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STARE DECISIS

An Essay in Legal Epistemology

Introduction

Stare decisis, is an ancient Common Law doctrine; it is usually summed up in the phrase that the like cases should be decided alike." In simpler times, this meant that the cases, in which the facts were similar, were to have identical legal outcomes. It is important to note in this respect that the decisive analogy applied only to the facts, i.e., that other, for example secondary legal etc. parameters of the case at hand, were on the contrary not supposed to be decisive.

As we shall see, however, the factual and the legal parameters of the case cannot really be separated.

Of course, one must keep in mind the venerable tradition of the Common Law, in which the judges literally created, on a case-by-case basis, the laws applicable in particular circumstances. However, the judges were supposed to "discover the law", rather than "create it" and as we shall see later, according to the legal intuitionists, there was a deeper wisdom in maintaining that this was really "a discovery" of the legal and logical solution in the particular problem of a particular case.

The discussion of the *stare decisis* doctrine today is more than simply a reiteration of the theories that come from the Common Law system in the first place. In the last sixty years the European Court of Human Rights, for example, continued to build up its case law according to the same formula. Despite the specific provision in the European Convention on Human Rights, to the effect that the decisions of the Court are binding only between the parties to the case before the court *(inter partes)*, it has been clear from the very beginning of the functioning of the Court that the next case that might come along, if similar, would be decided in the same way. Meanwhile, after World War II, the Continental Europe has been endowed with a multitude of constitutional courts. Depending on their different mandates, these courts are likewise committed to the constancy and predictability of their case law more or less having an *erga omnes* (*vis–à–vis* everybody) effect. This is how the specific aspect of the Common Law legal methodology has now spread everywhere in the Continental Europe, from Russia to Germany and especially also to all the so-called "new democracies", i.e., to the states that have after the fall of Communism, arisen in the 1990s.

All these states now have functioning constitutional courts and all these courts actually do work according to the *stare decisis* precept.

In terms of legal epistemology this is a minor revolution; it is a major change in the Continental legal systems that has not been really paid attention to. This legal conversion has immense implications for the functioning of the respective Continental legal systems.

The Continental legal systems, even in the time of Hans Kelsen, who had been the first to propose the establishment of the constitutional courts in Europe, used to function in a completely different manner.

According to the Continental legal theory, and especially so concerning the separation of powers, the courts' role was simply to make *concrete* and specific what the legislature had pronounced in the *abstract*. The German word for this process, central to the functioning of the Continental judge, is the awkward expression of *'Konkretisierung'*: the role of the judge according to Montesquieu had been merely to be the mouthpiece of what had previously been pronounced in the abstract law by the legislature. Especially the French had and still have the dread of the government of the judges: *le government des juges*.

In other words, according to Montesquieu and his followers in the Continental legal doctrine, there was to be not only the separation of powers (between the legislative and the judicial branch), but also a very clear division of labor. The legislature endowed with the sovereignty of the nation was to be the only source of the law precisely because it was the only branch of power that had been democratically elected and was therefore the true source of sovereignty. In the French legal tradition, this must be especially emphasized; the very French Revolution was to a large extent also a reaction to the arbitrariness of the *ancient regimes'* aristocratic justice.[1]

The above-mentioned division of labor between the legitimate legislative source of power on the one hand and the "concretizing" mandate of the judicial branch of power, was to be drawn along the Cartesian lines of separation of what is abstract from what is concrete. The tacit premise of the separation of the abstract from the concrete is a metaphysical presupposition to the effect that the abstract may and must be separated from the mere concretization of the sovereign will of the legislature.

Obviously, this has, in principle, little to do with deciding the like cases alike: *stare decisis.* Nevertheless, the so–called 'judicial practice' – in French *la jurisprudence* – together with the power of the appellate jurisdictions do serve the purpose of 'unifying the judicial practice'.

This hierarchical and vertical version of *stare decisis*, similar to the imperative that the like cases should be decided alike, however, co–exists with the prescription that each judge in each case depends exclusively upon the abstract norm. He or she is in principle not remotely bound by the positions taken higher in the judicial hierarchy let alone those, laterally, that have been taken on the same judicial level.

