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ORDERLY DEVELOPMENT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article analyzes the use of precedent by the European Court of Human Rights. It examines the various types of precedents in the practice of the Court and how they are utilized. It discusses different methods of development of case law, including overruling precedents, branching of the case law, and fragmentation of the case law. The article also proposes guidelines for the orderly development of case law.

Key words: *Precedent. – Case law. – European Court of Human Rights.*

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1. INTRODUCTION

The phrase "the orderly development of the Convention case-law" is borrowed from the 1990 *Cossey* judgment[1] of the European Court of Human Rights (ECtHR). In the *Cossey* case, the Court used this phrase to explain why it would not depart from precedent. One of the reasons cited was the need for the orderly development of its case law. At first glance, it might seem contradictory that the Court justifies its adherence to precedent by referring to the development of case law. However, in its practice and generally, precedent does not represent static law and does not preclude certain development. Indeed, in the *Cossey* case, the ECtHR made it clear it would not depart from precedent without cogent reason. Thus, departure from precedent has not been ruled out. Given that the Court is not a lawmaking court, departing from precedent essentially means deviating from the interpretation of the European Convention on Human Rights (ECHR), provided in the precedential judgment. This interpretation is typically rendered in specific factual circumstances. In some cases, the interpretation is closely tied to the facts, while in others, it is not.

The relationship between interpretation and fact is relevant for qualification of departure. If the interpretation has changed in essentially the same factual circumstances, the precedent is overruled. However, if the interpretation has changed in different factual circumstances, the old precedent remains applicable to the facts comparable with the original set of facts, while a new precedent is established for the new set of facts. The interpretation addressing the issue in the old precedent is branching in two or more lines of cases or is modifying from case to case. The specifics of these developments in case law may not always be clear, and differences of opinion can emerge, regarding whether there are good reasons for departing from precedent, whether the conditions are met for a new interpretation in essentially same factual circumstances, or whether different factual circumstances require a new interpretation. It is my proposition that examination of the concept of the orderly development of case law can be helpful in ensuring sound case law development and addressing these questions.

The article will commence with a brief explanation of precedents in common law legal systems and European Continental legal systems. It will then delve into the practical application of precedent by the European Court of Human Rights and distinguish between precedents where comparability

[1] *Cossey v. The United Kingdom* (App. No. 10843/84) Judgment of 27 September 1990, para. 35.

of facts is not relevant and those where it is. Within the second category of precedents, three modes of development will be identified: 1. overruling the precedent, 2. branching of the case law, and 3. fragmentation of the case law. These three modes of development are not without their challenges. The article will introduce the concept of orderly development of case law and demonstrate how it can help address these challenges.

2. THE PRECEDENT IN DOMESTIC LAW

2.1. The Precedent in Common Law Legal Systems

In *Jurisprudence* Sir John Salmond stated that:

"A precedent ... is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large" (as quoted by Collier 1988, 794).

Authors concur that in common law legal systems precedent is not the literal text of a judicial decision, but rather the legal essence that the courts derive from it. Svein Eng points out that in common law countries a judgment primarily resolves a specific case, but it also serves as the foundation for the general rule (Eng 2000, 277). This makes the precedent a form of unwritten law – *lex non scripta* (Tiersma 2007, 1188). There is a trend, however, towards textualizing the precedent in some common law countries (Tiersma 2007). Textualization of the precedents makes the law less prone to manipulation and more rigid (Tiersma 2007). The certainty in the law, equality and judicial efficiency have been usually cited as justifications for the doctrine of precedent (Maltz 1988, 368–370).

The requirement of analogy is deeply rooted in the doctrine of precedent. While Thomas Hobbes, Sir Matthew Hale and David Hume had differing views on precedent, G. J. Postema found common ground among them in the significance of analogy. He summarized their views as follows: "[T]he form of reasoning is thought to be the same: the instant case is located within or related to the complex details of common life . . . reposited in the common law, and conclusions are drawn from this context depending on the strength of the analogies to it" (Postema 1987, 32, quoted in Hunter 2001, 1250)". They did not, however, delve extensively into the subject of analogy. Earl Maltz (1988, 372) observed that the definition asserting that precedent

controls “the result in all future cases in which the facts are similar to the precedent case in all relevant respects” is not quite helpful and should be supplemented by a consideration which facts are relevant.

2.2. Precedent in European Continental legal systems

It is well established that, in European Continental legal systems, the lower courts are not legally bound to adhere to the judicial decisions of the higher courts. However, Yvon Loussouarn (1958, 257) observed that, in practice, they are *de facto* bound to do so. In Continental legal systems, the courts do not create law, but rather offer interpretation of legislation. The interpretations provided in the judgment of the higher courts are usually expected to guide the decisions of the lower courts. This practice stems from the inherent concept of unity within each judicial system. If each court were to independently interpret domestic legislation, it would lead to the fragmentation of the legal system. This principle of unity is a common feature shared by all Continental legal systems. In discussing precedent in international jurisprudence, which blends different legal cultures, Sanja Djajić (2018, 225) remarked that the concept of *de facto* precedent unites the common law and civil law approaches to judicial decisions.

