

## **Stare Decisis: On the Role of ‘Case Law’ in the Case Method of Teaching**

Shiva Srinivasan

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**Abstract:** *Why should law schools be obsessed with case law when there is nothing that corresponds to this phenomenon in the curriculum of business schools? What, more specifically, are the skills that are developed through the consideration of precedents in case law that are missing in the attempt to teach decision making through cases in business schools? This perspective essay is an attempt to differentiate between the approaches to the case method in use in law schools and business schools in the United States. Insofar as the use of the case method within professional schools in the American Ivy League has become a role model for pedagogy elsewhere, it is important to understand that there is a whole typology of approaches to the case method. While it is not possible to exhaust the different approaches in this essay, we must at least differentiate between the law school and business school approaches to teaching with the case method. This is all the more important since the introduction of the case method at Harvard Business School in 1908 was influenced by the pioneering experiments conducted at the Harvard Law School in the 1870s by Dean Christopher Columbus Langdell. The main theoretical and practical difference between these approaches was the importance accorded to stare decisis (or the role of precedents in case law) as a constraint in the process of decision making in the law school. Furthermore, cases used in the law school system are written by judges belonging to the appellate judiciary and not by faculty themselves. This gives a different orientation to the case method altogether since a case written by a faculty won't have any legal authority, but cases written by judges will. It is therefore important to expose students in business schools (who have to study business law, company law, and theories of regulation) to the role of precedents in judicial approaches to decision making. This essay attempts to make a pedagogical case to do precisely that.*

**Keywords:** *Case Law, Case Method, Decision-Making, Precedents, Prudence, Stare Decisis*

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### **I. Introduction**

This perspective essay is an attempt to address the following question: *What are the implications of the absence of case law in business studies?* The significance of this question relates to the fact that learning to think like a lawyer in a law school basically relates to finding analogies between situations requiring litigation in the present, and locating a suitable precedent from the body of case law in a particular area. Given that students in a business school must make sense of business law, company law, and different forms of regulation, it is important that they should have considerable exposure to how lawyers and judges think (Cardozo, 1921; Posner, 2008). This is not just a problem in the business school curriculum, but one that is of significance in the law school curriculum as well where they encounter the problem in reverse. A large number of law school graduates are not really interested in public law, statutory interpretation, or litigation, but will wind up doing some form of chamber law (like probate) or corporate law (like mergers and acquisitions). It is therefore important that graduates of both business schools and law schools understand that the case method is not the same everywhere, but varies according to whether we want to teach decision making in the context of business, law, or the locus of intersection between law and business (Christensen *et al*, 1991; Davis & Steinglass, 1997; Garvin, 2003). It is also important to remember that Harvard Business School adopted the case method in 1908 as a result of the pedagogical experiments that were conducted successfully by Dean Christopher Columbus Langdell at the Harvard Law School in the 1870s. The main difference though between the approaches at the business and law schools at Harvard is the importance accorded to case law in the latter. It is the propensity to overlook this important distinction that is the causative factor in the inability of business school graduates to understand judicial and regulatory forms of decision making in courses in business law, company law, and the theory and practice of regulation.

### **II. Joint Programs In Law & Business**

This problem of mutual incomprehension between graduates from law and business schools is being increasingly recognized as one that is worth correcting in the United States academy; hence the proliferation of joint JD/MBA programs that attempt to make intersectional careers in law and business possible. The same logic applies for joint programs in business and government as well since what all these programs have in common is the notion of using the case method as a way of rehearsing policy options and practicing with problem solving techniques in any given profession (Datar *et al*, 2010). There is thus a growing awareness that law schools must

