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# Precedents as a Source Of Law

Vedant Bhardwaj Singh

## ABSTRACT

*Humans are creatures of habit, and the use of judicial precedents is one of the most perfect examples to explain why. There is an air of peculiarity around them. They can be construed as the thoughts and the point of view of old, seemingly wise men or the community. But the core objective to utilize this tool as a source of law lies not in philosophy or common sense. Neither is its aim rooted in the fact that it is right, nor in the fact that it had ought to be done. Its driving force lies in the fact that it has been done.*

*Judicial precedents are not as old as customs as a source of law, nor it is as binding as a piece of legislature. Even then, there is a strange appeal to it which attracts judges time and time again.*

# INTRODUCTION

Humans are creatures of habit, and the use of judicial precedents is one of the most perfect examples to explain why. There is an air of peculiarity around them. They can be construed as the thoughts and the point of view of old, seemingly wise men or the community. But the core objective to utilize this tool as a source of law lies not in philosophy or common sense. Neither is its aim rooted in the fact that it is right, nor in the fact that it had ought to be done. Its driving force lies in the fact that it *has* been done.[1]

Judicial precedents are not as old as customs as a source of law, nor it is as binding as a piece of legislature. Even then, there is a strange appeal to it which attracts judges time and time again.

This fascination may lie in the fact humans crave consistency. It may lie in the fact that we take comfort in knowing that whatever we are experiencing has already been dealt with by someone in the past. It removes the fear of paving a new "judiciary's law" rather than simply following one.

Despite the many intangible reasons for its widespread use, judicial precedents have its own set of merits, demerits and classifications when being used as a source of law and that is what this project hopes to objectively investigate.



[1] John Chipman Gray, *Judicial Precedents, A short study in comparative jurisprudence*, 9, Harv. Law Rev, 27, 27, (1895).

# CHAPTER 1: PRELIMINARY OBSERVATIONS

## *VARIOUS DEFINITIONS*

Since law is closer to the social sciences than to the physical sciences, there are several various – at times conflicting – definitions of what a judicial precedent is.

According to Gray, "precedent covers everything said or done, which furnishes a rule for subsequent practice.

According to Salmond, "in a loose sense, it includes merely reported case law which may be cited and followed by courts".[2]

Keeton defines judicial precedent as a judicial decision with some amount of authority attached to it.

Jenk defined precedent as a "decision by a competent court upon a disputed point of law which becomes a guide and authority to be followed by all courts."

## *DIFFERENT TRAINS OF THOUGHT*

When we come to the topic of judicial precedents, there are two major opposing camps. One with the view which puts precedents on a pedestal and the other failing to even acknowledge judicial precedent as a source of law.



The subscribers of the former thought process have their ideologies aligned with writers like Blackstone and Cardozo. They believe that the scale of justice should be balanced and should not waver every time a new judge comes on to the scene. They value consistency above all. Besides it will become near impractical for a judge to navigate the muddy waters of justice without the foundation stones laid by his predecessors. It would destroy the faith people put in the judicial system if changes in the judicial bench were accompanied by changes in rulings.[3]

Proponents of the former thought process accept the fact that in some ways precedents can be extremely rigid but they also claim that the first thought should not be to alienate the concept of precedents when you hit a roadblock.

[2] DR. V D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 215 (5TH ED, 1987).
[3] DR. V D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 215-217 (5TH ED, 1987).

The other train of thought found its driving force in writers like Savigny and Stobbe who considered precedents to be evidence of customary law alone. Their reasoning lies in the fact that departure from established procedures is of utmost importance for the evolution of a better reasoning while interpreting the law. They argue that there is no point in following a precedent if it is flawed or has the potential to become obsolete in the future.[4]

## *STATUS OF JUDICIAL PRECEDENTS*

In Civil Law Systems

Legal systems based on the approach of the civil law fail to recognize past cases as a source of law and the doctrine of stare decisis is considered to be a vestigial organ.[5] Courts can look up past rulings on the topic in discussion for previous interpretations of the law but are free to make up their own mind while deciding their case. Despite its initial ignorance of precedent as a source of law, civil law systems are growing more open to the binding powers of the same.

