

Unit V Constitutional Law I

LLB 3rd, BALLB 5th

Dr. syed Asima Refayi

Doctrine of Precedent (Article.141)

Introduction

Decision which have already been taken by a higher court are binding to the lower court and at the same time stand as a precedent to the lower court judgement, which cannot be altered by lower court. This principle is known as *Stare decisis*, which is derived from the Latin phrase “*stare decisis et non quieta movere*”, which basically means to stand by the decided matters. In India it is commonly known as the concept of precedent.

As per Black’s law dictionary *stare decisis* means to stand by decided cases, to uphold precedents or to maintain former adjudications.

As explained by prof. A. Lakshminath, the doctrine of stare decisis helps to generate judicial accountability along with it, it also ensures fairness in adjudication and excludes arbitrariness and helps in maintaining stability and certainty. Prof. further explained that stare decisis is both a social as well as a legal norm.

Historical background

The desire for certainty and continuity in law gave rise to the doctrine of stare decisis. This doctrine was initially used in medieval England and America, where the common-law courts looked into the judgement of earlier cases as guidance also they had power to reject those which they does not considered good or which they considered bad.

Initially due to the lack of recording the decisions or judgement of cases in written form, doctrine of stare decisis was not freely used, but after the concept of recording the judgement came, widespread use of this doctrine was witnessed.

It was in 17th century for the first time in England, the decision of Exchequer courts were given a binding force. Later in 1883 the urgent need for recognizing the binding force of precedents was brought into notice in the case of *Mirehouse v. Rennel*. Further in 1873 and 1875 came up the Supreme Court Judicature Act, were the theory was stare decisis was established. In India the

concept of precedent established after the Britishers came to India, which lead down the hierarchy of courts and the concept of higher courts judgement binding the decision of the lower courts.

In 1935 the Government of India Act, explicitly mentioned that the decision of Federal Courts and Privy Council will be binding all the other Courts decision in British India.

Hence, from 18th century till date stare decisis is a characteristic feature of our legal system.

Doctrine of stare decisis under Art. 141 of the Constitution of India

Art. 141 of the Indian Constitution states that “*law declared by Supreme Court to be binding on all courts within territory of India.*” Art. 141 state that only the ratio decendi of a case is binding not the obiter dicta and the mere facts of the cases. Therefore, while applying the decision of S.C. by other courts, what is required is to understand the true principle lay down by the previous decision.

Some basic concept of Art.141

1. All the courts in India are bound by law to follow the decision of Supreme Court.
 2. Firstly the judgement has to be read as a whole and at the same time the observation from the judgement has to be determined in the light of the questions presented before the court.
- A judgement is used as a precedent only if it is based on deciding or resolving a question of law.
1. Sometimes while deciding a case court is divided, during that situation the decision taken by the majority of judges will be later used as precedent not the decision taken by the minority of judges.
 2. Ex-parte decisions by S.C are also binding in nature and can be used as precedents.
 3. The S.C. is not bonded by its own decision.
- Procedural irregularity and immateriality does not invalidate the binding nature of a judgement.
 - Special leave petition are binding in nature.

Types of precedents

1. Original and Declaratory precedents– original precedents refer to those cases where there is a question of law which has not been decided before, and then in such a case the decision of the judge forms original An original precedent is a law for the future, which creates and applies new rules. Declaratory precedent means those cases where application of an existing rule of law is used. In such cases it is seen that the rule is applied because a law already existed on it.

2. Authoritative or Binding precedent– it is also known as mandatory precedent or as a binding authority. It means those decisions which the judges must follow whether they approve it or not. It basically denotes the higher courts decisions which are binding over the lower courts of that region.
3. Persuasive precedent– these precedents are not as binding as the authoritative precedents. These precedents means that while making any judgement the judge has to consider these precedent and has to give higher weightage to it. The main concept behind considering it is that it is relevant and can help in making a fair decision. These cases could be of could which are put at similar level in the hierarchy of courts. Even lower court decision can play a role of persuasive precedent.

