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Stare Decisis, Commercial Exchanges and Predictability: A Proposal to Confront the Reform of the Judicial Branch

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STARE DECISIS, COMMERCIAL EXCHANGES AND PREDICTABILITY: A PROPOSAL TO CONFRONT THE REFORM OF THE JUDICIAL BRANCH

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"Set it down to thyself, as well to create good precedents as to follow them." Sir Francis Bacon, *Essays Of Love.*[1]

"[Stare Decisis] is a maxim among the lawyers that whatever has been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind." Jonathan Swift, *Gulliver's Travels.*[2]

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* Professors of Law in the Peruvian University of Applied Sciences (UPC); General Coordinator, Competitiveness Support Project; President of the Council of Ministers, World Bank. This Article proposes that predictability is the most important instrument of a possible reform to the Judicial Branch. Predictability is implemented through the Anglo-Saxon legal principle of Stare Decisis. The authors propose that Stare Decisis has already been implemented into Peruvian law in Article 400 of the Civil Procedure Code, but the principle has never been applied.

1. Francis Bacon & Basil Montagu, *Essays: Of Great Place*, *in* THE WORKS OF FRANCIS BACON 19 (1852).

2. JONATHAN SWIFT, GULLIVER'S TRAVELS 158 (Project Gutenberg 2008) (1892).

I. A NEW REFORM

The reform of the judicial branch has been a constant subject on the national agenda since the beginning of the Republic of Peru. It has been the subject of countless pronouncements by intellectuals and noted jurists; it has enriched the speeches and incited the demagogy of politicians and

country's leaders; it is commonplace in the frequently unattended "governmental plans" of political parties during electoral campaigns; and it has provided an excuse to compromise and weaken the independence of the judicial branch.

In January 2003, the subject of judicial reform has become relevant again when the President of the Peruvian Supreme Court of Justice, Dr. Hugo Sivina Hurtado, read an unprecedented message to the nation that was widely spread by the media.[1]

In a speech intended to highlight his intention to lead an integral reform of the administration of justice, the President of the Supreme Court called attention to "the pompous intervention of those who, having great political responsibilities within the government, baselessly criticize legal decisions with the purpose of exacerbating popular discontent and of suggesting the inability of the Judicial Power to face these situations."[2] He also emphasized his "firm conviction to recover our institutional space, by emphasizing autonomy and independence with the object of gaining respect as a power of state."[3]

The message offered a particularly interesting and absolutely unedited approach, which contrasted with what experts on the subject of judicial reform in Latin America had heard until then. In effect, President Sivina argued that critics of the performance of the judiciary try "to justify the necessity of imposing reform . . . from entities distinct from the judiciary."[4] He also stated that "the arguments that criticize the judicial branch are incoherent and make our work more difficult."[5] Both statements indicated the necessity of promoting reform "from within."

The need for reform "from within" constitutes an extraordinary affirmation of the independence of powers that formally consecrates our Constitution. In addition, it supposes a reaction to the fact that "often, under the clothes or speech of judicial reform formulated and designed 'from outside,' not by judicial authorities themselves, pernicious desires to intervene with and manipulate the system of justice are uncovered."[6]

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1. *See* Hugo Sivina Hurtado, President, Supreme Court of Peru, Message to the Nation (Jan. 2, 2003), *available at* http://www.pj.gob.pe/paginas/Mensaje.htm.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* EL COMMERCIO, Aug. 3, 2003, at A2. Months later Doctor Sivina reiterated these ideas by indicating that any reform from outside is not welcomed. Speech of Order of the president of the Supreme Court before the *Superior Court of Justice of Cusco on May 22, 2003, available at* http://www.pj.gob.pe/discurso_cusco.htm.

President Sivina is correct, because the history of Peru is plagued by events that confirm that the judicial power enjoys independence only on paper and is a part of the state that has only been respected in a relative sense. Although the judicial branch has always been an object of interest to many of Peru's governments in power, it has never been offered the resources which would guarantee autonomy. Instead the judicial banch itself has been treated like a resource. The most pathetic example occurred during the government of Alberto Fujimori Fujimori (1990-2000). The corruption was so great that judicial decisions were manipulated from the offices of the intelligence service. This "well-known secret" was of such dimensions that the World Bank cancelled a reform operation that it was developing for Peru.[7]

For this reason, President Sivina courageously criticized the previous attempts at reform. He stated that the corruption was not limited to the judicial branch.[8] President Sivina also renewed the issue of temporary service for judges.[9] He commented on the lack of access to justice by a great number of citizens and he explicitly recognized the problems of slowness and the violation of procedural norms.[10] Also, he emphasized the reform of the judicial power would be an effort "led by judges."[11] That is to say, reform would be launched "from within" and would be structured, coordinated, and developed by the judiciary itself, "but with strategic alliances with political sectors and civil society."[12]

President Sivina is not wrong. Cleaning up begins at home and it serves no purpose to direct financial aid, human efforts, time, and resources to something the inhabitants of the home do not want. Nevertheless, it is also recognized that the cleaning depends on those who visit the house (the users of the system). In this sense, the President mentioned the creation of a "National Accord for Justice in which the principles and minimal points should orient this process of modernization would be defined."[13] In his

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7. For an account of the process of reform of that decade, see Mauricio Garcia, *La Reforma de la Administración de Justicia* [*The Reform of the Justice Administration*], *in* INSTITUTO PERUANO DE ECONOMÍA SERIE ESTUDIOS [Peruvian Institute of the Economy Studies Series] Vol. 199-062. *See also* Red de Información Jurídica [Legal Information Center], *Origen, Iniciativa e Innovacionesde la Reforma Judicial en Perú* [Origin, Initiative and Judicial Innovations of the Judicial Reform in Peru], *in* SISTEMAS JUDICIALES, REFORMA Y MODERNIZACIÓN JUDICIAL [Judicial System, Reformation and Modernization], *available at* http://www.cajpe.org.pe/RIJ/ases/reforma/CE10-e.HTM.

8. Hugo Sivina Hurtado, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Hugo Sivina Hurtado, *supra* note 3.

speech he did not offer the content of this accord, but he referenced the methods of solving the most important problems that plague the administration of justice.[14] These problems include corruption, slowness, an absence of independence, a lack of efficiency and logistical support, and limitations of access to justice.[15] A problem that lamentably does not explicitly appear in the speech, but that he alludes to, is predictability.

President Sivina's speech was widely spread by the mass media. As usual, politicians took advantage of the occasion to offer declarations of a diverse nature. Similarly, experts and leaders of public opinion had a magnificent opportunity to emphasize their points of view and to construct alternatives. Also, important sectors of civil society and the business community put forth their opinions. In summary, a current of extremely favorable opinion was generated.

Along with the expressions of support arose some voices in which skepticism of the good intentions of the president of the Supreme Court was evident. The judicial power always has been the "ugly duckling" of the national government because of its lack of prestige, inefficiency, corruption, technical faults and lack of predictability. The perception of influential public leaders was that the declarations of President Sivina did not spring from good intentions and that they would not have any practical desired effect.

The fact is President Sivina's message to the nation did not remain mere words. In a relatively brief time, a Commission of Magistrates for the Reconstruction of the Judicial Power was formed.[16] The Commission's members consisted of the President of the Supreme Court, members of that Court, and members of diverse Superior Courts of the country, and some judges.[17] The commission formed thematic work groups that proposed a set of reforms for the Office of Judicial Administration, reforms for the other branches of government, an anticorruption and judicial ethics policy, reform of penal justice, and reform of civil justice.[18]

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14. *Id.*

15. *Id.*

16. [Agreement of the Supreme Court of Justice of Peru] Jan. 22, 2003 (deciding how to reconstruct the judicial branch).

17. [Agreement of the Supreme Court of Justice of Peru] Jan. 22, 2003. La Resolucion Administrative de la Presidencia del Poder Judicial [hereinafter Administrative Resolution of the Presidency of the Judicial Power] 035-2003-P-PJ (2003), *available at* http://www.cajpe.org.pe/RIJ/BASES/REFORMA/035-2003.htm; *see also* the text of the Lineamientos of the Commission of Magistrates for the Reconstruction of the Judicial Power, *available at* http://www.pj.gob.pe/econstruction/Documentos_Base/LINEAMIENTOS.htm (Document dateless).

