PRECEDENT AND CIVIL LAW: A ROAD AHEAD. REFLECTIONS ON THE WORKS OF FLAVIA CARBONELL AND RODRIGO CAMARENA *

*PRECEDENTE Y CIVIL LAW: UN CAMINO POR RECORRER. REFLEXIONES SOBRE EL PRECEDENTE A PARTIR DE LOS TRABAJOS DE FLAVIA CARBONELL Y RODRIGO CAMARENA**

Marina Gascón Abellán**

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Abstract:

This paper is the result of the analysis and discussion that took place at the Problema. Anuario de filosofía y teoría del derecho seminar entitled "The Construction of Precedent in Civil Law: Debates, Concepts and Challenges." At this event, Flavia Carbonell and Rodrigo Camarena delivered a concise presentation on precedent in their respective countries (Chile and Mexico), addressing issues of a regulatory, practical, theoretical and conceptual nature. Having witnessed both their arguments with keen interest and inspired by their presentations, I offer my points of view on the most important and prominent aspects of their contributions.

Keywords:

Judicial Precedent, Chile, Mexico, Project Precedent, Common Law.

Resumen:

El presente trabajo es producto del análisis y discusión que se llevaron a cabo en el seminario de la revista Problema. Anuario de Filosofía y Teoría del Derecho *intitulado: "La construcción del precedente en el civil law. Debates, conceptos y desafíos". En dicho encuentro, Flavia Carbonell y Rodrigo Camarena intervinieron con una exposición concisa respecto al precedente en cada uno de sus respectivos países (Chile y México), que a la vez abordan problemas de tipo normativo, práctico, teórico y conceptual. Con gran interés fui testigo de los argumentos de ambos, y motivada por sus ponencias, presento mis puntos de vista respecto a los rubros más importantes y relevantes en torno a sus contribuciones.*

Palabras clave:

Precedente judicial, Chile, México, proyecto precedente, common law.

CONTENT: I. *The Importance of Precedent Studies*. II. *Chile and Mexico, for Example: What the Works of Flavia Carbonell and Rodrigo Camarena Show us About the Importance of a "Precedent Project"*. III. *References*.

I. THE IMPORTANCE OF PRECEDENT STUDIES

Following precedents (or case law, which I shall not differentiate here)[1] has classically been seen as one of the distinguishing features between common law and civil law systems. While in the former —so they say— judges are bound by precedent (acting according to the principle of *stare decisis*), in civil law systems, judges are bound by the inherent role of the law and case law, —a merely "complementary" value of the system, to use the words of the Spanish Civil Code, (insisting that case law "is not a source" of law). However, things are not exactly like that. Such a strict distinction between the two legal cultures in relation to the value of precedent is simply not appropriate if it ever was. In common law systems, the written law has a particularly importantplace where more and more areas of law are being codified;[2] and yet it cannot be stated that case law (or precedent) has no value in civil law systems.

This last aspect is the important one for us. Whether it is considered a source of law or not, in our legal systems judges constantly resort to case law (or precedent), especially in the Supreme Court.[3] They make their decisions by "referring to" what other judges have said about similar issues. Along with interpretive or theoretical arguments, precedents form some of the *reasons to decide* a case.[4] They act as a *topos,* to first guide the interpretation of the rule, and later, to form the rationale as to the correctness of the decision. Therefore, although our systems may not be *stare decisis*, there is no doubt that precedent contains a *persuasive* value, acting as a kind of *soft law*. When there is a more or less consolidated uniform doctrine on an issue, courts are expected to adopt their decisions accordingly. And the stronger the consolidation and uniformity of that doctrine, the greater its persuasive force.[5] In short, precedent (or case law) is used as a resource in the process of searching for the best reasons for a decision. Hence, a decisive factor in its interpretation and application is whether or not it is a "source" of law.

