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Stare Decisis and Common Sense in American Civil and Criminal Jurisprudence

Stare decisis i „zdrowy rozsądek" w cywilnej i karnej jurysprudencji amerykańskiej

SUMMARY

Based on various law sources, the American *common law* is connected by a particular role of prior judicial rulings as a basis of judicial practice. The principle of *stare decisis*, which exists within its framework, leads to considering decisions of courts of higher instances as binding (settled in a binding manner of a given case type in the convention of *res iudicata*). However, it does not mean that precedents may not be amended or broken. In such a situation following factors may appear: defective rulings, triggering incoherent or unjust consequences, contraction with other precedents, and change of circumstances, which have led to a precedent decision to be taken.

Keywords: *stare decisis*; common sense; civil law; criminal law; American jurisprudence

"The life of the law has not been logic; it has been experience… The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"[1]. This statement by Justice Oliver Wendell Holmes, Jr., sums up not only the

[1] O.W. Holmes, Jr., *The Common Law*, Boston 1881, p. 1.

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underlying philosophy of the common law system. It also posits the reason behind the principle of *stare decisis* and emphasizes its importance in that system. To that extent, it is the principle of *stare decisis* allows the court to incorporate common sense into its decision-making philosophy while at the same time supporting consistency and stability in the law.

It is important to understand that the "common law" of the United States is itself derived from several sources, primarily court decisions that become the precedents for judicial decision-making. Philosophically, the writings of Montesquieu and John Locke provided the basis for the division of governmental power referred to as "the separation of powers". Their focus was on a division of power between the executive (the king in both cases) and the legislative branches of government. The judicial function was viewed then, and now in civil law jurisdictions, as an extension of the legislative branch. Its only function was to enforce the laws as written, and there was not discretion in the judges to interpret the law in relation to changing times. In part because of the colonial experience with a judicial system that was appointed in London, the idea grew in the United States that it might be a good idea to establish the judiciary as a separate and co-equal branch of the governmental structure. Indeed, this is perhaps the most revolutionary development in government that the Constitution implemented. It is important to note that this innovation was regarded with some skepticism at the time. The notion of judges who would be appointed, not elected, in effect for life was disquieting to many in the young country. It was in response to these anxieties that Alexander Hamilton wrote Federalist No. 78, one of a series of essays in support of the new Constitution. In it, he acknowledged that this was something of a novelty in political thinking, but he espoused the view that with the division of power in the executive and legislative departments, the judiciary would be "the least dangerous branch". That viewpoint, however, supports the historical reality that led to the creation in 1787 of The Constitution of The United States itself and its role in the common law process. Simply put, the tripartite framework of the Constitution was a popular reaction to the ineffectiveness of the Articles of Confederation to provide an adequate post-Revolutionary government.

It should be remembered that it had only been fourteen years since the end of a bitter war for independence from Great Britain, fueled as it was by the Declaration of Independence. It is hardly surprising that the government that the Constitution designed was meant to implement the rights of "life, liberty, and the pursuit of happiness" while still being a functioning government in the real world. That was the principal objective of the first seven Articles of the Constitution. They set up the framework of a government that, being tripartite in structure, would do two things: first, it would function as a government in the usual tasks that government does, such as military and taxation; second, be capable of protecting the rights of the citizenry that had been fought for in the Revolutionary War. That this was part

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of the intent of the Framers is clear from the fact that the Bill of Rights was to be promulgated as the first act of the new Congress in 1791. After all, collectively, these amendments became the definition of "life, liberty, and the pursuit of happiness" that limited just how far the government could intrude into the lives of the citizenry. The passage of the Bill of Rights was, of course, part of the original compromise that brought the Constitution into being, so it is proper to regard them as part of the original document. Indeed, the focus of the combined seven Articles and the first ten Amendments is clear from the language that they begin with "We, the People" and conclude with "to the people". In effect, the Constitution of the United States embodies the heritage of the Declaration of Independence that the rights and liberties of the people come from the people and are not bestowed, and therefore subject to arbitrary alteration, by the government. Because the document was created, and ultimately adopted, by elected representatives of the people of the original states and not by the government then in power, it can be asserted that the Constitution itself is part of the common law of the United States and therefore conditions the juridical process that implements it. It is from this point that the common law, as it is understood and has evolved in the United States, originates.