become more interdisciplinary, and focus on making 'counselors and problem solvers' of their graduates, rather than urge them to litigate everything that comes their way (Brest, 1996; Wizner, 2001-2002; Balkin & Levinson, 2006). The need for this essay however stems from the fact that not all students can either afford to participate in or even realize the importance of such joint programs. It is therefore important for those with an interest in the case method of teaching to sensitize their audiences in business and law schools of the intellectual challenges involved in overcoming this sense of mutual incomprehension. Given the high tuition costs in professional schools in the United States and elsewhere, most law school graduates actually wind up in corporate law to repay their tuition loans, and most business school graduates analogously wind up in the private sector. So for graduates of both business and law, there is an alarming lack of understanding of how lawyers, judges, and regulators think. Given this lack of understanding, it is not surprising that they wind up using forms of analysis that are not appropriate in legal or quasi-legal contexts. Furthermore, they are not able to either intellectually or emotionally differentiate between the status accorded to cases in the law with those used in business schools. Notice, that in the previous sentence, I did not qualify the word 'law' with the word 'school' unlike the word 'business' which is used as an adjective before the noun 'school'. The reason for that is simple: there is a *continuity of concerns* between the status of a case in the discourse of the law and the pedagogy of law schools due to the role played by case law in the decision making practices of the judiciary; the 'stance' that a judge takes in matters pertaining to the importance of invoking precedents in legal decision making is often a clue to not only his understanding of case law in specific and the common law in general, but his judicial philosophy as a whole (Wizner, 1989; White, 1988). A case in the legal system is both a 'source' for decision making *and* a 'tool' for decision making. A case in the business school system however is only a tool for practicing decision making and has no precedential function whatsoever. Not understanding this difference can lead to serious misunderstandings on how to approach problem solving situations at the intersection of law and business. This can, needless to say, affect the professional performance of both business school and law school graduates.

### **III. The Fear Of Regulation**

The enormous fear of even the simpler forms of regulation in business school graduates (let alone the more strenuous forms of regulation in the corporate and financial sectors mandated by Sarbanes-Oxley in 2002 and the Dodd-Frank legislation in 2010 by the US Congress) is prompted not so much by ideological aversion to regulation per se among business school graduates. It is the result of a complete lack of exposure to even the basic forms of legal cognition and regulation. The regulator and the regulatory process then become potential objects of 'capture' in the imagination of business school graduates rather than fellow professionals who are just doing their job (Posner, 1974). It also becomes increasingly difficult for many people in business schools to understand why anybody would even want to play the part of a regulator as a career option (Shiller, 2012). Given the continual increase in regulation in many parts of the world, business school graduates will need to increase their exposure to how lawyers, judges, and regulators think (Griffith-Jones *et al*, 2010). That is all the more reason why business school graduates should not only be taught the rudiments of case law in the courses that they have to do on business law, company law, and regulation, but also understand the functional differences between a case that is written by a judge and a case that is written by business school faculty. These arguments are also broadly applicable to the process of arbitration since many firms prefer to resolve their differences privately. The process of arbitration is not to skirt the role of precedents altogether, but to increase the amount of 'efficiency' with which differences can be resolved between parties in conflict in the private sector. So in either case – whether parties seek recourse to public forms of adjudication or private forms of arbitration – there is a persistent need to think through the differences between what we mean by a 'case' in the law school system *vis-à-vis* what we mean by a case in a business school. The 'norm of efficiency' however is not reducible to arbitration, but is one that is being increasingly sought after for the legal system as a whole in the law and economics movement (Hardin, 1995-1996).

### **IV. The Case Law Problem**

The absence of case law in the business school curriculum is related to the fact that business law, company law, and regulation are not always taught using the case method. Instead, the verdicts are summarized for business school students in a way that would be methodologically unthinkable in business schools within the mainline business curriculum. Studying law through concise summaries will not give business school graduates the professional confidence necessary to engage later on with lawyers, judges, and regulators. Confidence comes from understanding 'how' fellow professionals think (i.e. by detecting patterns of cognition) rather than from being able to summarize 'what' they are thinking. It also comes from being able to differentiate between different value systems, and in being able to situate the 'how' and the 'what' in relation to their political, intellectual, and social sources. The 'process' element in the legal system (whether it is the judicial process or the regulatory process that is in contention) is what is at stake in exposing business school students to both formal and substantive elements in business law, company law, and the theory and practice of regulation. An

