IS THE ENGLISH DOCTRINE OF JUDICIAL PRECEDENT BECOMING ONLY AN ILLUSION?

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Abstrakt v rodném jazyce
Cílem tohoto příspěvku je zabývat se akademickou otázkou vztahu anglické doktríny soudního precedentu a práva tvořeného legislativní činností britského parlamentu. Je skutečností, že význam legislativní činnosti parlamentu ve Spojeném království stále roste. Je však skutečně možné říci, že anglická doktrína soudního precedentu ztrácí na významu a stává se pouhou iluzí? Cílem toho příspěvku je prokázat, že tomu tak v žádném případě není.

Klíčová slova v rodném jazyce
Soudní precedent, ratio decidendi, obiter dictum, zákon v. judikatura.

Abstract
The purpose of this paper is to deal (in the form of an academic essay) with the relationship of the English doctrine of judicial precedent and the law created by legislative activity of the U.K. Parliament. It is a reality that the importance of parliamentary legislative power is growing. However, does it really mean that it diminishes the importance of the judicial lawmaking and that the doctrine of judicial precedent is becoming only an illusion? This purpose of this paper is to proof that it is by no means the case.

Key words
Judicial precedent, ratio decidendi, obiter dictum, statute v. case law.

1. INTRODUCTION

Doctrine of judicial precedent has always played pre-eminent role in English law. It will be shown in this essay that this doctrine is not an illusion, it simply cannot be. Conversely, it is a living and continually developing feature of English legal system which is to work in the future as well as it did in the past[1]. The first part of this essay deals with the question of ratio decidendi, Truth is that this ratio is usually difficult to find, however it will be shown that this sole fact is not able to undermine the doctrine of precedent as such. The second part addresses the approach the judiciary takes to the decision's ratio. Is the judiciary really ignoring it whenever possible? It shall be proven below that it does not. The final part deals with the relationship between statutory rules and case law and with the way these are applied by courts. It shall be shown that despite the growing number of statutory rules and despite the priority of statute, there are areas of law which are governed by precedents only and even in other areas of law, it is usually the case law which is eventually looked at when dealing with a case.

[1] As Philip James says in his Introduction to English Law: "…the Common Law may well prove as vital and enduring as the Roman Law, its mighty rival". James, Philip Seaforth, Introductin to English Law: 5th ed, 1962, Butterworths, London, from p. 13

2. RATIO DECIDENDI

It follows from the doctrine of precedent that like cases should be treated alike. It means that if a court is dealing with a case which shares material facts with a previous, already decided case, the court is generally bound[2] by the previous decision and should arrive to the same conclusion[3]. However the court is not bound by the whole decision but only by the rules and principles the decision creates and is based on. This is what is called its ratio decidendi. It is the crucial part of a binding precedent[4] which contains the relevant authoritative statements and legal reasoning. It is therefore to be understood as the indispensable principle of law abstracted from the material facts, which is used by the judge to make his decision[5]. Only the ratio binds judges in the future and all other pronouncements are said in passing and are considered obiter dicta.

Nobody disputes that the location of this essential part of a binding decision may and usually is a very difficult task, for English judges are not limited in length and in what they cover in their judgment, they usually do not specifically distinguish between ratio decidendi and obiter dicta statements. The scope of the ratio varies as well and usually depends even on elements found outside of the particular case[6]. If we are looking at a very long decision of appellate court, or in case judges do not agree as to the reasons for decision, the task will get even more difficult. However there are certain guides how to locate the ratio:

When all judges deciding a case agree as to its outcome, their majority view contains binding ratio decidendi. On the other hand, when a judge adopts a dissenting opinion, we can be certain that it is obiter dicta and we do not need to take his statements into account as binding[7].

It has been written above that judges mostly do not strictly distinguish in their decisions between ratio decidendi and obiter dicta. Sometimes, however, they do make such distinction (even though not expressly). As Denis Keenan notes, a judge may say "if it were necessary to decide the further point, I should be inclined to say that…" These "if statements" are not to be applied to the material facts of the current

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[2] Courts are normally bound by decision of a higher court and usually even by its own previous decisions

[3] It comes from the doctrine of stare decisis adopted by medieval traveling judges

[4] For not all precedents are binding (for instance decisions of Scottish courts normally do not bind English judges, however they may have persuasive power, decisions from other Commonwealth jurisdictions may be of persuasive power as well).

[5] *Household Fire Insurance Copany v Grant* (1978), The court decided in this case that "…letter of acceptance took effect when it was posted, the reason behind this principle being that the Post Office was the common agent of the parties" (Keenan, Denis J., Smith & Keenan's English law: 13th ed., 2001, Harlow: Longman, from p. 171).

[6] The time play its role as well, the judges may over years ascribe a broad ratio to a case, or conversely a very narrow one which is than difficult to apply in the future, for materiál facto of every case are almost never the same.

[7] However, dissenting opinions are often of persuasive nature, especially if pronounced by judges of high repute (Lord Atkin in *Donoghue v Stevenson [1932] A.C. 562)*

case and are therefore obiter dicta[8]. It is only by application a statement becomes binding, everything else said by a judge is an expression of his opinion about further hypothetical questions and even though it may have significant persuasive power, it is not binding.

However, in rare cases it may be really impossible to discover any ratio decidendi[9]. The Court of Appeal held, for example, that there was no discernible ratio in case Central Asbestos Co Ltd v Dodd[10]. Even though it is unpleasant and will make the decision making more complicated, it is not anything, which a judge could not deal with. In such circumstances the court will have to go back in time and find an earlier case dealing with the same issue and apply it to the situation dealt with now[11].

