CONUNDRUM OF HORIZONTAL *STARE DECISIS* IN INDIA AND US SUPREME COURT: ANALYSIS OF *JARNAIL SINGH* V. *LACHHMI NARAIN GUPTA*

ABSTRACT

The doctrine of horizontal *stare decisis*, according to which a co-ordinate bench is bound by the decisions of another co-ordinate bench of the same court, has been applied quite inconsistently by the Supreme Court. In a recent judgement of *Jarnail Singh v. Lachhmi Narain Gupta*, a five-judge bench of the Supreme Court has impliedly overruled the authority on horizontal *stare decisis*. This has affected the basic tenet of law: law must be certain. This also hampers the functioning of subordinate courts and the High Courts as there exists uncertainty on law declared by the Supreme Court under Article 141 of the Constitution. By means of case-analysis, I suggest two possible solution to this problem: the Supreme Court should authoritatively settle the law or follow the model of Supreme Court of the United States and do away with the doctrine of horizontal *stare decisis*.

INTRODUCTION

The judgement of the Supreme Court in *Jarnail Singh v. Lachhmi Narain (Jarnail Singh*),[1] which allowed the State to provide reservation in promotions for Scheduled Castes (SCs) and Scheduled Tribes (STs) without collecting quantifiable data, was widely celebrated by some and criticized by others. Most of the analysis of the judgement, however, tends to focus on reservation in promotion and application of creamy layer to SCs and STs. In this paper, by restructuring the debate to questions significant to doctrine of horizontal *stare decisis*, I argue that this doctrine has been violated quite often by the Supreme Court itself and its binding value has been questioned and eroded.[2] So, I will argue that the Supreme Court should authoritatively settle the law: either uphold the doctrine of horizontal *stare decisis* through a judgement

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[1] (2018) 10 SCC 396.

[2] There are several other 5-judge bench judgements which have eroded the law on horizontal *stare decisis* but Jarnail Singh being a clear and stark case of such exercise, it has been chosen for analysis. For judgements which have eroded horizontal *stare decisis*, see Joseph Shine v. Union of India. Justice R.F. Nariman has overruled a co-ordinate bench judgement of Yusuf Abdul Aziz v. State of Bombay; Raja Ram Pal v. Speaker, Lok Sabha, (2007) 3 SCC 184 overruled a co-ordinate bench judgement of P.V. Narasimha Rao v. State, (1998) 4 SCC 626.

of bench with quorum more than five or follow the model of the Supreme Court of the United States and do away with the doctrine. I shall begin by highlighting the background of conundrum of the horizontal *stare decisis* **(I)**. I will then go on to discuss why precedent holds importance. I shall also highlight advantages and disadvantages of having *stare decisis* in the legal system **(II).** This analysis of *stare decisis* shall then be extended to horizontal *stare decisis*. Finally, I will conclude by drawing comparison with the Supreme Court of the United States (SCOTUS) to suggest methods of resolving the said conundrum **(III)**.

I: BACKGROUND OF THE CONUNDRUM

Stare decisis is manifested in our legal system in two forms: vertical *stare decisis* and horizontal *stare decisis*. For the purposes of this paper, the focus is on horizontal *stare decisis* and hence elaborate discussion on vertical *stare decisis* will not follow. Vertical *stare decisis* maintains that a bench of lesser quorum is bound to follow judgement of higher quorum. Horizontal *stare decisis* maintains that a co-ordinate bench cannot overrule a decision of another co-ordinate bench – coordinate benches bind each other. In case a co-ordinate bench is not inclined to follow decision of another co-ordinate bench, all it can do is doubt the correctness of the previous bench's judgement and it has to refer to a bench of higher quorum for overruling the said judgement. It is open only to a bench of larger quorum to overrule cases and co-ordinate bench cannot per se overrule another co-ordinate bench's judgement. This principle was established by the Supreme Court in Central Board of *Dawoodi Bohra Community v. State of Maharashtra (Dawoodi Bohra*).[3] According to *Dawoodi Bohra*,

"*it will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon a matter may be paced for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted*".[4]

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[3] (2005) 2 SCC 673. ["Dawoodi Bohra"]
[4] Dawoodi Bohra (n 3) ¶12, 683.