In Common Law Systems

Common law systems are inspired by the doctrine of stare decisis, which means, "to stand by things decided, and disturb the settled law". Precedents play an important role in this legal system because of their enhanced binding forces.

In Indian Legal System



The Indian legal system has its roots in the common law. Thus, precedents play an important role in the Indian judiciary. Before the British colonialism period, the concept of precedents could not grow adequately because of a lack of an organized judicial system and resources to keep record.[6]

The concept of judicial precedents is now well settled in the article 141 of the Indian constitution which states that, "The law declared by the Supreme Court shall be binding on all courts within the territory of India."[7]

[4] Randy Kozel, *The problem of precedent* WASHINGTON POST (June 17, 2017 01:11pm), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/10/the-problem-of-precedent/.
[5] Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A comparative and empirical study of a Civil Law state in a Common Law nation*, 65, LA Law Rev, 776, 783-787.
[6] Aadhir Shukla, *Judicial Precedents in India,* MONDAQ (Sep. 30, 2021 01:17pm) https://www.mondaq.com/india/trials-appeals-compensation/882616/judicial-precedents-in-india.
[7] INDIA CONST. art 141.

The supreme court of India, on numerous occasions has explicitly stated that it is not bound by its previously furnished judgements, most famously in the Keshava Nanda Bharti case.[8]


[8] Kesavananda Bharti v State of Kerela, (1973) 4, S.C.C. 225 (India)

# CHAPTER 2: RECOGNISING THE VALUE OF PRECEDENTS

The value of judicial precedents in a legal system is governed by two major concepts which will be briefly explained in this chapter.

## *STARE DECISIS*

Stare decisis is a concept generated to cater the minds of those who crave certainty and stability. One of the widely accepted definitions of this concept was given by Kent,

"A solemn decision upon a point of law arising in any given case becomes an authority in a like case because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case."[9]

This doctrine improves upon the binding powers of a judicial precedent. This is a sound policy most of the times but the true test of this policy arises when errors creep into the previous judgements.

The acceptance of this doctrine was a gradual one. Experience helped in asserting its dominance in the Common Law. The sound reasons which gave birth to the doctrine of stare decisis were accepted by the judges after employing it in practice.

It was not until the nineteenth century that this doctrine evolved into its most rigid form in the British legal system. This may be the reason for the loss of its influence in the legal systems as extreme rigidity was not beneficial in a modernizing world.



[9] Fred W Catlett, *the development of the doctrine of stare decisis and the extent to which it should be applied*, 21, WASHLREV, 159, 159-165(1946).

### *JURISPRUDENCE CONSTANTE*

Jurisprudence constante illustrates a set of judicial norms because it referred to judicial precedents considered collectively.

The doctrine has French origins and is embedded in the civil law system. It directly compares to the doctrine of stare decisis. Previous decisions have high persuasive powers but are not binding in nature. Thus, the prowess of judicial precedents is reduced in this doctrine.

The main distinction between the two doctrines is that a singular court decision is enough to employ the doctrine of stare decisis. But for Jurisprudence constante, one needs to have a series of adjudicated case laws. Precedents are the secondary source of law in this doctrine.

After the pronounced rigidity of the stare decisis and the French Revolution, there was a decrease in the importance of legislatures and gradually adhered to a system of informal precedent law.[10]



[10] Marko Novak, *Ensuring uniform case law in Slovenia: Jurisprudence constante, Stare decisis and a third approach*, 27, STUDIA LURIDICA LUBLINENSIA 132, 132-140(2018).

# CHAPTER 3: PARTS OF A JUDGEMENT

A judgement has two essential parts namely, "ratio decidendi" and "obiter dicta". Usually only the ratio decidendi part of the judgement can serve as a precedent. But in *Municipal Committee Amritsar v Hazara Singh,*[11] the Supreme Court of India was of the opinion that the obiter dicta of the Supreme court are binding for all courts and tribunals in the territory of India.

The following chapter will briefly discuss the various aspects of ratio decidendi and obiter dicta.

## *RATIO DECIDENDI*

According to Salmond, "A precedent is a judicial decision which contains in itself a principle. This underlying principle which thus forms its authoritative element between the parties to it but it is the abstract of ratio decidendi which alone has the force of law as regards the world at large."[12]

The direct translation of the term from Latin means "reasons for decision." They can be used as an authoritative tool by courts in future cases. This is the binding principle in a judgement. It is the piece of judgement which can be generalized while discussing similar cases.