[1] Cite Capelletti and Cohen

The idea, of course, that each judge in the Continental legal system is completely independent from what other judges might have decided in a similar case, also implies that the above–mentioned hierarchical (vertical) unification of the judicial practice is of primordial importance because, obviously, the comparative justice demands it. Thus, in both systems mechanisms existed through which they sought internal coherence in the system.

The Self–Referential Danger

In principle, every closed system that is largely self–referential tends to degenerate into some kind of inbreeding anomaly. For example, in purely socio–anthropological terms every domestic system – and here we are not talking only about law – isolated from the outside world, tends to go irrational. The blind spots and the anomalies within the system, sociologically and anthropologically speaking, do not receive the negative feedback reaction capable of correcting the irrationalities that are bound to occur. Thus all national (nationalistic) mentalities are burdened with a number of blind spots etc., which the outside observer will soon notice, whereas the insiders remain subject to these conventional wisdoms etc. Incidentally, the spectacular corrective role of the international jurisdiction such as the European Court of Human Rights (hereinafter ECHR) stems precisely from its removal, i.e., the ejection from the national, in this case legal, framework. In this respect the ECHR, I used to say, is like the Wordsworth's "*cloud that floats on highs over vales and hills.*" Indeed, perhaps this is the main improvement in having an internationally binding jurisdiction in the first place.

The national (domestic) legal systems, *lato sensu*, in the large sense of the word, are by definition self-referential. This is almost a tautology because patently all decisions taken in a given legal system refer to norms within that given legal system. From my personal experience of five years is a judge of the Slovenian Constitutional Court, I can attest to this a priori self–referentiality. Having moved to ECHR, I soon discovered the difference between the national and the international frame of reference. Decisions of the constitutional court in the domestic system tend to take into account all kinds of national priorities, including the budgetary ones, which in the end prevent the judgments from being sufficiently removed from the national system in order to be truly impartial and objective. In contrast, the decisions of the ECHR do not even "know" of the extrinsic domestic considerations, let alone take them into account.

The Continental Legal System

In the Continental legal system, each judge in each case remains bound solely by the abstract norm in the code or in another source of law. In principle, thus every subsumption of a concrete case under the abstract norm is performed *de novo*, without reference to the decisions taken by other higher, let alone by the courts of the same level. The assumption that the abstract norm pre-determines the outcomes in particular cases is misleading because the gap between the abstraction and its concretisation may be more or less large.

Of course there are cases where the abstract form is, as it were, directly applicable and is, therefore, completely determinative of a particular case.

But in most cases the gap does exist, i.e., the system is therefore unpredictable precisely to the extent the abstract norm does *not* predetermine the outcome. Laterally and across the system, the participants are unable to predict the outcomes of many of the cases. This irritates especially the practicing lawyers. They cannot predict to their clients the outcomes of potential cases.

In other words, such a legal system behaves like a person devoid of short– and long–term memory. Moreover, the predictability, at least on the horizontal level of the specific judicial decisions, is largely inexistent.

The reason for all this is that the choice of the norm cannot be completely foreseeable, i.e., this depends on what the French call 'the qualification of the case': *la qualification juridique*. The presupposition that the adequate norm will spontaneously and automatically offer itself to the judge in a particular case, is misleading. We shall deal with this later. Suffice it to say here that the Continental, and largely for that reason formalistic, legal considerations concerns the choice of the most adequate norm in the first place.

This is where the cliché coming from the Common-law system, to the effect that in the Common Law the rule was difficult to find but easy to apply, whereas in the Continental system the statute is easy to find but difficult to apply, is just the tip of the iceberg of the real epistemological problems inherent in the system drawn along the lines of the radical separation between what is abstract on the one hand and the 'concretisation' of this abstract norm on the other hand.

The Facts and the Law

In both grand legal systems much is made of the fundamental distinction between the facts and the law. In both systems the facts are supposed to be different from the law, i.e., the abstract law is to be applied to the concrete facts.

Here, we are in a position to introduce the notion of antinomy.