Former Judge and President of the ECtHR, Luzius Wildhaber commented on the difference in legal reasoning between common law judges and Continental law judges. He noted that common law judges tend to engage in prudent reasoning, moving upwards from the facts of the case, while Continental law judges often employ sweeping reasoning, starting from abstract principles (Wildhaber 2000, 1530). Wildhaber emphasized that the gap between these two legal systems is not as wide as often depicted in literature. He pointed out that the rule of *stare decisis* in common law is not absolute, since exceptions exist. Thus, the House of Lords could depart from previous decisions, and courts can distinguish cases based on reasonable distinctions in the facts. On the other hand, he observed, that European Continental law courts routinely follow precedents (Wildhaber 2000, 1530).

3. PRECEDENT IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In principle, the European Court of Human Rights is not a lawmaking court; its primary role is to interpret and apply the European Convention on Human Rights. In the ECtHR practice, precedent comprises preserved

interpretation of the Convention. Interpretations may originate in a single case or be synthetized from multiple cases, eventually forming precedents. Unlike precedents in common law legal systems, a precedent of the Court is *lex scripta* – written law. The chambers or the Grand Chamber refer to and often quote specific sentences or textual sequences from previous judgments. The quoted text from previous judgments, referred to as "principles" by the ECtHR in recent years, has various functions. It can serve as a precedent in the strict sense, directly determining outcome of the case, but the Court also uses them as components in its legal reasoning.

In recent years, the legal reasoning of the ECtHR has been divided into two segments: 1. a general approach or general principles that relate to the broader legal context within which a specific disputed issue arises, and 2. the application of general principles to the specific issue at hand. The Court usually cites recent judgments in similar cases, and the references contained within these judgments lead to earlier cases, revealing a chain of cases in which the precedential principle was born, developed, and applied. In literature, such references, used as components of reasoning, have been likened to a "dense network" (Farnelli *et al.* 2022, 263). It is worth noting that the ECtHR is the most prolific international court. As of 22 October 2023, the Human Rights Documents (HUDOC) database, on the Court's website, reported that the Grand Chamber had delivered 5,297 judgments and 118 decisions, the chambers had rendered 62,589 judgments and 26,433 decisions, and the committees had produced 13,786 judgments and 19,698 decisions.[2] Consequently, the ECtHR case law thus contains an extensive collection of saved interpretations. In recent years, it has become a practice for the Grand Chamber not to reinterpret the Convention to resolve disputes but to utilize the "dense network" of references to previous judgments, thus relying on interpretations made in previous cases to resolve current disputes. However, such a practice may risk becoming selective and potentially dangerous, known as "cherry-picking".

In the *Chapman* case in 2001, the ECtHR outlined its position on the precedent as follows:

> "The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and

[2] ECtHR, HUDOC database, *https://hudoc.echr.coe.int* (last visited October 22, 2023).

> foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[3]

In *Chapman*, the Court made reference to the 1990 *Cossey* case, where a slightly different formulation was used. Responding to the observation by the applicant that the Court was not bound by its previous judgments, the Court stated in *Cossey*:

> "It is true that, as she submitted, the Court is not bound by its previous judgments; ... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[4]

Regarding this quote text, the Court referenced the *Inze* case from 1987. In paragraph 41 of the *Inze* judgment (referenced in *Cossey*), the Court elaborated on the prohibition of discrimination and on the Convention as a living instrument.[5] It may be noted that paragraph 41 in *Inze* specifically pertains to the second sentence of the text from *Cossey*. There was no reference to previous cases concerning the first sentence. Most likely, the Court's position, as stated in Cossey, was formulated for the first time there. This position was subsequently modified in *Chapman* and has since remained in its modified form in later cases. The modification includes several changes. One notable change is that one of the reasons for adhering to precedent – "the orderly development of the Convention case-law" – was omitted. The rational for this change is not immediately clear, and in

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[3] *Chapman v. the United Kingdom* (App. No. *27238/95*), Judgment of 18 January 2001, para. 70; *Christine Goodwin v. The United Kingdom*, (App. No. 28957/95), Judgment of 11 July 2002, para. 74; Similarly in *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 and 46951/99), Judgment of 4 February 2005, para. 121; *Savickis and Others v. Latvia* (App. No. 49270/11), Judgment of 9 June 2022, para. 202.

[4] *Cossey v. The United Kingdom* (App. No. 10843/84), Judgment of 27 September 1990, para. 35.

[5] *Inze v. Austria* (App. No. 8695/79), Judgment of 28 October 1987, para 41.

the author's opinion, it may not have been the most productive change. Two new reasons were introduced: foreseeability and equality before the law. Foreseeability is inherently linked to legal certainty, so this change is not particularly significant. Equality before the law might mean equal legal treatment in similar factual circumstances. This added reason thus underlines the importance of comparability of facts.

