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Thoughts about Stare Decisis: The Peruvian experience

Algunas consideraciones generales sobre el Stare Decisis: La experiencia peruana

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ABSTRACT: This research is a miscellaneous reflection on the “*Stare Decisis*” and “*Certiorari*” principles. It is assumed that courts are activists of law and, therefore, are also creators of law. This entails a frank and open discussion on what is the true objective of a justice system: the judge’s pursuit of Justice versus the positioning of dynamic efficiency and sustainability as the main and decisive variables. The different aspects addressed by the article are presented openly and do not imply - per se - the closure of a debate that should be considered relevant and current. On the contrary, the ideas in the article lead to rethinking the scope of Law, understood instrumentally, i.e., as a tool for development and greater equity, and to approach desirable scenarios of social justice.

KEYWORDS: justice system, *stare decisis*, *certiorari*, efficiency.

RESUMEN: Este artículo plantea a modo de miscelánea una reflexión sobre los principios “*Stare Decisis*” y “*Certiorari*”. Se asume que las cortes son activistas de Derecho y, por lo tanto, son también creadoras de Derecho. Esto conlleva plantear una discusión franca y abierta sobre cuál es el verdadero objetivo de un sistema de justicia: la búsqueda de Justicia por parte del juez versus el posicionamiento de la eficiencia dinámica y la sostenibilidad como variables dirimientes y principales. Los distintos aspectos abordados por el artículo son planteados de modo abierto y no supone -per se- el cierre de un debate que debe ser considerado como pertinente y actual. Por el contrario, las ideas dentro del artículo llevan a repensar el alcance del Derecho, entendido de manera instrumental, es decir, como herramienta para el desarrollo y la mayor equidad y acercarnos a escenarios deseables de justicia social

PALABRAS CLAVE: sistema de justicia, *stare decisis*, *certiorari*, eficiencia.

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INTRODUCTION

We present to our readers a very interesting and little explored issue in Latin America, which is linked to the issue of binding jurisprudence, also known as the “*Stare Decisis*” principle.¹

But what are judges there for? to seek justice? is the real objective to do justice or is it to generate legal certainty? The correct answer is that the administration of justice does

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not seek justice, it seems untrue, but the administration of justice seeks legal certainty and why the objective of the administration of justice is not justice, for a very simple reason because this is a very subjective concept and, in addition, what is fair for the members or let's say the winning party will be somehow unfair to the losing party, so this is one of the typical dilemmas that arise.

In this order of ideas, this article of reflection and analysis will present some considerations and reflections on the transcendence of Stare Decisis for the justice system, with emphasis on the Peruvian experience.

1. INITIAL CONSIDERATIONS

Based on the questions raised, we consider that the discussion related to the principle of “*Stare Decisis*” (Camarena González, 2016) and “*Certiorari*” becomes important and relevant. In all our countries the actions of the judicial powers are always criticized and it is argued that the judges, the Judicial Administration, the Supreme Court, and the Courts of Appeal, are not speedy, therefore, there must be a mechanism for cases to be resolved quickly since there are very few judges and that it could result in having more judges than currently exist but we consider that this also involves a significant social cost. In addition, it does not mean any improvement *per se*.

For example, Peru has proportionally more judges per capita than the United States, a detail that shows that the good administration of justice does not depend on the number of judges.

Although it is noted, by some critics, that the rules should be changed, i.e., to make the rules much more suitable

for cases to be resolved much more quickly so that there is more than a chance for litigants to resolve their cases speedily, does this imply an action with an immediate adjustment effect? We assume the answer is no.

Another problem that is always pointed out is that there is a lot of corruption in the judiciary and of course that judges “sell out” or “do things as they please”, again it is argued that the solution to the judicial problem must be found and that this implies the adoption of modern computer management systems. Again, does this imply an action with an immediate adjustment effect? For the second time, we assume that the answer is negative if this action is considered univocally and not as part of a reform package.

At other times it is argued that the solution to this legal problem is for judges to have access to better salaries and, obviously, for the administration of justice to have a higher budget. However, this *per se* is not the cure for the institutionalized evils in justice in our countries.

2. FURTHER CONSIDERATIONS

Another issue, and therefore the Council of the Magistracy, or the Academy of the Magistracy has existed in Peru, is that judges must be trained. This assumption has been the typical variant that both the World Bank and the International Monetary Fund, the Inter-American Development Bank, have considered a necessity in all the judicial reform processes that have been proposed in all Latin American countries. These have involved the search for alternatives in different orders. Unfortunately, all of them have failed because none of them attack the real problem, but what is the way to attack it?