An antinomy is a situation in which two entities simultaneously presuppose as well as exclude one another. Thus, the facts and the law are supposed to be different from one another, whereas in reality the existence of the legally relevant facts depends entirely on the pre–existence of the applicable law. As Hobbes has already noted, were it not for the law, the facts would not exist.

To take the most difficult example, in a system where the taboo of incest is not legally forbidden, legitimately the facts pertaining to the taboo relationships simply do not exist. On the other side of the extreme, the more usual example is the existence of a tax evasion where the "facts" of the tax evasion itself depend entirely on the preexistent norm proscribing certain financial behavior. If the "tax evasion" does not exist in the law, the facts of a "tax evasion" simply do not exist.

In this sense, as we have pointed out, the legally relevant facts, which are the only facts of which we can talk *within* the legal system, are completely dependent on the preexistent legal norms. On the other hand, these same facts are supposed to be – in terms of the distinction between the abstract of the concrete – radically different from the applicable norm.

Thus we have the antinomy in which two entities are mutually interdependent while at the same time supposed to exclude one another: a fact is supposed to be something completely different from the law and, *vice versa*, the abstract law is supposed to be something completely different from the facts.

To put it in another way, there are no legally relevant facts except for the pre-existing norm and so it is the pre-existing norm, which legally produces the facts to which it is supposed to be applied.

When the choice of the applicable norm is in the course of happening, we are already in the closed circle of the antinomy, i.e., the riddle will not be gotten rid of unless we deconstruct the antinomy itself: where the facts are the emanation of the norm, while they are supposed to be, again in terms of abstract vs. concrete, completely different from the same norm.

Glenville Williams, for example, grappled in a series of articles dedicated to English jury, with the difference between facts and law – apparently without being able to exit the antinomy. For obvious reasons, the distinction between and the separation of the facts and law is decisive for the division of labor between the jury and the judge.***

Antinomy of Facts and the Law

In both grand legal systems much is made of the distinction between the facts and the law. In both systems the facts are supposed to be completely separate and different from the law, i.e., the *abstract* law or the precedent is to be applied to the *concrete* facts.

In both systems, for example, the jurisdiction of an appellate court may be narrowed down to legal questions, i.e., the factual and the evidentiary questions pertaining to facts may be out of the scope of the jurisdiction. The jurisdiction of the constitutional courts, too, may be reserved in the so-called abstract review and even in the situations concerning the individual constitutional complaints, the distinction between the abstract norm and the concrete fact may be decisive. In a common law system, on the other hand, the radical separation of the facts and of law applies to the division of labor, as it were, between the judge and the jury in any jury trial.

Here, we are in a position to introduce the notion of *antinomy*. An antinomy is a situation in which two entities simultaneously presuppose as well as exclude one another.

Thus, the facts and the law are supposed to be different from one another. The facts belong to the realm of the real, empirical, factual etc. The only problem here is that the facts in law

belong to a historical event that cannot be resuscitated in order to be demonstrated in the present. However, even in empirical sciences, as Unger has shown, there exists the antinomy of theory and facts, where the facts and the theory are supposed to be separate and different from one another, whereas in reality they, too, are in an antinomy, i.e., produce one another and are interdependent.

The facts are believed to be completely separate from the theory and the theory's role is to explain them. Meanwhile, however, we begin to apperceive certain facts only after we have constructed a theory explaining them. Incidentally, this is the difference between the pure mechanical, say of a young child, *perception* uncontaminated by knowledge on the one hand — and the *apperception* where the observation of the same facts, on the other hand, displays a different picture. Therefore, any theory with an explanatory power makes patent certain facts that had not been even perceived before.

While the facts and the theory are supposed to be completely separated, it may thus be shown that the facts engender theories and that the theories construct new facts. The antinomy lies, therefore, in this mutual interdependence of facts and theories on the one hand, and their separation and juxtaposition on the other hand.

Exactly the same antinomy, however, exists between the legally relevant facts on the one hand and the norm applicable to them on the other hand.