introductory course, for instance, in 'law and economics' does precisely this in the business school curriculum provided that it is taught with cases or as an accompaniment to courses in law that are taught with actual cases rather than with brief case summaries. What students need to appreciate is that cases in the law matter both in terms of 'form' and 'content'. The term 'form' is used here in the sense of the 'patterns' that emerge when cases are written, read, and taught in the classroom. What these three elements have in common may be referred to as a 'cognitive pattern'. What case law does through the legal mechanism of precedents is to take these cognitive patterns forward from one generation of judicial decision makers to another without making these patterns an absolute constraint. Precedents to put it simply are sometimes necessary but not sufficient; the judge can therefore 'supplement' what is missing in case law with an intelligent intervention in the 'here-and-now'. But sometimes there is no need to do anything since the precedent is both necessary-and-sufficient, and it will suffice if the judge can explain the relevance of the precedent for the verdict that he is in the process of announcing or writing up for the case record. It is also important to remember that precedents apply variously depending on which aspect of law is in contention. So, for instance, they are thought to be more immediate and compelling in case law rather than in constitutional law (Monaghan, 1979; Noland, 1969). The mechanism of stare decisis can also be understood as akin to the notion of 'redundancy in communication theory'. Redundancy makes it possible to design a structure that is characterized by 'an incremental system of decision making' (Shapiro, 1972). This double function then of preserving the identity of prior patterns in case law while simultaneously exploring the interstitial differentiation between case law as a whole and the present case under consideration is what judges must do repeatedly to ensure that there is continuity and stability in the legal system albeit without stagnation (Pound, 1941; Powell, Jr., 1990; Kalt, 2003-2004).

### **V. Situating Cases In Law**

The main skill that business school students pick up when law courses in the business school curriculum are taught using the case method rather than through case summaries is the ability to differentiate between a particular case and the over-all structure of case law in a given domain – i.e. the structure of case law as such. This is not a demand that is made on business school students who are given to thinking through business cases as specific instances of decision making in both the functional and perspective areas of the curriculum without necessarily understanding its implications for the theory and practice of general management. This demand however is routinely made on law students since they are preoccupied with stability. In the absence of stability in the law, it is not possible for any party on its own, or when it engages with counterparties, to make arrangements in the present or to make any plans for the future. The ensuing uncertainty will not only adversely affect investor behavior, but reduce the probability that anybody will want to make any long-term transactions in the markets. Firms proceed on the assumption that a great deal of case law is 'well-settled' in terms of both legal doctrine and practice, and that litigation, if any, will be the exception and not the rule. These assumptions of 'business-as-usual' depend on the 'principles of prudence' built into the common law which ensures that transaction costs can be minimized through the mechanisms of stare decisis. It is these principles and the cost implications related to these principles that are made explicit when the basic assumptions in case law of a particular topic or in the structure of common law as a whole are subject to litigation. The invocation of these principles however is substantiated with specific instances of stare decisis in the case law in contention in the judicial process rather than through the formal invocation of a full-fledged theory in the form of a legal treatise. Judicial decision making can allude to or even draw support from a legal treatise in Anglo-American jurisprudence, but it is not allowed to completely disregard the precedential value of case law. On the contrary, it can be argued that 'some form of stare decisis is a byproduct of the legal process itself' and that it is 'not possible to separate a discussion of the value of stare decisis from a discussion of the value of common law itself' (Macey, 1989). Business school graduates and the contemporary firms that hire them must have a high level of comfort with the invocation of both the notion of 'identity and difference' as the cognitive and perceptual modes that serve as the co-ordinates of decision making.