It should be added here that the Contracting States to the European Convention on Human Rights attached a specific function to case law – advancing the procedural efficacy of the Court. Through Protocol No. 14 to the Convention, they relocated the power to decide the admissibility and merits of the cases whose underlying legal issue had been the subject-matter of well-established ECtHR case law. This power was moved from the competence of the seven-judge chamber to the competence of the three-judges committee. Faced with the problem of a rising number of repetitive cases that burdened the workload of the Court, the Contracting States transferred these repetitive cases to a judicial formation with a smaller number of judges, thereby increasing the Court throughput (Djajić 2018, 230). This solution does not function without difficulties (Djajić, Etinski 2018, 73–98).

3.1. Precedents Without Comparability of Facts

The case law demonstrates different approaches taken by the ECtHR regarding the issue of comparability. In some cases, comparability exists at the level of disputed issues only. The interpretation used to address an issue in a precedent case is subsequently applied to address the same issue in later cases, even in a quite different factual situation. The Court denotes sometimes such mode of comparability by the phrase *mutatis mutandis*. In the 1995 *McMichael* case, the Court addressed procedural aspects of Article 8 of the ECHR in the context of parental relationship. Later, in the *Taşkın* case of 2004, in the context of environmental pollution, the Court applied the legal finding on procedural aspects of Article 8, referring to *McMichael* in a *mutatis mutandis* manner.[6] This legal finding on the procedural aspects of Article 8 has become relevant to the same issue in subsequent cases, regardless of the factual background. Because there are legal issues that are common to multiple articles of the Convention, there are precedents that apply across its various articles. The principle of legality is an important element of several

[6] *Taşkın and Others v. Turkey* (App. No. 46117/99), Judgment of 10 November 2004, para. 118.

articles. The Court defined the criteria of legality in the *Sunday Times* case of 1979,[7] and they have been reiterated in numerous cases and remain valid today.[8] The principles related to the fair balance between competing interests and the margin of appreciation can be considered as this type of principles. This type of precedents is based on the comparability of legal issues. They are not based on the comparability of facts, but facts may influence their development. In the *Leyla Şahin* case[9], the Court, under the influence of specific facts, extended the concept of legality to include legal acts that fall under statutory law.[10] Another addition to the basic precedential principle of legality pertains to factors that determine the precision and foreseeability of legal acts.[11] The ECtHR has, thus, established a general principle in multiple variants and selects one according to the requirements of the given case.

3.2. Precedents Involving the Relevance of Fact Comparability

Many precedents are rooted in the comparability of the facts. It is a commonplace in the general precedent doctrine that the essential facts of the precedent case and the subsequent case must bear similarity. The ECtHR has often cited prior comparable cases, and sometimes even series of comparable cases, providing the case names and paragraph references in brackets. On some occasions, the Court advises the reader to compare the facts of the current case with those of a previous case, again in brackets. The critical question here is whether the facts of the precedent case and the latter case are sufficiently comparable, in other words, whether the factual difference are significant enough to distinguish the current case from

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7 *Sunday Times v. The United Kingdom* (App. No. 6538/74), Judgment of 26 April 1979.

8 *Ovcharenko and Kolos v. Ukraine,* (App. Nos. 27276/15 and 33692/15), Judgment of 12 January 2023, para. 96; *Mustafa Hajili and Others v. Azerbaijan* (App. No. 69483/13 and 2 others), Judgment of 6 October 2022.

9 *Leyla Şahin v. Turkey*, (App. No. 44774/98), Judgment of 10 November 2005, para. 88.

10 *De Wilde, Ooms and Versyp v. Belgium* (App. Nos. 2832/66; 2835/66; 2899/66), Judgment of 18 Jun 1971, para. 93; *Sanoma Uitgevers B.V. v. the Netherlands*, (App. No. 38224/03), Judgment of 14 September 2010, para. 83.

11 *Karácsony and Others v. Hungary* (App. Nos. 42461/13 and 44357/13), Judgment of 17 May 2016, para 125; *Delfi AS v. Estonia* (App. No. 64569/09), Judgment of 16 June 2015, para. 122. *Cantoni v. France* (App. No. 17862/91), Judgment of 11 November 1996, para. 29; *NIT S.R.L. v. the Republic of Moldova* (App. No. 28470/12), Judgment of 5 April 2022, para 160.

the precedent. These references to comparability serve various purposes: sometimes they support or explain the Court's line of reasoning, and in other cases, they determine the case's outcome.

4. DEVELOPMENTS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

At least three modes of development can be observed in the ECtHR case law: 1. overruling of the precedent, i.e., rendering the precedent obsolete; 2. the birth of a new precedent alongside the old precedent, i.e., branching of case law; 3. fragmentation of the case law. While the first two modes may be considered forms of orderly case law development, the third mode is most problematic as it introduces the most uncertainty to the case law. A common thread for all three modes is the relevance of fact comparability.