On the one hand, *stare decisis* is the legal principle in use in the United States and other common law jurisdictions that dictates that under normal circumstances the prior and previous decisions of higher courts shall be followed and not changed. All courts, particularly trial courts, are charged with maintaining and following this principle as they hear cases at whatever level when the facts and legal arguments are presented to them. There are two types of *stare decisis*: vertical and horizontal. Vertical *stare decisis* is when the highest appellate court in your state or country rules on an issue, lower courts are bound to that particular judgment. Horizontal *stare decisis* occurs when a trial court of similar stature in your judicial district rules in a particular manner, a sister court, on the same issue, will follow the ruling of that court.

While the focus of *stare decisis*, in general, is on what might be called "external" precedents, there is an "internal" component of *stare decisis* that sometimes impacts how the lawyer in the common law system will handle the case. This doctrine is known as "law of the case", and it is the clearest example of *stare decisis* applied internally to a single case as it moves through the system. This situation arises when a case is remanded back to a lower court, whether trial or appellate, from a higher appellate court after the higher court has decided part of the case. The "law of the case" doctrine is "that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages"[2]. It applies only to questions of law. In such an instance, that part of the case that was determined by the higher court may not be relitigated in the case and will, by defi-

[2] *Briscoe v. Goodmark Corp*., 102 S.W.3d 714 (Tex. 2003).

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nition, form part of the basis for the final judgment. A similar, though "external", subset of *stare decisis* is *res iudicata*, literally "the thing has been adjudicated". This happens when a later case is brought that involves either some of the same facts or the same parties or both as were in an earlier case that has been finally decided. In such a situation, the second court can resolve the case in whole or in part by disposing of those issues and parties that were taken care of in the earlier case in the interest of judicial economy and uniformity of result. Obviously, the parties to the lawsuit have from the appellate court a taste of *stare decisis* in their own case and, thus, a glimpse of the future of the case should it go back through the appellate process. In this instance, the law of the case doctrine combines for the parties the characteristics of consistency and finality in the subsequent life of the litigation, regardless of where it might go.

Horizontal, vertical, law of the case, and *res iudicata* aspects of *stare decisis* are combined with the "stacking effect" of prior decisions in that the lower court, which is usually a trial court, must accept and obey the rulings and precedents of the courts above it in the superior jurisdiction. This means that trial courts are obligated to obey appellate court and supreme court decisions; whereas, appellate courts are bound to recognize and follow the rulings of the supreme court. It is, however, recognized that courts, while generally charged to following previous decisions, may change or alter those decisions. In the event that a change is sought by any party to the controlling law as dictated by *stare decisis*, then the Supreme Court, as the final arbiter of the law, is the body that has the ultimate authority to change or completely overrule the existing precedent and set new standards in the law. Any change in existing law made by the Supreme Court then becomes the precedent to be followed from that point forward according to the principle of *stare decisis*. Indeed, it may be that, depending upon the issue, as the case moves upward through the appellate process, the focus of the effort shifts from merely reversing the decision of the trial court to changing public policy itself in a given area. At that point, the importance of *stare decisis* may be somewhat diminished because in the common law environment the trial judge has wide discretion that may impact how the appellate courts deal with the case.

A lawyer engaged in the private practice of civil law in the United States is affected by this doctrine because virtually all of those cases are bound by the existing common law, or law dictated by courts in their decisions in previous similar cases, as opposed to statutory law wherein the cases are decided by a statutory standard. At the outset of representation, a lawyer must consider the common law as it applies to the case in order to give the best advice to the client. In other words, if a lawyer needs to know how his or her case will be judged, what the outcome may be and what must be done to prove the case, the lawyer would look at decisions made by courts in similar cases instead of looking in the statutes for the exact "black letter law" governing a specific set of circumstances. This is the principal contrast of

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between the American civil common law system and the civil law in Continental Europe which, for the most part, uses a form of law more similar to code law or statutory law.

In the common law system, because the statutes and the case law precedents are always evolving, particularly in relation to the facts of a case, there will be cases where it appears that the book of rules has run out. The result is that the judge is left with few guidelines other than a basic sense of right and wrong and, sometimes, a sensitivity to the notion that courts are inherently human institutions designed to meet human needs. For the judge in such a circumstance, the essence of the common law system is summed up, as Justice Benjamin Cardozo once said, "We must not only do justice, we must be seen to be doing justice". For example, in 1988, at the height of the AIDS scare, a publicly supported hospital in Texas refused to provide AIDS victims with a then-experimental drug called AZT at no cost because it had not been fully government approved. All of the other hospitals in the area had provided the drug at no cost, apparently without regard to the governmental non-approval. A case was brought against the government and the hospital to force it to give the drug to AIDS victims. As the attorneys argued, the courtroom filled with people in various stages of the illness, some covered with sores, some coughing, all dying. The judge, realizing that there were no precedents, no statutes, no rules, to provide guidance in this case, had to look to ancient law for support. The Roman doctrine of *parens patriae* provided the mechanism for the decision. As the court said from the bench, "[…] from time to time, the court must be to some extent the voice of the community. That voice […] must be, and is, raised in favor of life". It then ordered the hospital to dispense the drug without further delay.