The structure of the Peruvian State is defined by the division of power or three powers in the Peruvian case: the Executive Power, the Legislative Power, and the Judicial Power. Certainly, it is mentioned that the three are equivalent and that they are part of the division of powers of the State. And the question we must ask ourselves is: What is the reason why you can say that you are a power of the State? And the reason is not that the Constitution says that you are a power of the State. The reason is not that the law says that it is a power or because the doctrine says so or because it has been taught to us since the first year of law school or even in high school.

Being a State Power means that you can change things or legislate, although it may seem untrue, the Legislative Power by definition is the main power in terms of dictating laws, but the Peruvian Executive Power also dictates laws because, in some way it does it through its supreme decrees, organic decrees, among others, in some way it establishes provisions, it also exercises the power to administer and generate norms. The legislature is a power because it dictates laws, and the Judiciary is also power not to the extent that it administers justice or because it dictates norms but because of what is called binding jurisprudence.

With this idea of power as novel as the possibility that the so-called Judicial Power has in the confirmation of establishing binding jurisprudence is that it establishes the real power that the Judicial Power has in some way. Another concept that is very important for us to keep in mind is that in law school comparative law has always taught us this idea: What is the primary source of law? What is the secondary source of law? Jurisprudence. What is the third source of law? Custom. What is the fourth source of law? Doctrine. This is the case in

all civilized countries of the world. But what happens in the framework of the Andean Community and Latin America the order is different, first, the normative order is the legislation, although it may seem untrue, the second is the doctrine and the third is the jurisprudence.

3. ON JURISPRUDENCE

Case law is a minor source of law, at least in my experience. A secondary source of law is also doctrine, i.e., what a law professor says, what a treatise writer says, what a law book says is sometimes relevant. In general, however, it is less relevant than what the jurisprudence in our courts says. Why is the jurisprudence in our courts not so relevant? In the Peruvian case, we find that Supreme Court A says one thing that often contradicts what Supreme Court B says. The same chamber in case A says one thing and fifteen days later exactly the opposite, the judge of a province or a department of my country has one thing, and the judge of another jurisdiction says exactly the opposite. That is to say, the judge interprets “as he pleases” and here we are in a serious problem because he assumes that we are at his whim and here we are not in a serious problem because we are supposed to be before a power that legislates through interpretation of the norm and this should be a report and not leave each judge free to do as he pleases or interpret as he pleases.

Furthermore, we have to talk about several types of jurisprudence, in general terms, the doctrine speaks of two main types of jurisprudence: a) doctrinal jurisprudence which is normally the “*obiter dicta*” or the opinion given by judges regarding a particular case, and which in some way serves as non-binding guidance for judges and deals with the way they

should decide; b) the second type is binding jurisprudence, and c) the third type is constituted by the first type of jurisprudence. In our opinion, both are similar since normative jurisprudence when it is binding jurisprudence concerning a pre-existing rule will imply that the judge interprets it in a particular way. The difference in the case of normative jurisprudence lies in the fact that when there is no norm, the judge will establish his legal criterion for this legal void. In general terms, binding case law and normative case law are almost the same and this is what is known in the Anglo-Saxon system as “*Stare decisis*”, which is the subject of this contribution (Civitarese, 2015).

4. HISTORICAL CONSIDERATIONS ON STARE DECISIS

What does “*Stare decisis*” mean? It is a Latin expression from the time of the Romans that says: “*Stare Decisis et non quieta mover*” which means “*stay to what has been decided and keep still*”. This indicates the Supreme Court when it determines in an indubitable way how the legal norms are interpreted in a concrete case and, therefore, it is implemented establishing as a precedent of obligatory observation for all jurisdictional bodies, and all Supreme Court sentences in general lines must establish this “*Stare Decisis*” which is a binding jurisprudence.

An example that I have put in class on several occasions is the following one, the check signed upside down can be increased validly that it is an expression of will fact that is signed upside down does not invalidate it does not matter what matters is that it was this signed, is upside down or not, it does not matter what matters is signed. But there can be counter documentation, that the check says that another value has a set formality and as it was signed upside down the formality was breached the arguments are perfect. But what does the

Supreme Court do through the “*Stare Decisis*”? It says for better or for worse if it is valid and, therefore, what happens from that date on, the hundreds of thousands of cases that there were at that time on the matter of checks signed upside down are automatically resolved and there would be no need to be debating, for a court to say one thing and another chamber to say another and a court to say the other. Therefore, the “*Stare decisis*”, in a way, what this case generates is a precedent that makes it obligatory, that regulates how a concrete case must be interpreted from that moment on and, therefore, all the cases that are linked in the future must be seen in that way, which generates not justice but what will generate legal certainty, which is finally the most important thing for a country to be able to move forward.