It is the facts, i.e., certain aspects of human behavior that generate the need for the norms regulating them. In this sense the facts on the ground are juxtaposed to the so-called deontological tension, the need to standardize and regulate the comportment of legal subjects. We might even say that human behavior is the *object* of normative regulation, where the norm itself is the *subject*, i.e., the legislator. In any event, it is clear that the separation of this object from the subject is a priori presupposed –, which is what legislative regulation is all about. This is the usual simplistic legal understanding of the relationship between what is normative on the one hand and what is factual or the other hand.

However, here the norm corresponds to the theory. The norm is the theory that makes certain aspects of the historical event legally relevant, whereas in reality the existence of the legally relevant facts depends entirely on the pre–existence of the applicable law. As Hobbes has brilliantly noted, were it not for the law, the facts would not exist.

To take the most difficult example, in a system where the incest is not legally forbidden, legally the facts pertaining to the taboo simply do not exist. On the other side of the extreme the more mundane example is the existence of the offence of tax evasion, where the "facts" of the tax evasion itself depend entirely on the preexistent norm proscribing certain financial behavior. If the "tax evasion" does not exist in the law, the 'facts' of a "tax evasion" simply do not exist. In this sense these 'facts' had not existed before the tax laws came into existence. As we have pointed out, the legally relevant facts, which are the only facts of which we can talk *within* the legal system, are wholly dependent on the preexistent legal norm.

On the other hand, these same facts, which are the side product of the law, are supposed to be – in terms of the distinction between the abstract of the concrete – radically different from the applicable norm.

Thus we have the antinomy in which the two entities, facts and norms, are mutually interdependent while at the same time they are supposed to exclude one another: a fact is supposed to be something completely different from the law and, *vice versa*, the abstract law is supposed to be something completely different from the facts.

To put it in another way, there are no 'facts' except for the pre-existing norm and so it is the pre-existing norm which literally produces the facts—to which it is supposed to be applied.

When the choice of the applicable norm is in the course of happening, we are already in the closed circle of the antinomy, i.e., the riddle will not be gotten rid of unless we deconstruct the antinomy itself. Where the 'facts' are the emanation of the norm while they are supposed to be, again in terms of abstract vs. concrete, completely different from the same norm. And contrariwise: the need for the norm and the norm itself originate in certain meta-legal circumstances, which are only made 'facts' by virtue of the legislative action.

A very good example of this antinomy between the norm and the facts may be found in the substantive criminal law or more precisely in the illusory nature of the so-called principle of legality. The gist of the principle of legality pertains to the imperative that the forbidden behavior of the defendant must be completely predetermined by the norm of the substantive criminal law. This imperative goes back to 18th century's Césare Beccaria, who in his essay "On Crimes and Punishments" (1764), postulated the geometric precision with which all crimes and punishments must be exactly foreseen: *nullum crimen, nulla poena sine lege praevia*. Article 7 of the European Convention on Human rights thus consecrates this earliest principle.

The elegant simplicity of this Enlightenment imperative, however, declines into complexity the moment we examine how the major premise in the penal syllogism is constructed to begin with.

Initially, the police, the prosecutor etc., will have pointed to a particular article in the criminal code and then look for the 'facts' supporting this hypothetical incrimination. Or, to put it inversely, the police, the prosecutor, the investigating judge, etc.--will not look for the 'facts' that are not in the hypothesis.

In this respect, therefore, one can immediately have the possibility of false positives proving, according to the principle of legality, that the act committed was not a criminal offense. On the other hand, one can have false negatives, which would never be identified because nobody in the process has ever thought of another possible article in the criminal code. Even if dealing with a single article, we shall later see that this is not at all the case, one already notices the problem with the selective perception of the so-called 'facts'. The elements of the crime chosen as the initial hypothesis are in position to become 'facts', whereas other circumstances not in the initial hypothesis have no chance of ever becoming 'facts'.

Things become much more complex if one takes into account more than one provision of the criminal code. At a minimum, of course, there are at least two provisions of the criminal code, which are always in place. On the one hand, as we said, we are speaking of a particular offense, but on the other hand there must be at least one provision deriving from the general part of the criminal code, i.e., at least the general provision concerning the level of criminal liability: direct intent, recklessness, gross negligence, unconscious negligence etc. If one is talking of homicide, the final outcome would clearly depend on this level of criminal liability in order to determine whether it's murder, or manslaughter, or negligent homicide, etc.

