5

How Do We Decide Whether Moving Online Makes a Difference?

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5.1 INTRODUCTION

One of the best ways to comprehend what difference it makes to move online is to compare cases that differ essentially on the basis of only one thing – one of them is online.

In some cases, moving online might make a difference to how the law works. Identifying those particular cases (as well as those where the digital factor does not make a difference) is a worthwhile theoretical task. However, there is another related question that carries a similar significance: How can courts decide whether in a particular case moving online should make a difference on how the law works? This chapter presents a study with the aim of exploring this question.

Getting acquainted with this process can provide greater clarity on this relatively new phenomenon and stimulate new theoretical insights. Having knowledge of criteria relevant for the discussed decisions has the potential of impacting legal practice by making judicial decisions more predictable and substantiated. Rich and comprehensive reasoning in legal documents is an attractive alternative to legal documents that provide scarce citations of laws and actual logical links, which lead to the conclusion of relying on the intuition of the lawyer.

5.2 BEFORE WE BEGIN

Legal theory proposes several ways to determine whether a new case requires a different treatment. In this context, the assessment would require to decide whether a new fact requires a departure. One of the most famous tests, which requires taking into account only the material facts, was devised by Arthur L. Goodhart for the application of precedents.[1] Julius Stone explained this method by directing to seek a reason that explains whether the later case provides grounds for the same outcome as the

[1] A. L. Goodhart, 'Determining the ratio decidendi of a case' (1930) 40 *Yale Law Review* 2, 161–83; A. L. Goodhart, 'The ratio decidendi of a case' (1959) 22 *Modern Law Review* 2, 117–30; T. Bustamante et al., *On the Philosophy of Precedent: Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009* (Stuttgart: Franz Steiner

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precedent.[2] However, the more prevailing approach for precedents is the rule model that is sometimes described as the *ratio decidendi*, perceived as a legal rule that the judge used as necessary to justify the conclusion of the precedential judgment.[3] It is a widespread view that was aptly worded by Karl N. Llewellyn, that we have to keep in mind the reason for the rule (accordingly, apply it where the reason extends and rethink the rule where the reason becomes irrelevant or is found to be wrongful).[4] The concept of *purpose* is also discussed in the application of precedents. This can be used as the goal of a particular judicial precedent – the reasoning on which the precedent was based and the purpose of relevant legal categories, such as particular individual rights or obligations.[5] The purpose of judicial precedent can aid as a reason in the assessment of whether its *ratio decidendi* is applicable (according to the purpose that justifies it).[6] However, it can be hypothesised that evaluating the legal relevance of a factual difference is not chaotic beyond the limits of the aforementioned criteria, and a deeper examination reveals certain patterns, especially in the context of moving online.

A specific test to evaluate whether a digital factor affects the decision to apply a particular legal rule can be carried out only after there are general indications that the considered rule could be applicable. This chapter presents research on cases where a rule can be found, which was designed for legal relations in the non-digital space, and a new situation occurs, which differs in the sense that it takes place in a digital environment. However, before acknowledging that it is the only difference, a regular evaluation of the rule's applicability must first be conducted.

5.2.1 *Similar Aspects in Dissimilar Cases*

The discussed initial evaluation could be regarded as a typical process in everyday legal practice. However, it is worth remembering that these issues should not be confused with novel legal challenges posed by the cases of focus here. Otherwise, such confusion risks that the conventional tools of legal reasoning be neglected, where they are actually appropriate.

Verlag, 2012); I. McLeod, *Legal Method* (London: Palgrave Macmillan, 2007); J. L. Montrose, 'Ratio decidendi and the House of Lords' (1957) 20 *Modern Law Review* 2, 124–30.

[2] J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (Sydney: Butterworths, 1985), p. 123.

[3] R. Cross and J. W. Harris, *Precedent in English Law* (Oxford: Clarendon Press, 2004), p. 72; W. M. Landes and R. A. Posner, 'Legal precedent: a theoretical and empirical analysis' (1976) 19 *Journal of Law and Economics* 2, 249–307, at 250; L. Alexander and E. Sherwin, 'Judges as rulemakers' (2004) 15 *University of San Diego Public Law and Legal Theory Research Paper Series*, 1–36; L. Alexander and E. Sherwin, *Demystifying Legal Reasoning* (Cambridge: Cambridge University Press, 2008).

[4] K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New Brunswick: Transaction Publishers, 2008), p. 117; K. N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1991), p. 189.

[5] G. Lamond, 'Do precedents create rules?' (2005) 11 *Legal Theory* 1, 1–26, at 7; J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press, 1979), p. 203.

[6] J. F. Horty, *Rules and Reasons in the Theory of Precedent* (Cambridge: Cambridge University Press, 2011), p. 6.