4.1. Overruling the Precedent

Overruling a precedent involves setting aside a precedential judgment by a new judgment in a subsequent case. In the new case, the ECtHR interprets the ECHR differently and replies to the disputed issue contrary to the reply given in the precedent judgement. The essential facts in both cases are the same. The interpretation was not changed due to different facts, but due to developments in the sources the Court uses to interpret the Convention. This can include the emergence of a new European consensus on the disputed issue, changes in international law, or developments in documents of the Council of Europe, etc. The Court takes the phrase "European consensus" to mean an informal agreement of the Contracting States on a specific issue, emerging from their converging internal practices. It is widely recognized that the Court interprets the Convention as a living instrument. The Court is renowned for its evolutive interpretation. The above quoted passages from *Cossey* and *Chapman* support this. Alastair Mowbray also found in the case law other reasons, used by the Court, for overruling the precedent (Mowbray 2009, 179–201).

The *Christine Goodwin* case[12] is an illustrative example of overruling a precedent in the context of the orderly development of case law. The central issue at hand was whether the positive obligation of Contracting States

[12] *Christine Goodwin v. The United Kingdom* (App. No. 28957/95), Judgment of 11 July 2002.

under Article 8 of the Convention, to legally regulate the status of post-operative transsexual persons, falls within the margin of appreciation of the Contracting States. The issue initially appeared before the Court in the *Rees* case in 1986.[13] At that time, given the absence of a European consensus on the matter, the Court determined that the existence of this obligation fell within the margin of appreciation of the United Kingdom. This response was reiterated in several subsequent cases. Over time, the Court acknowledged that a European consensus had started to emerge. A majority of judges believed, however, that it had not reached a level where it could provide precise answers to specific questions regarding the status of post-operative individuals. In the *Christine Goodwin* case, the Court overruled the precedent set in *Rees*. Notably, in this instance, the Court did not confirm the existence of a sufficient level of European consensus, but it altered its interpretation anyway. The change of interpretation was influenced by factors such as the international development trend, extending beyond the Contracting States, in the legal regulation of the status of these individuals. Additionally, the Court considered the new importance given to dignity in its case law, among other factors. It should be noted, however, that in *Sheffield and Horsham*, the 1998 case that preceded *Christine Goodwin*, a minority of judges had already asserted that the European consensus had reached a sufficient level for a positive obligation of the Contracting States.[14] The existence and maturity of a European consensus as a source for interpreting the Convention is not straightforward. Different views of judges are possible and they occur from time to time. On the other hand, Kanstantsin Dzehtsiarou and Conor O'Mahony have criticized the Court's reliance on an "international trend" that extends beyond the Contracting States, from the platform of the common values of the States that share the same legal instrument (Dzehtsiarou, O'Mahony 2013, 351–352).

4.2. Branching of the Case Law

Shevchuk observed that similarity between the cases is required for the European Court of Human Rights to follow its previous precedents and that the Court uses the distinguishing technique to assess similarity (Shevchuk 2011, 157). He explained that the Court derived the distinguishing technique from the methodology of Anglo-Saxon case law and that the

[13] *Rees v. The United Kingdom* (App. No. 9532/81), Judgment of 17 October 1986.

[14] *Sheffield and Horsham v. The United Kingdom* (App. Nos. 22985/93 and 23390/94), Judgment of 30 July 1998.

Court uses it "when life conditions and social changes have an impact on the need to deviate from existing precedents, however without overruling such precedents" (Shevchuk 2011, 157). Having not been overruled, the precedent continues its life, but new line of divergent cases emerges. Indeed, sometimes a new factual framework, rather than social changes, requires divergence from existing precedents without overruling them.

The ECtHR considered the matter in the *Magyar Helsinki Bizottság* case in 2016.[15] The issue before the Court was whether the right to freedom of expression, as formulated in Article 10 of the Convention, includes the right of access to information held by a State. In the 1987 *Leander* case[16] the Court gave a negative answer, which was subsequently upheld in a series of later cases and thus became settled case law. The negative answer was given, however, in the context of the private interest of the applicants. The applicants sought information, held by State authorities, which was related to their private interest. In a new context, specifically the context of journalism and discussion on matters of public interest, the Court has started to depart from the settled case law. In this new context, the Court found that the right to freedom of expression includes the right of journalists, NGOs, bloggers, and other advocates of public interest to access to information of public interest held by a State. The Court did not characterize the modification of case law as the overruling of *Leander*, but rather as "a clarification of the *Leander* principles".[17] The *Leander* principle remains valid beyond the field of information of public interest, sought by advocates of public interest for public purposes. Thus, a new factual framework may lead to divergence from precedent without overruling it (for more see Etinski 2022, 18–19).

The issue of comparability of facts sometimes arises in this mode of development of case law, presenting a challenge for judges. This situation occurred, for example, in the *Savickis* case in 2022.[18] In this case, the Court altered its interpretation previously given in the *Andrejeva* case in 2009.[19] The central issue before the Court in both cases was whether Latvia's differential treatment of citizens and "permanently resident non-citizens", regarding the calculation of employment periods accrued outside Latvia during the time of the USSR for retirement pensions, complied with Article 14 of the Convention in connection with Article 1 of Protocol No. 1. Latvia

[15] *Magyar Helsinki Bizottság v. Hungary* (App. No. 18030/11), Judgment of 8 November 2016.