Decisions which are not considered binding under Art. 141 of Indian Constitution

There are some decision which are not considered as a precedent or which do not have a binding effect. Those are:

1. The decision that is not expressed
2. The decision not founded on reasons,
3. The decision that does not proceed on consideration of the issue.
4. Obiter dicta of a case is not binding, hence it cannot be relied upon solely as a ground to hold any statutory rule invalid.it has a persuasive value.
5. Decision is rendered per incuriam is not binding in nature. Per incuriam's literal meaning is resulting from an ignorance. Hence any decision made on per incuriam, it is not used as a precedent.
6. Decision is rendered sub-silentio, and then also it is not used as precedent. Sub-silentio means to a situation when the point of law involved in the decision is not perceived by the court. It means when a point of law or particular question of law was not consciously determined.
7. C's observations on the facts of the cases are not binding.

Advantages of precedents

Precedent means to follow the same which has been done earlier. Hence the first step while considering the precedent is to look the similarity, if there is any then the magnitude or degree of similarity that existed between the problems. After this it has to be seen whether the same has been used before a precedent and has resolved the problem.in this manner the precedent works. Therefore the advantages our legal system enjoys by adapting this doctrine are-:

1. It is time saving avoids unnecessary litigations
 2. There is an orderly development of the law
- It brought greater certainty and consistency in law, which is the most remarkable advantage. As a good decision making body needs to have consistency
1. Avoid arbitrariness in judgements.

2. It eliminates the element of ambiguity and enables the lower courts to follow the decision of higher court unanimously.
3. The presence of precedent decreases the probability of a judge making a mistake.
4. It also serves the concept and interest of justice as giving different decision to similar situation might be considered unjust.

Disadvantages of precedents

Every good thing comes with it by-products which are bad or has negative effect. Some of the negative effect of stare decisis doctrine are:-

- Also practical law is based on experience, by considering precedent the scope of experience decreases which hampers the essence of practical law.
- It is being criticised because of its limiting effect over the development of law.
- The first and foremost disadvantage of this doctrine and the precedent system is its rigidity.
- Other disadvantage is its complexity which sometime makes situation more uncertain.
- Many time judicial mistakes are being continued in the form of precedent.

Conclusion

Hence, the stare decisis doctrine is very helpful for our judicial system. But at the same time the convenience of following the precedent should not be left to degenerate into just a mechanical exercise performed without any thought. It should be used carefully, in the view of promoting justice and equity.

2nd Topic

Advisory Jurisdiction of Supreme Court of India (143)

Article 143 of the Constitution confers Advisory Jurisdiction to the Supreme Court of India. This provision finds its origin in Section 213 of the Government of India Act, 1935, which conferred upon the Governor General the discretion to pose questions of public importance to the Federal Court. Similarly, as per Article 143 the President has the power to address questions to the Supreme Court, which he deems important for public welfare. The Supreme Court "advises" the President by answering the query put before it. Till date this mechanism has been put to use only twelve times. However, it is pertinent to note that this is not binding on the President, nor is it "law declared by the Supreme Court", hence not binding on subordinate courts."

INTRODUCTION

Supreme Court of India is the highest court established by Part V, Chapter IV of the Indian Constitution. The Supreme Court of India came into being on 28 January 1950. It replaced both

the Federal Court of India and the Judicial Committee of the Privy Council which were at the apex of the Indian court system. It is the highest appellate court which takes up appeals against the verdicts of the High Courts and other courts of the states and territories. As originally enacted, the Constitution of India provided for a Supreme Court with a Chief Justice and seven lower-ranking judges – leaving it to Indian Parliament to increase this number. Parliament increased the number of judges from the original eight in 1950 to eleven in 1956, fourteen in 1960, eighteen in 1978, twenty-six in 1986 and thirty one in 2008.

Articles 124 to 147 of the Constitution of India lay down the composition and jurisdiction of the Supreme Court of India. The Jurisdiction of the Supreme Court of India can broadly be categorised into three parts:

1. Appellate Jurisdiction
2. Original Jurisdiction
3. Advisory Jurisdiction

In this paper the Advisory Jurisdiction of Supreme Court is widely discussed. The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution.

BACKGROUND

The Advisory jurisdiction of the Supreme Court in constitution has its source in Government of India Act, 1935. It adopts the provision of Section 213(1) of the Government of India Act, 1935, to confer an advisory function upon the Supreme Court as was possessed by the Federal Court.

Section 213 of the Government of India Act, 1935 laid down on the lines of the White Paper proposals that if at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may, in his discretion, refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the Governor-General thereon.