In fact, something is changing in civil law legal culture. On the one hand, there is now a marked tendency to establish *institutional mechanisms* to turn courts of cassation into courts of precedent, i.e., courts whose main function is not only (or not mainly) nomophilia, but also (or above all) to establish guidelines for deciding future cases.[6] Although it may sound like an exaggeration in some of our legal systems, we are witnessing a progressive construction of a system of case law precedents and, as a consequence, we are living in a strange "transition" period where —if I may use the expression— the "*legal* practice of precedent" (reiterated and abstract legal theory in the courts) coexists with the classic concept of precedent typical in common law (the rationale for deciding the case as opposed to the *obiter dicta*). On the other hand, *interest in the study of precedent* has also increased a great deal, both in procedural and

legal theory.[7] It seems to me that both phenomena are driven by the same reason: the well-founded conviction that a system of precedents guarantees better values within the system, such as legal certainty and equality. And I say "well-founded" conviction because this is so. To the extent that following precedents implies the reiteration (and therefore the consolidation) of the same reasons for deciding, when it contributes to *enhancing the uniformity of law* through the coherence of judicial decisions, it is evident that a greater uniformity in the interpretation of the law will guarantee improved legal certainty and equality. This is clear. The existence of a range of interpretative solutions makes it hard to foresee (and to some extent, prevents) the judicial response that a case might probably receive; and of course, it also thwarts the goal of equality in the law since there is no point in proclaiming equality if the courts, by virtue of their interpretative freedom, then provide different responses.

The initiative that Sandra Gómora, Álvaro Núñez and I are now presenting goes precisely in that direction: that of promoting amongst us the study of precedent, bringing to the table numerous issues of a normative, practical, theoretical and conceptual nature that need to be addressed. The magnificent work that Rodrigo Camarena, Flavia Carbonell, Fabio Pulido and Silvia Zorzetto have so generously provided to accompany the "kick-off" of this project are a good example of the importance of the discussion on these issues. I would like to acknowledge and congratulate all of them, although for purely organizational reasons, I will only make a few brief comments on the work of the first two.

II. Chile and Mexico for Example: What the Work of Flavia Carbonell and Rodrigo Camarena Show Us About the Importance of a "Precedent Project"

A. What happens when different chambers of the same court subscribe to different legal theories or interpretative criteria? (Carbonell's question)

In her excellent study *Variaciones sobre el precedente judicial: una mirada desde el sistema jurídico chileno,* [Variations on Judicial Precedent: From the perspective of the Chilean legal system], Flavia Carbonell presents us with a remarkably interesting case which constitutes an opportunity and an incentive to reflect on various aspects of precedent. Although any simplification is detracting, the essential aspects of the case may be summarized as follows:

1) *For a long time in Chile*, *an extremely important issue* (the prescriptibility[8] of civil suits claiming compensation for moral damages suffered by those who disappeared or were tortured by agents of the State during the military dictatorship) *was under discussion in two different chambers of the Supreme Court, the Civil Chamber and the Criminal Chamber,* (the cases reached the Court through two channels: through a civil cassation appeal, or through a criminal cassation appeal when the civil suit took place within a criminal proceeding) *while subscribing to differing legal principles* (the Civil Chamber upheld the opinion of prescriptibility, and the Criminal Chamber that of imprescriptibility, based on the imprescriptibility for crimes against humanity).

2) In 2013 (in the case "González Galeno v. Chilean Tax Authorities"), by virtue of Art. 780 CPC, the Supreme Court Plenary returned a verdict of 9 to 7 votes to *combine case law and assume the Civil Chamber criterion*.

3) A few months later, after the ruling of the Plenary, the *Criminal Chamber ignored it and continued to uphold its own legal case law of the imprescriptibility of the action,* so the disparity between legal principles within the Supreme Court persisted.

Carbonell uses this case to illustrate the questions and doubts concerning the "rule of self-precedent" and "binding precedent," since, in addition to being important because of the practical problem it represents, it is most interesting from a theoretical perspective.