This is normally done in the framework, as occurs in Ecuador and Peru. The Peruvian Supreme Court is dedicated to establishing decisions in the framework of cassations is the ideal scenario for it to interpret the norm. Therefore, the development of this principle of “*Stare decisis*” has always been incorporated. It starts from classical Roman law and is maintained during the Roman Empire and includes the *Code of Justinian* in the 6th century AD. Although the crisis of the Roman Empire made all the principles of Roman law gradually “disappear” (fall into disuse), however, in the 12th century A.D., the Code of Justinian reappears and incorporates into the law, not so much in countries like France, Germany, among others, which were very “codigueros”, but in the *English system*, i.e., which had another normative source such as custom. Certainly, the identity and custom were not clear, therefore, they rescued the principle of “*Stare Decisis*” from Roman Law for when the Supreme Court at that time, the House of Lords, decide on what becomes or not a binding jurisprudence.

As we have observed, this principle, which has its origin in the Roman system but which, in the countries of continental tradition went unnoticed and is incorporated into the Anglo-Saxon system, is linked to the concept of the Bill of Rights and the English unwritten Constitution and from there it is consolidated as the great principle to guarantee legal stability. What happens, normally, in the Anglo-Saxon system of law and what then happened in continental Europe, this principle somehow remained in the European system. Later, Napoleon Bonaparte somehow “with the stroke of a pen” eliminated the principle of “*Stare Decisis*” because Napoleon considered the most important source of law to be the code. Therefore, to a certain extent, with Napoleon, the jurisprudential system is set aside as the most important source of law and the written rule becomes the most important source of law. And why then is the principle of “*Stare Decisis*” important? Because it is necessary to maintain this system as the most important source for the structure of law and legal certainty. Because it promotes procedural speed, avoids corruption, generates institutional credibility, promotes investment, revalues the judiciary, avoids political pressures, and confers stability, predictability, and rationality to authority.

5. ADVANTAGES OF STARE DECISIS

Starting from the idea that the Supreme Court in the framework of the legal institute of cassation establishes as its objective to establish precedents of binding jurisprudence, we will analyze the different reasons why, in my opinion, this is the system that our country should work on and impose.

So, first, the procedural celerity that is verified when it is already known how the Supreme Court is going to resolve in

some way based on the principle of “*Stare Decisis*” as it happens in the United States, England and common law countries discourages the filing of lawsuits whose possibility of success is not reasonable.

Secondly, the judges already know how they are going to resolve, the resolutions become faster and, therefore, this also has an advantage because it reduces the work of the judges and the need to enter complex legal discussions. After all, the Supreme Court has already determined in the framework of a song what was the right thing to do, which generates procedural speed.

Third, they limit corruption because it is logical that since it is already known how it will be resolved in advance, the discretion of the judges in the interpretation of the legal norm is reduced. We have always expressed our discomfort about judges interpreting the law as they see fit, of course, corruption is behind these strange payments that are made in jurisdictions to judges to “resolve”. This entails the risk that a case is decided in a completely different sense. It also implies that *objective standards* are established to determine when the judicial interpretation departs from the spirit of the norm or the famous *prevarication*. By the way, to prevaricate is not to go against the express text of the norm, to prevaricate is to twist the interpretation of the norm. If the norm has already been interpreted by the Supreme Court in a sense A, then if the judge does not interpret what the Supreme Court said, he is prevaricating, then this generates the possibility that judges are not corrupted.

Another very important element is the existence of each jurisprudential line generating greater confidence in the Judiciary and providing an image of transparency and

impartiality, it makes the Judiciary respected, the judicial institution is respected, and provides a very clear chair of transparency towards the judge or the system, therefore, This situation of not having contradictory sentences generates credibility in the Judiciary, allows the quality of the resolutions and the service provided to the citizens to be seen progressively, a situation that generates a virtuous circle in favor of the administration of Justice.

In addition, there is a very important element, and it is the issue of *legal certainty*, to the extent that it is known in advance which is the jurisprudential line that the Supreme Court through the cassation, via precedent of mandatory observance generates legal stability, it is already known how the law was applied in specific cases and this is legal certainty. This would generate a more favorable investment climate, thus reducing the risk of the country and therefore investors decide to invest in the country. What investors are most interested in is that there is legal certainty because there are rules that provide legal certainty, but that is interpreted with certainty and that is what makes the business climate adequate and, therefore, generates higher levels of investment will provide more jobs and there will be a greater contributive capacity in society, ergo the system works properly.