On clause 101 of his 30 October, 1947 first Draft Constitution, the Constitutional Advisor very largely reproduced the provision of the 1935 Act after substituting “President’ for ‘Governor-General’ and ‘Supreme Court’ for ‘Federal Court’.

Article 119 of the Draft Constitution prepared by Drafting Committee (21 February, 1948), replaced clause (2) of the Constitutional Advisor’s draft. On 27 May, 1949 when the draft article came up for discussion in the Constituent Assembly, H.V.Kamath moved an amendment to the effect that in clause (2) for the word ‘decision’ the word ‘opinion’ and for the words ‘decide the same and report the fact to the president’ the words ‘submit its opinion and report to the President’ be substituted. At the revision stage, draft Article 119 was renumbered as Article 143 of the Constitution.

ADVISORY JURISDICTION

Article 143 of the Indian Constitution confers upon the Supreme Court advisory jurisdiction. The President may seek the opinion of the Supreme Court on any question of law or fact of public importance on which he thinks it expedient to obtain such an opinion. On such reference from the President, the Supreme Court, after giving it such hearing as it deems fit, may report to the President its opinion thereon. The opinion is only advisory, which the President is free to follow or not to follow. (*Keshav Singh's Case*, AIR 1965 SC 745). However, even if the opinion given in the exercise of advisory jurisdiction may not be binding, it is entitled to great weight.

The first reference under Article 143 was made in the *Delhi Laws case*, (1951) SCR 747. In almost sixty years, only twelve references have been made under Article 143 of the Constitution by the President for the opinion of the Supreme Court:

1. *In re the Delhi Law Act*, AIR 1951 SC 332
2. *In re the Kerala Education Bill*, AIR 1958 SC 956
3. *In re New India Motors Ltd. v. Morris*, AIR 1960 SC 875
4. *In re Berubari* (Indo-Pakistan Agreements), AIR 1960 SC 845
5. *In re the Sea Customs Act*, AIR 1963 SC 1760
6. *In re Keshav Sing's Case*, AIR 1965 SC 745
7. *In re Presidential Poll*, AIR 1974 SC 1682
8. *In re Special Courts Bill*, AIR 1979 SC 478
9. *Re in the matter of Cauvery Water Dispute Tribunal*, AIR 1992 SC 522
10. *Re in the matter of Ram Janamabhoomi*, (1993) 1 SCC 642
11. *Re on Principles and Procedure regarding appointment of Supreme Court and High Court Judges*, AIR 1999 SC 1
12. *Gujarat Assembly Election Matter*, AIR 2003 SC 87

In August 2002, the then President Dr. Abdul Kalam sought advice of the Supreme Court under Article 143 in connection with the controversy between the Election Commission and the Government on elections in Gujarat. The issues related to the limits on the powers of the Election Commission under Article 324, the impact of Article 174 on the jurisdiction and powers of the Commission and whether the Commission could recommend promulgation of President's rule in a state.

The Supreme Court may decline to give its opinion under Article 143 in cases it does not consider proper or not amenable to such exercise. It was, however, held by the Supreme Court in *M. Ismail Faruqui v. Union of India* (AIR 1995 SC 605) that in that case, reasons must be indicated.

JUDICIAL INTERPRETATION

Article 143 is not part of administration of justice. It is part of an advisory machinery designed to assist the President (the Executive). Article 143(1) is couched in broad terms which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court.

Power of Reference

1. If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
2. The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the [said proviso] to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

The Supreme Court has held in *In re the Kerala Education Bill, 1957* that the use of the word “may” in Article 143(1), in contradiction to the use of the word “shall” in Article 143(2) shows that whereas in a reference under Article 143(2) the Supreme Court is under an obligation to answer the questions put to it, under Article 143(1) it is discretionary for the Supreme Court to answer or not to answer the questions put to it.

The President’s reference under Article 143(1) to the Supreme Court in *In re The Special Courts Bill 1978* (*“the special courts reference”*) raised important questions of constitutional law. The facts giving rise to the Special Courts Reference were briefly these:

1. When the former Prime Minister, Mrs. Indira Gandhi revoked the emergency after her defeat in the 1977 Parliamentary elections, the overwhelming demand arose in the country for the punishment of Mrs. Gandhi, her son Sanjay and other guilty men. The investigations of the Shah Commission left no doubt that there had been grave abuse of power during the emergency. Justice to countless victims of the Emergency demanded that the guilty should be brought to trial. However, the ordinary process of law is dilatory and Mrs. Gandhi’s party made no secret that the weapon of delay would be used to prevent the “guilty men” from being brought to speedy trial. Consequently, a private member, Mr. Ram Jethmalani, introduced in the House of the People (Lok Sabha) a Bill for the setting up of Special Courts. On 1 August, 1978 the President acting under Article 143, referred the following questions for the opinion of the Supreme Court.