The essence of the theoretical issue raised by the Chilean case is summarized as follows. Self-precedent, understood as a rule of rational argumentation obliging judicial bodies to decide on cases in accordance with a universalizable criterion, implies that every judicial body (every decision-maker) must respect its own precedent (i.e., it must always rule according to that criterion) unless, when appropriate, disregarding it is adequately justified; specifically, when it is understood that the previous criterion is not correct or is less correct than the current one. What happens when different chambers within the same court hold varying legal theories or decision-making criteria, to whom does the rule of self-precedent apply in such a case? Should it be understood that these chambers are *independent judicial bodies*, and that therefore the rule applies to each of them individually? Or, on the contrary, should it be understood that these chambers are simply *parts of a single court*, and that therefore the rule of self-precedent binds all the chambers within that court?

The first option (*each chamber, an independent body*) implies that different chambers may subscribe to different legal theories on the same issue; i.e., it admits that within the same court, contradictory legal theories may validly coexist. This is a misunderstanding not well accepted by most people, as it derails our logical expectations of the uniform application of the law, at least within the same court. The second option (*the judicial body is the court, composed of all its chambers*) is much more satisfactory for our expectations of the uniform application of the law, but requires articulating regulatory mechanisms to avoid discrepancies of criteria among the different chambers of the court or —if they have already occurred— correct them by setting the criterion or the "0ne-right legal theory"[9]. That is not to say, the *epistemically or philosophically one-right legal theory* since this issue depends on the interpretation of the theory handled, but the *institutionally one-right* one because there is a judicial rule that has granted it this status. Naturally, this option is desirable to maintain legal certainty and equality.

It seems to me that the Chilean case might be interpreted as reflecting this second option(*the judicial body is the court, composed of all its chambers)* since it is understood that Article 780 of the CPC establishes this "institutional mechanism" to standardize the case law of the chambers[10] and by virtue of that, the Plenary ruled and established the one-right case law opinion. This happens to coincide with that adopted by the Civil Chamber, where civil suit for compensation for moral damages is subject to prescriptibility. But the anomaly of the situation is that the Second Chamber continued to subscribe to its case law interpretation(differing from the one set as "one-right" by the Plenary), thereby showing that

its response is to be understood as a manifestation of the first option: *each chamber, an independent body.*

Flavia Carbonell seems to suggest that the Criminal Chamber's "fractious" attitude could be explained because, besides the aforementioned Article 780 CPC, "there are no additional rules that establish a mandatory binding of the Chambers to the *ratio decidendi* of the Plenary Court decision", and therefore, in the absence of such obligation, the Criminal Chamber did what it was supposed to do: respect its own precedent. However, it seems that things are not completely clear. On the one hand, because I find it a stretch to interpret that the Criminal Chamber's determination to maintain its previous criterion is entirely due to the lack of an express rule of *stare decisis*; and even less to its conviction of being an independent judicial body obliged to act according to rationality-universality criteria (and therefore follow its own precedent criterion before aligning with the Plenary Court criterion). On the other hand, things may also be seen from a different perspective.

The Plenary, in effect, responded that it is because there is a rule in the system granting them this competence when there is contradictory case law. But then it is worth asking: if we accept that this mechanism (of case law unification) cannot be understood as a rule of *stare decisis* binding the different chambers to the "one-right answer" established by the Plenary, in what sense should it be understood if it cannot be interpreted as a constitutive rule granting competence to the Plenary to establish a binding precedent?[11] Why was this mechanism introduced? For nothing? What should be the scope given to this Plenary decision? None? In my opinion it is clear that the mechanism of Art. 780 CPC could also be understood, without undue effort, as a rule of *stare decisis*, so that the decision of the Plenary should be the "one-right answer" for the case. And once this "one-right answer" has been established by the Plenary, there is no longer any reason for the chambers to appeal for self-precedent due to one simple reason: self-precedent is in essence a rule of rational argumentation that applies (only) when the correct solution does not exist. But when the correct solution exists (as in this case),[12] the different chambers should simply apply that solution.