### *Identifying Ratio Decidendi of a case*

It is imperative for a future court to identify the ratio decidendi before employing it as a precedent. The difficulty arises because a judge while giving the judgement will not highlight the ratio decidendi of a case. The task of eliciting the ratio is given to the future judge.

History has given us hordes of tests for identifying the ratio decidendi of a case. Each method comes with its own merits and demerits, but certain principles are seen in all these methods, which are highlighted below.

- Distinguishing material facts from unimportant facts.
- By discovering the precedents applied to identify the court's approach.
- By restricting analysis to the majority opinions.
- By reading out subsequent decisions and considering it at several levels.

[11] Municipal Committee Amritsar v Hazara Singh (1975) INSC 66 (India)
[12] DR. V D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 244-245 (5TH ED, 1987)

### *OBITER DICTA*

Obiter dicta is basically considered to be every part of a judgement which is not the ratio decidendi. It Latin translation is, "among other things."

John Chipman Gray rightly noted, "it must be observed that at the Common Law not every opinion expressed by a judge forms a judicial precedent."[13]

Obiter dicta is persuasive at its core, and nothing else, except in unique circumstances like the obiter dicta of supreme court of India. But the doctrine possesses various weights of persuasiveness. They can range from passing remarks which fail to eclipse any relevant portion of the case in hand to heavily rational remarks which can be construed to be ratio decidendi.

Obiter dicta is a tool used for social commentary and judicial activism. It is a safe place ina judgement where the judge can freely express his opinion.



[13] Rod Hollier, *The ultimate guide to the ratio decidendi and obiter dictum*, THE LAW PROJECT https://www.thelawproject.com.au/ratio-decidendi-and-obiter-dictum#.

# CHAPTER 4: NOTABLE JUDGEMENTS IN INDEPENDENT INDIA

Since Indian courts follow the doctrine of Stare Decisis, it makes sense to look at some practical applications of the binding force of judicial precedents which changed the legal landscape of this country.

### *Kesavananda Bharti v State of Kerela (1973)*[14]

Arguably the most influential judgement of independent India and one of the perfect examples of judicial precedents acting as a source of law.

The main theme of this case was to safeguard the sanctity and the authority of the Indian Constitution through the doctrine of "Basic Structure".

According to the court, there is an inalienable soul to the constitution which is to be considered sacred. No government can attempt to abridge it in any circumstance.

The court listed down a non-exhaustive list of principles which were to be considered in the basic structure, including constitutional rights, federalism, secularism etc.

The verdict was passed with a 7:6 majority and may well have saved democracy in modern India.

### *Mohammed Ahmed Khan v Shah Bano Begum (1985)*[15]

It is considered to be a landmark judgement for the empowerment of rights for Muslim women. The court navigated its way through the muddy waters of personal laws and its dynamics with respect to equality amongst all Indian subjects.

The judgement touched upon the areas of individual rights, religious tolerance and the role of a secular state. The verdict allowed Shah Bano to extract alimony from her ex-husband.

What followed was a massive political battle and a controversy, as to how much can the court intervene in personal laws.

The case opened the doors for a more liberal introspection of anachronistic personal laws.

[14] Kesavananda Bharti v State of Kerela, (1973) 4, S.C.C. 225 (India).
[15] Mohammed Ahmed Khan v Shah Bano Begum (1985) S.C.R. (3), 844 (India).

***Justice K S Puttaswamy v Union of India (2017)***[16]

In this case, the Supreme court of India ruled that fundamental right to privacy is implied in life and liberty and is a part of article 21 of the Indian constitution. This is an extremely useful precedent in the context of the technological changes that our society is going through. The implications of this judgement can be seen in incidents like the judiciary's vehement attacks against media trial. They claim that media trial prejudice the masses even before the judgement is passed. The recognition of privacy as a fundamental right will also help in the inclusion of the various identities in the gender, race, caste and sexual spectrum.