[16] *Leander v. Sweden* (App. No. 9248/81), Judgment of 26 March 1987.

[17] *Magyar Helsinki Bizottság v. Hungary*, op.cit., para. 154.

[18] *Savickis and Others v. Latvia* (App. No. 49270/11), Judgment of 9 June 2022.

[19] *Andrejeva v. Latvia* (App. No. 55707/00), Judgment of 18 February 2009.

included these work periods in the calculation of pensions of its citizens, but did not do so for "permanently resident non-citizens". In *Andrejeva,* the Grand Chamber decided, by a majority of 16:1, that this constitutes discrimination. In *Savickis*, the Grand Chamber arrived at a contrary conclusion, with a majority of 10:7. Natālija Andrejeva was employed in a State Federal company, but she worked in a regional department of the company, located in Latvia. On the other hand, Jurijs Savickis and the other applicants in the latter case were employed in companies in other Soviet Republics, working outside of Latvia, and concluded their employment there before settling in Latvia. This difference pertained to factual circumstances. Another difference was not factual, but related to a new legal view of the Constitutional Court of Latvia. In *Andrejeva*, Latvia justified the different treatment of citizens and "permanently resident non-citizens" by lack of economic resources. Subsequently, the Constitutional Court introduced a new justification – "constitutional identity". In the context of the case, "constitutional identity" implied a certain correction of historical injustice. The Baltic States had been occupied and annexed by the USSR and subjected to the Sovietization and Russification policies. In this context, Latvia argued that the applicants had the opportunity to obtain Latvian citizenship, but chose not to do so. Seven judges dissented, believing there was no good reason for departing from *Andrejeva*, as they considered the facts in the two cases essentially the same.

4.3. Fragmentation of the Case Law

"Fragmentation of the case law" refers to the evasive form of development of case law, which encompasses the branching of the case law and alteration of the precedential principle on a case-by-case basis. This most problematic mode of case law development can be exemplified by certain cases concerning the interpretation of Article 1 of the Convention. The core issue revolves around whether individuals who are the victims of violations of the Convention by a Contracting State, but are located outside of its territory, fall under the jurisdiction of the Contracting State. In other words, it questions whether the Court has jurisdiction *ratione personae* to consider applications from these individuals.

Referring to previous decisions of the European Commission of Human Rights, in the *Drozd and Janousek* case[20] in 1992, the Court stated that the term "jurisdiction" was not limited to the national territory of the Contracting

[20] *Drozd and Janousek v. France and Spain* (App. No. 12747/87), Judgment of 26 June 1992, para. 91.

States. It noted that the Contracting States might be responsible for acts of their authorities that produce effects outside their own territories. In the *Loizidou* case of 1995, the Court found that Türkiye had jurisdiction over the actions of its soldiers in the occupied region of Northern Cyprus, thereby establishing that a person on that territory was under the jurisdiction of Türkiye. Consequently, the Court ruled that it had jurisdiction *ratione personae* and declared the application admissible.[21] However, in the *Banković* case of 2001, the Court reached a different conclusion. It held that the respondent States did not have jurisdiction over their air strikes on a TV station in Belgrade, and the victims were not under the jurisdiction of these States. As a result, the Court found it had no jurisdiction and declared the application inadmissible.[22] The Court noted that as a multilateral treaty, the Convention was applicable in a regional context, specifically within the legal space of the Contracting States and that the FR of Yugoslavia was outside of this legal space.[23]

In might seem that *Banković* overruled *Drozd and Janousek*, however, this was not the case. In the *Öcalan* case of 2005, the Court determined that Türkiye had established its jurisdiction over Abdullah Öcalan when he was handed over by the Kenyan officials to Turkish officials on the territory of Kenya. The *Öcalan* case set a precedent that was followed by subsequent cases. In the *Al-Saadoon and Mufdhi* case in 2009, the Court found that the United Kingdom had jurisdiction over two Iraqi nationals detained in British-controlled military prisons in Iraq.[24] This holding was reiterated in the *Hassan* case[25] and the *Jaloud* case[26] under similar circumstances. A new line of cases was thus created, where the exercise of physical power and control by an organ of a Contracting State over a person beyond the territory of the Contracting State brings the person under the jurisdiction of the Contracting State. This raises the question how much the fact of exercise physical power and control distinguishes these cases from the exercise of physical power

21 *Loizidou v. Turkey* (App. No. 15318/89), Decision of 23 March 1995.

22 *Bankovic and Others v. Belgium and Others* (App. No. 52207/99), Decision of 21 December 2001.

23 *Ibid.,* para. 80.

24 *Al-Saadoon and Mufdhi v. the United Kingdom,* (App. No. 61498/08), Decision of 30 June 2009, paras. 86–89.