18. *See* Thematic Work Groups, executive information and executive summaries, *available at* http://www.pj.gob.pe/Reestructuracion/documentos. htm.

This analysis and the elaboration of proposals proved to be an extremely valuable exercise. Unfortunately, the self-imposed deadline created by the commission expired.[19] Also, a parallel method of communication was not developed to allow civil society and the political class to know what was being done at the time. In effect, its work was so "from within" that it seemed "secret" to the point that civil society knew little or nothing of what was developed in the Palace of Justice.

At the same time as the Commission's works, many incidents darkened the image of judicial power. Unfortunate events in the administration of justice continued taking place. Finally, a scandal affected public opinion as a result of shameful acts that all Peruvians can appreciate. In a street fight, hired thugs from two separate factions took over the administration of a television channel. This act took place as a result of individual judicial decisions.

Weeks after these events took place, on July 28, 2003, the President of the Republic, Alejandro Toledo, indicated in critical way in his National Celebrations speech that he "did not notice any advance of judicial reform." For that reason, he offered diverse legislative projects intended to create a commission dedicated to the integral reform of the Judicial Power.[20] That is to say, President Toledo considered a reform "from outside."

The reaction of the judicial power was immediate. That day, the president of the Supreme Court entered the arena once again and expressed his disagreement with the president of the Republic, declaring that "time was not wasted and that they have been arduously working."[21] Nevertheless, the results achieved by the activities of the judicial power concerning the reform "from within" were not disseminated, and the recommendations made by the thematic work groups were not put in practice. The explanation for this inaction is simple: they did not have a budget and the Ministry of Economy and Finance was not in the capacity to offer the necessary economical resources.

In spite of the apparent opposition of the judicial power, the executive power continued its attempt to promote a reform "from outside." This effort took shape months later with the support—by a parliamentary majority—of the legislative power. A new law created the Special Commission for the Integral Reform of the Administration of Justice

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19. A term of three months from its installation was established. Administrative Resolution of the Presidency of the Judicial Power, *supra* note 19, art. 2. The results of the thematic work groups were made available for public Aug. 2003, *available at* http://www.pj.gob.pe/Reestructuracion/documentos.htm.

20. *See* EL COMMERCIO, July 29, 2003, at A2-3.

21. *Id.*

(Ceriajus).[22] According to Article 2, the Special Commission is composed of top officials from the main state institutions, such as the judicial power that presides over it, the national public prosecutor, the Constitutional Court, the ombudsman, the Ministry of Justice, the Congress of the Republic, and representatives of civil society chosen by the participant institutions of the National Agreement Forum.[23] The aim of Ceriajus was to design a comprehensive plan of reform that included the possibility of proposing modifications to the constitutional and legal norms of the judiciary, as well as, presenting proposals and immediate measures before April 23, 2004.[24] Ceriajus was organized into ten thematic work groups made up of diverse authorities on the law.[25] These groups were formed in order to facilitate the debate and the work of the Ceriajus plenary sessions on essential subjects related to the reform.[26]

Once again, the reaction of the Supreme Court was immediate. A few days after the promulgation of the law that created Ceriajus, by means of Administrative Resolution of the Presidency of the Judicial Power 191-2003-P-PJ, of October 22, 2003, the National Agreement for Justice was established. The objectives were to promote the proposals of the Commission of Magistrates for Judicial Reconstruction, to receive citizen initiatives for the modernization of the judicial power and to create points of consensus to propose judicial policies that would allow a real change of justice in Peru. The National Agreement for Justice also intended to establish the Social Pact for Justice. The Pact aimed to establish a far-reaching plan of judicial policy (over twenty years). The plan was outlined as a process that in coordination with the Forum of National Agreement would generate a space for reflection and thematic discussion on the judicial subject would be in agreement with the Twenty-eighth State National Agreement Policy called "Full Compliance with the Constitution and Human Rights, and Access to Justice and Judicial Independence."[27]

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22. Law 28083 (2003) (Peru).

23. Law 28083 art. 2 (2003).

24. Specifically, the mission of the Ceriajus consists of proposing a national plan for the Integral Reformation of the System of Justice that harnesses and coordinates the sectorial efforts of each organization that forms the justice system. The plan seeks to guarantee the institutional autonomy and prioritization of an approach that guarantees the protection of citizens' rights and helps the social and economic development of the country. For an account of the points of view in relation to the origins of the Ceriajus. *See* Abraham Siles Vallejos, *La ley de Ceriajus: ¿Acuerdo o Disenso para la Reforma de la Justicia? [The Law of Ceriajus: Agreement or Dissent for the Reform of the Justice?]*, 68 CONSORCIO JUSTICIA VIVA (2003).

25. Notice of the Creation of Thematic Work Groups, Ninth Plenary Session of the Ceriajus (Dec. 30, 2003), *available at* http://www.pj.gob.pe/CERIAJUS/Noticias.htm.

26. *Id.*

27. *See* ACUERDO NACIONAL [National Agreement], SECRETARÍA TÉCNICA DEL ACUERDO

These activities would be led by a distinguished group of jurists who form the Impulse Group, establishing a means for personalities "from outside" the judicial power to participate "from within."

In October 2003, there were three forums for the debate of the reform of justice administration in Peru. On one hand were the efforts "from within" promoted by the judicial power through its judges. On the other hand was Ceriajus, which was established as a mechanism "from outside" but included the judicial power. Finally, there was the Impulse Group of the National Justice Agreement, which was a mixed forum created within the judicial power but made up of by persons unrelated to the judiciary.

This panorama was somewhat confusing because apparently there would be three courts of deliberation and proposals. Nevertheless, it incorporated all the actors and interested parties in promoting a suitable judicial system. Therefore, the well-known confrontation between the judicial power and the executive and legislative authorities regarding the reform plans adjusted itself gradually. For example, on the day in which the Ceriajus was incorporated, the president of the Supreme Court put aside apparent disagreements and clearly proposed "let us leave aside quick criticisms, the skepticism regarding change, as well as everything that divides us, to sit together and to discuss in a open and responsible way the comprehensive plans for reform that we are going to create."[28]

Doctor Sivina's message emphasized a firm decision to marginalize disagreements and to focus on Peru's judicial reform. Obviously, the process would be the subject of controversies and conflicting opinions, but the reform would be developed.

The central question which we must consider is what is final objective of the reform? That is to say, what is it that we want to achieve? Diverse and noted people have given their opinions on this subject. They have claimed that one goal is to avoid corruption. Other people say that the objective is to make procedures faster. Many indicate that it should aim to establish independence. Others say that it is necessary to attract high-level professionals. In this sense, diverse actions have been proposed, such as the modification of decisions, even constitutional, that deal with the structure of the judiciary or with judicial procedure. Also, it has been indicated that the objective is to guarantee the tenure and competitive salaries of judges. In the same way, it has been suggested that judges should be educated as part of the reform in order to improve the quality of

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NACIONAL, at 45, July 22, 2002.

28. *See* Alfredo Villavicencio, *Ceriajus: ¿será posible vencer la maldición nacional de la historia de nunca empezar?*, 159 REVISTA 7 (2003), *available at* http://www.idl.org.pe/idlrev/revistas/159/159CERIAJUS.pdf.

decisions. It is also highlighted that it is important to have information technology and computerized systems to improve the tracking of cases. All of these diverse objectives and mechanisms exist to comprehensively reform the judicial administration. All are important, and they are interrelated. Nevertheless, it is very important to identify an objective and activity that combine, offer coherence, and serve as a thread.

In this sense, this Essay takes as a starting point the hypothesis that the indicated objectives, despite their importance, are secondary to the true objective of the reform: to offer legal stability.

That is to say, the central objective of the reform aims to generate legal stability in Peru. This can be obtained by making the decision-making process predictable and it starts by means of the mechanism of the binding precedent. This is what is known in Anglo-Saxon law as the principle stare decisis et non quiets movere (Stare Decisis).

