THE ISSUE OF BINDING VALUE OF PRECEDENT CASES IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

(Avrupa İnsan Hakları Mahkemesi İçtihatlarında Emsal Kararların Bağlayıcılık Değeri Sorunu)

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ABSTRACT

Legal value of previously established case-law and reasoning principles thereof are still under discussion, even there are deep-rooted traditions on this issue in several legal systems.

The binding value of previous decisions, indeed a problem all high courts al over the world, has been elaborated differently in each legal system.

In this study, the practice of the European Court of Human Rights is taken under consideration in respect of value of the previous judgments. The Strasbourg Court, in addition to its original concepts, applying principles either derived from the continental law or the common law, has taken an ambiguous attitude on this issue. Therefore, some suggestions are put under consideration in respect of practice and the possible amendments to the text of the European Convention on Human Rights in order to maintain equal treatment of cases and to clarify the position of the Court.

Keywords: Precedent, Binding Precedent, *Stare Decisis, Jurisprudence Constante,* Judicial Consistency.

ÖZ

Önceden karar verilerek emsal haline gelmiş içtihatların ve bu içtihatlardaki ilkelerin hukuki değeri, farklı hukuk sistemlerinde, bu hususta köklü hukuki gelenekler olsa da, hala tartışma konusudur.

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Aslında dünyadaki tüm yüksek mahkemelerin ortak bir sorunu olan önceki içtihatların bağlayıcılık değeri, her hukuk sisteminde farklı şekilde ele alınmıştır.

Bu çalışmada; önceki kararların hukuki değeri konusunda, Avrupa İnsan Hakları Mahkemesi'nin uygulaması mercek altına alınmaktadır. Kendi geliştirdiği kavramlar yanında, kıta Avrupası veya Anglo-Sakson hukukundan türetilmiş ilkeleri de kullanan Strazburg Mahkemesi, bu konuda belirsiz bir tutum takınmıştır. Bu itibarla, davaların eşit muamele görmesini sağlamak ve Mahkeme'nin durduğu yeri netleştirmek üzere uygulamada ve Avrupa İnsan Hakları Sözleşmesi metninde yapılabilecek muhtemel değişikliklere ilişkin bazı öneriler ileri sürülmüştür.

Anahtar Kelimeler: Emsal Karar, Bağlayıcı Emsal Karar, Yargısal Tutarlılık

INTRODUCTION

'Case-law' is generally used to describe the collection of the legal principles derived from all the reported cases forming a body of jurisprudence on a specific field of law[3]. Legal value of priorly established case-law and reasoning principles thereof are still under discussion even there are several traditions in deep-rooted legal systems.

In this respect, the case-law of the European Court of Human Rights (*hereafter* the Court or ECtHR) displays some institutions and elements of adjudication borrowed from common law and civil law traditions in addition to several *home-made* concepts. Some of these concepts have already been incorporated in the European Convention on Human Rights (*hereafter* the Convention) or in the Rules of the Court. However, the legal value of the precedent judgments has not been determined decisively neither in the Convention nor in the Court's case-law[4].

Certainly, apart from advantages (legal certainty, transparency and consistency of case-law, time-saving, equal process of same or similar cases, support to the impartiality of judges and etc.) provided by binding precedent system, there are also disadvantages brought by the same system (restriction on flexible adjudication, becoming too mechanic, perpetuation of judicial mistakes and etc.). However, we believe that a middle way may be found where the advantages prevail.

3 For other definitions please see, http://www.merriam-webster.com/dictionary/case%20law, http://thelawdictionary.org/case-law/ IAD:8.12.2014.

4 For similar opinions please see TERRIS D. / ROMANO C.P. R. / SWIGART L, ***The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*** (2007), p.120. ; BORDA A.Z., "Precedent in International Criminal Courts and Tribunals", ***Cambridge Journal of International and Comparative Law***, (2013) 2: pp.287–313.

In order to maintain principles of legal certainty, equality before law, consistency and transparency in the case-law of the Court, we propose that "certain degree of binding value" for the judgments which qualified as precedent should be entrenched in the Convention or in the Rules of the Court.