1. *Whether the Bill or any of the provisions thereof, if enacted, would be constitutionally invalid.*
2. *The nature of the Supreme Court’s power under Article 143(1) and whether the law laid down in the opinions is “the law laid down by the Supreme Court” under Article 141.*

While dealing the above question, CHANDRACHUD C.J. said that the question whether the law laid down in the opinions was “law declared by the Supreme Court” would require to be considered more fully on a future occasion. He observed that:

“It would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all, even if, as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned.”

He was aware that Supreme Court decisions had held that it was not law within Article 141, but he supported the need for future consideration.

Article 143 does not deal with ‘jurisdiction’ of Supreme Court but with the ‘power’ of the President. It does not refer to any adjudication at all, but with consultation. There is to be no judgment, decree or order; there is to be Opinion to be forwarded to the President in a report to him. The Supreme Court itself would however remain free to re-examine and if necessary to overrule the view taken in an opinion under Article 143(1). It was held in *Cauvery Water Disputes Tribunal* 1992, that the jurisdiction under Article 143(1) cannot be used to reconsider any of its earlier decisions. This can be done only under Article 137 of the Constitution.

REFERENCES MADE TO SUPREME COURT

In the matter of *Cauvery Dispute Tribunal* (AIR 1992 SC 522), a tribunal was appointed by the central government to decide the question of waters of river Cauvery which flows through the states of Karnataka and Tamil Nadu. The Tribunal gave an interim order in June 1991 directing the State of Karnataka to release a particular quantity of water for the state of Tamil Nadu. The Karnataka government resented the decision of the Tribunal and promulgated an Ordinance empowering the government not to honour the interim Order of the Tribunal. The Tamil Nadu government protested against the action of the Karnataka government. Hence the President made a reference to the Supreme Court under Article 143 of the Constitution. The Court held that the Karnataka Ordinance was unconstitutional as it nullifies the decision of the Tribunal appointed under the Central Act (Inter State Water Dispute Act, 1956) which has been enacted under Article 262 of the Constitution. The Ordinance is also against the principles of the rule of law as it has assumed the role of a Judge in its own cause.

In a landmark judgement in *Ismail Faruqui v. Union of India* [(1994) 6 SCC 360], the five judge bench of the Supreme Court held that the Presidential reference seeking the Supreme Court’s opinion on whether a temple originally existed at the site where the Babari Masjid subsequently stood was superfluous and unnecessary and opposed to secularism and favoured one religious community and therefore, does not required to be answered.

In *Delhi Laws Act* case, the Court considered the validity of the Act with regard to delegated legislation. In *Re Kerala Education Bill*, the Bill was reserved for consideration of the President who referred to the Supreme Court to give its opinion on its validity. In *re Berubari Union*(1960), opinion of the court was sought to find out the manner in which the territory of India could be transferred to the Pakistan. In *Re Sea Customs Act* (1962), to consider the validity of the Sea Customs Bill with reference to Article 288 of the Constitution. *The Special Court reference case* (1978), also known as Keshav Singh’s case, the reference was made to consider the extent of the privileges of the legislature and the power of the Judicial reviews in relation to it. In *re Presidential Bill* (1974), consideration of certain doubts in regard to Presidential election

was sought. In all these cases the Supreme Court came with various interpretations of Article 143 of the Constitution.

CONCLUSION

From all these cases interpreted by the Apex Court, we came to conclusion that Article 143 empowers the President to make references to Supreme Court on any matters but it cannot be said as the Jurisdiction of Supreme Court. Now it is on court to examine whether it should be answered or not, if not with valid reasons. However, the views taken by the Court is not binding on the President. Till now, the twelve references have been made by the President.

It was also held by the Supreme Court that the references made under this Article are not the “law declared by the Supreme Court” under Article 141 of the Constitution. So it is not binding on inferior courts, even though have high persuasive value.