It is necessary to indicate that in a country with limited resources and clear budgetary limitations, it becomes indispensable to identify an area of the law or the judicial activity in which—at a first moment—the binding precedents are put in application. For this purpose, the commercial area, that in which the commercial interchanges are generated, would be the first priority in the effort to generate precedent. To the extent that the solution of controversies is predictable, it will generate legal stability. Greater legal stability will support a more stable economy that will result in a better climate for investment and in the possibility of generating more resources for the national budget, which will enable more resources for the judicial branch. The incorporation of binding precedent into the framework of the Supreme Court could be the beginning of a virtuous circle that would yield positive results to the system.

II. INTERCHANGE: THE CLASSIC MOTOR OF ECONOMIC GROWTH

The economic growth of a nation can be explained by many determinants. Nevertheless, it is unquestionable that its main impulse mechanism is the existence of a vibrant market, characterized by the progressive multiplication of voluntary interchanges of goods between individuals.[29]

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29. *See* George L. Priest, *Pobreza, Desigualdad y los Simples Principios del Desarrollo Económico* [*Poverty, Inequality and the Simple Principles of the Economic Development*], 45 THEMIS LAW MAG. 187, 189-90 (2000). For example, Priest indicates five determinants for the economic development: the discovery of natural resources; the technological and organizational innovation that derives in one more a more efficient administration of the social resources; an increase of the performance level of the economic actors; the increase of the value of the human

Individuals voluntarily decide to exchange goods because both hope to benefit from the interchange. In voluntary transactions, all the involved parties end up winning. All of them, to a certain extent, increase their level of well-being when giving a good in exchange for another which is more valuable to them.

The existence of voluntary exchanges also generates social benefits beyond the people that are directly involved. First, if an individual knows that he can win with the exchange of a certain good, he will have an incentive to invest in its production, which often will mean the creation of new jobs.[30] Secondly, in a developed market, individuals can concentrate on producing the kind of good for which they have greater aptitude, while they can obtain the goods they need by means of exchanges. This generates the division of work and the specialization among individuals, which allows for a more efficient organization of production.[31] Thirdly, because of the possibility of obtaining benefits from the exchange of goods, individuals have incentives to invest resources in human capital, technological innovation, organizational innovation, and in the discovery of new natural resources.[32] All of these factors positively affect society.[33] Finally, people who benefit from an interchange have a greater level of wealth, which generates a greater capacity of consumption. A greater capacity for consumption increases demand, which creates new jobs and the possibility of all the individuals of carrying out new exchanges.

Thus, exchanges have a multiplying effect on wealth. For this reason, their promotion must be the central objective of any economic system and the judicial power should play an important role in that. Exchanges by definition always generate conflicts (technical or judicial) and conflicts are solved by rules. If the rules of the game are not established properly and are not predictable, it is logical to suppose that the transactions will be subject to instability or a lack of security. For that reason, if a predictable judiciary does not exist, it is reasonable to presume that it will cause commercial disruptions.

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capital; and, the interchange between individuals. As it is observed in this section, the last factor does not have an isolated repercussion in the economic development. It also positively affects the other factors identified by the author.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.* (showing that the interchange between individuals affects and positively stimulates the other factors indicated by Priest).

III. THE COSTS OF EXCHANGE

It has been said that the more business activity in a society, the greater its level of development and economic growth. Nevertheless, business transactions generate a series of costs.

First, there are costs to determine the benefit that will be obtained by the acquisition of a good. For example, when a person wants to buy an automobile, he or she invests time and money in finding out its specific characteristics, cost of maintenance, and level of comfort. Second, there are costs to identify the opposite party with whom the exchange will be carried out. If a person wants to sell real estate, it is necessary to place an advertisement in the newspaper or to hire a real estate agent. Third, there are costs related to the negotiation of the terms of the desired agreement. The parties usually invest time and effort to reach agreement on the details of the contract. The negotiations often include the cost of lawyers, valuation experts, technicians and auditors. Finally, there is the cost of assuring that the other party fulfills their side of the agreement.[34]

In the same way, when a time-dependent installment contract is entered into, each one of the parties expects that his counterpart will fulfill their committment in the most efficient way possible. It is possible that one would have to force the other party to fulfill their commitment, incurring various types of costs.[35] Thus, the possibility of incurring monitoring costs exists. For example, costs could include personal verification that the agent does his work, hiring a watchman to do so, installing a complicated and onerous system of monitoring, et cetera. Lamentably, the monitoring costs, especially in complex operations, are usually expensive.[36]

Another potential cost that may be incurred is designing a contract that creates incentives for the agent to fulfill his or her duties. For example, in a brokerage contract, it is possible to offer the agent a commission on a successful sale or by the number of transactions made. Only the talent of individuals limits the mechanisms that can be created to stimulate those individuals to fulfill their part of a contract. Nevertheless, all these mechanisms are expensive. In this way, making sure that a contract is

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34. For example, the costs of assuring contract fulfillment when the benefits are deferred to a later date. When the benefit of a contract is realized simultaneously with its signing, it is not necessary to incur the costs of assuring the fulfillment because both parties know that if they do not fulfill their side of the agreement then the other will not perform.

35. *See* Eric Posner, *Agency Models in Law and Economics*, University of Chicago Law School, John M. Olin Law and Economics Working Paper No. 92 (2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=204872.

36. This is especially true because usually they involve new contracts (to contract watchmen, for example) where new costs will be incurred to assure his fulfillment.

fulfilled can be tremendously onerous. The cost of assuring the fulfillment of the agreement often turns out to be greater than the expected benefit from the transaction. It is important to remember that voluntary exchanges take place because individuals expect to obtain benefits.

People engage in transactions because they assume that the costs, which they will incur, will be smaller than the benefits they hope to obtain. Therefore, the existence of relatively low transaction costs is an indispensable element for the transaction to take place. Taking the previous examples as a base, the judicial power has a very important role to fulfill its efficiency can generate an increase or reduction in transaction costs. If the judiciary is predictable, we can assume that the costs, which the parts will have to incur will be smaller. In the opposite sense, the lack of predictability not only increases costs, but also, makes them uncertain.

IV. THE PURPOSE OF INSTITUTIONS

The previous section illustrated how transactions impose a series of costs. In the next paragraphs, we will concentrate on costs related to the difficulty of determining whether a contract was fulfilled and, consequently, to predict if the agreement will generate the expected benefits.

The main contribution of the New Institutional Economy[37] is that it has indicated that the reasons why some markets grow and their nations become developed are the institutions that arise within them. Institutions are the rules aimed to reduce uncertainty in society by establishing stable structures that reduce the cost of commercial transactions.[38]

Institutions, according to this school, can be formal or informal.[39] All of them have some type of relation to the existence of uncertainty in contractual performance.[40] When this Essay refers to formal institutions, it is referring mainly to institutions developed by the State itself, such as law or the judiciary. These formal institutions' main objective is to assure

37. *See* DOUGLAS NORTH, INSTITUCIONES, CAMBIO INSTITUCIONAL Y DESEMPÉNO ECONÓMICO [INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC DEVELOPMENT] (Spanish edition published by Fondo de Cultura Económica, Mexico D.F.) (1989); David Hughest et al., *Do Quasi Markets Evolve? Institutional Analysis and the NHS*, 21 CAMBRIDGE J. ECON. 259 (1997); Ha-Joon Chang, *Breaking the Mould: An Institutionalist Political Economy Alternative to the Neoliberal Theory of the Market and the State*, *in* SOCIAL POLICY AND DEVELOPMENT PROGRAMME PAPER NUMBER 6 (2001).

38. Christel Lane, *The Social Regulation of Inter-firm Relations in Britain and Germany: Market Rules, Legal Norms and Technical Standards*, 21 CAMBRIDGE. J. ECON. 197 (1997).

39. *Id.*

40. *Id.*

individuals that the State will perform under the contracts they sign. In this way, these institutions reduce costs by creating ways to ensure that contractual counterparts fulfill their obligations. Thus, the costs of entering into contracts are diminished and more contracts are created. As a consequence, society will reach greater wealth and development.

On the other hand, informal institutions are, among other things, social customs or agreements. In a society where individuals tend to fulfill contracts, where close personal relations between retailers exist, where reputation has a great value, or where trade union agreements exist that sanction those who fail to fulfill contracts, the costs of engaging in commerce are reduced substantially. This is because it becomes simpler to predict the success of the operation.