3. APPLICATION OF RATIO DECIDENDI IN SUBSEQUENT CASES

Some critics assert that judges can easily (and often do) ignore the ratio and eventually decides the case regardless of the ratio found. It is not so. Judges of course may, in some cases, depart from a previous ratio. However this discretion is absolutely necessary in order for the law the keep pace with reality and to sustain its development. Judges do not exercise this freedom in arbitrary way. There are rules saying where this departure is admissible and where it is not. In general all higher courts bind the courts bellow and are usually bound even by its own previous decision[12]. There are, however, situations when strict following of the previous case's ratio would have adverse effect. To deal with these situations several exceptions from the rule of binding precedent developed:

a judge does not have to follow previous decision if he distinguishes the current case from the previous one on material facts, it means that he needs to find features of the case he considers which are sufficiently different from the previous case[13],

as already mentioned above, the court logically does not have to follow a previous judgment if its ratio is not discernible[14] ,

if a decision conflicts with a basic legal principle it also ceased to be binding[15],

if an important precedent or a statutory rule has not been considered by the court making the previous decision, subsequent courts can ignore such decision[16],

decision which has been overruled by a statute is also of no binding force[17]

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[8] Keenan, Denis J., Smith & Keenan's English law: 13th ed., 2001, Harlow: Longman, from p. 171

[9] For istance there is no majority opinion deciding for a specific *ratio*

[10] Central Asbestos Co Ltd v Dodd [1972] 2 All ER 1135

[11] In case there is no such decision, the court will create a new precedent based on the rules and principles of case law as whole.

[12] This is however only a simplification , for it is not purpose of this essay to consider the court structure in more detail

[13] Narrowing the *ratio decidendi* by distinguishing, Quin v Leatham [1901] AC 495

[14] *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135

[15] Beswick v Beswick, 1967

[16] Decisions made *per incuriam*

if there are several decisions issued by the same rank of courts, the court dealing with the question should generally choose the later one, however it is not this simple, for the later one does not necessarily have to be the correct one, conversely it could have been issued in ignorance of the previous decision[18]

After coming into effect of the Human Rights Act 1998, the courts ceased to be bound by any previous case law conflicting with the Convention.

4. STATUTE V PRECEDENT

It comes from the doctrine of Parliamentary Sovereignty that Parliament is the supreme law making body in the land[19] and "no-one may question the validity of an Act of Parliament"[20].

Statutes, as a form of parliamentary legislation, are therefore the primary source of English Law. However despite the above mentioned facts, it is the case law created by judges that constitutes the cornerstone of the English Legal system, for English law has never been generally codified. Law of contract, tort and equity law, are still until these days coved by case law only. However even a statute once dealt with in case will be interpreted by judges[21] and eventually, it will be the case that will be looked back by court, once deciding a similar issue in the future. A lawyer, when dealing with a legal issue, will search reported cases[22] even if the issue is already regulated by statute. Disadvantage of statutes is that they are formed on basis of theory conversely case-law is purely built by reasoned decisions, coming from real life situations. It enjoys a great deal of certainty[23] and flexibility. Judges are here to "apply the principles which emerge from the case-law of the past, to adapt them to the conditions of the present, and so to mould them that they may be fit to serve for the future"[24]. Critics assert that the case law is too rigid, complex and may sometimes cause injustice[25]. However statutory rules can easily cause the same problem for the judges cannot depart from a statutory rule if its wording is clear and without ambiguity.[26] It takes a long process to change a statutory rule and it may be even impossible to arrive to a change, sometimes only because of political tensions and disagreements. There is also no difference in complexity between precedents and Acts of Parliament, for there is not only highly organized general codes but usually also a complex bulk of statutory rules as well[27].

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[17] For statute is the highest source of law

[18] Colchestr Estates (Cardiff) v Carlton Industries [1984] 2 All ER 601

[19] The Crown and Parliament Recognition Act 1689 declared Parliament to be a Sovereign body

[20] Terrett, S., English Legal System, Workbook 1, University of Cambridge, 2005

[21] About 50 % of all High Court CASE and 90 % of House of Lords cases deals with statutory interpretation, for even statutes are not always clear and without confusion

[22] Law Reports

[23] for since the judicial decisions are usually consistent, it is possible to predict the court's future ruling

[24] James, Philip Seaforth, Introductin to English Law: 5th ed, 1962, Butterworths, London, from p. 13

[25] It was recognized even by the House of Lords in 1966 Practice Statement

[26] Fothergill v Monarch Airlines Ltd [1981]

[27] Some become obsolete even before they are first used

5. CONCLUSION

Throughout the centuries the English legal system has been built up by creating and applying precedent after precedent, and even today when Parliament keeps passing more and more statutory rules, the judge made law has not lost its importance. It is certainly not an illusion. It has been shown in this essay that even though locating the ratio decidendi is not an easy task and sometimes even impossible one, there is no way how this fact could affect the doctrine of precedent. Judges despite enjoying quite wide discretion as how to apply rules derived from the ratio on the future cases do not exercise this right arbitrarily for there are rules they have to obey. It has not been claimed in this essay that the system of precedent is perfect, however neither are rules created by statutes. We should take advantage of using these two features of English legal system as complementary, so we can enjoy the better parts of both.

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