TOPIC III
THE DOCTRINE OF PRECEDENT
Lecture Slides for LL.B I

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Introduction

- The doctrine of *Stare Decisis et non quieta movere* commonly known as *stare decisis* is an English doctrine which simply means ‘stand by preceding decisions; the principle that courts must abide by precedents set by judgements made in higher courts.’
- It is a doctrine which provides that, once a point of law has been decided in a particular case, that law must be applied in all future cases containing the same material facts.

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- For example in Donoghue v Stevenson [1932] AC 562 the House of Lords held that a manufacturer owed a duty of care to the ultimate consumer of the product.
- This set a binding precedent which was followed in Grant v Australian Knitting Mills [1936] AC 85

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- It is the habit of courts to follow their previous decisions within more or less defined limits.
  - The courts in the judicial hierarchy are bound to follow decisions of the ancestor courts which are above in the hierarchy.
- For the doctrine of judicial precedent to work, it is necessary to be able to determine what a point of law is. In the course of delivering a judgment, the judge will set out their reasons for reaching a decision.

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- The rationale for this rule is to ensure;
- Adherence to precedent helps achieve two major objects of the legal order.
  - Firstly it helps to maintain a system of stable laws. This stability gives predictability to the law and affords a degree of security for individual rights.
  - Secondly it ensures that the law develops only in accordance with the changing perceptions of the community and therefore it more accurately reflects the morals and expectations of the community.

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- The reasons which are necessary for them to reach their decision amount to the *ratio decidendi* of the case.
- The *ratio decidendi* forms the legal principle which is a binding precedent meaning it must be followed in future cases containing the same material facts.
- It is important to separate the *ratio decidendi* from the *obiter dicta*.

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- The *obiter dicta* is things stated in the course of a judgment which are not necessary for the decision.
  - For example in *R v Howe & Bannister* [1987] 2 WLR 568 the House of Lords held that the defence of duress was not available to murder.
  - This was the *ratio decidendi* of the case. The Court went on to consider whether the defence should be available to those who attempt murder and stated *obiter dicta* that the defence of duress should not be available to attempted murder.

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- Courts are normally not prepared to give decisions which are strange to the general practice of other court.
- In most cases courts will try to search for previous decisions on any matter that seem to be so strange.
- See the case of **Ahamadi Chali v R [2006] TLR 313 at 319 (CA)**

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- Hence generally doctrine of precedent ensures;
  - Consistence of the law
  - Uniformity
  - Certainty of the decision made in cases whose material facts look alike. See the case of **Ally Linus and 11 Others v T.H.A and Another [1998] TLR 5**

