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PAPER-I

LEGAL THEORY-II

SEMESTER-II

TOPIC FOR PRESENTATION

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PRECEDENT AS UNDERSTOOD  
IN U.K., FRANCE AND U.S.  
LEGAL SYSTEMS.

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INTRODUCTION

Precedent is fundamental base of local law. General behaviour and way of living are the main components of precedent. Attitude, belief, faith, custom, traditions have significant role to play in precedent.

① "In a traditions - dominated country, where custom, traditions and practices based on them, are respected for their authority.

The English doctrine of precedent is neither new nor revolutionary.

Our Dharna Sastras are full of injunctions which say that what is laid down by traditions or in the practice of shishtas should be followed unquestioningly."

Generations after generations put some unwritten limits and restrictions for code of conduct. Primitive men lived in the groups with some understanding and sense of compromise with mutual adjustments.

① PROF. A. LAKSHMINATH - Precedent in Indian Law (P. 01)

Second Edition - 2005

Publisher:- Eastern Book Company, LUCKNOW 226001.

② "Doctrine of precedent is intimately connected with the hierarchy of courts.

This is so in 'Indian Judicial system', 'English Judicial system', 'French Judicial system', 'American Judicial system'; and in fact all judicial systems of almost all civilized countries of the world.

The fundamental principle is that inferior court in judicial hierarchy is bound by the orders of superior courts normally except in certain specified cases."

### HISTORY OF THE STRUCTURE OF ENGLISH LAW

The Great Britain consists of England, Wales, Scotland and some minor islands.

The United Kingdom (U.K.) consists of the area of Great Britain and Northern Ireland.  
Technically, The English Law is limited to the area of England and Wales.

② Justice P.S. NARAYANA - Law of Precedents  
First Edition - 2005 (P.07)

Publisher:- Asia Law House  
S.P. GOOGIA (H.U.F.) Opp I.O.B. Bank Street  
Hyderabad-95

③ "English Law is neither the law of United Kingdom, nor that of Great Britain, because Northern Ireland, Scotland, the dependent territories i.e. Channel Isles and the Isle of Man are not ruled by 'English Law'."

The law of Scotland differs both in principle and procedure and accordingly the organisation of courts is also different. The judiciary system of Northern Ireland also is unlike the English system."

#### SALIENT FEATURES OF ENGLISH CONSTITUTION

① Partly written and partly unwritten  
According to Thomas Paine and Alexis De Tocqueville

"ENGLAND HAS NO CONSTITUTION"

But, there can be no state without constitution.

By Constitution we mean a body of fundamental rules and principles, determining the structure of the state.

By Unwritten we do not mean that none of its principles are written.

③ Dr. S. R. MYNENI - Legal Systems of the world  
First Edition - 2007 (P. 81)  
Publisher :- S. P. Gogia (H. U. F.)  
c/o Asia Law House - Hyderabad

④ However, there are several written constitutional documents and statutes of the U.K. as given below:-  
(THE PRECEDENT WILL HAVE MAJOR ROLE)

- (i) Magna Carta (1215)
- (ii) Petition of Rights (1628)
- (iii) Bill of Rights (1689)
- (iv) The Act of Settlement (1700)
- (v) Reforms Act (1832)
- (vi) The Colonial Laws Validity Act (1865)
- (vii) Parliament Act (1911)
- (viii) Emergency Powers Act (1920)
- (ix) The Statute of Westminster (1931)
- (x) Emergency Powers (Defence) Act (1939)
- (xi) Crown Proceedings Act (1947)

2 Evolutionary Constitution

3 Parliamentary Sovereignty

4 A Unitary Constitution

5 A flexible Constitution

6 A Parliamentary Form of Government

The King is the nominal head of the State. The real functionaries are the ministers who belong to Majority Party in the House of Commons and remain in office so long as they enjoy

④ Dr. S. R. MYNENI - Legal Systems of the world  
 First Edition - 2007 (P. 96)  
 Publisher :- S.P. Gogia (H. U. F.)  
 C/o Asia Law House - Hyderabad.

confidence of the Parliament.

As the ministers are also the members of the Parliament; so there is co-ordination between the executive and legislative wings of the Government.

[7] Separation of Powers.

Montesquieu said

"The Crown is the executive,  
Parliament is the legislature  
and the Courts form the judiciary."

Civil Courts, The Superior Courts,  
The Appellate Committee of the House  
of Lords

The Supreme Court of Justice of  
the U.K. - Apex of Judicial System

All these constitute judicial organization  
in U.K.

LEGAL SOURCES IN THE U.K.