In turn, this implies that the major premise in substantive criminal is a combination of at least two provisions in the criminal code.

But it is easy to imagine that other provisions from the general part of the criminal code, such as attempt, insanity, self-defence, defence of another, duress etc., also develop into an integral part of the hypothetical major premise. Typically, the prosecutor in his indictment will recombine as many different provisions in the code as necessary in order presumably to cover the 'facts' on the ground. In fact every criminal code is so constructed in its general and special part to permit the recombination of its provisions in constructing the well adapted and applicable major premise.

From this very sketchy description it obviously follows that the 'facts' and the norms, to say the least, coexist in this mutual interaction: the 'facts' generate the initial prosecutorial hypothesis, i.e., they become 'facts' only once they are perceived through the substantive norm of criminal law. Given that there are literally billions of possible combinations of the provisions of the code it is somewhat illusory to maintain, as Beccaria did, that the outcome of this process is completely predetermined by the sole existence of the description of the singular criminal offense in the criminal code.

Indeed in this process, too, we observe not only the mutual interactions of facts and norms but also the antinomy. The facts are supposed to be separate from the norms but they generate the applicable major premise no matter how complex it may be, i.e., as a recombination of the provisions from the general from the special part of the code. In this process certain determinative circumstances of the case become 'facts' whereas others fade into the background. The latter, in other words, never become 'facts'. The absurd side of this process has been picked up by Albert Camus in pointing out in his Stranger that one might be condemned because he failed to cry on his mother's funeral.

There are two suppositions which derive from the above.

First, to the extent that the above a recombination of provisions into the determinative major premise cannot be completely anticipated, the principle of legality is an illusion.

Second, the described interaction between the norms of the facts demonstrates that the latter cannot be separated from the former because they are an integral part of the ping-pong process of determining the best applicable combination of provisions. This

constatation is in contrast with the presupposition that the facts predetermine the applicable norm and vice versa, that the norm simply applies the facts.

The antinomical nature of this process exists in the contradiction between, on the one hand, the presupposition to the effect that norms are different and can be separated from the facts, while on the other hand they obviously implicate one another.

Thus the two entities (norms and the facts) simultaneously exclude (are separate from) and imply one another.

Codification

Let us, at this point, consecrate a few words to codification. Another myth taken for granted in the Continental legal system is that codification is an original source of law. This mystification goes back to Roman law and more specifically to the Justinian's codification, the so-called *Corpus Juris Civilis*. Very few European lawyers are nowadays aware of the fact that the Justinian's codification was only a restatement of the judge–made law in the first place. Not only that, Justinian's codification, i.e., the restatement, was very selective and much of the accumulated wisdom of ages, the wisdom of praetors, the judges, has thus been lost. Moreover, Justinian's expressed intent was to deprive the magistrates from their power to invent law while resolving the specific conundrums deriving from specific fact patterns of the specific cases before them. The codification, therefore, had for its intent to freeze the law at a certain point in development. The remark of Prince Kropotkin that the code is a crystallization of the past in order to strangle the future, is already at that point in time very much apropos.

This happens to be true also for other nineteenth century codifications such as promulgated by Leopold of Tuscany, Frederic the Second of Germany, Catherine the Great of Russia and, of course, Napoleon. It is well known, for example, that Frederick hated the lawyers and the judges. He wanted his *Landesgericht* to be so casuistic and so specific in order to make the lawyers irrelevant and thus unnecessary.