I. CONCEPT OF PRECEDENT AND ITS USE IN DIFFERENT LEGAL SYSTEMS

There is no reference to the concept of precedent in the texts of the Convention and its additional protocols. The same rule goes for the Rules of the Court. Fortunately, the case-law of the Court provides some hints on the concept and its use. Therefore, the use of precedent in different legal traditions and later the approach of the ECtHR are to be elaborated under the present title.

The concept of precedent has different meaning, scope and application in civil and common law systems as well as in other legal traditions. Since extensive literature has already been produced on the concept of precedent and its implementation in different national legal orders, theoretical or technical discussions will not be dealt with here. However, the core points will be touched as long as they are related with the present proposal on the Convention system.

In broad terms, precedent is defined as "a rule, first set by a court judgment in a particular case and which is used as a principle for resolving similar cases in the future"[5].

In civil law systems, due respect is paid to prior judicial decisions though they are not necessarily considered to be binding (doctrine of non-binding precedent or judicial consistency). *Jurisprudence constante* is another legal doctrine applied in civil law systems, according to which a long series of previous decisions applying a particular rule of law is very important and may be determinative in subsequent cases.[6]

In common law systems, the doctrine of *stare decisis*[7] or binding

5 Precedent, http://en.wikipedia.org/wiki/Precedent IAD:06.12.2014. Definition is taken from Black's Law Dictionary.

6 The rule of law applied in the *jurisprudence constante* directly compares with *stare decisis*. But the Louisiana Supreme Court notes the principal difference between the two legal doctrines: a single court decision can provide sufficient foundation for *stare decisis*, however, "a series of adjudicated cases, all in accord, form the basis for *jurisprudence constante*." http://www.lasc.org/opinions/2005/04c0473.opn.pdf IAD:8.12.2014. Moreover, the Louisiana Court of Appeals has explicitly noted that *jurisprudence constante* is merely a secondary source of law, which cannot be authoritative and does not rise to the level of *stare decisis.* http://en.wikipedia.org/wiki/Jurisprudence_constante IAD: 8.12.2014.

7 The term literally means "to stand by decisions already made"originating from the Latin maxim *Stare decisis et non quieta movere*: "to stand by decisions and not disturb the

precedent[8] is applied. The doctrine of binding precedent in common law can be summarised as follows: all courts are bound to follow decisions made by courts higher than they in the hierarchy (vertical application) and courts of last resorts are normally bound by their own previous decisions (horizontal application)[9].

The principle of *stare decisis* or binding precedent serves the objectives of predictability, consistency and fairness within a common law system. Without binding precedent, there is a risk of conflicting decisions and uncertainty. On the other hand, too rigid adherence to precedent may lead to rigidity in the law. The common law approach to precedent provides a balance between predictability and flexibility. While most judges see themselves constrained by binding precedent, there is scope within the rules for the development of common law principles, for correction of errors and for the making of new law.[10]

One should add variations of systems, namely "mixed legal systems" as a third category benefiting from different legal traditions including civil and common law systems.[11]

undisturbed."

8 Some scholars draw a distinction, though minor, between the 'precedent' and 'stare decisis'. *Please see* SINCLAIR M., "Precedent, Super-precedent", **George Mason Law Review** (2007), p.363, footnote 3 quoted partly in the following. "Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850,* 3 AM. J. 28, 30 (1959) (Precedent needs a doctrine developed through a line of cases; stare decisis can use one case alone as authority); K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions,* 3 J. APP. PRAC. & PROCESS 397, 415-16 (2001) (explains that stare decisis means only "stand by things decided"; precedent is about bases for decision, and is an "evolving doctrine."); Polly J. Price, *Precedent and Judicial Power After the Founding,* 42 B.C. L. REV. 81, 105(2000) (explaining that stare decisis is strict, formalistic; precedent is less so.)". In this contribution, the terms of *stare decisis* and binding precedent will be used in the same meaning.