Normally, formal and informal institutions affect the fulfillment of contracts. A comparative study of German and English companies made by the Economic and Social Research Council of the University of Cambridge determined that in the German Federal Republic, the enterprise community has developed a series of self-regulations on relationships between companies, technical fulfillment of agreements, and technical standards that have remarkably elevated the level of confidence in the success of transactions. This increase of predictability translates into a greater number of contracts between companies and in the establishment of more solid and durable relationships. Also, they were able to determine that in the United Kingdom there is less integration of the entrepreneurial community, more individualistic proceedings and lower self-regulation. This resulted in higher costs for establishing commercial relationships.[41]

Another study made by the same institution found that of a group of German, English, and Italian companies, almost 100% used methods in addition to the legal system to assure the performance of signed agreements.[42] In fact, 70% of the polled companies indicated that one of the factors that made them trust the fulfillment of their counterparts' duties was the existence of long term relationships and previous experiences with satisfactory endings.[43]

Even though it is rare to find companies that use only the legal contractual system as the mechanism to reduce risk in their operations, companies in the three countries studied indicated that the legal system is a central mechanism to obtain confidence in the fulfillment of

41. *Id.*

42. Brendan Burchell & Frank Wilkinson, *Trust, Business Relationships and the Contractual Environment*, 21 CAMBRIDGE. J. ECON. 217 (1997).

43. *Id.*

agreements.[44] Also, in a survey by the World Bank of 3,600 companies in sixty-nine countries, more than 70% indicated that an unpredictable judicial power was a great problem for their commercial operations.[45] Again, the predictability of the judiciary is central to the consolidation of commercial exchange.

The reason that formal institutions are important to companies that operate in large economies is simple. To have informal institutions as the only mechanisms to generate confidence in the fulfillment of contracts implies a series of costs. Long-term relationships take time and effort. Also, restricting commercial relationships only to individuals of a well-known reputation considerably limits business opportunities. Finally, putting faith in private conflict resolution institutions can be impractical due to restricted coercive capacity. Also, due to administrative costs, private conflict resolution only can be used by companies or people that can afford it. Big companies in developed countries (like the ones mentioned in the study) usually participate in impersonal businesses with a multiplicity of individuals of different localities and nationalities. They are also involved in businesses that need rapid establishment of commercial relationships. Informal institutions usually are insufficient in large and vertiginous economies.

In conclusion, small markets are usually characterized by the supremacy of informal institutions. These are societies where service is customized, production is on a small scale, repeated relationships are used, cultural homogeneity exists and commerce is conducted on a local scale.[46] In contrast, formal institutions such as the legal framework and the judicial branch are important within developed economies. The operation of these formal institutions encourages predictable results of contracts. In fact, as Douglas North indicates, the formal rules can complement the effectiveness of informal institutions by reducing the costs of monitoring, forcing specific performance, and allowing for more complex transactions.[47]

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44. *See id.* at 223.

45. Richard Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117 (1999).

46. *See* NORTH, *supra* note 39, at 52-53.

47. *See id.* at 66.

V. THE IMPACT OF PERUVIAN JUDICIAL POWER ON ECONOMIC DEVELOPMENT

If formal institutions such as the judicial power do not reduce the costs of assuring the fulfillment of contracts and, therefore, do not offer predictability for economic activity, it will not be possible to reach the desired level economic development. In fact, one of the accomplishments of the New Institutional Economy has been to determine that the most important source of underdevelopment in the third world is the incapacity of societies to achieve effective contract enforcement at low cost.[48]

The *World Development Report 2000/2001*, created by the World Bank, exposed the relationship between the effective establishment of justice and better general economic results.[49] This report found a relationship between an indicator of legal status and GNP per capita in 166 countries in 1997 and 1998. The index highlights "the market mechanisms depend on credible threats of sanction as a result of breaking existing contractual obligations, endorsed by expeditious mechanisms to solve the differences and to demand the performance of contracts. The lack of those dissuasive mechanisms can increase the costs of economic transaction activities."[50]

The same institution made another investigation, this time using a sample of 3,800 companies in seventy-three countries, which determined a lack of predictability in legal rules and the performance of the institutions has a negative impact on investment decisions.[51] The economic growth of countries declines when the State offers no security on contracts performance.

With this research in mind, it is opportune to ask how the judicial branch influences the economic development of Peru. According to a survey of the Instituto Apoyo, 80.8% of micro and small entrepreneurs recognized the necessity of an institution that helped them to solve conflicts with other individuals.[52] Nevertheless, only 6.6% of them reported that they had turned to the judicial power to solve these disputes in the previous six months.[53] The most evident reason for this behavior

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48. WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 102-03 (2001).

49. *Id.*

50. *Id.*

51. *See* Aymo Brunetti et al., *Credibility Rules and Economic Growth: Evidence from Worldwide Survey of the Private Sector*, 12 WORLD BANK ECON. REV. 353 (1998).

52. HUGO EYZAGUIRRE & CARLOS CALDERÓN, PODER JUDICIAL Y MICRO Y PEQUEÑA EMPRESA. IMPACTO Y POSIBLES SOLUCIONES [The Judiciary and Micro and Small Enterprise: Impact and Potential Solutions] 50 (Instituto Apoyo 2000).

53. *Id.* at 49.

was that 21% of the entrepreneurs surveyed consider the judicial branch's performance to be very bad, 41.2% considered it bad, 18.6% considered it regular, and only 6% thought that it offered good services.[54] In summary, the range of negative grades given by the people surveyed was 93.4%. Also, 80% of micro and small entrepreneurs interviewed describe the judicial branch as slow, expensive, and biased. In a similar survey, 70% of medium and big business owners had similar opinions regarding the judiciary.[55]

The previous results are not surprising if we considere that during the last fifteen years, citizens gave 70% to 80% rates of disapproval and distrust of the judiciary.[56] Other studies confirm this assessment. According to an investigation made by the group of public opinion of the University of Lima at the request of ProJusticia, using a sample of seventy-one managers of companies in Lima, 84.5% of them had little confidence in the Supreme Court, 90.2% had little confidence in the Superior Court, 64.8% had little confidence in specialized courts, and 33.8% indicated that they have no confidence in the courts at all.

Because the formal institutions do not work properly, it becomes tremendously expensive for companies that conduct large transactions to operate in Peru. Also, micro and small companies only count on the support of informal institutions to reduce the costs of ensuring the effectiveness of contracts.

In a survey of small companies, 48% indicated that the most used mechanism to reduce the risk of breach was working with known clients and suppliers, while 11% indicated that the main mechanism they used was to sign contracts with recognized experienced retailers.[57] The dependency on these mechanisms is so high that 30% of micro and small companies surveyed indicated that they would not change their trusted supplier even if offered cheaper prices by others and 48% would demand at least a 25% discount to accept a new supplier. The numbers are similar with medium and large companies. A survey made by the World Bank in our country determined that a third of the industrialists would not change their supplier to a cheaper one due to fear of breach of contract.[58]

Unlike developed countries, where formal and informal institutions offer support regarding contracts, in Peru, the majority of industrialists use

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54. *Id.* at 53.

55. *Id.* at 54.

56. *See* COMISIÓN ANDINA DE JURISTAS [ANDEAN COMMISSION OF JURISTS], ACCESO A LA JUSTICIA Y DEFENSORÍA DEL PUEBLO [COMMUNITY ACCESS TO JUSTICE AND DEFENSE] 167 (Lima 2001).

57. *See* EYZAGUIRRE & CALDERÓN, *supra* note 54, at 58.

58. *See* Messick, *supra* note 47, at 124.

almost exclusively informal institutions. This shows that we have a relatively primitive economy with a trade unionist nature and based on personal ties. It is a fact that the lack of predictability of the judicial branch exists to the detriment of modernity.

