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Sources of law

➤ Doctrine of Judicial Precedent

Common law is mainly focused on the basic principle of judicial precedent concerned with ***stare decisis*** which is the single binding precedent. The doctrine of binding precedent can be defined as the decision of a previous superior court that binds a future lower court.

An authoritative judgment consists of two important elements:

- 1) **Ratio Decidendi**: binds the judgment (only the **RATIO DECEDENDI** would bind the judgment and not every part of the authoritative judgment)
- ❖ Rule of law expressly or implicitly treated by the judge as a necessary link for the decision (Rupert Cross)

Legal History – PRELIMINARY YEAR

- ❖ The combination of the following three stages for Goodheart is concerned.
 - a) When the applicable law is used b) on material facts c) decision is arrived at.
Queen v Lathem

2) **Obiter Dicta:** Judge's expression of opinion uttered in court or in written judgment, but not essential to the decision and thus not legally binding as a precedent. An incidental remark. This is simply the **non-binding** part of the judgment. This means

- 1) When a court cuts down an expressed ratio
- 2) A later superior court alleges that the Ratio is too wide and unnecessary for the decision
- 3) A ruling of a judge based on hypothetical facts.
- 4) If 2 reasons are given for decision but one is only hypothetical, then that is Obiter.

Carlill v Carbolic Smoke Ball Company, Bandahamy v Senanayake

- **Distinguishing**

This is a device used by the lower courts to free itself from the binding nature of the judicial authority. However in doing so, the lower courts accept the ration but states that in the instant case material facts are different.

- **Overruling**

This device is for the later superior court. Later superior court may overrule any lower court decision. It has a retrospective effect except for decisions which are *res judica*.

- **Refusal to follow**

Used to Courts of coordinate jurisdiction. That is court of appeal in 1973 is superior to the Supreme Court in 1949. Refusal to follow leaves 2 equally powerful authorities for later lower courts.

Exceptions to doctrine of Stare Decisis

- 1) Abrogated Decisions
- 2) Per incurium
- 3) Precedents Sub Silentio

➤ **Custom as a Source of Law**

For a local custom to be authoritative there are certain tests that need to be established. As per the case *Muttalibu v Hameed*, the tests needed to establish a local custom are neatly listed. Thus, it requires a custom to be of usage besides being 1) Notorious 2) certain 3) Reasonable 4) Must not offend against the intention of any legislative enactment.

Legal History – PRELIMINARY YEAR

Also, “no usage however extensive will be allowed to prevail if it is directly opposing to positive law. Thus, the following requirements stand firm.

- ❖ Custom must be ancient – *Chinappa v Kanakkar*
- ❖ Custom must be reasonable – *Ernest v Ahamadu Lebbe, Baba Appu v Abaran, Kitnen Kangany v Young, Bryan v Foot*
- ❖ Custom must be definite or certain – *Fernando v Fernando*
- ❖ Conformity with statute law – *Nobel v Durel, Seaville v Colley, Kandar v Sinnachipillai*
- ❖ Conformity with basic principles of common law – *Fernando v Fernando*

Commonly tested areas!!

- ✓ Mosaic Legal System of Sri Lanka
- ✓ Structure of Governance that prevailed in Ceylon during the Dutch period.
- ✓ Court system during the Dutch period, courts of first instance, Superior courts
- ✓ Stare Decisis
- ✓ Reception of law by Statute, Judicial activism
- ✓ Sources of law (custom, religion)
- ✓ Personal laws (kandyan, Tesawalamai, Muslim)