9 There are two types of precedent in English law: binding precedent and persuasive precedent. Binding precedent is found in the *ratio decidendi* of the case, or the 'reason for deciding'. This is a precedent from an earlier case, which generally must be followed even if the judge in the later case does not agree with the legal reasoning behind it. A binding precedent is created when the facts of a later case are sufficiently similar to an original case and if the decision was made by a court which is higher than, or in some cases the same level as, the court hearing the later case. Persuasive precedent is not binding on the court, however a judge may consider such a precedent and decide that it is the correct principal to follow. They can come from many sources, including *obiter dicta* ('things said by the way'), lower courts, Privy Council decisions, and a dissenting judgment. For more information, *please see* HOLLAND / WEBB: The Doctrine of Judicial Precedent http://www.lawteacher.net/constitutional-law/essays/understanding-the-doctrine-of-judicial-precedent-constitutional-law essay.php#ixzz3Kwl0rUuo IAD: 3.12.2014.

10 GENN H., **Common Law Reasoning and Institutions**, London 2014, p.59.

11 Louisiana of the USA, Quebec of Canada and South Africa may be mentioned in the third category. ALVERO, M.G., "The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation", ***Louisiana Law Review*** (2005) 77, pp.779-780. HONDIUS E., 'Precedent and the Law', **Electronic Journal of Comparative Law**, http://www.ejcl.org/113/article113–3.pdf IAD:3.12.2014.

As regards international legal order, judgments of international courts have two aspects: first is the precedential value of judgments in respect of national legal orders. This point is interrelated with the binding scope of judgments and still a subject of endless debates. The precedent cases of the European Court Justice on European Union law in respect of the EU countries may be accepted as an exception.[12] Many scholars suggest that realising the principle of binding precedent between international courts and national courts seems to be not possible considering widely different legal cultures.[13] Second aspect is the precedential value of judgments in respect of the Court's own case-law. This point is related with maintenance of consistency and internal inspection of the produced case-law to avoid any discrepancy. The proposals made in this study are mainly related on the second aspect.

II. APPROACH OF THE COURT ON PRECEDENT CASES

There is a broad consensus amongst commentators, working both within and outside the Strasbourg institutions, that significant rulings by the Court on the interpretation and application of the Convention are generally followed in subsequent cases, although the doctrine of binding precedent is not accepted in the case-law of the Court[14]. It is noteworthy that the Court itself calls its own judgments to be precedents, but even so it may not be bound by those judgments and can review the previously taken approaches to address certain issues if circumstances change. [15]

The Court addressed the issue of binding precedent with similar wording in the Grand Chamber judgments of *Christine Goodwin v. UK*, *Mamatkulov and Askarov v. Turkey* and *Vilho Eskelinen and Others v. Finland* :

"74. While the Court is not formally bound to follow its previous judgments, it

12 It is generally accepted that the precedent judgments of the European Court of Justice on the EU law have binding and precedential effect on the court judgments of member countries.

13 For more information *please see* , TERRIS D. / ROMANO C.P. R. / SWIGART L, ***The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*** (2007), p.120. ; BORDA A.Z., "Precedent in International Criminal Courts and Tribunals", ***Cambridge Journal of International and Comparative Law,*** (2013) 2: pp.287–313.

14 MOWBRAY A., "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law", ***Human Rights Law Review,*** 9(2), p.1, *http://hrlr.oxfordjournals.org/cgi/reprint/ngp006?ijkey=CwqDiQ0PhWzuxGJ&keytype=ref.* Judge P. de Albuquerque, contained in his dissenting opinion in the case Herrmann v. Germany (application no. 9300/ 07), legal meaning of issues previously resolved by the Court (previous ruling) does not have the quality of rule of stare decisis, under which principles upon which the Court founded its previous judgment are binding in future similar cases. In fact, the Court can overcome (change) its own case-law, if the latter is unclear (uncertain) or needs further development in order to widen the limits of the protection guaranteed by the Convention".

15 MAGRELO M., "Non-binding precedent: some aspects of the ECHR's case-law essence in the continental law system", ***Bulletin Academy of Advocacy of Ukraine,*** p.61.