In addition, in Peru, the judiciary creates uncertainty regarding contracts and its incoherence negatively affects the little certainty that the informal institutions create. Due to the incoherence of ruling decisions that exist in Peru's system, individuals are not able to comprehend the reasoning of laws regarding contracts. Peru not only has a slow, inefficient, and corrupt system of justice, but the courts are also unpredictable due to the lack of coherence in the national jurisprudence. Thus, thanks to the judicial branch, Peru's contractual system does not offer minimal predictability regarding the compliance of the involved parties in a contract. This tremendously elevates the costs of economic exchanges and prevents the realization of many contracts. The consequences of the described situations are extremely serious and they explain to a great extent the low growth level of Peru's economy.[59]

A. *Credit Access*

Because the judicial system does not allow parties to predictably know what rules enforce contracts, financial organizations have a smaller expected return rate in loan contracts. To compensate for the increased risk, they must charge higher interest rates, which limits the credit access of many companies that operate in Peru. Empirical studies of American and European markets demonstrate that the disincentives to investment generated by low predictability on profit are substantially greater in industries dominated by small companies. The apparent reason is that while great companies often finance their own projects by themselves (using its patrimony or by means of the stock market), small companies usually need external financing.[60] This is particularly serious in a country like Peru, where the market mainly consists of micro and small business.[61]

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59. Consequences of the defective operation of the formal institutions are not new thing in Peru, they were studied in the 1980s by Hernando de Soto and the Institute Freedom and Democracy (Instituto Libertad y Democracia/ILD). *See* HERNANDO DE SOTO, EL OTRO SENDERO [The Other Path] (Instituto Libertad y Democracia 1987).

60. Vivek Ghosal & Prakash Loungani, *The Differential Impact of Uncertainty on Investment in Small and Large Businesses*, 82 REV. ECON. & STAT. 338 (2000).

61. A study conducted by the Instituto Apoyo found that 65% of micro and small businesses did not seek bank loans because they did not have the required guarantees or because of the very high interests rate. *See* EYZAGUIRRE & CALDERÓN, *supra* note 54, at 74.

B. *Vertical Integration*

Because the binding execution of contracts signed between suppliers and distributors is unpredictable, companies tend to integrate themselves vertically in order to make sure that breach will not exist. This kind of organization is often inefficient because the costs of transaction within one company are higher than the costs of operating in a market where legal security exists. This diminishes the growth and the organizational effectiveness of companies.[62]

C. *Enterprise Associations*

The theory of common facilities states that competing companies can reduce to their costs by forming associations or partnerships.[63] For example, they can share the costs of carrying out investigations importing technology, or buying supplies.

According to the Institute Support, only 2% of micro and small industrialists indicated they have used the modality of joint purchase of supplies or bags of acquisitions, because they fear problems with payment or delivery. Furthermore, only 17% indicated that they associated with others to satisfy demand peaks, because they fear later conflicts in the establishment of agreement.[64]

D. *International Trade Reduction*

The deficiencies of the judicial power not only affect the development of local industry, but also, international trade. Local industries usually have easier access to informal institutions, and they know what retailers have good reputation. In addition, they probably have established long time commercial relations. Local business have the possibility of belonging to local unions and they know the customs and uses of the country. Foreign companies usually do not have these advantages, which is why economically developed countries do more business with other economically developed countries than with third-world countries.[65] Third-world countries do not offer to foreign companies the mechanisms to lower the costs related to international exchanges. In fact, it has been determined that an increase of 10% in the transparency and impartiality

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62. *See* OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 85-102 (1985); *see also* RONALD COASE, THE FIRM, THE MARKET, THE LAW 42-43 (1990).

63. *See* EYZAGUIRRE & CALDERÓN, *supra* note 54, at 72-73.

64. *Id.*

65. James Anderson & Douglas Marcouller, *Insecurity and the Pattern of Trade: an Empirical Investigation*, 84 REV. ECON. & STAT. 342 (2002).

index of the judicial system of a country results in an increase in imports by 5%. Also, it has been calculated that if the institutional quality indices of Peru, Argentina, Brazil, Chile, Colombia or Mexico were the same as those of the European Union, the international trade of these nations would expand in 30%.[66]

In Peru, the judicial branch is inefficient, contradictory, and unpredictable. For that reason, it does not assure individuals that the contractual terms will be respected, nor allow them to know the legal rules applicable beforehand. Thus, it increases the costs and lowers the amount of economic interchanges, reducing the economic development of Peru.

The judicial branch to which parties will turn in order to solve their controversies, has a role to fulfill. It will do it by making the system predictable. This may be obtained through the putting into practice the principle of Stare Decisis.

VI. STARE DECISIS

A. *Historical Development*

One of the most important institutions of the Anglo-Saxon common law is Stare Decisis. Stare Decisis is a Latin expression that literally means "keep to the determined decision and maintain the calm."[67] This phrase, transferred to colloquial Peru, could be translated today as "you already know what I think, you do not rock the boat," because it aims to promote calm in law. In common law, it is also related to expressions such as "stand by decided," "to uphold precedents" and "to maintain to former adjudications."[68]

From its remote origins in Roman law, Stare Decisis appeared as a legal principle intended to prevent abuses by the kings, Roman consuls and emperors by giving judges the ability to avoid ad hoc decisions bent by the influence of those in power. It was a mechanism of defense for the judicial system by guaranteeing the independence of the judges. In the same way, before Justinian, Stare Decisis allowed replacing the absence of law or, being the case, the lack of precision of them, and in addition, it came to be consecrated or recognized as a formal custom.

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66. *Id.*

67. OSCAR RABASA, EL DERECHO ANGLOAMERICANO [*The Anglo-American Rights*] 30 (Fondo de Cultura Económica 1944).

68. *Id.*

In the United Kingdom, Stare Decisis developed in the form we know today and then expanded to the United States and other countries with the same legal tradition (British ex-colonies). The introduction of the principle of Stare Decisis was not a product of the invasion of the Roman, the Teutonic, and Saxon tribes. This institution was established in England in 1066 with the invasion of French Normans that brought with them Roman based law, which was adapted and gradually fused with the existing consuetudinary system of the time.

Unlike mainland Europe, where the feudal regime was relatively weak, and the authority of the king was omnipotent, in medieval England, the system of land possession before the Norman invasion reinforced feudalism and made it very powerful. Judges and courts depended on the feudal lord and not on a symbolic central power. With the arrival of the Normans, there was an introduction of a legal structure sustained in laws and codes. Furthermore, there was an attempt to centralize the power (the law is an expression of the central power). Nevertheless, the preeminence of feudal lords forced the Norman kings to exert their power through a Royal Council or *curia regis*, which was a true state branch that acted in representation of a weak monarch.

It is through the Royal Council that the English kings governed and this Council controlled all the government functions (the Council was composed of the most notable feudal lords). This was the beginning of the division of powers concept that sustains the contemporary democratic systems because the government functions were entrusted to the ministers of the court rather than being concentrated in a single person. Also, the legislative function was given to the parliament of the king.

The jurisdictional function was also delegated to three institutions: the Court of King's Bench or the Council of the King to take care of administrative matters; the Court of Common Pleas or Court of the Ordinary Litigations to solve the civil controversies; and the Court of Exchequer, that was instituted as the instance to solve tributary matters. These three judicial institutions constitute the beginning of the management system of justice of England and is the reason why they are known as Courts.

These three courts:

> were extended and multiplied later until completing the present organization of the Judicial Branch of the British Empire, and were originally the ones that turned through their resolutions the uses and rudimentary customs of the feudalism and the primitive tribes Saxons and Normans on the legal norms of all the kingdom, from

where it really developed the body and structure of the Anglo-Saxon right denominated Common Law.[69]

In this context appears Stare Decisis because in a country in which the right was fundamentally consuetudinary, it was necessary to establish a mechanism that offered solidity and predictability in the legal system. Furthermore, it kept the king, his ministers, or the parliament from using their power against what in repeated occasions was considered just or legal.

This can be done through obligatory jurisprudence, which instead of being a decision with limited effects for the involved parts, generates consequences for all society. Stare Decisis is, as it was indicated previously, a shield against the political power besides being a deeply democratic principle.

B. *Definition and Conceptual Frame*

Stare Decisis, or the binding force of the judicial precedent, supposes that once a case has been resolved by means of a sentence, it settles down an antecedent that in principle cannot vary later. The rule mandates that the precedent must be obeyed when a controversy presents identical fact and law matters. Its purpose is to maintain equilibrium in the balance of justice in order to prevent ambiguity every time there is a new interpretation from a judge. It assumes that the balance of justice inclines by the weight of the facts and not by the capricious interpretation of the judge. What is more, "once defined and declared solemnly the law in the concrete case, what before was uncertain and perhaps indifferent, becomes a norm and it is not in the will of a judge to scorn it or to modify it according to his or her personal conceptions."[70] In sum, it aims to offer legal security by means of a predictable legal system.