Be that as it may, the case is magnificently presented by Carbonell because, in addition to the crucial problem it directly raises, it invites us to reflect on some important issues. For example, it invites us to ask ourselves what level of protection we want for the values that self-precedent and vertical precedent promote. Or what regulatory changes should be undertaken to better achieve these objectives. I agree with the author on the first of them, to redefine the functions of the Court of Cassation (Taruffo has clearly denounced this: a Court of Cassation with thousands of cases a year to decide can hardly become a Court of precedents) or to divide the Court into chambers specializing in different matters. It even pushes us to reflect on how collegiate decisions should be adopted to generate a binding precedent (for example, whether a qualified majority should decide). Or, —in relation to the latter— on the binding force that can be attributed to precedents issued by divided chambers, especially when the dissenting vote enjoys a solid enjoys solid argumentation. And naturally, the case also invites reflection on some crucial issues to establish a system of precedents: in particular, the meaning and scope

of “judicial independence”, usually argued against establishing binding precedent mechanisms, or at the risk of system of binding precedents that turns Supreme Courts into “legislative or “quasi-legislative” bodies; and of course, the very concept of precedent itself.[13]

Precisely regarding this last very important issue (the concept of precedent), I find Rodrigo Camarena's work *La ratio decidendi a través de ojos mexicanos,* (*Ratio decidendi* from a Mexican perspective)also published in this issue, very thought-provoking.

B. What is understood by ratio decidendi? (Camarena's question)

Camarena addresses one of the core issues for a system of precedents to work: that of defining *ratio decidendi* (what constitutes a precedent). His analysis is based on a reform to the Mexican Constitution carried out in 2021, to evolve towards a system of precedent, and his objective is to identify the different concepts of the “reasons” for Supreme Court rulings that will now be binding “for all jurisdictional authorities”.[14] It seems important for me to point out that this theoretical exercise is particularly necessary in a case such as Mexico's, a system reflecting the paradigm of the “transitional” situation to which I referred at the beginning. Consequently, it poses the need to make a system of precedents effective (which requires identifying the *ratio decidendi* of the decisions) quite different from the entrenched “doctrinal” practice framework (that of case law “*tesis”*: abstract statements identified, in this case, by the court itself when deciding a case). Apart from the Mexican case, this is an important theoretical exercise since most Latin American legal systems are in a similar “transitional” situation, although not all to the same extent.

Camarena’s theoretical exercise is of considerable practical significance. The fundamental problem faced by judges and lawyers in “following precedent” means identifying the *ratio decidendi*. But identifying it clearly requires two prior tasks. The first (of a theoretical or conceptual nature) consists of providing a definition of *ratio decidendi*: what is meant by *ratio decidendi* and how these “reasons” should be understood? The second (of a practical nature) consists of the court setting the precedent do so in a clear, meticulous and precise way so that it can be easily identified by subsequent judges. This second issue is by no means trivial, for if subsequent judges cannot clearly identify the “reasons” that constitute the precedent, it will be overly complex to implement it extensively and uniformly. Therefore, no matter how much we refine the concept of precedent theoretically and no matter how many reforms we make to turn our change our courts of cassation into courts of precedent, without the proper communication of those "reasons" by the precedent-setting court, the goal of unifying the law by way of precedent cannot be achieved.[15]

Rodrigo Camarena has done an excellent job on the first issue, the conceptual issue, summarized in the question: what are the “reasons” that constitute precedent? He provides us with four different ways to shape or understand those reasons, comparable in reality to four different ways the Court can “create” laws:

a) The *judicial legislation* model (Alexander), which conceives the reasons as canonical rules formulated with clarity and precision, so that they truly constrain and may not be discarded by a simple exception or *distinguishing*.

b) The *implicit rules* model (Goodhart), which sees reasons as the rules that can be inferred from relevant facts of the judgment, regardless of the explicit rule formulated by the court or the argumentation used (which may be fallacious, politically undesirable or morally scandalous), and which naturally allows *distinguishing*.

c) The model of the *moral-policy justification* of decisions taken (MacCormick), which, besides the facts of the case and their consequences, understands "reasons" as statements indistinguishable from those justifications. This model, says the author, coincides with a post-positivist standpoint which includes principles as the justification for any rule.

d) And the *social category* model of Levenbook), in which the Court makes its decisions by organizing the world on the basis of shared categories or beliefs whose meaning and validity do not correspond exclusively to the judiciary, but to the entire community; i.e., the meaning of precedents "is governed by society". Thus, precedents will not take root if the Court attempts to establish a precedent with categories rejected by the community *ratio*. "If, on the other hand, it uses strongly internalized or otherwise latent social categories, the precedent is more likely to consolidate itself and become binding".