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 (see, for example, Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey [v.UK] judgment, p. 14, § 35, and Stafford v. the United Kingdom [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited Stafford v. the United Kingdom judgment, § 68)."[16]

It can be argued that the court is now applying the doctrine of non-binding precedent which enables the Court having certain flexibility on overruling precedents[17].

On the other hand, conclusions are drawn by the scholars as to the Court's reluctance to expressly acknowledge that it is overruling established case-law and its failure to provide adequate justifications of the social or scientific developments underpinning its revised jurisprudence.[18]

The Court was criticized for having utilised a number of different justifications for overruling established case-law in an implicit manner. The justification invoked most frequently by the Court is the duty to ensure that the Convention is interpreted in an evolutionary manner that reflects contemporary standards in accordance with the living instrument doctrine. The Court either does not clearly declare that it is overruling a previous judgment (as happened in *Mamatkulov* regarding *Conka*) or the Court uses euphemistic language (*e.g.* the existing case-law is being "further developed" in *Vilho*). It has been left to dissenting judges to decry the majority using stronger epithets, vividly demonstrated by the five dissenters in *Vilho* who criticised the Court for having "overturned its well-

16 *Christine Goodwin v. UK,* Judgment of 11 July 2002, for the whole text of judgment *please see* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596#{"itemid":["001-60596"]} IAD:8.12.2014.

17 For similar opinions, please see BALCERZAK, M., "The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights", 27 ***Polish Yearbook of International Law*** (2004-05), p. 139.

18 MOWBRAY A., "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law", ***Human Rights Law Review,*** 9(2), p.1, http://hrlr.oxfordjournals.org/cgi/reprint/ngp006?ijkey=CwqDiQ0PhWzuxGJ&keytype=ref.

established case-law." Therefore, the Court has to be more transparent in explicitly acknowledging when it is revising and altering its existing case-law. [19]

III. THE METHODS USED IN THE CONVENTION SYSTEM FOR A CONSISTENT AND EQUALLY-PROCESSED CASE-LAW[20]

Within the Court, various means are used in order to ensure the clarity and consistency of the case law. The Convention allows for the relinquishment of a case by a Chamber of the Court to the Grand Chamber in order to avoid inconsistencies with previous judgments (Article 30 of the Convention). Similarly, a Chamber judgment can be referred to the Grand Chamber (under Article 43), and this procedure can be used to avoid risks of discrepancy in the case law . Furthermore, one of the functions of the Bureau of the Court (comprising the President, Vice-Presidents and Section Presidents) is to facilitate co-ordination between the Court sections.

In 2001, the Court established the post of jurisconsult, whose role is to monitor the case-law and accordingly promote its consistency.

The Court's Conflict Resolutions Board (established in 2005) meets on an *ad hoc* basis, at the instigation of the President, in order to facilitate the resolution of case law conflicts (which may lead to an invitation to a Chamber to relinquish a case, or a proposal that a request for referral to the Grand Chamber be accepted).

The Section Registrars are also required to ensure consistency of the case law in and between the Sections.

IV. DEGREE OF THE PRECEDENTIAL VALUE TO BE GIVEN TO JUDGMENTS

There is a wide spectrum of doctrines as to what extent precedent judgments should have authoritative effect on prospective judgments. Therefore, doctrines of binding precedent, persuasive precedent, *jurisprudence constante,* systemic respect and non-binding precedent are the most well-known ones in this respect. In our understanding, the Court is now app-

19 Mowbray argues that "[the] analysis discloses a variety of sources of developments have been taken cognisance of by the Court encompassing public expectations (*Selmouni*), international developments (*Christine Goodwin*) and evolving domestic understandings (*Stafford*) when departing from previous case-law. Although the full-time Court has deployed a range of justifications for overruling earlier judgments it has followed the circumspect approach of its predecessor in avoiding expressly stating that it is so doing." However, Mowbray expresses his satisfaction since the primary beneficiaries of those overrulings were the applicants. *Ibid.* p.27-28.