- (i) Judicial precedents
- (ii) legislature
- (iii) certain ancient text

## ⑤ THE HIERARCHY OF ENGLISH COURTS

It will be convenient to begin with the civil courts.

At the bottom of the hierarchy there are the County and Magistrates' Courts with a limited jurisdiction over cases of first instance.

Next comes the High Court whose judges exercise an unlimited jurisdiction over such cases.

The Divisional Courts, which are part of the High Court, enjoy a limited appellate jurisdiction in addition to hearing certain special applications in the first instance.

Next comes the Court of Appeal (Civil Division) which hears the appeals from the County Courts and the High Court.

Finally there is the House of Lords which hears appeals from the English Court of Appeal, the Court of Sessions in Scotland, and the Court of Appeal in Northern Ireland.

So far as the Criminal Courts are concerned, the Magistrates' Courts exercise an important summary jurisdiction over cases of first instance.

## ⑤ RUPERT CROSS AND J.W. HARRIS

Precedent in English Law (p. 05, 06)

Fourth Edition - Reprint 2004

Publisher :- Lady Cross and Jim Harris

Oxford University Press, New York (U.S.)



A convicted person has a right of appeal to the Crown Court in a summary case, but the most important appellate and supervisory work in relation to summary jurisdiction is done by the Divisional Court of the Queen's Bench Division of the High Court.

Trials on indictment take place in the Crown Court. A person convicted on indictment may appeal to the Court of Appeal (Criminal Division) where an appeal lies to the House of Lords.

### Preliminary statement of the English Doctrine of PRECEDENT

Every Court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords) are bound by their previous decisions.

There is room for debate over certain matters of detail, and it cannot be denied that this statement is inaccurate in one respect, although a trivial one.

⑥ "It is basic principle of the administration of justice that like cases should be decided alike."

⑥ RUPERT CROSS AND J.W. HARRIS  
Precedent in English Law (P. 03)  
Fourth Edition - Reprint 2004  
Publisher :- Lady Cross and Jim Harris  
Oxford University Press, New York (U.S.)

## MEANING AND SCOPE OF PRECEDENT

⑦ This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge.

The strength of this tendency varies greatly.

It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it.

Judicial precedent has some persuasive effect almost everywhere because stare decisis (keep to what has been decided previously) is a maxim of practically universal application.

The peculiar feature of the English doctrine of precedent is its strongly coercive nature.

English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so.

⑦ RUPERT CROSS AND J. W. HARRIS

Precedent in English Law (p. 03)  
Fourth Edition - Reprint 2004

Publisher :- Lady Cross and Jim Harris  
Oxford University Press, New York (U.S.)

Case-law

English Law is to an large extent based on case-law.

'Case-law' consists of the rules and principles stated and acted upon by judges in giving decisions.

The fact that English Law is largely a system of case-law means that the judge's decision in a particular case constitutes a 'precedent.'

The Commission was set up in 1965, and it is charged with the task of reviewing the law with a view to systematic development and reform, including in particular codification.

③ Rules of Precedent

The rules of precedent are dependent on the practice of the courts, which has varied considerably.

As recently as 1948, it was possible for Dr. Goodhart, one of the leading contemporary writers on precedent, to say

⑧ RUPERT CROSS AND J.W. HARRIS

Precedent in English Law (p.04)

Fourth Edition - Reprint 2004

Publisher:- Lady Cross and Jim Harris

Oxford University Press, New York (U.S.)

"The English doctrine of precedent is more rigid today than it ever was in the past."

At present the English doctrine of precedent is to some extent in a state of flux, but there appear to be three constant features.

- (i) The respect paid to a single decision of a superior court.
- (ii) A decision of such a court is a persuasive precedent even so far as courts above that from which it emanates are concerned.
- (iii) A single decision is always a binding precedent as regards courts below that from which it emanated.

The essentials of good law are Certainty, uniformity and consistency.

Common law in England was judge-made, i.e. judges moulded or created out of the original customary rules, the common law of England whose principles are today found in case-law.

PRECEDENT IN  
FRENCH  
LEGAL SYSTEM

Historical and  
Geographical Relations  
between England and France

① The distance between England and France is less than 30 kilometres, and every year or so it is reported in the papers that some courageous swimmer has been successful in his or her attempt to cross the channel. A Norman dynasty originating from France conquered England in the year 1066 and still reigns in the United Kingdom.

The kings of England have called themselves Kings of France from 1314 to 1802 and they still keep in our days the title of French Province, Dukes of Normandy.

② RENÉ DAVID - English Law and French Law  
First Edition - 1980 (P. 09)  
Publisher:- Eastern Law House Private Ltd.  
54, Ganesh Chunder, Avenue, Calcutta.