The practice of the Supreme Court overruling judgements of co-ordinate benches is not new.[5] However, in all these cases it could be very well be argued that these judgements being delivered by benches of lower quorum were per incuriam of *Dawoodi Bohra* which establishes law relating to horizontal *stare decisis*. *Jarnail Singh*, a five-judge bench, has overruled *M. Nagaraj v. Union of India*[6] which is a judgement rendered by a bench co-ordinate to *Jarnail Singh*. In *Rashmi Metaliks Ltd. v. Metropolitan Development Authority*[7], it was held by the Supreme Court that the correct approach is to cite that one judgement as precedent, which holds the field firmly, i.e. a precedent that has been followed without fail. *Dawoodi Bohra*, however, lacks this characteristic of precedent as *Jarnail Singh* has impliedly overruled *Dawoodi Bohra* by virtue of *Jarnail Singh* being of same strength as *Dawoodi Bohra* yet it has not followed law laid down by *Dawoodi Bohra*. This is quite significant because *Dawoodi Bohra* which is the basis for horizontal *stare decisis* in India is now no more a good law.[8] After *Jarnail Singh*, co-ordinate benches are left at their wisdom (and also confusion) to follow horizontal *stare decisis* and make a reference to a larger bench in case of disagreement or simply go on to hold that it is open to them to overrule previous judgements of co-ordinate benches. This situation raises significant questions of law which will be addressed in the next section.

II. *STARE DECISIS*: ITS SIGNIFICANCE IN A LEGAL SYSTEM

Stare decisis is a Latin phrase which means “to stand by decided cases; to uphold precedents; to maintain former adjudication”.[9] This principle is expressed in the maxim *stare decisis* et non quieta movere which means “to stand by decisions and not to disturb what is settled”.[10] A matter policy, *Stare decisis* reflects a “policy judgement that

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[5] Dr. Subhash Kashinath Mahajan v. The State of Maharashtra, Criminal Appeal No. 416 of 2018, a judgement of three-judge bench overruled State of M.P. v. Ram Krishna Balothia, (1995) 3 SCC 221; Another 3-judge bench case where Indore Development Authority v. Shyam Verma, Special Leave Petititon No. 9798 of 2016 overruled Pune Municipal Corporation v. Harakchand Misirimal Solanki, 2014 (3) SCC 183. Jayant Verma v. Union of India, (2018) 4 SCC 743, a 2-judge bench overruled State Bank of India v. Yasangi Venkateswara Rao, (1999) 2 SCC 375.

[6] (2006) 8 SCC 212.

[7] 7 (2013) 10 SCC 95.

[8] This is because the position of law is unclear. One may cite Dawoodi Bohra to give weight behind horizontal *stare decisis* but at the same time example of Jarnail Singh may be cited to rebut this claim. Ruling of Dawoodi Bohra on horizontal *stare decisis* will apply to benches of lesser quorum. Here, the source of Dawoodi Bohra is 5-judge which is question by a same source, 5-judge in Jarnail Singh.

[9] A. Lakshminath, Judicial Process and Precedent (4th edn., Eastern Book Company) 110.

[10] Lakshminath, ibid.

'in most matters it is important that the applicable rule of law be settled than that it be settled right"[11] and it reflects practice of the Court to refer to precedents for institutional reasons such as saving Court's time rather than hearing the issue afresh.[12] It is a reaffirmation of the age-old wisdom that bedrock principles are founded in the law rather than in the predilections and proclivities of individuals men and thereby they contribute to the integrity of our constitutional system of the government. At the same time, it is unfair on the part of Courts to its subjects, i.e. citizens, where Courts do not apply the rules that were taken by its subjects to be applicable in a given situation and this hits the root of rule of law which mandates adherence to formalism.[13]

Our Constitution does not impose on the Supreme Court any rigid formula which operates to fetter its decision-making task on some doctrinaire and insular perception of the judicial function. Rather every successful proponent of overruling precedent has borne the heavy responsibility of persuading the Court that changes in the society or the law dictate that the values served by *stare decisis* yield in favour of the greater subjectivity in the decision-making task. "Overemphasis of precedent furnishes an insurmountable road block to the onward march towards the promised millennium".[14] This has been resolved by flexible interpretation and the trend of judicial decisions is that *stare decisis* is not a dogmatic rule allergic to logic and reasons; it is a flexible principle of law operating in the province of precedents providing room to adjust to the demands of the changing times dictated by social needs, State policy, and judicial conscience.[15]

Stare decisis representing the apotheosis of a legalistic ideology believes that the law should be founded upon such values as certainty, consistency and continuity. In Prof. Hart's analysis the *stare decisis* doctrine represents the secondary rule, or power conferring rule, or a rule of recognition which imposes a duty upon the Judges to conform to norms of the law.[16] The underlying logic is to maintain consistency, bring in

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[11] Agostini v. Felton, 521 U.S. 203, 235 (1997) (internal quotation marks omitted).
[12] F. Schauer, Precedent, STAN. L. REV. 39 (1987) 571.
[13] John Finnis, Natural Law: The Classical Tradition, The Oxford Handbook of Jurisprudence and Philosophy of Law (ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro, OUP 2004) 16.
[14] DS Nakara v. Union of India, (1983) 1 SCC 305.
[15] Lakshminath (n 9) 110.

predictability in law and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.