***M C Mehta v Union of India (1987)***[17]

The judgement introduced the doctrine of "absolute liability." This case revolutionized the 1868 doctrine of strict liability. It broadened the interpretations of liabilities as it coined the term absolute liability. The new doctrine is doing well to keep up with India's growing industrial and technical prowess.

This doctrine creates more accountability and is based on the polluters pay principle. The absolute liability rule makes it compulsory for industries to take responsibility for their damages completely so that the health of those who are affected is prioritized.

It also took a note on the compensation protocol and amended that compensation must be paid proportionally to the financial status of the organization.



[16] Justice K S Puttaswamy v Union of India, (2017) 10, S.C.C. 1 (India).
[17] M. C. Mehta & *anr* v Union of India & *ors*, (1987) S.C.R. (1) 819 (India).

# CHAPTER 5: MISCELLANOUS INFORMATION ON JUDICIAL PRECEDENTS

## *TYPES OF PRECEDENTS*

There are mainly four recognized types of precedents in most legal systems. This subsection will briefly explain all of them.

**Authoritative Precedent**

These judicial precedents are binding in nature. The lower courts have to accept this type of precedent regardless of whether they want to or not. Theses are most commonly found in the Common Law System.[18] They are divided into types:

Absolute Precedent: They have to be followed blindly without taking into consideration, the present judge's opinion.

Conditional Precedent: Even though they are binding in nature, it is up to the present judge, whether to ignore it or accept it.

**Persuasive Precedent**

This type of precedent has no independent legal standing on its own. They serve as a guiding light for judges and are portrayed as historical sources of law for reference. They have no binding force in them.



**Original Precedent**

Original precedents are formed when the court enters into uncharted waters. According to Salmond, "an original precedent is the one which creates and applies a new rule." The court uses its own discretion to create laws for the state, that is that there is no legislative or historical reference available to the judge.

**Declaratory Precedent**

In its most primitive sense, declaratory precedents are used to declare or apply existing rules.

[18], LAW PORTAL https://www.lawcolumn.in/kinds-of-precedents/

### *MERITS PRECEDENTS AS A SOURCE OF LAW*

1. It introduces the dimensions of predictability and consistency to the legal systems.
2. It helps save time in future ruling, as judges have a reference to guide them.
3. They are reflective of the public opinion and thus add certainty to the legal system.
4. It guides judges to think practically without prejudice.

### *DEMERITS OF PRECEDENTS AS A SOURCE OF LAW*

1. It increases the complexity of the already complex legal system.
2. There can be various interpretations of a judicial precedent in the future, which will create confusion.
3. Because of its rigidity anachronistic precedents will be needed to follow blindly which will be bad for the society.
4. It forces courts to look backwards rather than forward for inspiration. Thus, it reduces the scope of progression.

### *ALTERNATIVE SOURCES OF LAW*

Apart from judicial precedents, there are two other recognized sources of law.

**Custom as a source of law**

It is considered to the oldest source of law. It originated at a time where there were no codified laws present in the society. It is a rule of action voluntarily and uniformly followed by people. It embodies a rule of conduct approved and accepted by the community for generations.

**Legislation as a source of law**

Legislation is a process of law making and is considered to be an essential source of law. It has a wide jurisdiction and is binding on all the citizens of the state. It is the declaration of certain principles being acknowledged as legal scriptures, by the legislature of any State.

# CONCLUSION

The project has successfully achieved what it had sought out to achieve at the beginning of the project. The brief discussion above has helped in the critically analyzing the concept of judicial precedents as source of law.

Precedents are a very important aspect of law and their evolution throughout the pages of history serves an important reference in jurisprudence.

Although at times they can be very rigid, this system helps in increasing the flexibility while interpreting a law. They help in ensuring equal justice and certainty to the legal systems all around the world.

There are other sources of law which compliment the role of precedents in our society. This helps in enhancing the positives of precedents which is to establish a set of hierarchy in the judiciary of any country.

As exhibited by various landmarks cases in India, the practicality of precedents is also beneficial for the masses, as several socially oriented doctrines have been introduced by authoritative precedents.

Thus, despite a train of thought claiming that precedents should not be considered to a source of law, the project clearly highlights departure from the doctrine of stare decisis in its entirety will do more harm to the community than good.[19]



[19] DR. V D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 215-250 (5TH ED, 1987).

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