Stare Decisis has value in itself. It is fundamental for the judicial system. To the extent that the precedents are based on substantiated and reasoned decisions, not only will it marginalize secondary prejudice and damages, it also will develop the law as expression of justice. By definition, the decisions will be different from the policies because decisions generally respond to diverse interests and do not necessarily aim to be fair. In addition, to the extent that the precedents that create Stare Decisis are inspired by previous decisions (ratifying them, distinguishing them or modifying them), the publication for its reasoning creates

69. *Id.*
70. *Id.* at 548.

transparency in the decision-making process, which consolidates legal security.

This doctrine tends to confer great importance to the reasoning of the decision, so it is possible that it will be considered as a law although taken through a dictum or commentary. The decisive part of the sentence is formally the only one that has law rank and that normally is applied only in a particular case.

In the sense that justice must be administered in an equitable way, it is necessary to resolve analogous cases in a similar way. As it was indicated before, Stare Decisis mandates that a judicial decision must follow the previous sentence unless it is distinguished or overruled.

C. *Central Values*

The central values of Stare Decisis are stability, certainty, predictability, consistency, and respect for authority. By definition, precedents generate stability in the legal system and the economy because they confer certainty. Certainty promotes legal stability because the economic actors and civil society as a whole will be able to predict the result of any controversy. The point is to let the parties know what to expect and to compel consistent decisions.

These values are important to the judiciary's role in conflict resolution and, more importantly, in the creation of law. This is what confers the judiciary the category of "power" because its role changes from "last possibility" to a true "last instance" that invests it with moral authority and effective power.

D. *Importance of the Publication of Judgments*

Judicial decisions must be published, because publishing them increases predictability. In fact, even if it no more than recounts the logic of a particular case, publication is beneficial because it shows how the law is applied to different facts. Therefore, the publication of judgments offers certainty by increasing the accumulation of precedents. In effect, the weight of precedent on a point of law makes that point more solid and makes it much more difficult for its interpretation be substituted in a capricious manner. A great number of affirmations of a certain precedent allow lawyers to depend on the stability of a legal doctrine with greater confidence.

Expressed in another way, a court may ignore one inconvenient precedent, but it cannot do so if a dozen exist. Secondly, posterior casuistry helps "confirm" precedent as well as allowing the dark points to be clarified. Thirdly, an increasing accumulation of apparently routine decisions on a particular point of law can suggest to judges, lawyers and

academics that a problem is arising in the market. This can lead to calls for regulatory reform or to settle a controversial precedent. Finally, publication promotes an important institutional objective: to maintain the appearance that justice is being carried out. Publication constitutes a signal to litigants, civil society and the business community that nothing is happening in secret and that the work quality is subject to public scrutiny.

Stare Decisis, as binding precedent or compulsive jurisprudential doctrine, makes publication mandatory. This circumstance results in a quality control mechanism because it allows any conceptual errors to be discussed and corrected later. In effect, binding precedent, as previously indicated, becomes a sort of "law" or "quasi-legislative ruling" normally issued by the judicial community. Unlike the United States or other common law countries, where decisions of the highest courts result from publicized hearings, in Peru, the judgments of the Supreme Court are only known by the parties to a controversy. This is pernicious to the development of the rule of law in general and promotes corruption.

E. *Consistency of Quality*

In this same line of thought, Stare Decisis gives incentives for the superior application of legal reasoning. Today, it has been confirmed that the reasoning behind the decisions in Peru leaves much to be desired, despite efforts to increase the logical reasoning of decisions.

Stare Decisis, or binding Supreme Court precedent, compels judges to maintain the same standard of quality. It helps the effort by elevating the effectiveness of judicial work in general and of decisions individually. This work, obviously, will be supported by continued analysis by the legal community and by society.

F. *Reduction in Litigation*

The precedents generated by Stare Decisis will not be affected by the proliferation of litigation. The performance of judicial administration is affected by the increase in population, the increase in legislation and other legal dispositions, which are promulgated (the tendency towards over-regulation), the situation in which laws are of poor quality and require interpretation, and the considerable increase in commercial transactions and a greater incidence of interpersonal conflicts. All of these factors result in an increase in use of judicial procedures that creates a serious problem for which Stare Decisis offers an effective alternative solution. This is because judges will know in advance how similar cases should be resolved, which will root out litigation that is propelled by the will of the lawyers and not by the parties or the justice of the cause. Finally, Stare

Decisis will resolve growing caseloads with greater rapidity because it will avoid appeals in cases with repetitive legal situations.

G. *Lawyer Behavior and Consequences for Parties*

Once a judicial decision is published, it is supposed to create a citing obligation on the part of lawyers. It is not only inadequate but also unethical for a lawyer to not perform this duty by informing the client of the existence of a precedent binding to the case. A lawyer is obligated to advise his client of the existence of a precedent that affects their interests and of the way he interprets it. This situation has a double effect. On the one hand, it imposes ethical standards on the development of the profession. On the other hand, it compels improvement in the technical level of the profession because it forces constant update and analysis.

When a court or a tribunal initiates the decision-making process and finally issues an opinion, the parties to the action have a reasonable expectation that, faced with similar cases in the future, the court will process them in the same way. Justice does not only mean that a particular case will be solved in a just way, but also that the parties know how similar cases will be decided in the future. This promotes credibility, respect and confidence in the system. Even if a decision or the precedent is considered mistaken or erroneous, the psychological effects are attenuated by the knowledge that other cases will be treated in the same way.

H. *Nonexistence of Stare Decisis*

The advantages of Stare Decisis are theoretical in our country because precedents are irrelevant, and even the review of previous decisions (understood as antecedents or review of judgments) is practically nonexistent. As a result, the effectiveness of the judicial system is decreased considerably. The nonexistence of Stare Decisis generates chaos. It takes away, even from the more experienced lawyers, the ability to predict with any degree of certainty the possible result of litigation. It inevitably elevates the costs of transactions and reduces the legitimacy of the system. There is an "equation of justice" that is expressed in the following way: with greater predictability, less cost and more legitimacy; with lower predictability, greater costs and less legitimacy.

The absence of Stare Decisis generates random and arbitrary results that cause the Superior Courts and the Supreme Court to be overloaded by appeals. Conversely, the publication of the results of binding precedents, that in Peru would be expressed by means of plenary sessions, would allow inferior courts and litigants to have access to precedents that would improve the speed and the quality of the decision-making process. In

addition, potential litigants would know whether it would be worth the trouble to initiate an action and what the possibilities of success would be.

On the other hand, the absence of Stare Decisis and the non-publication of binding precedents affect predictability from two perspectives. In the first place, it relieves the judicial decision of the responsibility to reason and to justify a point of view in an integral way. Secondly, the increase in the number of decisions that take place as a result of the automatization of the administration of justice becomes less important to the formation and consolidation of the law. That is to say, legal stability is brought about not by quantity but by quality.

I. *Antecedents in Peru*

One example of Stare Decisis being implemented in Peru is in the Peruvian Institute of Antitrust and Intellectual Property Defense (Indecopi). In accordance with Article 43 of Legislative Decree 807, the Indecopi Court has the potential to establish binding precedents.[71] The precedents of the Indecopi courtrooms represent the incorporation and adaptation of the Stare Decisis of Anglo-Saxon law into Peruvian reality. In effect, this court has the capacity to adopt interpretative criteria around a norm and this becomes obligatory for the commissions or offices of that institution. Unlike the Anglo-Saxon system, in which all judgments of the higher courts constitute precedent, in Indecopi only those decisions that have explicitly been declared as such have these characteristics. This is an adaptation of the Roman system to the Anglo-Saxon.

The implementation of Stare Decisis has allowed Indecopi to avoid an overload of cases and capricious interpretations. It is possible that the litigants and the academic sector may not share the same opinion of the precedents. Nevertheless, no one doubts the excellent reasoning that characterizes them. Proof of this is that less than 1% of the cases that are aired before the institution appear before the judicial branch in an administrative appeal.