25 *Hassan v. the United Kingdom* (App. No. 29750/09), Judgment of 16 September 2014.

26 *Jaloud v. the Netherland* (App. No. 47708/08), Judgment of 20 November 2014.

and control by the air force in *Banković*. In any case, the application of the Convention has extended beyond the regional circle of the territories of the Contracting States, as determined in *Banković*.

The next significant modification occurred in the *Hanan* case of 2021.[27] This expanded the jurisdiction of a Contracting State to include military pilots responsible for civilian deaths from airstrikes outside the territory of the Contracting State. The new *ratio decidendi* was that only the court of the Contracting State was competent to prosecute the pilots. This fact was absent in *Banković*. In *Banković*, the International Criminal Tribunal for the former Yugoslavia also had jurisdiction over pilots who took part in the bombing. In the *Ben Al Mahi* case of 2006, the Court held that Mohammed Ben El Mahi, a Moroccan national residing in Morocco, who felt injured by caricatures of the Prophet Muhammad, published in Denmark, was not under the jurisdiction of Denmark and rejected his application as inadmissible.[28] In the *Wieder and Guarnieri* case in 2023, the Court rule that Joshua Wieder, a USA citizen living in Florida, and Claudio Guarnieri, an Italian citizen residing in Berlin, fell under the jurisdiction of the United Kingdom regarding the interception of their Internet communication by the United Kingdom intelligence agencies on the territory of the United Kingdom.[29] The basis for the decision was that the interference with the applicants' rights occurred within the territory of the United Kingdom and therefore fell within its jurisdiction. The *Ben Al Mahi* case was not referenced in this decision. The interference in *Ben Al Mahi* also occurred on the territory of the Contracting State. Such development of case law concerning interpretation of Article 1 leaves an impression of fragmentation.

4.4. Overlapping and Complexity of the Modes of Development of Case Law

There are developments of case law that exhibit characteristics of various modes. The case law concerning the liability of individuals or entities responsible for media content in cases of unlawful speech by third parties, transmitted through the media, can be categorized into two chains of cases.

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[27] *Hanan v. Germany* (App. No. 4871/16), Judgment of 16 February 2021.

[28] *Ben Al Mahi and Others v. Denmark* (App. No. 5853/06), Decision of 11 December 2006.

[29] *Wieder and Guarnieri. the United Kingdom* (App. Nos. 64371/16 and 64407/16), Judgment of 12 September 2023.

The first chain begins by the *Jersild* case[30] and continued through *Thoma*[31], *Verlagsgruppe News*[32] and *Print Zeitungsverlag*[33]. The second chain starts with *Delfi*[34] and proceeds through *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*[35], *Pihl*[36] and *Sanchez*.[37] There are factual and legal difference between these two chains. The first chain pertains to all forms of media, other than the Internet. In these cases, the Court assessed the liability of persons responsible for media content for unlawful speech of a third party in light of the right to freedom of expression, as guaranteed by Article 10. The second chain is specific to Internet media, and the ECtHR examined the issue in light of Article 10, informed by international documents addressing hate speech on the Internet.

The precedential principle, as formulated in *Jersild*, asserts that criminal punishment of a journalist for televising the racist speech of a third party is not compatible with Article 10, as it hinders the press's ability to contribute to discussions of matters of public interests. In *Thoma* the Court ruled that imposing civil liability on a journalist working for a national radio station for quoting an article critical of individuals responsible for reforestation in Luxembourg, as published in a newspaper, was in violation of Article 10. There are factual and legal distinctions between *Jersild* and *Thoma*. The first case dealt with criminal liability and an unlimited number of members of racial and ethnic groups who were affected by racial speech. The second case pertained to civil liability and a limited number of identifiable individuals who were injured by the journalist's critique. The circumstances of the second case potentially triggered the right to protection of private life and required striking a fair balance between the right to freedom of expression and the right to the protection of private life. The judgment in *Thoma* implies that the Court considered the facts not sufficiently different to warrant departing from *Jersild*.

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30 *Jersild v. Denmark* (App. No. 15890/89), Judgment 23 September 1994.

31 *Thoma v. Luxembourg*, (App. No. 38432/97), Judgment of 14 December 2006.

32 *Verlagsgruppe News GmbH v. Austria*, (App. No. 76918/01), Judgment of 14 December 2006.

33 *Print Zeitungsverlag GmbH v. Austria*, (App. No. 26547/07), Judgment of 10 October 2013.

34 *Delfi AS v. Estonia* (App. No. 64569/09), Judgment of 16 June 2015.

35 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* (App. No. 22947/13), Judgment of 2 February 2016.

36 *Pihl v. Sweden* (App. No. 74742/14), Decision of 7 February 2017.

37 *Sanchez v. France* (App. No. 45581/15), Judgment of 15 May 2023.