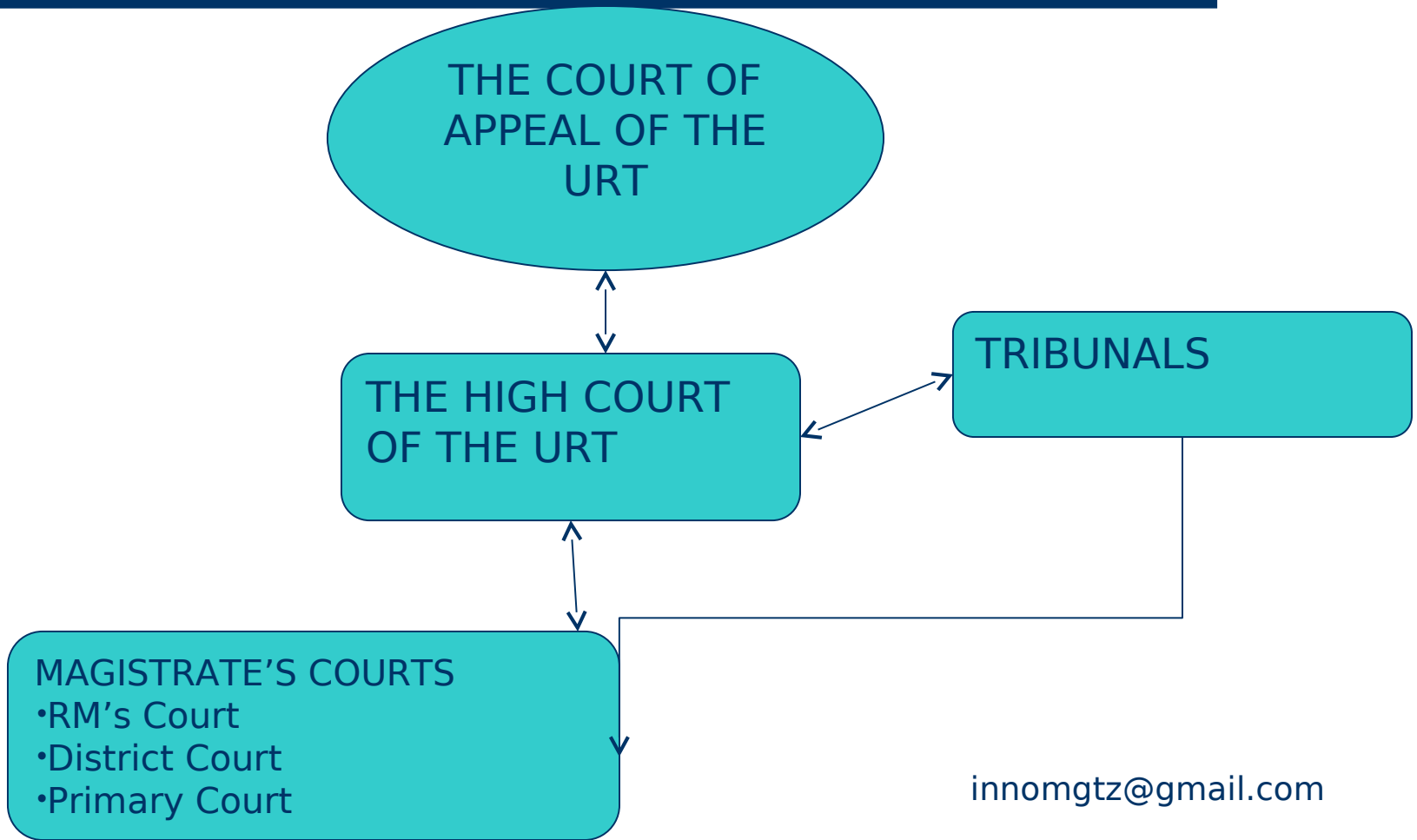
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- The general application of the doctrine of stare decisis is seen through the doctrine of precedent
- Under this doctrine, superior courts (courts of records) are in theory bound to follow their own previous decisions and all subordinate courts are bound by decisions of superior courts.

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JUDICIAL HIERARCHY



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- Hence the Common law doctrine of precedent is to the effect that;
  - Each court in the judicial hierarchy is bound by the principles enunciated by prior decisions of the courts above it
  - Superior courts of the country (In case of England, the House of Lords and the Court of Appeal) are in theory bound to follow their own prior decisions

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Levels of Obligations

- The doctrine of precedent operate under two major levels;
  - Horizontal obligation
  - Vertical obligation
- Horizontal obligation occurs where courts under concurrent jurisdiction are called upon to consider decisions made by either of the courts
  - In theory, for the purposes of certainty uniformity and consistence in decision making, decision of such courts is supposed to bind each other.

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- However, in practice, decision by one court cannot bind another court of the same jurisdiction (concurrent jurisdiction)
- That is to say, a decision by the High Court of URT cannot bind the High Court of Zanzibar
- Similarly, a decision by a single judge of the High Court cannot bind another judge of the same court.

- The difference lies when a single judge is considering a decision made by the full bench of the same court.

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- Under vertical obligation, superior courts' decisions are binding to all courts and tribunals below.
- The Court of Appeals' decisions are binding upon all courts and tribunals below it.
- The High Court's decisions are binding upon all courts and tribunals below it.
  - Decisions by superior courts are called precedents

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The applicability of the doctrine of precedent

- Rigid or strict application of the doctrine of precedent may, in some cases, defeat justice.
- Hence, realizing this, Lord Gardner, L.C issued a Practice Statement [1966] 3 All ER 77 that stated;
  - *"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases.*

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- *It provides **at least some degree of certainty** upon which individuals can rely in the conduct of their affairs, **as well as a basis for orderly development of legal rules**.*
- *Their Lordships nevertheless recognise that **too rigid adherence to precedent may lead to injustice** in a particular case and also unduly restrict the proper development of the law.*
- *They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.*

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- Hence as per the Practice Statement, the House of Lords is normally bound to follow its previous decisions but it may depart whenever it feels right to do so.
- As for the position in the English Court of Appeal, the same is stated in the case of *Young v Bristol Aeroplane Company Limited*, [1944] 1 KB 718, (CA)

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- The English Court of Appeal is bound to follow;
  - Its own decisions
  - Those of courts of co-ordinate jurisdiction, and
  - The "full" court is in the same position in this respect as a division of the court consisting of three members.