The practice of following precedents enables citizens to plan their conduct in the expectation that past decisions will be honoured in the future. Many disputes are avoided, and others settled without litigation, simply because people have a good notion of how the courts will respond to certain types of behavior. Underlining the importance of certainty in a legal system, Venkatama Iyer J. observed:

"*Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled*."[17]

Non-compliance with this established principle not only leaves the public confused which hampers compliance of law but also leaves the subordinate courts without guidance.[18] This adversely affect the main function of law, i.e. to regulate human behavior, as humans are not sure of what to comply with and this is in violation of Fuller's eight 'principles of legality', law must be understandable and it should not be impossible to obey.[19]

III: SCOTUS AND HORIZONTAL *STARE DECISIS* IN INDIA

Importance of *stare decisis*, from the perspective of Law and Economics, was highlighted by Benjamin N. Cardozo who was of the opinion that, "To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him".[20] To this effect, horizontal *stare decisis* aims to prevent decision from being easily

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[16] Kenneth Einar Himma, Inclusive Legal Positivism (n 13) 7.
[17] Jaisri v. Rajdewan, AIR 1962 SC 83, 88.
[18] Leach C.J. in Seshamma v. Narsimha Rao, ILR 1940 Mad 454.
[19] Brian H. Bix, Natural Law: The Modern Tradition (n 13) 11.
[20] Benjamin N. Cardozo, The Nature of the Judicial Process, (9th edn., 2011, Universal Law Publishers) 149.

overruled and save time of the Court as co-ordinate bench mostly comply with previous judgement and reference to a larger bench is very rarely made.

This is particularly relevant in the context of India where the High Courts and Supreme Court have large pendency of cases and time of the courts is of very high value.[21] It may be asked if it possible for a judge to be able to keep track of and apply relevant case law consistently when the number of reported cases is massive, with about 50, 000 cases reported since the inception of the Court in 1950 and thousands more added each year.[22] Given the large number of cases that the Supreme Court decides each year, it may itself be unable to keep up with the decisions and follow precedents in a consistent manner.[23]

When faced with inconsistent and mutually contradicting precedent, the Court has to resolve the conflict which imposes a heavy opportunity cost on the system of adjudication. The Court which has to resolve these conflicts is a constitutional court, i.e. HC or the SC, and chaos in precedents would consume too much of its time which otherwise would have used for its main purpose, the protection of key constitutional norms such as human rights, democracy, rule of law etc.[24]

This may also lead to poor reasoning of cases which may be in ignorance of precedents and create multiple, mutually self-contradicting precedents which will lead to a situation of no-precedents. Indeed, if a court is likely to ignore precedents anyway, the very distinction between settled and unsettled law is erased, and all law becomes unsettled.[25] This problem is further complicated by the fact that the Indian Supreme Court is a polyvocal court where majority of cases are heard by a bench of two or three judges.[26] These benches confuse doctrine and consequently, leads to more cases being brought

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[21] See Snehil Kunwar Singh and Kumar Satyam, Pendency: issue to be addressed, DECCAN HERALD, 22 October 2018, < https://www.deccanherald.com/opinion/perspective/pendency-issues-be-addressed-699084.html> accessed 2 January 2019. 43 lakhs cases are pending before High Courts and 58,000 before the Supreme Court.

[22] Andrew Green and Albert H. Yoon, *Triaging the Law: Developing the Common Law on the Supreme Court of India*, JOURNAL OF EMPIRICAL LEGAL STUDIES, Vo. 14(4), Dec 2017, 683, 709.

[23] Green and Yoon, ibid, 685.

[24] Tarunabh Khaitan, *The Supreme Court as a constitutional watchdog*, SEMINAR 721, available at <https://www.india-seminar.com/2019/721/721_tarunabh_khaitan.htm> September 2019.

[25] Khaitan, ibid.