The *Print Zeitungsverlag* ruling established the civil liability of the publisher for transmitting the content of an anonymous letter that targeted two persons, and the relationship between Article 10 and Article 8 became a central issue. The Court decided that establishing civil liability for the publisher did not contravene Article 10. It invoked the *Jersild* principle and indicated that the judgment did not depart from it. The key legal issue in *Print Zeitungsverlag* revolved around the relationship between Article 10 and Article 8. While the Court did not explicitly state this, it is likely that the Court saw the facts in *Print Zeitungsverlag* as sufficiently different from those in *Jersild* to justify departing from it and providing a new legal response to the issue of liability for unlawful speech by a third party. In *Jersild*, the racial statements offended an unknown number of unidentified members of a racial group, leading to the State authorities pursuing criminal prosecution. In contrast, the anonymous letter, the content of which was transmitted by *Print Zeitungsverlag*, harmed two identifiable individuals. These individuals sought and received a remedy for the violation of their privacy through civil proceedings. The facts raised the issue of balancing the right to freedom of expression and the right to protection of private life. The Court consulted its case law on establishing a fair balance between the interest of free discussion of matters of public interest and individual's interest in enjoying privacy. A decisive factor was that the Court found that the information disseminated by the anonymous letter was not based on factual circumstances. This fact may distinguish *Print Zeitungsverlag* from *Thoma*, which is comparable in other respects.

A new line of cases addressing the same legal issue – liability of an intermediary for transmission of unlawful speech by a third party, in the new factual circumstances of the Internet – was initiated by *Delfi*. In this case, the Court found that the establishment of civil liability for a news company in the case of unlawful speech posted by visitors on company's the web portal, which endangered an individual's life, was compatible with Article 10. The Court went on to establish criteria for determining whether the imposition of civil liability on an Internet intermediary for unlawful speech posted by visitors on the page was consistent with Article 10. These criteria have been applied in subsequent cases and extended to criminal liability, as seen in *Sanchez*. The factual circumstances of Internet communication are distinct from those of communication through radio, television or print media, giving rise to different legal questions. Transmission of unlawful speech by a journalist or publisher is typically an intentional act. The crucial question here is what was the purpose of the transmission. Transmission of unlawful speech via a web page is not an intentional act of the owner of the website. The central question here is what measure the website owner can take to prevent or remove such content. In addition to these factual difference,

Article 10 has been informed by international legal development concerning hate speech on the Internet. As a result, these factual and legal distinctions have guided the development of case law regarding the liability of intermediaries for transmitting unlawful speech by third parties along three branches. The two primary branches are differentiated by the distinction between non-Internet media and Internet media. The branch addressing non-Internet media further splits into two sub-branches, depending on whether the unlawful speech impacts the public interest, as in *Jersild*, or the private individual interest, as in *Print Zeitungsverlag*.

4.5. Orderly Development of Case Law

The concept of orderly development of case law might include some guidelines. The first guideline could involve the requirement of foreseeability, which the ECtHR has itself established. Looking at the means regularly employed by the Court for interpreting the Convention, relevant case law, and trends of its development, the judges should consider whether the decision could have been anticipated. The second guideline could entail the Court considering the future when formulating its precedential judgment – it should be looking at the future. It would assess how its legal findings in the judgment might be applied in future cases and take into account how its presentation of the facts might influence the use of the precedent. As the precedent appears in the practice of the Court in the form of *lex scripta*, the textual formulation of legal findings is important. It seems that there is a growing trend in the volume of judgments. It is a great question how healthy this is for case law. Too many facts presented as relevant in the precedential judgment may create problems regarding comparability and diminish the abstractness and generality of the precedential principle. The third guideline might suggest that the Court could adopt a more flexible approach to the precedent, focusing more on the *ratio decidendi* of the precedent than on its textual formulation. The fourth guideline could involve cases where doubts arise about the maturity of the condition for a change in interpretation or the comparability of facts. In such situations, judges should be guided by a broader framework composed of the values underlying the Convention and fundamental human rights doctrines. Despite the Court's reluctance to openly acknowledge departure from precedent, the fifth guideline could encourage the Court to show more willingness to overrule a problematic precedent in due time. The Court's case law is not a chaotic mass of judgments and decisions that judges randomly choose from to fit their preferences when

resolving cases. The above analysis shows that certain regularities governing the dynamic of case law may be discerned. These guidelines could, however, hopefully contribute to the better functioning of the case law.