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- The exceptions to this rule are:
  - Where there are two conflicting decisions for which the court is entitled and bound to decide which of two conflicting decisions of its own it will follow;
  - Where the decision of the court, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;
  - The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

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- The expression per incuriam simply means through want of care.
  - It is a decision or dictum of a judge which clearly is the result of some oversight
- Sir Raymond Evershed, M.R in the case of **Morelle Ltd v Wakeling [1955] 1 All E.R** at page 708 stated as follows;

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- As a general rule the only cases in which decisions should be held to have been given per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned, so that in such cases some part of the decision or some step in reasoning on which it is based is found, on that account, to be demonstrably wrong.

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The doctrine of stare decisis before and after independence

- Before independence, the final appellate court was the Privy Council.
- Below it there was;
  - The Eastern Africa Court of Appeal
  - The High Court
  - Other subordinate Courts
- The status of the Privy Council was the same to the House of Lords though its decisions were not binding to English courts-Case *Portline Ltd v Benline [1958] 2 Q.B 146*

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- In principle, the Privy Council was not bound by its previous decisions since it dealt with matters originating from different jurisdictions.
- The exceptions were stated in the case of *Chacha s/o Wambura v R [1953]20 E.A.C.A 339* which include;
  - When dealing with matters from a specific jurisdiction
  - When interpreting statute pari materia
  - When decision is on the matter relating to application of the common law

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- English decisions, As per O'conor, P in the case of *Kiriri Cotton v Dewani [1958] E.A 239,* decisions of Superior Courts in England such as HL, CA were binding to our Courts.
- They were binding
  - If were made on the question of General Reception Clause
  - If given and established before the reception date of 22.07.1920 in Tanganyika
  - If stand un-reversed by a particular superior court

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- Soon after independence, appeals to the Privy Council were abolished.
  - In Tanganyika they were abolished in 1962
- The highest appellate Court remained to be the East Africa Court of Appeal.
  - It had the same status as its predecessor the Privy Council
- As to the status and influence of Privy Council's decisions, two conflicting decisions were made.

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- The first was that made by Spry, J.A, in *Rashidi Moledina v Holma Ginneries [1967] E.A 195* where it was stated that
  - Any decision made on the existing laws was binding.
  - That meant decisions of the Privy Council were binding to our Courts even after independence.
- The second was that given by Sir Charles Newbold, P in *Dodhia v National & Grindlays Bank Ltd and another [1970] E.A 195*

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- It was stated that;
  - Decisions of the Privy Council were not binding to our Courts
  - The EA Court of Appeal was free to depart from its previous decision when it is right to do so
  - Regard may be paid to English Court if our courts are interested to see what the English law is
  - Application of English law to our country is subject to such modifications as the circumstances of the country and its inhabitants require

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- In the year 1977 the East Africa Court of Appeal collapsed following the Collapse of the East Africa Community.
- Between 1977 to 1979 the Court of Appeal of East Africa (Tanzania-Ad hoc) operated in the position of the collapsed East Africa Court of Appeal
- The Current Court of Appeal was formed in 1979.

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- It became the highest appellate court in Tanzania in all matters originating from both mainland and Zanzibar except on Islamic matters originating from Zanzibar.
- As for the relevance, operation and justification of the doctrine of precedent, the Court of Appeal of Tanzania has status just like its predecessor courts (Privy Council and East Africa Court of Appeal)

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The Case of JUWATA v KIUTA [1988]TLR 146

- This is a famous case that established the status of the Court of Appeal of Tanzania in relation to the operation of the doctrine of precedent.
  - This matter arose out of trade dispute. It concerned the redundancy of 94 KIUTA employees who were JUWATA members.
  - When the matter was referred to the Permanent Labour Tribunal, the Tribunal relying on the Court of Appeal decision in the case of Zambia Tanzania Road Service Ltd. v J.K. Pallangyo Civil Appeal No. 9 of 1982, held that it had no jurisdiction to entertain the dispute.

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- Being aggrieved JUWATA, unsuccessfully, appealed to the High Court applying for orders of certiorari and mandamus. Aggrieved again, JUWATA appealed to the Court of Appeal.

- The dispute in this Case centered on the correctness of the Ratio Decidendi in Pallangyo's Case.
- The Court of Appeal cited the case of Dodhia v National & Grindlays Bank Ltd. and another, [1970] E.A. p. 195 at pp. 198 to 200

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- The Court then observed;
  - Since the Court of Appeal of Tanzania is a successor of the former court, it stands in the same position as its predecessor, unless the law establishing it expressly provided to the contrary. A close scrutiny of the Constitution of the United Republic and the Appellate Jurisdiction Act, 1979 shows that the Court of Appeal of Tanzania has been vested with more powers than its predecessor had…thus has the jurisdiction stated in the Dodhia's case.

