

Produce a detailed written essay: 'Using cases to illustrate, explain how and why the courts make use of the doctrine of judicial precedent and statutory interpretation to resolve points of law.'

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Introduction.

In the English legal system, the judges are the ones that have to apply the law. This means the Courts will need to use both Judicial Precedent, and Statutory Interpretation to resolve points of law, so as to keep consistent and fair.

Judicial Precedent

Judicial Precedent is based on the maxim, "*stare decisis et non quieta movere*,"¹ which translates from Latin, into "*stand by what has been established and do not unsettle what has been established.*"² This translation follows the essential need for fairness and certainty in the law. Judicial Precedent acts on the basis of a judge having to follow a previous decision if they are dealing with a case on similar principles. The precedent that they are lead to follow, is created from the judgement at the end of a case, it is the closing speech made by the judge/s summing up the case's points of law. This judgement contains two parts, the "*ratio decidendi*" and the "*obiter dicta*."

Ratio decidendi

The ratio decidendi is what exactly forms the precedent; other judges are bound to follow, as it is the legal principles of the judgement. The translation of ratio decidendi is, "*the legal principles upon which the decision is based.*"³ For another take on the definition, Sir Rupert Cross said it was "*any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion.*"⁴ In this decision the judge must evaluate the principles of the case and reach a lawful decision as to what the sentence etc should be. The ratio decidendi is the only part of the judgement that is actually part of the binding on subsequent decisions. Sometimes, but mainly in older cases, it is very hard to distinguish between ratio decidendi and obiter dicta.

Obiter dicta

The obiter dicta is the remainder of the judgement, and are usually the other things said. The translation of obiter dicta is, "*the things said in passing,*" this means that they bore very little relevance or meaning to the current case, and although they do not bind any future cases, the Judge's may be persuaded to consider them. In some cases – i.e. in the House of Lords – there is more than one judge, so they may all wish to explain their reasons and there will be a large bulk of obiter dicta. Judge's obiter dicta may include hypothetical situations which would say how the case and their decision would be different if a fact of the case had been changed.

Original Precedent

Original precedent is, simply, where a case like the current one has never come before the courts, thus the decision reached in this case becomes the original precedent. It would be binding precedent on all cases similar afterwards. The Judge reaches the decision that will become precedent, by looking at cases with some similar facts and base the reasoning of his judgement on this knowledge, this process is known as reasoning by analogy. This was seen in the case of Hunter and Others v

¹ OCR Law for AS – Jacqueline Martin, page 181, for latin of Judicial Precedent.

² OCR Law for AS – Jacqueline Martin, page 181, for translation of the latin.

³ www.lawsblog.co.uk, for Dr. Jepson's warning on the definition of ratio decidendi.

⁴ OCR Law for AS – Jacqueline Martin, page 182, for Sir Rupert Cross' comments on ratio decidendi.

Canary Wharf LTD and London Docklands Development Corporation.⁵ The case was about whether the interference with the television reception by a large building was capable of constituting to an actionable private nuisance. The claimant and others were suing the defendant for damages as their reception of broadcasts had been poor for many years, and was claimed to have been caused by the tower. Lord Justice Pill said that the interference of the television signals was not actionable as “*interference of enjoyment of land,*” so was similar to the obiter dicta in Aldred’s Case 1611, as it stated a view is a delight not a necessity.

Binding Precedent

Binding precedent is where, even if the judge disagrees with the precedent from an earlier case, he must follow it as he is bound by the court hierarchy, thus the court must be above, or sometimes the same level as the precedent-making court, in order to break away from it – i.e. in a civil court, the County Court must follow the decisions of the High Court, etc. All courts in the English legal system are bound by the European Court of Justice as EU law is supreme to English law.

Persuasive precedent

Persuasive precedent is precedent that, by law, is not actually binding. Despite this, judges can be influenced to use it, if they agree with the reasoning or the sentence. Persuasive precedent works in 5 different ways.

Judicial Committee of the Privy Council

This court is not part of the English or Welsh hierarchy, meaning they can overrule the House of Lords; however this does not mean that their decision will become definite precedent to the courts of England and Wales, as they are not bound by it. This precedent was used effectively in the case of A-G for Jersey v Holley 2005. When the majority of the Privy Council’s judges – six out of nine – ruled that in the defence of provocation, a defendant is to be judge by the powers of an ordinary person with self-control, this conflicted with the House of Lord’s decision, so in R v Mohammed 2005 the Court of Appeal followed the Privy Council’s decision as opposed to the binding precedent of the House of Lords.