The "orderly development of case law" concept, as outlined here, may also be helpful in situations of doubts, such as whether a European consensus has developed enough to inform precisely the Convention on a specific issue or whether the facts of two cases are sufficiently comparable. *Christine Goodwin* is an example of such development of case law. The Grand Chamber did not find that the European consensus had reached a sufficient level of coherency to answer precisely to all aspects of the disputed issue, but the Court had noted in a previous judgment the process of building European consensus, signaling thus that a change of the precedential legal finding was possible. Furthermore, the Court was motivated to change the previous interpretation by observing the growing significance of human dignity in its case law. This was quite in accordance with the fundamental values and human rights doctrines. Similarly, *Magyar Helsinki Bizottság* is an example of healthy development of case law. The change began in previous cases and was consolidated in this case. Unquestionably, the change was in keeping with the basic values underlying the Convention. In contrast to these cases, the *Savickis* case is problematic. The Court gave a great concession to the doctrine of constitutional identity, used by the Constitutional Court of Latvia to justify different treatment of citizens and permanent residents regarding the calculation of employment periods for pension accrued outside Latvia during the USSR period. It is not easy to see how the redress of the historical injustice of the occupation and annexation of Latvia by the USSR, by differentiating the accounting for the pensions of citizens and non-citizens, is compatible with building an inclusive and stabile society. Furthermore, the impact that the justification of different treatment of citizens and non-citizens, based on the "constitutional identity", may have on the practices of national authorities and the further development of case law is problematic. *Banković* also does not fit the standards of orderly development of case law. The judgment was criticized as incompatible with the basic idea of human rights (Roxstrom, Gibney, Einarsen 2005, 62) and the object and purpose of the Convention (Orakhelashvili 2003, 547; Altiparmak 2004, 226; Happold 2003, 88). The *Banković* principle was modified several times in later cases, thus diminishing its precedential value. In *Thoma* the Court approached the *Jersild* principle not as *lex scripta*, but as a general rule that leaves space for certain factual differences.

5. CONCLUSIONS

The European Court of Human Rights places great importance on the stability and foreseeability of its case law. The Court has reiterated on numerous occasions that it will not depart from a precedent without good reason. Unlike common law legal systems, the Court's precedent is a written text, *lex scripta*. The precedential principle is a sentence or a sequence of the text of the precedential judgment that the chambers and the Great Chamber cite in later cases. Given that the Court is not a lawmaking court, in substance these precedents are essential interpretations of the Convention by the Court. Despite their written form, the Court commonly designated them as "principles". In some instances, these precedential principles address specific legal issues, which, together with other legal matters, constitute the legal content of a case. Typically, such precedential principles are not closely connected to the facts of the case. When the same specific legal issue arises in a later case under significantly different factual circumstances, the Court employs the precedential principle to build a legal explanation of the latter case. In other situations, the precedential principle is intimately tied to the facts of the precedent case; it does not merely serve as one part of the mosaic of judicial reasoning but constitutes the legal holding that ultimately dictates the outcome of the case. In order for the precedent to be applied as a decisive factor in a later case, it is essential that the facts of the two cases are sufficiently comparable. The Court invokes an evolutive interpretation of the Convention as a good reason for departing from the precedent. In cases where the precedential principle is closely linked to the facts, the Court also departs from the precedent when the facts of later case are not sufficiently comparable with those of the precedent. These two forms of departure have distinct consequences. When the Court departs due to a new interpretation of the Convention, the precedential judgment is overruled, rendering the precedent obsolete. The overruling judgment becomes a new precedent, setting the legal holding for all subsequent cases. Conversely, when a departure occurs due to a lack of factual comparability, a new precedent is established in a different factual context, while the old precedent remains applicable to its original set of facts. This results in the emergence of both an old line of cases governed by the old precedent and a new line of cases guided by the new precedent, essentially creating a branching effect in the case law. As in common law legal systems, not all precedents within the Court's practice are of the same caliber. Some of them originated in the early years and remain in effect today. New factual circumstances bestowed to some of them "younger brothers", causing branching in the case law. Others have been overruled due to a new interpretation of the Convention or other reasons. While certain precedents may not be of the highest quality, the

Court refrains from overruling them for various reasons and instead utilizes specific distinctions in the facts, which results in fragmentation in the case law.

The Court's case law is not a chaotic mass of judgments and decisions from which judges pick interpretations arbitrarily to resolve cases. There are regularities within the case law that guide its dynamic and utilization. Nevertheless, the phrase "orderly development of the Convention case-law", used by the Court in the *Cossey* judgment of 1990, calls for further examination. Regarding the general doctrine on precedent and the Court's case law, this article proposes several guidelines. The first guideline is articulated by the Court itself, focusing on the requirement of foreseeability. In line with the means regularly employed by the Court for interpreting the Convention, the relevant case law and the trends in its development, the judges should assess whether the decision could have been reasonably anticipated. When shaping precedential judgments, the Court should look to the future, considering how its legal findings might be applied in future cases. Moreover, the Court should be mindful of how its presentation of facts might affect the use of the precedent. There appears to be a trend in the Court's practice where the volume of judgments is increasing. It may be a matter of debate how this affects the health of the case law. Excessively detailed facts presented in the precedential judgment can create problems related to comparability and may diminish the abstractness and generality of the precedential principle. The third guideline suggests that the Court could adopt a more flexible approach to the precedent, moving away from the concept of *lex scripta* and, instead, considering the *ratio decidendi* of the precedent or seeking its spirit. The fourth guideline proposes that in cases where doubts arise regarding the maturity of the condition for a change of interpretation or the comparability of the facts, judges should be guided by a broader framework based on values underpinning the Convention and the fundamental principles on human rights.

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