of a Hierarchy of Courts and the need for certainty, led the Superior Courts in England to establish the above cardinal principle.

The ruling of the House of Lords in the ***London Street Tramways Co. Ltd v. London County Council (1898) A.C. 375*** reiterated that the House of Lords, the Supreme Court of the U.K. at the time, was bound by its own previous decisions. The above principle was strictly obeyed for a very long time.

In 1966 the House of Lords issued its famous practice statement emphasising the importance of Precedent for legal certainty, but also recognising the potential for hardship, in individual cases, caused by too rigid adherence to precedent.

The practice direction of 1966 states that previous judgments of the Supreme Court are, as a rule, considered binding. Only reasons of the utmost importance such as the substantial change of circumstances, on which the principle of law applied in the previous judgment was based, may justify departure from the ratio decidendi of the previous judgment. Freedom to depart exists, also, when it is considered that the previous judgment was, undoubtedly, based on a wrong principle of law or that, if followed, it will lead to, obviously, unjust results.

The freedom to depart from its previous decisions under the above mentioned circumstances gave the House of Lords, the Supreme Court of the U.K., the flexibility not to follow its own previous decisions, exceptionally and under the above specific circumstances.

The Doctrine of Precedent is based on the principle of the hierarchy of the Courts obliging the lower courts to respect and follow the decisions of the higher courts. In this sense the decisions of the higher courts gained the force of, judge made, law. Therefore the need for importing some flexibility in the rigid rule of binding precedent was necessary in order to avoid injustice in certain cases.

The Rule of Binding Precedent is founded on the theory of the ancient Greek Philosopher Aristotle, who taught that “equality” signifies that substantially the same things and the same situations should be treated in the same way. This implies that if the situations and the things are not substantially the same, then they should be treated differently. Following this rationale, the Doctrine of Precedent allows the departure from previous precedent if the facts of the compared cases are not similar. Earlier decisions may be distinguished from the case in issue if the facts of the present case are different from those of the earlier precedent. Furthermore what is binding in a judgment is only the ratio decidendi i.e. the reason (Ratio) on which the case was decided. If the Court in the previous judgment said things, in passing, which were not necessary for deciding the case which are called obiter dicta, then Courts in future cases are not bound to follow those obiter dicta.

In case there are two or more conflicting decisions of the higher courts, a lower court may choose which one to follow. Under the 1966 practice direction, the Supreme Court is not obliged to follow a previous decision of its own if it is satisfied that it was given “per incuriam” i.e. inadvertently, without due care, or if this will result to injustice for the litigants, in the case at hand.

When Judges in a common law jurisdiction decide cases, they should have in mind the need to do justice in the particular case, the need to conform with the doctrine of precedent and the need to reach a legally principled decision. At the level of superior courts the question that usually arises is to strike the right balance between certainty and flexibility. Interrelated to this question is the question of the proper role of Judges in a common law jurisdiction. To what extent is it appropriate for Judges to develop the common law, and to what extent should they defer to parliament in the matter of law reform? There are, no doubt, limits to the judicial function as the Judges are not elected by the people and they should respect the doctrine of separation of powers and the rule of law. Nevertheless it is considered legitimate for Common Law Superior Courts to introduce new notions in their case law such as the equitable principle of “Estoppel”, as well as the principles of legitimate expectations and proportionality that were introduced in the common law by famous English Judges, such as Lord Denning and Lord Diplock, under the guidance of European Union Law and the European Convention on Human Rights (see, ***Schmidt v. Secretary of Dtate for Home Affairs (1969) 2 Ch. 149 and R (on the application of Keyu v. Secretaryof State for Foreign and Commonwealth Affairs (2015) UKSC 69 at para 132***).

In ***Willers v. Joyce (Re: Gubay (deceased) No 2) (2016) 3 WLR 534*** the U.K. Supreme Court had the following to say:

“In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. *Cross and Harris, Precedent in English Law 4th ed (1991), p 11 … rightly refer to the “highly centralized nature of the hierarchy”* of the couts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy.”

In ***Midland Silicones Ltd v. Scruttons Ltd (1962) AC 446***, Viscount Simonds had the following to say about the first duty of the Judge of the Common Law. His first duty is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius, he added.