This evolutionary characteristic of Anglo-American jurisprudence permits the courts to serve an "announcement of public policy" function that is, in the United States, co-equal with the executive and legislative branches of government. To that extent, this function of the courts is a legitimate extension of the U.S. Constitution, though it was not initially anticipated that this would be the case. It was not until 1803 that the U.S. Supreme Court established itself as co-equal with the other branches of the government with the pronouncement, "It is emphatically the province and duty of the judicial department to say what the law is" in the familiar words of *Marbury v. Madison*[3]. While it is customary to think of "judicial review" as the principal result of *Marbury*, it should be obvious that, whether it is the result of the evaluation of statutes or regulations or the Constitution itself. In the exercise of this function, the Supreme Court has the ability to announce alterations in public policy with just as much force as an act of Congress or an executive order would possess, and this is the situation in which the concept of *stare decisis* comes into play.

[3] 1 Cranch 137, 5 U.S. 137 (1803).

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An American lawyer who is of the opinion that the existing common law is unjust and decides to make an attempt to change the law, would file the case in the trial court and obtain a verdict from the judge or jury and a judgment from the court. Because of *stare decisis*, the law that is being sought to be changed would control my case. If the judgment were unfavorable to the outcome that the lawyer is trying to obtain, the case would be appealed to the next level, the appellate court. If that did result in a reversal of the "bad" judgment, it would be a victory of changing the law. In the event that the "bad" judgment was upheld, the case would then go on to the Supreme Court where it would hear the legal arguments. Its judgment would be the final word. If the Supreme Court should be of the opinion that the law needed to be changed, they would enter a judgment in favor of the party asking for the change. There would now exist a new precedent, a new public policy, and a new law that would then have to be followed from that moment on by all other courts pursuant to the doctrine of *stare decisis*.

While this process is essentially the same whether in civil or criminal cases, there are some examples where *stare decisis* is not as fixed a principle as it would appear. Indeed, it can be argued that it is in the criminal law where there is an intersection between common sense and *stare decisis* as a product of the various protections for defendants that arise in the Bill of Rights. An example of this is the "exclusionary rule" as it relates to the admissibility of evidence in a criminal trial. The Fourth Amendment protects individuals from unreasonable searches as seizures. Such a restriction has been a rock-solid rule in the criminal law for a very long time. Its origins can be traced to the case of *U.S. v. Burr*[4] (commonly referred to as "the Aaron Burr Case"). The case is quite long and covers many topics, particularly the definition of treason, but that is not all. The case also focused on whether or not certain evidence had been properly obtained by the investigating authorities. The court determined that the papers were defective and thus in violation of the Fourth Amendment, and the evidence was excluded. Aaron Burr was acquitted. While this at first appears to be an overly technical decision, it reflects a reading of the U.S. Constitution that was consistent with the protection of the civil rights of the defendant. This concept was formalized in *Weeks v. United States*, a case in which a person had been convicted with evidence that had been acquired without a warrant or otherwise constitutional process[5]. Because of the violation of the Fourth Amendment, the conviction was reversed. This principle was applied to the states in *Mapp v. Ohio*[6]. Together, these three cases created a very clear statement of public policy that law enforcement had to be wary of, or else their efforts might be rendered worthless.

[4] 25 Fed. Cas. 30 (C.C.D. Va. 1807) (Opinion of Marshall, C.J.).
[5] 231 U.S. 383 (1914).
[6] 367 U.S. 643 (1961).