Courts in a Lower Hierarchy

This is where the decision previously made by a lower court – usually in cases of appeal going from the Court of Appeal to the House of Lords – may be used to influence the higher courts decision, as they may see it as the most effective ruling. This precedent was used successfully in the case of R v R (1991), where the House of Lords agreed with the Court of Appeal’s decision that a man could be found guilty of raping his wife.

Statements made obiter dicta

A third example is statements made obiter dicta, as explained above, these are the things said in passing of the judge’s summary of the case, and although to that particular case they may be deemed irrelevant, in another case they may be seen as vital information to be included in its principles. This type of precedent was used successfully in the cases of R v Howe 1987, and later R v Gotts 1992, where it was decided in the first case that duress couldn’t be a defence to a charge of murder or attempted murder, and then in the latter case, a defendant charged with attempted murder tried to argue that his defence was duress, but the persuasive precedent meant that this was discarded as a defence.

A dissenting judgement

Next is, dissenting judgement, where a case has been decided by a majority of judges –i.e. 2-1 in the Court of Appeal – but in a later case, the judge may decide to agree with the verdict of the minority.

⁵ Essay Competition Winner, Natalie Harding, read and précised for case details.

Courts in other countries

Finally, there are decisions of courts in other countries, this means that in some cases where other country's law is the same as our common law – i.e. in the Commonwealth as they are all governed by the same head of state – so their decisions in similar cases may be considered.

Avoiding judicial precedent

Despite all of the above, there are ways of avoiding the judicial precedent system.

The House of Lords and the Practise Statement

The House of Lords is the highest court in the English Legal System. Up until 1966, they were bound by their previous decisions, in order to ensure the same consistency that the other court's had. In the case, London Street Tramways v London County Council 1898, the House of Lords decided that the individual case's circumstances were inferior to the need for consistency in the law. Thus, the House of Lords was completely bound by their own past decisions, unless the precedent case's decision was seen as *per incuriam*, which in English means in error. There was then a case, DPP v Smith 1961, where a person could be found guilty of murder if they could have foreseen that death or serious injury was certain. This then led to Parliament, changing the Criminal Justice Act 1967. It was later realised that the House of Lords would need more flexibility, hence Lord Chancellor issued the Practise Statement 1966, which established that the House of Lords could change the law if they feel "it appears right to do so". It was first used in the case of Conway v Rimmer 1968, but only involving a technical law on discovery of documents. So, the first major use occurred in Herrington v British Railways Board 1972 which was based on the precedent of Addie v Dumbreck 1929, which involved the duty of care towards a child. So in the precedent case of Addie v Dumbreck 1929, they said that the occupier of land owed a duty of care if the injuries were caused deliberately, and in the later case, the House of Lords ruled that social conditions had changed and so should the law be.

Distinguishing

Distinguishing is used by judges to avoid following a past decision which he would normally have to follow. The judge would, have to find the case facts to be sufficiently different for him to draw a distinction between the cases; once he has done this he is no longer bound by it. The cases of Balfour v Balfour 1919, and Merritt v Merritt 1971 demonstrate this. This was where a woman said her husband was in breach of contract, in Balfour they decided this was merely a domestic arrangement as there was no legally binding contract, however the second case was successful as the judge decided that although, they were both husband and wife parties, the latter agreement was made after they had separated, furthermore the agreement was in writing.

Overruling

Overruling is where a court decides that the principal's decided in an earlier case is wrong, and this decision is usually made by a higher court, overruling a lower court's decision.

Reversing

Reversing is where a court higher up in the hierarchy overturns the decision of a lower court on appeal in the same case – i.e. if the Court of Appeal disagrees with, thus reverses the decision that the High Court has made.

The need for Judicial Precedent

Judicial Precedent is necessary for many reasons. One of which is certainty, this is because the courts will follow their past decisions and people will know how the law should be applied and what the law is. A second example is consistency and fairness within the law, as you know you will be treated the same as anyone else in your position. There is also a need for flexibility in precedent, as there is

a way that the House of Lords can move with different times and attitudes. Finally, it helps save time as the judge will know the principles they will need to follow, and so can choose the sentence that was previously applied in the precedent case. All of the above shows the need for Judicial Precedent in the English legal system.