20 DONALD A. / GORDON J. / LEACH P., ***The UK and the European Court of Human Rights***, 2012, p.109-110.

lying the doctrine of non-binding precedent which enables the Court having certain flexibility on overruling precedents[21]. Without erasing that flexibility of the Court on adjudication, one or two basic principles may be introduced into the fundamental texts of the Strasbourg system.

Considering the *home-made* principles of "living instrument" and "dynamic interpretation" of the Court, ever growing and evolving human rights standards, rapidly changing social conditions and established case-law of the Court, it can be said that binding or persuasive precedent doctrines may be too rigid and "well –established"(!) to be tailored for the Court. However, "any kind of binding degree" granted to the precedent judgments of the chambers and the Grand Chamber of the Court should be regulated in the Convention, or in the Rules of the Court. In this context, doctrines of systemic respect or *jurisprudence constante* may shed light on the possible route to be taken.

In accordance with Article 46 of the Convention, final judgments of the Court are binding. However, precedential binding value should be given solely to the judgments of the chambers and the Grand Chamber, since the judgments or decisions of committees and single-judge formations may unlikely be qualified as precedent. The methods mentioned under Title III may help to reconcile possible problems.

Precedential binding value for the judgments can be realised either by adding a sentence to Article 45 or 46 of the Convention or adding a provision in the Rules of the Court stipulating that "governing reasons of precedent judgments of the chambers and the Grand Chamber shall be observed in similar[22] cases".

The reasons, used by the Court on overruling precedents or departing from well-established case-law, may also be regulated in an exclusive and liberal manner in those texts. In that case, the wording of the regulation

21 For similar opinions, please see BALCERZAK, M., "The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights", 27 ***Polish Yearbook of International Law*** (2004-05), p. 139.

22 In the US law, the concept of commanding precedent may be an example for analysing the concept of "similar cases". Commanding precedent, is a precedent whose facts are "on all fours" with the case at hand. Such a precedent is called on all fours when all four parts of the instant case are essentially the same as the mandatory precedent, or are very similar:
1.The parties are the same, or have such great similarities as to have exactly the same standing.
2.The circumstances involving the two cases are materially the same, or are so similar as not to matter.
3.The issue is exactly the same, or if more than one issue exists, they are materially the same types.
4.The remedy the plaintiff or petitioner seeks is of the same kind as in the past case.
"commanding precedent" http://en.wikipedia.org/wiki/Commanding_precedent IAD:8.12.2014.

may be "governing reasons of precedent judgments of the chambers and the Grand Chamber shall be observed in similar cases unless there are unreasonable circumstances". Thus, the reasons for overruling precedents, or for departing from well-established case-law are left to the discretion of the Court.

IN PLACE OF A CONCLUSION

The Strasbourg Court, trying to meet all the needs of 47 states with different legal cultures, has to hold a clear position on value of previous judgments, either liberal or strict, to maintain consistency, legal certainity and transparency of its established case-law. If there are to be exceptions to the established and announced rules, those exceptions have also to be clarified explicitly in the texts of the judgments.

It is not a wise solution to direct the parties or to expect from readers of the judgment to understand that the established case-law has been changed, whereas there is no explicit attribution to that change in the text of judgment. It is a common and often heard criticism that the dissenting opinions of the judges are the only sources to realize a depart from the established case-law.

Although the European Court applies mainly "non-binding precedent" doctrine, the number, scope and effects of applicable rules seem to be not clear yet. The preferable solution is to be found by the Court by setting forth the applicable rules in its case-law or Rules of the Procedure on value of previous judgments. However, adding a simple phrase, as suggested in the study, to the text of the Convention or its additional protocols may be the second option.

Justice Brandeis says "In most matters, it is more important that the applicable rule of law be settled than that it be settled right."[23]. We hope that matters in the Convention system are settled right with right applicable rules.

23 B.C.KALT: "Three levels of *stare decisis:* distinguishing common-law, constitutional,and statutory cases" *Texas Review of Law and Politics* (2003-2004) , p.277.

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