### **VI. Stability In Judicial Decision Making**

Stare decisis, simply put, is about ensuring 'stability' in the process of judicial decision-making. This notion of stability is important in order to make it possible for economic agents comprising both individuals and firms to plan not only their lives, but also the arguments that they will present from the locus of the plaintiff or the defendant during litigation. The demand for 'equal treatment under the laws' and the notion of 'due process of law', which represent important ideals in common law jurisprudence, demand that the modalities of litigation and the modalities of decision-making must be reasonably predictable, if not perfectly rational. The criteria of evaluation in judicial decision-making, unlike decision-making in firms, involve an additional level of theoretical analysis. Judges have to proceed not only with a situation analysis based on the empirical details in a given case, but must also situate the case within the set of precedent(s) that governs the boundary conditions in a given case; they have to situate a situation analysis within the textual traditions of case law. The criteria of

evaluation in judicial decision-making, then, comprise both the general principles of jurisprudence that are relevant to the legal system in place, and the specific criteria that emerge in a particular case that is the object of litigation. This is because the case must be understood not only in its moment of 'specificity' (as demanded by the idea of working on a 'case-by-case' basis), but also in the forms of 'generality' inherent in the case law of a specific area. Students who are taught through the case method in the law school system must not only have the analytic skills necessary to do a situation analysis that is rooted in the empirical context of the case, but must also demonstrate the knowledge and research skills necessary to *situate the situation analysis* within the formal structure of case law. In order to do this, they have to identify the key precedents in any given case without violating either 'equity' or 'due process'. The case method in the law school system then must be able to relate the 'empirical' world of facts to the 'textual' domain of case law (unlike the business school system where there is little if any role for the textual in the process of case analysis).

## **VII. The Case For Stare Decisis**

In a case analysis in business schools, the specific knowledge embodied in a case is not that important except insofar as the students are expected to imbibe theories and methods from the functional areas that are relevant in a given case. In this model, students are being taught not only the modalities involved in taking and/or recommending decisions in the realm of strategy, for instance, but are also expected to internalize the theory behind the decisions whenever possible. Cases can then be arranged in the form of case books under a specific set of themes, topics, and areas on any aspect of management theory and practice. But there is no attempt to get business school students to encounter notions that correspond to the philosophy of the precedent, which acts as an important constraint in decision making (i.e. stare decisis). Why is this important? What, if anything, can we do to think through this problem? Why must the extra skills involved in understanding the relationship between the empirical and the textual – that is a part of the training for law school students – necessary in the context of contemporary business schools as well? While comparisons between the law school and business school experiences are important in the history of professional education, I don't think the question of the role of legal precedents as a cautionary form of constraint in decision-making has been sufficiently appreciated outside the law school system. Decision making in firms is thought to have much more freedom than is, in fact, the case, but so-called 'rational' decision-making in firms and organizations is much more complicated than that the problem with this model of decision making is that it gives students in business schools the misplaced notion that if they know how to analyze a situation, draw up a list of options, think through the options, and so on, then anything is possible. When students wind up as associates in firms, they find that it is not possible to get much done along the rational lines they were taught. Why does this happen? This happens because the pursuit of rational decision making in the business school system is basically a spatial analysis, but takes on the form of temporal interventions in firms. Decision making and implementation is problematic furthermore because the problem of precedents is not sufficiently understood except, for instance, in the context of public administration (Davis, 1950). The only time that precedents are introduced to students is through organizational dynamics, which prescribe the do's and don'ts of the firm. So what newcomers and decision makers who have to carry responsibility for important tasks encounter in firms is a kind of stasis, which they conclude must be all-bad since it is a constraint in the process of decision making. What is overlooked in such situations is that large scale decisions which have strategic implications for the future of the firm may also have regulatory implications, especially in the case of large firms, multinationals, transnationals, etc. These decisions may also make demands on decision makers from the domestic and cross-border regulatory regimes in place. We must therefore move away from the model of decision making where everything is or can be decided by the main decision makers in isolation, and also consider how input from expert committees, consultants, and key stakeholders are factored into the final decision. What is the way out then given the pressures that decision makers in firms are subject to? What are the main problems that they will encounter given that their course work in business schools did not sufficiently equip them for those skills that correspond to the problem of managing precedents in the context of case law?