[26] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, THE AMERICAN JOURNAL OF COMPARATIVE LAW, Vol. 61, 173; Green and Yoon (n 22).

before the Supreme Court.[27] In a legal system where horizontal stare decisis is inconsistently applied, it not only affects the litigants but also future cases for which it will act as a precedent. Till the time such conflict is resolved, a vast body of mutually contradicting cases will be produced having applied the law differently leading to further chaos

Litigants and lower courts may then recognise this problem and react in ways that exacerbate the problem. Litigants could exploit this lack of institutional knowledge by bringing low-probability (of success) cases before the Court as benches may not know or follow what other benches have done in the past.[28] Further, lower courts may not follow SC decisions where they feel there is a low probability of being corrected for not doing so. It may also create a situation where the lower court judges may not be able to distinguish the law laid down by the Supreme Court.[29]This would lead to a never-intensifying vicious cycle of too many cases leading to poorly reasoned judgements, in turn leading to too many cases, is created.[30]

Such a situation where there exists a large body of mutually contradicting precedents and differences due to polyvocal nature of the Court raises serious questions on the ability of the Court to act consistently with the rule of law in the sense of setting and following a coherent, though evolving, body of precedents.[31]

Horizontal stare decisis demands adherence from co-ordinate benches which Indian Supreme Court has failed to do. Thus, horizontal *stare decisis* is a double-edged sword: save court's time and promote efficiency if followed, or create uncertainty as has been discussed earlier. Notwithstanding the constitutional context and the difference in the accompanying social environments, SCOTUS is very significant in this context as it does not follow horizontal stare decisis. This is also because SCOTUS sits *en banc* and horizontal stare decisis would not permit overruling of previous judgements. This

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[27] Richard Posner makes a similar argument about how the increase in the size of the U.S Courts of Appeal increased appeals to them since there was more uncertainty in the law. Richard Posner, *The Federal Courts: Challenges and Reform*, 120 – 22 (1999).
[28] Greean and Yoon, (n 22) 686.
[29] Robinson, (n 26) 125-26.
[30] Khaitan, (n 24).
[31] Green and Yoon, (n 22) 692.

enables SCOTUS to achieve certainty in law. In fact, there is dichotomy between law and practice in India in context of horizontal stare decisis: Dawoodi Bohra exists on paper whereas Courts follow SCOTUS in practice. If this dichotomy is resolved and practice is made law, the problem of non-adherence to horizontal stare decisis would be ruled out and certainty in the legal system would be achieved which would help not only Indian Supreme Court but also High Courts and other subordinate courts to follow their constitutional duty under Article 141 of the Constitution.[32]

CONCLUSION

It is clear from the preceding discussion, as has been argued by some scholars, that the Indian Supreme Court lacks "precedent consciousness".[33] This has been attributed to proactive judges[34] who have often refused to take note of a relevant precedent or those judges who though have taken note of an existing precedent, have been reluctant to address it appropriately and bypassed it.[35] This has led to a situation where there is no law on judicial propriety to be followed by co-ordinate bench which are faced with judgement of other co-ordinate bench. In such situation, the Supreme Court must authoritatively settle the law. There can be two course of action to be followed by the Supreme Court: either uphold the doctrine of horizontal stare decisis through a judgement of bench with quorum more than five or follow the model of the Supreme Court of the United States and do away with the doctrine. As from the experience, non-compliance with the horizontal stare decisis is quite regular the act of doing away with horizontal stare decisis seems more plausible.

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[32] The Constitution of India, Art 141 states that,
"The law declared by the Supreme Court shall be binding on all courts within the territory of India."

[33] See for example, R. Dhavan, The Supreme Court of India: A Socio-Legal critique of its Juristic Techniques (1977).

[34] Subba Rao J overlooked M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468 IN Basheshar Nath v. CIT, AIR 1959 SC 149 AND Deep Chand v. State of UP, AIR 1959 SC 648. He also overlooked decision in Burrakur Coal Co. ltd. v. Union of India, AIR 1961 SC 954 in P. Vjravelu Mudaliar v. Collector (LA) AIR 1965 SC 1017. Union of India v. Metal Corpn. of India Ltd., AIR 1967 SC 637 overlooked Burrakur, but relied on Vajravelu which was a decision on Art. 14 and Art. 31(2).

[35] R.F. Nariman, J., in Jayant Verma v. Union of India, (2018) 4 SCC 743, a 2-judge bench overruled State Bank of India v. Yasangi Venkateswara Rao, (1999) 2 SCC 375.