The doctrine of precedent was described as “the skeleton on which the flesh of the common law can hang”. As Lord Neuberger (Former President of the U.K. Supreme Court) has observed: Without the doctrine of precedent “the notion of a corpus of law built up in a reasonably coherent and consistent way, by the judiciary, is a dead letter”.

Dispite the above pronouncements the role of the Judge in the Common Law is an important one. The Judge interprets legislation (statute law) and develops the Common Law, i.e. the Judge made legal principles.

In Cyprus, which is a common law jurisdiction, the Supreme Court had the opportunity to examine the Doctrine of Precedent, in various cases. In the ***Republic of Cyprus v. Demetrios Demetriades (1977) 3 C.L.R., 213*** it was noted that the doctrine of precedent has its origins in England. In England the Courts are bound by decisions of Supreme Courts in the same hierarchy, and the Court of Appeal and the Divisional Court (High Court) are each bound by their own decisions (see: ***Alma Shipping Co S.A. v. V.M. Salgaoncar E. Irmaos Ltd (1954) 2 Q.B. 94***). It was also stressed that the principle that the House of Lords was bound by its own decisions has been replaced by the recognision that the Court, while treating its former decisions as clearly binding, may depart from the previous decision, whenever it appears right to do so. Reference was made to the Practice Direction of 1966 (which applies to Cyprus, with the necessary changes) where it was emphasized that precedent is an indispensable foundation as providing some degree of certainty and as being the basis for orderly development of legal rules. In departing however from precedent, the Court stressed that it would bear in mind “the danger of disturbing, retrospectively, the basis of which contracts, settlements of property and fiscal arrangements have been entered into, and also the especial need for certainty as to the Criminal Law”.

In the same case the Supreme Court of Cyprus made reference to ***Geelong Harbor Trust Commissioners v. Gibbs Bright & Co. (1974) 2 W.L.R., 507***, where Lord Diplock said: “If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary and of the proper balance between the respective rules of the legislature and of the judiciary as lawmakers”. Lord Diplock also referred to the political philosophy of the nation concerned, and to the appropriate limits of the lawmaking function of a non-elected judiciary.

In the case of ***Kenevezos v. Themistocleous and Others (2007) 1 C.L.R. 412***, the Supreme Court of Cyprus, after referring to its previous case law, underlined that freedom to depart from the previous judgments of the grand chamber of the Supreme Court exists only when it is considered that the previous judgment is based on an undoubtedly wrong principle of law or that it leads to, obviously, unjust results. As the Supreme Court observed, departure from precedent should only occur in rare cases and with scepticism.

In ***Watts and Others v. Laouri and Others, Civil Appeal no. 319/2008, dated 7.7.2014***, the Supreme Court of Cyprus referred to three conditions that if satisfied, may justify departing from previous judgments of the Supreme Court: (a) that fundamental reasons justifying the departure from precedent should exist, such as substantial change of circumstances, political, economic or social, or (b) the previous judgment must have been based on an undoubtedly wrong principle of law, or (c) following the previous judgment in the present case would lead to, obviously, unjust results.

As a conclusion it may be said that judicial precedent is a fundamental factor of the English Legal System and of all other Legal Systems based on the English Common Law. It provides certainty as to what the law is. Freedom to depart from precedent should be exercised rarely and with a lot of scepticism. Freedom to depart adds flexibility to the rigidity of the system, and allows the law to constantly evolve and develop with the changing times, meeting the needs of the citizens, whilst providing, at the same time, a solid framework of rules and regulations to live within.

The general consensus is that the doctrine of binding judicial precedent has benefits that far outweigh its defects. The freedom of departure from binding precedent, by the Courts, depends on the political philosophy of each nation concerned about the width of the powers of non-elected judges to make (judge made) law.

Some nations leave the legislative role, entirely, to Parliament, whereas others accept some margin of law making power to the Superior Judiciary. Freedom to depart from Precedent is freedom, for Superior Courts, to introduce new principles into the existing Legal System thus developing the Law, without Parliamentary interfearance.