## **VIII. Stare Decisis As A Safe-Guard**

So when executives try to change things in the firm, it becomes difficult for them to figure out what is or is not possible in a given situation. They often demand unlimited latitude while managing firms without realizing that change often becomes possible even given the constraints of working with precedents. So there is a lot to be learnt by understanding how judges deftly handle the problem of continuity and discontinuity without upsetting the system within which they make decisions. It is the judicial attitude to stare decisis in terms of both theory and practice that gives us a clue to how this becomes possible. It will also make it possible for decision makers in management contexts to manage expectations more effectively since attempts to change a firm usually go awry during moments of transition. The process of managing expectations however is not an occasional event but is a continual demand on decision makers given the pace and volatility in capital and

information flows. Landmark law is often revised continually by those working within the common law tradition (be they judges or legal scholars) in order to bring back the formal coherence that is lost during times of upheaval in case law. *Stare decisis* then is a judicial safe-guard to prevent the process of decision making from oscillating wildly as is the case in the psychic mechanisms that constitute 'doing' and 'undoing' within the symptomatology of obsessional neurosis (Laplanche & Pontalis, 1967, 1988). There are a few more reasons as well that are relevant to this context. These reasons pertain to the increasing importance that is being attached to administrative law and the prodigious increase in regulation across a range of industries throughout the world in recent times. So the notion of change is not by any means obvious in socio-economic environments that are marked by crisis and uncertainty (Gorton, 2012; Srinivasan, 2012). The increase in the levels of complexity, the transactional costs of doing business, and the ongoing revisions in contemporary models of risk analysis will mean that firms will increasingly prefer 'safe-and-tested' ways of doing business in the present, and 'innovate-with-caution' in the medium-to-long-term. When they do this, they will find that an understanding of administrative law and regulatory structures are not external to the process of decision making in firms, but become increasingly internal challenges. The world of taking decisions and getting it vetted after-the-fact for regulatory implications is over (Münchau, 2010).

### IX. Conclusion

The main argument here is that irrespective of whether we are in favor of regulation or deregulation from an ideological point of view, what we are witnessing in the wake of the financial crisis of 2008 is the advent of a new era of regulation. Henceforth it will become increasingly necessary to invoke the notion of 'prudence' or 'prudential supervision' as the matrix of decision making in firms. It is this notion of prudence in decision making that lawyers are expected to imbibe through immersion in the practices and norms of the common law. The main difference though between a lawyer in colonial America and a contemporary lawyer is that the latter thinks of himself as being preoccupied with finding precedents in favor of his client's brief within case law rather than think of his practice as an engagement with the common law as such (unless he is philosophically inclined and therefore thinks in the language of legal theory or the principles of jurisprudence). What is required then is to appreciate that the underlying principles of the common law are not exactly obvious; they must be discovered and passed on to the next generation of lawyers. So, needless to say, lawyers oscillate between asserting either that the common law is only a matter of 'experience' or a matter of 'logic' (Holmes, Jr. 1881, 2005), and do not necessarily appreciate the dialectical relationship between the 'mystery' of the law and the 'science' of the law. The simultaneous invocation of mystery *and* science is an attempt then to serve a double function: it not only institutes reason as the essential tool of discovery in the law, but also circumscribes the limits of reason through the invocation of experience (Boorstin, 1941, 1996). The case method then as an analogue to this double function of reason in jurisprudence must make it possible for students to incorporate the skill-sets that are made available in the law school system so that students of management, public policy, and public administration, are able to bring together the empirical domains of business along with the textual domains of regulation (without wishing away the pervasiveness of law in the quest for a pure locus of decision making). A sustainable model of change then is one which will incorporate the conflicting metaphysical impulses that constitute identity and difference, initiative and restraint, innovation and regulation (Boorstin, 1941, 1996). The structure and history of the common law and the modalities of its transmission through the case method then are not irrelevant for the business school curriculum.

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