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- The Court held;
  - The decision in Pallangyo's case,... was decided per incuriam;
  - All courts and tribunals below the Court of Appeal are bound by decisions of the Court regardless of their correctness;
  - The Court of Appeal should be free in both civil and criminal cases to depart from such previous decisions when it appears right to it do so;
  - ...The rights of the parties in Pallangyo's case are not altered by this decision.

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- The question is, is the High Court bound to follow its previous decisions?
- In the case of **Kerama Enterprises Co. Ltd and 2 others v Exim Bank (T) Ltd, Commercial Case No. 12 of 2013**, High Court of Tanzania Commercial Division at Arusha (Unreported), hon. Makaramba J stated;

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- I should point out here that in the absence of a decision by a superior court to harmonize these otherwise conflicting two decisions by the same Court on the same subject matter, parties are at liberty to follow that which in their considered view accords more with justice. **However, the doctrine of precedent is in favour of the position that a decision by a judge of a court of parallel jurisdiction is not binding on another judge of court with similar jurisdiction.**

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- The judge continued to say;
  - In any event, even a judge of the High Court is not bound by his own decision and is at liberty to depart from his own previous decision if the justices of the case so demand. A judge of the High Court however, should not lightly depart from a decision of a fellow judge of the High Court just for the sake of departing. There must be fairly and highly convincing reasons for a judge to depart from his own decision or from the decision of a fellow judge.

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- Same views by the same judge are reiterated in the cases of;
  - Juma Salehe Makongo v Exim Bank (T) Ltd, Commercial Case no.17 of 2013, High Court of Tanzania Commercial Division at Arusha (Unreported)
  - Damian Kigaila Masalla v Exim Bank (T) Ltd Commercial Case no. 15 of 2013 High Court of Tanzania Commercial Division at Arusha (Unreported)

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Influence of English Decisions

- Though it is a settled principle that foreign decisions are not binding in our jurisdiction, yet the influence of English decisions has been massive in our jurisprudence.
- Since 1920 when the Tanganyika Order in Council 1920 (22.7.1920) imported English Received laws, such influence has remained to live within our legal system including influencing our judicial precedents.

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- The process of retaining the application of English laws in our country has been done through various pieces of legislation, e.g s.180 of the Land Act, 1999 (Act No. 4 of 1999)
- Several decisions of the Court of Appeal and High Court in Tanzania have followed or cited foreign decisions when our laws are inadequate.
  - Nonetheless such authorities are persuasive.

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Evasion Techniques

- Strict application of the doctrine of precedent may sometimes defeat justice.
- But it has to be noted that a subordinate court or tribunal is bound to follow a precedent of the superior court regardless its correctness- JUWATA v KIUTA's case
- However, to avoid such awkward circumstances, courts have developed mechanisms of evading strict application of this doctrine.

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- Such evasion techniques include;
  - Distinguishing
  - Overruling and Constructive overruling
  - Departure when it is right to do so
  - Where there are two or more conflicting decisions-read the case of *Luxury Apartments Ltd v Dr Edward Wilson Ngwale and Another, Misc Commercial Case No 175 of 2014, High Court of Tanzania Commercial Division at Dar es Saalam (Unreported)* Hon. Nyangarika J.

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- Compare that decision with another case, In the matter of application by Ephraem Christopher Manase Mrema v Elias Masija Nyang’oro and 2 others, Commercial Case no. 20 of 2013, High Court of Tanzania Commercial Division at Arusha (Unreported).

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QUESTION FOR DISCUSSION

- In each of the following scenario, state whether Precedent A is or is not binding on the court in question;
  - The High Court of Kenya in 1960 considers precedent A, a decision of the English Court of Appeal in 1870. Precedent A was overruled by the House of Lords in 1959
  - The Court of Appeal for Eastern Africa in 1960 considers precedent A, a decision of English House of Lords in 1926.

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- The High Court of Tanzania in 1975 considers Precedent A, a decision of Privy Council in 1958.
- The Court of Appeal of Tanzania today considers precedent A, a decision of the Court of Appeal for Eastern Africa interpreting a section of the Uganda Penal Code. The Court of Appeal of Tanzania has before it an identical section in the Tanzania Penal Code.
- The High Court of Tanzania today considers precedent A, a decision of the Court of Appeal of Tanzania in 1983. The Court of Appeal of Tanzania overruled it in 1988 on review as it was decided per incuriam.

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