⑩ French has been for centuries, next to Latin, the official language of the kingdom of England, where not until the 15<sup>th</sup> Century it was replaced by ENGLISH.

In all aspects of civilization and in all fields of knowledge developments have been intimately connected and have proceeded at a same pace in England and in France, but to this picture and to this general statement there is one exception: in the field of law England has been a lonely rider. "Common Law" (Common Law) has been developed by the Courts of Westminster and equity by the Court of Chancery by a process of their own and merely without any contact with legal science and with the practice of the law as it was conceived on the Continent of Europe.

The French Legal system is very much different from the British and American systems. It bears the imprints of barbarian customs, Canon law, Roman law and Modern Law inspired by advanced political and social thoughts.

⑩ RENÉ DAVID - English Law and French Law

First Edition - 1980

(P. 09)

Publisher: - Eastern Law House Private Ltd.  
54, Ganesh Chunder, Avenue, Calcutta.

⑩ THE NATURE OF FRENCH CONSTITUTION 1958

The French Constitution which came into force on 04<sup>th</sup> OCTOBER 1958.

It contains a preamble and Ninety Two Articles.

The Preamble reaffirms the Declaration of Rights of 1789, was based on the doctrine of "NATURAL LAW" and "GENERAL WILL"

It guaranteed the right of free speech, press, Assembly and religion. Its MOTTO is "LIBERTY, EQUALITY AND FRATERNITY"

Popular Sovereignty :-

Article 2 of the Constitution declares FRANCE as an indivisible, secular, democratic and social republic. It ensures equality before law to all citizens without distinctions of origin, race, or religion. It respects all creeds.

Rigid Constitution - Revision or amendment to the constitution is not so easy, Article 89 of the constitution includes a special procedure.

⑪ Dr. S. R. MYNENI - Legal Systems of the world  
First Edition - 2007. (P.35)  
Publisher: - S. P. GOGIA (H. U. F.)  
c/o Asia Law House - Hyderabad

It is a Mixture of Parliamentary and Presidential Forms.

The President appoints the Prime Minister. The Prime Minister appoints and dismisses his colleagues (other ministers). There is separation of Legislative and Executive powers.

### ⑫ Main Features of the FRENCH LEGAL AND JUDICIAL SYSTEM

- (i) Codified Law
- (ii) No elected Judges
- (iii) Dual Hierarchy
- (iv) Court of Conflict
- (v) Absence of Judicial Review
- (vi) Independence of Judiciary.

#### ⑬ Hierarchy of Civil Courts

(1) Tribunal d'Instance

is the court at Bottom. There are 468

(2) Tribunal de Grande Instance <sup>such Courts.</sup>

is the principal Court of original jurisdiction. There are 181 such courts.

(3) Cour d' Appel - There are 30 such Courts.

(4) Cour de Cassation - is the court at APEX

(5) Tribunal of Conflicts  
(Tribunal des Conflicts)

CRIMINAL COURTS - for criminal offence.

⑫ Dr. S.R. MYNENI - Legal Systems of the world  
FIRST EDITION :- 2007 (P. 38)

Publisher :- S.P. GOGIA (H.U.F.)

⑬ - do c/o Asia Law House - Hyderabad  
do do do do do (P. 47)



(14) THE ROLE OF PRECEDENT  
IN FRENCH LEGAL PROCEDURE

The French Judicial system is based on the division of the country into districts.

So far, as Civil cases are concerned, each district has a court of first instance and a court of appeal.

The district courts of first instance are not bound by their own previous decisions or those of any other district court of first instance, nor are such courts of first instance bound by previous decisions of their own appellate court or that of any other district.

The district appellate courts are not bound by their own past decisions or those of any other district court of appeal.

There is right of appeal on points of law from the district appellate court to the COUR DE CASSATION IN PARIS

The more serious criminal cases are tried by a district ASSISE court from which there is no appeal from the possibility of an application to the COUR DE CASSATION a question of law which may result in an order for a new trial.

(14) RUPERT CROSS AND J.W. HARRIS  
 Precedent in English Law (P.12)  
 Fourth Edition, Reprint 2004, Lady Cross & Jim Harris  
 Publisher: - Oxford University Press, New York (U.S.)

### (15) Speciality of FRENCH PRECEDENT

French Law is not based on Case-law (la jurisprudence) at all.

The Civil and Penal Codes are theoretically complete in the sense that they (and other statutory provisions) are supposed to cover every situation with which the ordinary courts are concerned.

Case-Law is not a source of law in FRANCE.

French Judge does not regard himself as absolutely bound by the decisions of any court in a single previous instance.