Also, as precedents have been published, and academia has been able to comment on them intensely, which increased the quality of their interpretation and even led to their modification over the course of years. A similar system is seen at the level of the Constitutional Court and the Tax Court. The difference between these courts and those of Indecopi are that their precedents are not specifically declared. Nevertheless, the parties recite and those courts permanently incorporate the rulings of previous

71. Law on the Faculties, Norms and Organization of the INDECOPI, Legislative Decree No. 807, tit. VII, art. 43.

decisions. This has resulted in an important level of predictability within the framework of constitutional and taxation controversies, respectively. However, the decisions of the Tax Court and Indecopi are appealable to the judicial branch, so that the predictability that is generated administratively is diluted because the Peruvian judicial branch does not apply the system of precedents.

A unique characteristic of Peruvian law that has passed unnoticed in spite of the genius of its invention is that Peru is probably one of the few Roman tradition countries in the world that has specifically incorporated the principle of Stare Decisis in its judicial system. The 1991 Code of Civil Procedure contains a rule that incorporates Stare Decisis. This Peruvian law is extremely interesting because it embodies principles and characteristics that have been reviewed elsewhere in this work. Article 400 of the Code allows, when there are questions with respect to the nature of a decision to be made and the court requests, justices to meet in open court to discuss the questions and solve them. The decision that is made by absolute majority of the attendees to the plenary session constitutes judicial doctrine and binds the jurisdictional organs of the State, until modified by another plenary session. If the lawyers made oral argument at the hearing of the case, this will be cited to the plenary session. A plenary session will be mandatory when it is known that another court is interpreting or applying law to a specific issue. The complete text of all the casatorias judgments and the resolutions that decide the issue untriable are published mandatorily in the official newspaper, although they do not establish judicial doctrine. The publication must be done within sixty days of issuance.

Upon reading, one of the branches of the Supreme Court may request what is called a "casatorio" plenary session to solve the controversy. This will be done by a full bench, which means that the complete body of the Supreme Court will participate in the decision. This is considered "judicial doctrine" and becomes binding for this court and all the jurisdictional organs of the state, which means that the decision will be permanent until modified by another casatorio plenary session. Finally, the law mandates that the decisions underlying the precedent are published. This converts them into "quasi-laws."

The legislative adoption of the principle of Stare Decisis is most important for Peruvian Law and judicial stability. However, although the law has been effective for more than a decade, it has never been applied. There has been no "plenary session" held pursuant to the law despite the fact that the instrument had helped significantly with efforts at judicial reform and would require a smaller investment in terms of budget than other reforms.

The decision not to apply Article 400, which in principle could be applied to criminal cases since the law does not say otherwise, can be reversed. Furthermore, this law has been partially proposed as one of the activities approved by the Commission of Magistrates for the Reconstruction of the Judicial Power.[72] Within the framework of the thematic Ceriajus groups, a group has been established that refers to "Predictability and Precedent," which could adopt as a theme the subject of Stare Decisis.[73]

VII. OUR PROPOSAL

Within the framework of the process of judicial branch reform initiated by the presidency of the Supreme Court (National Agreement for Justice) and by the executive branch (Ceriajus), one of the main initiatives that could be taken into consideration consists of generating procedures that promote the predictability of judicial decisions.

There are many reasons why predictability is important for the reform of the administration of justice, such as the credibility of the judicial power, bringing the best lawyers into the judiciary, the fight against corruption, the identification of ways to promote the development of judges, and starting programs to increase computerization.

Judicial reform is not an end into itself. Therefore, it is important to identify an objective that coagulates the diverse efforts within the framework being developed by the National Agreement for Justice and Ceriajus horizontally. For that reason, the search for legal stability as the central objective of reform has connotations at the political, economic, and social levels.

The political and social connotations do not require emphasis. However, as far as economic concerns go, legal stability is not secured only by means of the establishment of "contract laws" or by adding to the constitution certain legal principles that permit the rules of trade to be maintained without fluctuation.

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72. Listing of the thematic work groups, *available at* http://www.pj.gob.pe/noticias/noticias.asp?opcion=detalle&codigo=928.

73. For an analysis of the origins and reaches of Certiorari, see Edward A. Hartnett, *Questioning Certiorari: Some Reflexions Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); John Paul Stevens, *The Life Span of a Judge Made Rule*, 58 N.Y.U. L. REV. 1 (1983); Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four-Or is it Five?*, 36 SUFFOLK U. L. REV. 1 (2002).

Therefore, we plant the working hypothesis that legal stability, within the framework of judicial reform, depends on the predictability of judicial decisions. In the same sense, beginning with the premise that there are limited resources for extensive reform—by definition, a long-term project—its important to associate legal stability and predictability with commercial subjects, or "commercial justice," from the start.

In effect, if judicial decisions in commercial disputes are predictable, it will probably send the message to the national and international community of investors that a stable business climate exists in Peru, which in turn will legitimize the efforts of the judicial power to obtain a more suitable budget. Then, if there is more stability, there will be more domestic and foreign private investment; if there is more investment, there will be more resources for the state treasury; if there are more resources, the judicial power will be able to increase its budget, or in any case, its needs will be legitimized.

It is difficult to determine what constitutes "commercial justice" because civil law and commercial law are incompatible. Commercial subjects are understood as, among others, the laws of securities, specialized mercantile contracting or "modern contracts" (franchising, factoring, know-how, technology transfers), antitrust regulation, intellectual property, public contracting and privatizations, and bankruptcy law.

The urgency for the development of activities in this sphere stems from the need to create a more stable investment climate and to promote competition. The slowness, corruption, and lack of predictability that normally characterize the judicial power constitute an obstacle to the attraction of capital, the promotion of commercial activity, and to economic growth.

This Essay suggests the need to base case law in the principle of Stare Decisis in order to complement and harness any advance in "commercial justice." As it has been indicated, Stare Decisis means that the decisions or judgments of the Supreme Court of Justice—specifically adopted within the framework of the plenary sessions—become binding precedent, therefore, they are immediately to be observed and applied by the diverse hierarchies of judicial administration.

The principle of Stare Decisis is necessarily complemented by the rule of certiorari, which allows the Supreme Court of Justice to select the cases that it considers important to consider. That is to say, by means of the filter of certiorari, the Supreme Court selects the cases to be the object of analysis or, in its case, merit the the summoning of a plenary session that will produce a binding precedent. Nevertheless, certiorari can be implemented later. This is as soon as an important number of precedents

controlling fundamental issues of Peruvian law can be counted that will be, obviously, a secondary effort.

VIII. CONTEXT OF PROPOSAL

The systemization of case law is an indispensable for the success of any initiative intended to reinforce law in general and commercial law in particular. The promotion of trade that would accompany the creation of trade courts will be unattainable if judicial decisions are not predictable. This can only be attained through the systemization of case law.

In effect, systemization will have positive repercussions in all aspects of the judicial reform process, because the training of judges, legal development, computerization, and efforts to promote ethical standards to avoid corruption serve little purpose if the judiciary is allowed to interpret the law in an arbitrary and contradictory way. It is a matter of unifying criteria to make the system predictable and, therefore, to offer legal stability.

The systemization of case law requires work in two specific and closely related areas:

a) The processing and classification of judgments handed down by all judicial bodies, which will allow the users of the system (judges, lawyers and litigants) to know early on the concrete interpretation of the law. This will have to be an ongoing job because it must be updated. It is not a work of chronological counting, but of systemized processing, which may be carried out by the judicial branch, but could also be done by private companies, which would avoid large spending on the task. In most countries of the world, case law is compiled and archived by private companies competitively.
b) The implementation of plenary sessions of the Supreme Court under Article 400 of the Code of Civil Procedure, with the purpose of instituting "binding precedents" that contribute to the unification of lines of interpretation. That is to say, it is a matter of using systems similar to the ones adopted in the United Kingdom or by the Supreme Court of the United States in the principle of Stare Decisis. This would be one of the most important and innovative initiatives of judicial branch reform and would mark a clear departure from previous efforts on an international scale. In effect, a preliminary investigation of the reform projects of the Judicial Power promoted by the World Bank, the Inter-American Development Bank and the American Agency for International Development (USAID) on a world-wide scale reveals that the subject of Stare Decisis has not been considered.