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An extension of the exclusionary rule is the "fruit of the poisonous tree" doctrine enunciated by the Supreme Court in *Wong Sun v. United States*[7]. This is an example of common sense as being integral to the concept of *stare decisis*. Under this doctrine, any evidence that is taken without proper authority is excluded, but so is any other evidence that is derived from an illegal search or seizure. All of this, however, was subject to being changed. In 1984, there was a series of cases that created "exceptions" to the exclusionary rule and, though they softened the precedents, did not entirely do away with the exclusionary rule. These were *Nix v. Williams* (inevitable discovery by police), *United States v. Leon* (warrant invalidated subsequent to search), and *Massachusetts v. Sheppard* ("good-faith" belief by the police that the warrant covered the items seized)[8]. In effect, these three cases shifted the public policy much more in favor of the police than the defendant, thus creating a new chain of *stare decisis* on which lawyers must now rely. While *stare decisis* is a doctrine of law that does not permit settled law to be upset, the United States Supreme Court has severely diluted the doctrine by creating exceptions to the doctrine that almost obliterate the rule.

Article III of the Constitution vests the whole judicial power in the Supreme Court and the lower courts created by Congressional legislation. The original jurisdiction of the Supreme Court was outlined in the original article, but it has been steadily reduced in scope with the passage of time so that in fact the overwhelming majority of its cases are appellate cases. The question of whether to retain and follow established precedent or to overturn it and begin a new line of precedent lands squarely on the shoulders of the Supreme Court from time to time. When the Supreme Court significantly alters precedent, especially to the point of eliminating it altogether, whether in civil or criminal cases, there is often the tendency to think that such changes are politically motivated. Studies, however, have shown that in many instances the judiciary is in fact quite closely attuned to the views of the people at large and is sometimes in advance of major shift is public policy. Precedent in the common law system can, however, be overruled by the court at any level if the public policy factors for doing so are sufficiently weighty. Among these factors are: 1) the original rule or decision was flawed; 2) the application of the prior rule can lead to and has led to inconsistent results, thus belying one of the underlying justifications for *stare decisis* in the first place; 3) the rule conflicts with other precedent in some respect, especially if there is a newer and better-reasoned case; 4) the rule regularly produces an unjust result unanticipated by the original decision or places an unnecessary burden on the system; or 5) the reasons that supported the precedent in its original form no longer exist because

[7] 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[8] 467 U.S. 443 (1984), 468 U.S. 897 (1984), and 468 U.S. 981 (1984), respectively.

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of the passage of time[9]. It can also be that, in the event that the legal basis of the rule has been changed or abolished, the precedential value of the prior decision has been undermined and may be overruled. For example, the ratification in 1865 of the Thirteenth Amendment to the Constitution abolishing slavery had the effect of overruling *sub silentio* the *Dred Scott Decision* of 1857 that had been a factor in precipitating the War Between the States. At the Constitutional level, the overruling of precedent can occur either in the amendment process or by legislation. Either way, the independence of the judiciary is not impacted but is in fact reinforced by having the opportunity to create afresh precedents that will serve as *stare decisis* in the new legal context.

While in theory *stare decisis* is a jurisprudential tenet that lends stability to the law, judges can, and sometimes do, alter the jurisprudential value of *stasis* in the law based on their particular political leanings. For example, if the majority of the judges on a particular appellate court have been appointed by one political party and, as the majority, fashion the decision their way, they are seen to be judicial activists by their opponents. The product of their majority opinion may be viewed as judicial legislation, i.e., judicial activism, leading to much debate about its legitimacy. That said, there are times when the courts must be "activist", particularly when the other two branches of the government fail to act.

It is perhaps a desire to have some stability in an otherwise rather untidy political system that makes *stare decisis* so important. One practical political effect of the American Revolution was to extend governmental power to a third branch of government, the judiciary, as an expression of the concept that this was to be a government of laws and not of men. It is *stare decisis* that lies at the base of that distinction and provides both consistency and finality in the operation of the judicial system, and it is common sense that allows the system of precedent to evolve as the society requires.

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STRESZCZENIE

Amerykańskie *common law*, kształtujące się na gruncie różnorodnych źródeł,wiąże się ze szczególną rolą wcześniejszego orzecznictwa jako podstawą praktyki sądowej. Istniejąca w jej ramach zasada *stare decisis* prowadzi do uznania decyzji sądów wyższych instancji jako wiążących (wiążąco

[9] *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

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rozstrzygających dany typ sprawy w konwencji *res iudicata*). Nie oznacza to jednak, że precedensy nie mogą być zmienione i przełamane. Umożliwia to pojawienie się takich czynników, jak: wadliwość orzeczenia, wywołanie niespójnych lub niesłusznych (niesprawiedliwych) skutków, sprzeczność z innymi precedensami oraz zmiana okoliczności, które wywołały podjęcie decyzji precedensowej.

Słowa kluczowe: *stare decisis*; zdrowy rozsądek; prawo cywilne; prawo karne; amerykańska jurysprudencja

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