The French law is influenced by the background of rules provided first by Roman Law and codified custom, and later by the codes of the NAPOLEONIC ERA.

In French and other laws of the Romano-Germanic family, legal principles have always been sought in a pre-established body of rules in the corpus iuris civilis in former times and today in codes.

(15) RUPERT CROSS AND J.W. HARRIS  
Precedent in English Law (p. 10)

Fourth Edition, reprint 2004  
Publisher: - Lady Cross & Jim Harris  
Oxford University Press, New York (U.S.)

⑩ The decisions of the courts in the "countries of written law" (pays de droit écrit) were of secondary importance. non-exemplis sed legibus iudicandum est declares the code of justinian.

Decided cases may very well have some authority, but apart from quite exceptional circumstances they are not considered to contain rules of law.

This is, in fact unnecessary because quite independently of them there is a sufficient legal system.

### CONTRAST WITH U.K.

This situation is quite different in ENGLAND; where the authority of Roman Law was never recognized in the same way as it was on the continent.

The Common Law, created by the royal Courts of Westminster, is a 'judgemade' law. The role of judicial decisions have not only been to apply but also to define the legal rules.

⑩ Dr. S.R. MYNENI  
 Legal Systems of the World  
 FIRST EDITION - 2007 (P.125)  
 Publisher: - S.P. GOGIA (H.U.F.)  
 C/O ASIA LAW HOUSE - HYDERABAD

The rules set by decided cases must be followed or else the certainty of the common law will be destroyed and its very existence compromised.

The duty to observe the rules as stated by the judges (State decisis "let the decision stand") in other words to respect JUDICIAL PRECEDENT, is the logic of a 'JUDGE MADE' legal system.

Once a regular system of law reporting had developed and reports published, judges began to be guided by decisions in previous cases, and eventually it became the established practice that judges were bound to follow the decisions of higher courts in similar cases.

The general rule established in 19<sup>th</sup> Century and consistently followed; since was of binding precedent.

The hierarchy of courts is very useful for practice of precedent. It is circulated vertically from court to court.

- (i) Court of Justice of the European Communities
- (ii) House of Lords
- (iii) Court of Appeal (Civil Division)
- (iv) Court of Appeal (Criminal Division)
- (v) Queen's Bench Divisional Court
- (vi) High Court

### Three Simple Propositions applicable for the Rule of Precedent

(1) The decisions rendered by House of Lords are binding precedents to be observed by all other Courts.

(2) The decisions of the Court of Appeal are binding precedents for all courts except the House of Lords.

(3) The decisions of a judge of the High Court must be observed by lower courts.

### Rule of Precedent and Statute Law

The Rule of Precedent is also applied in the interpretation of statutes.

A statute may be defined as an express and formal laying-down of a rule or rules of conduct to be observed in the future by persons to whom statute is made applicable.

In comparison, FRENCH Legal system is totally independent and original for every individual without restriction.

# PRECEDENT IN U.S.

## LEGAL SYSTEM

### Legal System in the United States of America

It is highly developed with modern outlook. Novel principles with practical vision is at the base of Legislation. The country has made remarkable progress in short span of time. The credit goes equally to legislature, executive and judiciary. The legal system is neither traditional nor blind-faith oriented. Science and technology brought Industrial growth raising per capita income for ever.

### Salient Features of the U.S. Constitution

(i) written character with well defined terms and concepts.

(ii) Federal Character

America was originally a Federation of thirteen states, but due to admission of new states, it is now a Federation of fifty states.

(iii) Supremacy of the Constitution

(iv) Presidential form of Government

(v) Dual Citizenship - American is citizen of U.S.A. as also of the state where he or she is domiciled.

⑰ Dr. S.R. MYNENI

Legal systems of the World (P. 136)

FIRST EDITION - 2007

Publisher: - S.P. GOGIA (H.U.F.)  
c/o ASIA LAW HOUSE - HYDERABAD

- (vi) Republicanism
- (vii) Judicial Review
- (viii) Separation of Powers
- (ix) Popular Sovereignty
- (x) Rigidity

18 STRUCTURE OF AMERICAN LAW & COURTS

- (i) Supreme Court
- (ii) The Federal Court System
- (iii) Inferior Federal Courts
- (iv) Federal Courts of Appeals
- (v) Special Federal Courts
  - (a) Custom Court
  - (b) Tax Court
  - (c) Military Court
  - (d) Other special Courts.

SCOPE OF PRECEDENT IN THE COURTS

Although the NORTH AMERICAN PRACTICE of giving judgement in the form of elaborate discussions of previous cases is more like ENGLISH than the continental.