This of course is not the whole truth on this subject matter. Take for example the American Model Penal Code, literally created by The American Law Institute in Philadelphia.[2] This codification created by many law professors and other experts introduced, for example, a very new notion of *dolus eventualis* , i.e., the state of mind in which the criminal actor does not specifically desire the forbidden consequences of his act; he merely acquiesces to these consequences, the elements of crime. In the Continental legal tradition this acquiescence represented a major unresolved problem, because the will of the criminal actor is not, as it were, direct; it is only indirect. The editors of the Model Penal Code very creatively based

[2] The Institute was founded in 1923 following a study conducted by a group of prominent American judges, lawyers, and teachers known as "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law." The Committee had reported that the two chief defects in American law, its uncertainty and its complexity, had produced a "general dissatisfaction with the administration of justice." According to the Committee, part of the law's uncertainty stemmed from the lack of agreement on fundamental principles of the Common Law, while the law's complexity was attributed to the numerous variations within different jurisdictions of the United States. http://www.ali.org/index.cfm?fuseaction=about.creation

their provision concerning the required will of the actor on his sheer knowledge of the probability of the consequence. In cases where the actor had been practically certain that the consequence would have occurred, he is criminally liable because his acquiescence to the consequences derives directly from his being practically certain that the consequence in question will in fact occur. Thus the cognitive element, which is easy to prove, implies acquiescence, which is, as a passive volitive element, difficult to ascertain.

The mandate of the American Law Institute has, since 1923, been to reduce the uncertainty and the complexity of the Common Law. In the area of criminal law the purpose of this mandate was, indeed, very clear and the Model Penal Code in fact for the first time introduced the possibility of reliance, especially by the criminal defendants, upon the so-called principle of legality. Even in the 1970s the textbook on criminal law was Perkins on Criminal Law, i.e., a casebook attempting to systematize the subject matter according to the cases on the record. [3]

For example, the above-mentioned acquiescence to the forbidden consequences of a criminal act, which in the Model Penal Code appears under the name of "knowingly", was in the casebook described as "wanton and willful disregard of unreasonable human risk".[4] The case referred to in this respect was a case of a young offender standing on the bridge over the train tracks and throwing stones randomly at the passing trains. One of the stones happened to kill a passenger in a train and the American Common Law reacted by inventing this strange formula of wanton and willful disregard of unreasonable human risk –, in a situation where the actor did not intend to kill the passengers in the train but he somehow disregarded that possibility.

Quite clearly, the judge who invented the above formula, was confronted with the situation in which the defendant could not have been convicted of unintentional homicide, i.e. murder, but neither was he completely innocent of the fatal consequences of his disregard for the unreasonable risk for the death of the passenger that could actually have occurred. The judge was therefore confronted with a new situation, not so usual in substantive criminal law, and was forced to invent a formula to resolve the conundrum, with which he was faced. Needless to say, this had happened in a country and in a jurisdiction that had been cognitively completely separated from the decades of doctrinal debate concerning the same problem in the Continental Europe.

Only with the arrival of the Model Penal Code does change during the 1970s begin to sink in. At the time, I have taught criminal law in New York and I taught it through a casebook written by James Vorenberg, the then Dean of Harvard Law School. This was probably one of the first casebooks predicated on the Model Penal Code, because Prof. Vorenberg had been the member or the American Law Institute and had contributed to the Codification. In this respect, a little anecdote illustrates well how difficult it was in the beginning for the American judges, even in New York, to assimilate the notions deriving from the Model Penal Code. One of the students who had graduated from law school and had clerked for a New

[3] Rollin M. Perkins, PERKINS ON CRIMINAL LAW, 2nd. Ed., Foundation Press, 1969

[4] See, for example, Matthew Lippman, ESSENTIAL CRIMINAL LAW, Sage Publications 2014, p. 147, referring to "the depraved heart murder."

York judge, reported to me that the judge for whom he worked had no notion whatsoever of the concept of "knowingly", i.e., of the doctrine concerning the criminal acquiescence, the *dolus eventualis*.

Of course, in this context, it must be kept in mind that the notions of substantive criminal law in jury trials may or may not be determinative of the final verdict. The judge's instructions may have been whatever they were, but then the jury was sequestrated and it never explained either its deliberations or the rational foundations of its verdict.

One must, therefore, note in this context that the substantive criminal law was not in a position to develop, precisely because even the appeal on the points of substantive criminal law was, due to the absence of the motivation or the verdict –, impossible. In other words, most of the appeals in the area of criminal law had been based on the procedural mistakes on the part of the police, the prosecution and the judge in a complete disregard of the possible errors committed by the jury rendering the guilty verdict.