Another relevant issue is that there is a great crisis in Latin America regarding the valorization of judges, to the extent that this principle of “*Stare Decisis*” exists, the service is much more transparent, more efficient, and legitimized. There is nothing more important for the justice system than the social perception of the figure of the judge, and this rises considerably. This is what happens in all the countries of the Anglo-Saxon system where the “*Stare Decisis*” exists. That is to say, the judge

is “a gentleman judge” and nobody messes with them because it is known what they are called, that they are transparent people, and that they apply the principle of “*Stare Decisis*” in a proper way. This makes the process much faster and, therefore, the judiciary takes on greater importance. However, we cannot deny that there are discordant voices such as the one expressed by Núñez Vaquero (2016).

Let us also remember that the “*Stare Decisis*” is a mechanism that should also promote private investment and, therefore, allow the Judiciary to justify a system of improvements and, most important of all, the “*Stare Decisis*” system should avoid political pressures which, as we know, involve the political power pressuring the judges to “interpret” the rules according to the interests of the Government of the day.

In Peru, during the Fujimori dictatorship, the Executive not only controlled the Executive, but also the Legislative and the Judiciary, and therefore controlled the Supreme Court and, consequently, the Supreme Court ended up issuing rulings following the preferences of the Executive. On the other hand, as the legal principle of “*Stare Decisis*” or binding jurisprudence becomes more vigorous, it is very difficult to change whimsically a jurisprudence that has been repeated and consecrated for many years and it is very difficult to distort what the judges say and what the justice system seeks in the long term: dynamic efficiency and sustainability² in the provision of the justice service in an open and democratic society.

2 We understand dynamic efficiency as the capacity to adapt, respond and generate new knowledge. This within an environment of maintenance in time or sustainability of results (which involves the fulfillment of objectives and certainly, to satisfy the objects of a social system (justice, productive or economic process, among others)).

6. ON *CERTIORARI*

As we can see for all these reasons the principle of “*Stare Decisis*” is extremely important. Binding jurisprudence is very important for all the reasons we have explained, but of course, from time to time, it is necessary to change it. Legal circumstances or social or economic circumstances make it necessary to modify the judgment on a subject matter, this is a situation that reflects the evolution of the law, and here comes the exception to the rule of “*Stare Decisis*” which is the principle of “*Certiorari*” or *certification*.

What does “*Certiorari*” mean? It is the mechanism through which the Supreme Court of Justice has the power to select cases that it considers important for economic, political, social, or other reasons, on which it will apply the principle of “*Stare Decisis*” (Weigand, 1994). This does not mean that all the sentences that go to the Supreme Court must be subject to review, which happens in many countries.

The American case that leads to a request for review on appeal and/or cassation and the American Supreme Court, for example, decides to consider that the case is no longer worth seeing and what is limited to say, “*Certiorari di nai*”, which means denied or not subject to review, because there is already extensive prior case law that resulted from the issue previously examined.

With this type of mechanism you are not overloading the Supreme Court with thousands of cases on which it will have to resolve what has already been resolved, but simply limiting itself to say “*Certiorari di nai*” and of course, there is the other possibility that they indicate “*Certiorari ofrecido*” which means that part of the request is considered: This is identified in the

decisions of the American Supreme Court or the Supreme Court of the English House of Lords. It assumes that the case merits review or deserves to be heard adequately. The U.S. Supreme Court by 1888-1891 had an avalanche of cases, -approximately 2000 cases in reserve- and was three years late in sentencing. This was generated around 1891, 121 years ago, protests from judges, businessmen, and civil society, among others.

In that order of ideas, we must bring up what happened with the Supreme Court of the United States when it was verified that it was taking too long to resolve (a typical and current problem in Peru) and the risks of an indiscriminate Stare Decisis. In addition to Stare Decisis, the decision was made to incorporate the “Certiorari” principle whereby when a minority of four of the nine justices of the Supreme Court say that a case is important, the position of the minority is respected, and the case is analyzed by the U.S. Supreme Court. In this way, the dictatorship of the majority is avoided, and the minority is respected.

CONCLUSIONS

By way of conclusion and final reflection we would like to share with you a historical fact, it is interesting that the U.S. Supreme Court until 1914 offices were in the basement of the Capitol and the judges were not full-time but were judges “scattered” throughout the United States and that they met from time to time to establish their resolution on the cases to be resolved.

Certainly, the subject has evolved from five thousand cases that with the incorporation of the “Certiorari” and the rational use of the “Stare Decisis”, currently, the American Supreme Court does not resolve more than 400 cases per

year, with which, the system has acquired predictability and its sentences of the Supreme Court acquire great relevance and importance. This must be incorporated with efficiency, efficacy, and effectiveness in Peru and the rest of the Latin American countries. Certainly, the search for balance for the benefit of society and the establishment, consolidation, and respect for a justice system that meets the objectives expressed by the rationality that sustains it and gives it its *raison d'être* is still a pending task.

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