The United States Supreme Court and the appellate Courts in the different states do not regard themselves

18 Dr. S. R. MYNENI  
Legal Systems of the world (P. 148)  
FIRST EDITION - 2007  
Publisher :- S. P. GOGIA (H. U. F.)  
C/O ASIA LAW HOUSE - HYDERABAD

as absolutely bound by their past decisions.  
There are many instances, some American lawyers would say too many, in which the supreme Court has overruled a previous decision.

### RATIO DECIDENDI AND OBITER DICTUM ?

Every Court is bound to follow any case decided by a court above it in the hierarchy and appellate courts (other than the House of Lords) are bound by their previous decisions.

\* THIS IS TRUE ONLY IN CASE OF U.K.

Ratio decidendi (reasons for deciding)

In case of U.S. we have different norms with independence of Court decisions.

① According to Professor Patterson an Obiter Dictum is a "statement of law in the opinion which could not logically be a major premise of the selected facts of the decision."  
Appellate courts in U.K. sit with more than one judge. Three or five. Different judgements do not concur, although they reach the same conclusion.

① RUPERT CROSS AND J.W. HARRIS  
Precedent in English Law (P. 76)  
Fourth Edition - Reprint 2004  
Publisher :- Lady Cross & Jim Harris  
Oxford University Press, New York (U.S.)



## Contrast with U.K.

### ② PRECEDENT AND CUSTOM

Blackstone says

“The municipal law of England, on the civil conduct prescribed for the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds the lex non scripta, the unwritten or common law and the lex scripta; the written or statute law.”

The lex non-scripta, or unwritten law includes not only general customs, or the common law properly so called, but also the particular custom, of certain parts of the kingdom and likewise those particular customs are made laws observed in certain courts and jurisdictions.”

To revert to an example which was held in 1905 that the fishermen of Walmer were entitled by local custom to dry their nets on a particular stretch of sand. Because local customs can truly be said to be law before they are enforced, custom must be regarded as subordinate to precedent in our day to day life. Note for instance, The Wagon Mound case in 1961 (unit 12).

### ② RUPERT CROSS AND J.W. HARRIS

Precedent in English Law (P.167)

Fourth Edition - Reprint 2004

Publisher: - Lady Cross & Jim Harris

Oxford University Press, New York (U.S.)

(21) An English Court may even turn for guidance to a decision in the United State or the Commonwealth, where the legal systems have the same basis.

Many other countries, particularly in Continental Europe have no doctrine of binding precedent.

Instead main source of law in these countries will be a CODE; Almost all of the rules of civil and criminal law have been written out fairly simply, and then formally enacted by the legislature.

### CONTRAST WITH FRANCE

The Constitutional Council of France shall consist of nine members, whose term of office shall be nine years, and shall not be renewable. One third of the membership shall be renewed every three years. Three of the members shall be appointed by the President of the Republic, three by the President of National Assembly and three by the President of Senate.

(21) S. B. MARSH - Outlines of English Law  
AND J. SOULSBY (p. 20)  
Publisher: - McGRAW-HILL Book Company  
(UK) Limited - ENGLAND.

②② BILLS PROCEDURE IN U.S.A.

All bills for raising revenue shall originate in the House of Representatives, but the senate may propose or concur with amendments as in other Bills.

Every Bill which shall have passed the House of Representatives and the senate shall before it becomes a law be presented to the President of the United States, if he approves it, he shall sign it, but if not, he shall return it with his objection to the House in which it shall have originated, who shall enter the objection at large on their journal and proceed to reconsider it. If after such reconsideration, two thirds of that House shall agree to pass the Bill; it is sent to other House and if it is approved by two third; it SHALL BECOME A LAW

The strictness and punctuality in the procedure really praiseworthy. The sound discipline in legal system of U.S.A. is appreciated by whole world.

②② M.V. PYLEE - Constitutions of the World  
Third Edition - 2006 - VOLUME - 2 (P. 2792)  
Publisher:- Universal Law Publishing Co.  
DELHI - 110 033 . PVT. LTD.

CONCLUSION :-

It is true that the Precedent rules are based on the practice of the judges. Here we should observe the hierarchy of Courts. Dilemma of Senior and inferior courts should be solved effectively with the degrees of higher and lower demarcation. This is most common in U.K. Legal Systems.

The French people solemnly proclaim that they are attached to Rights of Man and the principles of National Sovereignty. They have supplemented the Precedent with innovative skill.

The U.S. Precedent has FEDERAL ENVELOPE. The power is divided; but freedom to judges beyond any legal restriction.

All three different states we assessed impartially. We appreciated their unique approach to PRECEDENT. The importance of Precedent will be everlasting with subjective interpretation.



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