Statutory Interpretation

Statutory Interpretation is how the Judge's will interpret the many statutes passed by Parliament each year. However, obviously, this is not always clear and in explicit detail, so there needs to be certain sections dedicated to which context the law should be taken in.

Ejusdem generis

Ejusdem generis is where, if a statute is too vague, the words from the statute are interpreted in the context of the list. This was the case in Powell v Kempton Racecourse 1899, where a man had conducted a betting game in an outside area. The law said that it could not be conducted in a "house, office, room or other place," and as the other terms all describe indoor places, so "other place" was deemed to mean other indoor place.

Expressio unius exclusio alterius

Expressio unius exclusio alterius is where other statutes are expressed and others are excluded. This was the case in Tempest v Kilner 1846, where the requirement of a "contract was necessary for the sale of goods, wares and merchandise more than £10," and as there was no general term, "stocks and shares" were not allowed to be classified under this statute.⁶

Noscitur a sociis

Noscitur a sociis is where words are interpreted in the context of the statute. This was the case in Inland Revenue Commissioners v Frere 1965 where the section set out "rules for interest, annuities, or other annual interest," so as the first word, interest, could mean any kind of interest, but as the latter part of the sentence says annual interest it makes you believe that it too, is annual interest.⁷

The literal rule

This means the interpretation of the statute will be applied to the **exact** meaning of these words, and in most cases is the approach taken, with no repercussions, as the Act of Parliament is correct and clear. In R v Judge of the City of London Court, Lord Esher stated that "if the words of the act are clear then you must follow the even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."⁸ This shows how it is impressed upon judges to follow the literal rule as Parliament should consider legislation enough for it to fulfil their purpose. But however, this rule can lead to some absurdities, one of which being shown in the case of Whiteley v Chappell 1868, where the defendant was charged with impersonating a dead person, so as to take their vote. The law said it was illegal to "impersonate any person entitled to vote," the court found the defendant not guilty as the literal rule meant that the dead person was not entitled to vote. There are, along with absurd results, some harsh rulings, like in the case of London & North Eastern Railway Co v Berriman 1946. This case was about a widow of a rail worker who was killed whilst maintaining the line. She had tried to claim compensation, but under the Fatal Incidents Act it says the worker must be "relaying or repairing" the line, so the court took the literal approach once more and ruled that she should not be given any compensation.

The golden rule

⁶ OCR Law for AS – Jacqueline Martin, page 236, for case details.

⁷ OCR Law for AS – Jacqueline Martin, page 236/7, for case details.

⁸ OCR Law for AS – Jacqueline Martin, page 225, for Lord Esher's comments on the literal rule.

This is merely an adaptation of the literal rule; it means that you will follow the literal rule in every case, unless following it means that the result would be an absurdity. There are two ways to apply the golden rule; in a wide application, or in a narrow application. The wider application can be illustrated by the case of R v Allen 1872. In this case, the issue of bigamy was raised. Under s.57 of the Offences Against the Person Act 1861, you cannot marry whilst the original spouse was still alive, without a divorce. However, the defendant claimed that he could not 'legally' marry this other woman as he was not divorced. Now, had the literal rule been applied, this would have been true and the defendant acquitted, but as they applied the golden rule, the court decided that the word marry meant to go through a ceremony of marriage with someone, so the defendant was prosecuted. The narrower application of this is shown in the case of R v Sigsworth 1935, where a son had murdered his mother, and was due to inherit her money, possessions etc, under the ruled in the Administration of Justice Act 1925. However, the court refused to send out the message that you can benefit from your crimes, so prevented this from happening by applying the golden rule.

The mischief rule

Whereas the literal and golden rules apply what Parliament said to the law, the mischief rule applies what Parliament meant. This rule comes from Hayden's Case 1584; it says that a court should consider:

1. What the common law was before the Act?
2. What was the defect that the common law didn't provide for?
3. What is the remedy Parliament have resolved?
4. What was the true reason for the remedy?

A case where the mischief rule was applied is Smith v Hughes 1960, where prostitutes soliciting in the streets are not abiding by the rules of the Street Offences Act 1958. When brought to court, the defence was that they were at a window, and various other places, inside a house, despite this the court ruled that the Act was there to prevent any kind of soliciting of prostitutes, so found them guilty.