In principle, the author presents the four concepts as "possible", without any clear preference for one or the other. Rather, he presents them as "shifting and sometimes overlapping ideas depending on the interpretative context in which the Court sets the precedent". Thus, in some cases it may be justified to issue rules according to the judicial legislation model; in other cases, it may be advisable to leave the implicit rule; in cases of analogy or differentiation or in cases of overturning a precedent, the model of moral-policy justifications will always be present; and the social categories model would allow it to account for cases where there is a discrepancy between legal and social concepts.

Although all models are equally valid at the explanatory level (insofar as they allow for different scenarios in the Court's creation of precedent), it is clear that each one has advantages and disadvantages in certain situations or state of affairs considered significant. Hence, they are not all on the same level from a regulatory or prescriptive point of view. The first model, *judicial legislation*, has the advantage of precision as it conceives reasons as canonical rules indicating what should be done and followed precisely. Yes, but it evokes the danger of "governance by judges", representing one of the classical objections to be faced in any attempt to create a system of precedents. The second model, *implicit rules*, where precedents are conceived as rules "inferred" by the judgment issued by the corresponding judges, seems to be more respectful of judicial independence and of establishing precedents as a collective process. The third model, *moral-policy justification* in decisions made, understands precedents as parts of a coherent system of principles that evolves over time, while also posing the risk of introducing ideology into the law. This is also to some extent, a risk of "governance by judges". And the fourth model, *social categories,* also seems to be more respectful of judicial independence and the collective process in the construction of precedent as it allows rules to be overturned by virtue of shifting social categories, but it is at the cost of legal certainty.

The theoretical reconstruction of the different ways of conceiving reasons that Camarena shows us is important because, besides allowing us to explain the diverse ways of formulating

precedents, it permits us to clearly visualize which ones are more suited to achieve objectives we consider valuable. For example, if we think a system of precedents should ensure the clear identification of precedents in order to ensure their general implementation and thus a uniform application of the law, I believe this theoretical reconstruction points to *judicial legislation* as the most appropriate model. However, we should shy away from this model if the main value pursued is to prevent the court creating precedent from becoming a mini-legislator. In short, depending on what we prioritize (improving the identification of precedents to make the system work, or avoiding the "legislation" of a precedent-setting court), the models of "reasons" Camarena presents are a good tool to guide the choice of one system or another. In any case, these are matters worthy of further thought and discussion.

Because this is indeed the purpose of the project we started -to continue reflecting, sharing and discussing. The magnificent works of Flavia Carbonell and Rodrigo Camarena (as well as those of Silvia Zorzetto and Fabio Pulido) show us that we have some way to go in the transition towards systematic precedents.

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Notes

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** Researcher attached to the University of Castilla-La Mancha, mail: marina.gascon@uclm.es ORCID: https://orcid.org/0000-0002-3984-1806.

1 Naturally, I am not blind to the fact that it is very common to differentiate between precedent and case law. This is, significantly, the case of Taruffo, although of course he is not the only one (Michele Taruffo, pp. 2007, 87 ff.). However, it seems to me that what this author reflects by insisting on this distinction is a criticism of the *modus operandi* of case law in civil law systems, a *modus operandi* of a chaotic network of abstract and partial interpretations of the law making it difficult for it to fulfill its role of standardizing the law, i.e., to create a genuine system of precedents. I could not agree more with him in this criticism. But in my opinion, there is no reason not to use both concepts equally (at least conceptually). I will be taking precedent or case law here to mean the legal theory applied in one or more judgments which specify the scope or interpretation of the law in the specific circumstances of the case; i.e., that which expresses the *legal reason* according to which the case has been resolved and which would therefore constitute guidelines for deciding on future cases: the *law pertinent to the case*.