The implementation of Stare Decisis would make the judicial power of Peru a member of the select group of countries (all of them developed) for which binding precedent is a fundamental part of a legal system that consists of laws adopted by the legislature and decrees and actions of the executive that are interpreted in an obligatory way by the judiciary. This is what is known as the "balance of powers" and it has allowed the judicial power in developed countries to have relevance and importance as well as prestige and independence.

IX. PROPOSAL JUSTIFICATION

The success of judicial systemization has a positive impact that is not limited solely to one concrete aspect of the reform of justice but reverberates throughout its themes.

A. *Speed of the Administration of Justice*

Case law, in that it establishes uniform criteria of interpretation, not only will increase predictability, but will become a disincentive for the filing of complaints with a low probability of success. Nowadays, the possibility of success generates over-expectations. With a system of precedents, however, it is supposed that only those demands will appear that have a reasonable possibility of success. This will precipitate a decrease in the load of litigation because the judges will have fewer cases to decide.

In the same way, the creation of criteria for uniform interpretation will alleviate the work of judicial decision-making because it will be enough to identify the line of case law that was followed in similar cases so it will not be necessary to discuss larger questions of law.

A faster delivery of justice guarantees that the judicial branch in general, and commercial justice individually, do not become repositories of wasted capital expenditures. Also, it offers businesspeople the security that conflicts within the system will be resolved in a brief and reasonable time.

B. *Control of Corruption*

The level of confidence in a certain market depends on its actors' belief that they compete under equal conditions. For that reason, the presence of institutional corruption generates distrust in the investors and reduces economic growth. As such, it is important that the judicial branch become the leading institution in offering a transparent image. It should level the

playing field by making sure that no actor is favored arbitrarily by state organizations.

Nevertheless, at the present time, judges enjoy absolute discretion to interpret the meaning of the law. It allows them to conceal cases of corruption easily. Also, this situation frustrates the establishment of objective standards that would expose cases in which a court does not adhere to the law. Binding precedents can be seen as objective criteria that determine when a magistrate departs from the correct interpretation of the law, making control of corruption simpler. That is to say, the system of precedents becomes the anticorruption mechanism *ex ante* by antonomasia.

The existence of clear lines of case law also serves as a means of reduction of corruption in those cases where it arises from private initiatives. The reason is similar to the previous one: in a system of binding precedents that reduce the scope of the judge's discretion, individuals will find less opportunities to corrupt judicial civil employees.

C. *Increase of Institutional Credibility*

The existence of clear lines of case law would generate greater confidence in the judicial system and portray an image of transparency and impartiality, fundamental for the legitimacy of its decisions. Thus, institutional credibility is increased as well as the level of public confidence in the magistrates.

In addition, the existence of binding precedent would succeed in eliminating the existence of contradictory judgments. This is particularly important because their presence can mean a high political cost to judicial institutions.

Currently, the public's unfavorable perception of the judicial power prevents it from attracting top professionals. The increase of institutional credibility would create the incentives necessary to attract experts of a considerably higher level of education as civil employees that would increase the quality of judgments and the service offered by the judicial branch in general.

The increase of the judicial branch's credibility would translate into an increase in the country's political stability. This, in turn, would attract domestic and foreign investment because political instability is one of the main factors contributing to Peru's risk indicators.

Any measure that is adopted in the process of judicial reform, including the creation of commercial courts, would be considerably strengthened if mechanisms to legitimize the institution before society are achieved jointly.

D. *Clear Rules and Promotion of Private Investment*

By offering civil society clear and definitive criteria on how to interpret law in specific cases; predictability would be generated in judges' decisions. In turn, this will generate legal stability, which has positive effects on the attraction of private investment in the country.

If the judicial power develops a policy of unification of case law, especially in those areas in which greater interpretative differences exist, the predictable application of a legal rule to an individual situation will generate greater certainty among the users of the legal system and among investors who could potentially use it.

Clearer legal rules would bring as a natural corollary the promotion of domestic and foreign private investment, because the investor would have a better capacity to measure risk. Greater levels of investment, in turn, will be followed by an increase in employment levels, in the possibilities for economic agents to develop bigger projects, and an increase in the taxpaying capacity of businesses and individuals.

X. PROPOSAL IMPLEMENTATION

The initiative consists of implementing mechanisms that allow the unification of precedential threads and give predictability to judicial solutions. The aim of these mechanisms is to create a more diligent process, diminishing the indices of corruption, increasing institutional credibility and generating clear rules to promote private investment. Thus, the goals pursued by the creation of commercial justice will be reinforced and strengthened.

In this analysis, the system of certiorari should definitely be included, because it allows the judicial branch to "select" those cases which it considers important to make a statement and to establish a precedent. Certiorari is the mechanism used by the Supreme Court to "select" those cases that, due to their importance or impact on society, require an explicit and unequivocal decision. In sum, the Supreme Court chooses certain exemplary cases in order to establish a precedent that will have to be followed by inferior courts. Certiorari and Stare Decisis are complementary because the first allows the selection of the cases that will be the objects of the second. Nevertheless, certiorari should be implemented in the second part of the reform, as soon as there is a body of binding precedent in the sphere of the plenary sessions that have resolved the most common legal controversies. Suggested are these activities, in this order:

A. *Functional Operating Study of the Peruvian Legal System*

Beforehand, a report on the economic consequences of the current legal system. In this way, the currently existing incentives of the justice system in our country and those that would arise upon the implementation of Stare Decisis in our country would be described. In addition, the manner in which this institution has been historically developed in third-world countries would be exposed. Finally, the impact that the systemization of justice would have on the diverse parts of judicial reform could be explained, with a particular emphasis on commercial justice.

B. *Operating Study of the Rule of Certiorari*

A report on the characteristics of the certiorari rule would be conducted. The study would explain how the rule has been developed historically in the United States, with particular emphasis on the argument of the reduction of judicial case loads and on the rule's link to Stare Decisis.

C. *Study on the Use of Case Law by the Operators of the Legal System*

This would establish to what extent judges and counsel invoke or use case law as a means to permit them to determine the most suitable interpretation of the law for a certain case. It would also determine the possible sources available in Peru to inform oneself on points of case law. Finally, the level of importance of case law to legal education would be discerned.

D. *Study on the Predictability of Existing Case Law Criteria for Commercial Matters*

The existence of contradictions in the different lines of case law in the most relevant areas (especially in commercial law) would be verified (as far as empirically possible). Also, the commercial cases where existing case law results in less predictability would be established. Finally, it would be determined which of these areas creates a greater case load. With this information, a work agenda for the jurisdictional plenary sessions could be formed.

E. *Elaboration of Rules for the Adoption of Binding Precedents*

Regulations would be created that would serve as a framework to determine the procedure to follow whenever the Supreme Court decides to convene a plenary session. These regulations would create incentives for the Supreme Court judges to systematically implement the adoption of

binding precedents. The regulation would include elements of certiorari with the goal of establishing a means of "selecting" cases.

F. *Pilot Plan for Establishing the First Binding Precedents*

It would be important to advise the members of the Supreme Court in two areas. The first is putting into practice the system of plenary sessions. The second is the selection of the first binding precedents, assisting the magistrates in the preparation of corresponding judgments. This is fundamental because the credibility of the system depends on the high standard for the decisions.

G. *Creation of a System of Publication of Precedent*

The success of this system depends on the judges from lower courts and the users of the judicial system having knowledge of each new binding precedent. For that reason, inexpensive and efficient mechanisms to disclose and to publish the precedents adopted in plenary sessions should be established.

H. *Constitutional Reform*

One alternative that could be considered consists of promoting a constitutional reform that has as its object to incorporate the principle of Stare Decisis in our Magna Carta. It would allow us to, at the outset, offer the highest class of judiciary, as well as avoiding the possibility that the principle could be eliminated by means of a simple modification of law. Also, it would encourage the Supreme Court to go through with the plenary sessions, which, as it has been indicated, have been avoided, even though Article 400 of the Code of Civil Procedure has been effective for more than a decade.