The purposive approach

This is the approach that takes into account what the courts think Parliament meant to achieve. This is a particularly favoured approach for those judges who like control in their interpretation of the law. In the case of Magor & St. Mellons v Neport Corporation 1950, Lord Denning says that, "we sit here to find the intention of parliament and carry it out, and we do this better by filling in the gaps and making sense of enactment than by opening it up to destructive analysis."⁹ The purposive approach is more commonly used in European law as there may be facts that can be lost or unclear through translation, so as long as the judge can guess what the general idea is, they can interpret the law well enough. This was the case in R v Registrar General ex parte Smith 1990, where a man, convicted of two murders and confined to Broadmoor Mental Hospital, wanted to see his birth certificate – as he was adopted – so as to meet his mother. Under s.51 of the Adoption Act 1976, he is entitled to this right, but the purposive approach was used as Parliament could never have intended to promote such serious crime as he may harbour a grudge towards his mother.

Intrinsic and extrinsic aids

Intrinsic aids are the things within the statute that make it clearer; such as the Interpretation section, long title, short title, preamble, marginal notes, attached schedules and any headings before a group of sections. Extrinsic aids are the things not included in the statute which may help you interpret the law; these are things like EU law, earlier case law, previous Acts on the same topic, dictionaries of the time, reports on law reform bodies, and most importantly Hansard. Hansard is the official report on what was said in Parliament when the act was debated.¹⁰

⁹ OCR Law for AS – Jacqueline Martin, page 230, for Lord Denning's comments on the purposive approach.

¹⁰ OCR Law for AS – Jacqueline Martin, page 233, for the definition of Hansard.

The need for Statutory Interpretation

Statutory Interpretation is necessary for many reasons. Sometimes, Parliament will pass an Act that has unclear or broad terms. This phrasing issue could lead to problems – i.e. in the case of the Dangerous Dogs Act 1991 the phrase, “any dog of the type known as the pit bull terrier,” this word leads us to believe it means breed, but we cannot be sure. Secondly, there is the issue of ambiguity. There are many words with more than one meaning, leading to ambiguous legislation – i.e. the word park, as in play-area and also, find somewhere to put your vehicle. Next there is the issue of a drafting problem; this would be made when the bill is initially drafted by Parliament., and if it has been amended several times there could be confusing wording or phrasing, or in contrast, the legislation could have been hurried through and thus not thought-out properly so difficult to interpret. Another problem could be that new developments may mean that the Act has become irrelevant in some places, as shown in the case of Royal College of Nursing v DHSS 1981, where the Abortion Act 1967 said that only qualified doctors could perform abortions, but due to their updated training, nurses could also carry out the procedure. Finally, there could be translation difficulties if the law has been taken from the EU, and is now being applied to the English Legal System. All of these possibilities show that there is a massive need for Statutory Interpretation.

Conclusion.

Overall, the need for judicial precedent and statutory interpretation for judges is crucial to the law-enforcement system of the courts. Whilst they are both flexible, as their decisions are based on the suitability of the case and the judges own personal preference, they are still rigid enough to show, fairness, consistency and certainty in the law.

Bibliography.

www.peterjepson.co.uk – for essay competition’s previous winners, then précised points of their work.

OCR Law for AS – for general notes and knowledge on subject matter.

The A-Z of Law.

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See footnotes additionally.

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PLAN

Introduction.

Why do courts need to resolve points of law?

Judicial Precedent.

Types...

- Ratio Decidendi...Legal principles upon which the decision is based.
- Obiter Dicta...Things said in passing.
- Original Precedent...First case decision made. Hunter and Others vs Canary Wharf.
- Binding Precedent...Lower courts in hierarchy, and ECJ.
- Persuasive Precedent...Other countries. Statements made obiter dicta. Courts lower in the hierarchy. Judicial Committee or the Privy Council. Dissenting judgements.
- House of Lords...Practise Statement.

Avoidance...

- Distinguishing.
- Overruling.
- Reversing.

Why it is needed...

Statutory Interpretation.

Types...

- The literal rule.
- The golden rule.
- The mischief rule.
- The purposive approach.
- Intrinsic and Extrinsic aids.

Why it is needed...

Conclusion.

Summary of answer.