This latter is what is important. What we call precedent or case law is part of the legal reasons for a decision. What is important is that these reasons are always presented as a criterion or rule that can *potentially be generalized or universalized*, especially when the decision comes from a high court. The way it to decide is determined because the same decision would have to be made in a substantially similar case, and thus with the intention of projecting this decision-making rule into the future (Sandra Gómora-Juárez, 2018, p. 229) coincides with this appreciation.

2 This observation is already commonplace. *Cfr.* for example, Michele Taruffo (2007, p. 85).

3 “Neither judges nor lawyers -says Nieto (2001/2002, 106)- handle the laws in absolutes, but rather with additions and interpretations incorporated by the Supreme Court... The various editions and collections of laws are all the more appreciated, the richer the case law annotations that accompany them. Their psychological and practical value is, therefore, much greater than that which the civil code seems to suggest”.

4 It is precisely for this reason current approaches study precedent in the discourse of legal reasoning. Such is the case of Leonor Moral (2002) whose approach I find accurate as it departs from the traditional, but sterile, analysis of the theory of sources of law.

5 In effect, the way the role of cassation has evolved, it can now be said that what matters most in their decisions is not so much to safeguard the law in a decision of a specific dispute (nomophylactic function) as its ability create a standard for ruling on future cases. In short, it is now assumed that the central mission of a Supreme Court is above all to advance the proper and uniform interpretation of the law: to serve as a *court of precedents*. It is not, therefore, that the role of safeguarding the law in specific disputes has failed, but that there is a clear tendency to give priority to the public duty of “unifying the law by means of its proper interpretation based on the decision of the cases presented”, Mitidiero (2016, p. 107). Cfr. also Vecina (2003: 30 ss.) and Michele Taruffo (2001, pp. 96 y ss.)

6 The persuasiveness of a court's precedent may be due, obviously, to the quality and strength of the argumentation it contains, but also to the institutional position of that court in the system of judicial organization and the powers or functions it entails. That is to say, case law may be persuasive for *rational* (argumentative) and/or *authoritative* (court) reasons. Cf. Leonor Moral, 2002: Chap. III; and Bustamante, 2016.

7 “The higher the level of uniformity in past precedents, the greater the persuasive force of case law” (Vicy Fon and Francesco Parisi, 2006, p. 519), I will not even attempt to make a list of legal theory and other theoretical studies on these issues because it would be exceedingly long, but it must be said that very valuable studies have been made and are still being made on the matter, in practically all Latin American countries.

8 Legal concept referred to the period of time set by the law to exercise a right, after which the possibility to take legal action to enjoy the specific right is extinguished.

9 I have argued this point in Marina Gascón 2011 and 2016.

10 Article 780 of the Civil Procedure Code, as the author recalls, refers to the power of the parties to request the merits of an appeal to be “heard and resolved by the full court” (generally it is heard in chambers), based “on the fact that the Supreme Court, in various rulings, has upheld different interpretations of the legal aspect of the subject of the appeal”

11 Álvaro Núñez and Beatriz Arriagada have magnificently developed an in-depth theory, in which they hold that an existing binding precedent system requires the existence of constitutive norms (Cf. for example, Álvaro Núñez, 2021; and María Beatriz Arriagada, 2021).

12 I insist on this - an *institutionally* correct solution, not an *epistemically* correct one, which is an entirely different matter.

13 The work of Beatriz Arriagada and Álvaro Núñez that I have just mentioned already show seminal theoretical developments on this point.

14 CPEUM, (Political Constitution of Mexico) Art. 94: The reasons that justify the decisions contained in the sentences issued by the Plenary of the Supreme Court of Justice of the Nation by a majority of eight votes, and by the Chambers, by a majority of four votes, shall be binding for all jurisdictional authorities of the Federation and federal entities

15 I have given much thought to this point and insisted on it in Marina Gascón, 2016.