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On 19 April 2018, the Court of Appeal of Ireland delivered a judgment in *Muwema v. Facebook Ireland Limited* that is an important reminder in the context of the initial evaluation.[7] This case involved a legal problem regarding a required standard of proof to issue an order of disclosure. The order was requested against the operator of a social network – Facebook – to disclose the identity of its user. The respondent protested this request, arguing that the user in question would be exposed to arrest and ill-treatment at the hands of the authorities in Uganda whom he opposed. The court provided grounds for the solution of this issue in earlier precedents, which not only did not have the element of the digital space but was also established in rather different cases. The court mentioned *Foley v. Sunday Newspapers Ltd* (2005) regarding an injunction to prevent the publication by the defendant of an article that, if published, the plaintiff considered would place at real and serious risk his right to life and/or right to bodily integrity.[8] Another case was even more distant from the relevant circumstances and was decided in the context of the surrender of a person to Poland under a European arrest warrant. However, all these cases included the same sort of question of balancing one person's right to life and bodily integrity against other concepts guarded by law (e.g., another person's freedom of expression). The court relied on the aforementioned precedents and stated that 'there is no reason why the court should not require the same standard of proof in relation to an assertion by the plaintiff seeking a Norwich Pharmacal order where the court is required to carry out a balancing exercise between competing constitutional rights'. This common denominator can be formulated as follows – *where different cases involve the balancing of the same individual rights, this connection can be sufficient to make these cases comparable both in the digital and physical context*.

The most important takeaway from this example is that legal provisions might be relevant even if they do not contain a typically applicable legal rule. There are undoubtedly numerous examples, which confirm that in legal practice judicial precedents are not only used in cases where all material facts coincide but also where the cases are quite different. The Muwema case confirms that the explored class of cases cannot be held as an absolute exception of this tendency – going online does not cancel the ruling.

5.2.2 *Sometimes: Not Merely a Difference but a Wholly Different Affair*

Reasoning algorithms in the preparatory stage must consider a probable scenario where no applicable rule can be found in statutory law or judicial precedents. This type of crossroad leads to one of two paths: either courts (a) recognise there is no regulation, or somehow (b) justify the application of an old rule, which was not initially intended for such cases.

[7] *Muwema v. Facebook Ireland Limited* [2018] IECA 104.
[8] *Foley v. Sunday Newspapers Ltd* [2005] IEHC 14.

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Naturally, courts can be inclined towards the second path, since the first can require the creation of new rules that is only in the power of parliaments, not the judiciary. However, the first path may not require this and can lead to an outcome that is strongly dependent on one of these principles – 'everything that is not forbidden is allowed' or 'everything that is not allowed is forbidden'. A particular outcome might vary according to the type of legal issue. If it is a matter of criminal liability, the defendant is acquitted. Similarly, a new type of commercial business cannot be treated as requiring a prior licence (and be seen as illegal) if it conceptually differs from the licensed form of commercial activities. However, in cases of a civil dispute between two private persons, different interests must be balanced – the court cannot refuse to resolve the dispute because there is no legal rule.

The last scenario applies usually in cases where courts might have to create a new rule. One case containing factual circumstances that do not have any analogical counterparts in the non-online environment is the *Google LLC v. Oracle America, Inc.* case.[9] It was resolved by the US Supreme Court judgment of 5 April 2021. This case concerned copyright infringement when a certain type of computer code was copied – the copied lines of code were part of a user interface for programmers to access prewritten computer code through the use of simple commands. As a result, this code is different from many other types of code. The copied lines are part of a tool called an Application Programming Interface. The court found applicable law in general provisions regarding copyright infringement, but it decided to distinguish the case from others regarding copying computer code – this unique type of code was treated differently. One of the reasons was that it was widely used by programmers and, given how much the programmers had invested in learning it, enforcement of copyright would limit the future creativity of new programs. Therefore, the enforcement would interfere with rather than further the copyright's basic creativity objectives – the 'copyright supplies the economic incentive to [both] create and disseminate ideas […] and the reimplementation of a user interface allows creative new computer code to more easily enter the market'. This shows that the US Supreme Court took into consideration the social impact of the decision and objectives of the law, but, most importantly, this case demonstrates that even though judicial precedents could be found that, at first sight, appeared applicable, the Court decided to distinguish the case and, in a way, create a new rule.

5.3 PURPOSE AND FUNCTION OF THE DISPUTED OBJECT OR ACTIONS

Among the criteria used in the analysed cases, the purpose of the disputed object was used very frequently. One such example can be found in *Magyar Jeti Zrt v. Hungary*

[9] *Google LLC v. Oracle America, Inc.*, 593 US 1 (2021).

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of the European Court of Human Rights (ECtHR).[10] In this case, a violation of the European Convention on Human Rights (ECHR) was found after domestic authorities held an online news portal liable for posting a hyperlink leading to defamatory content. The courts established the objective liability of the news portal: although the practice of the domestic courts exempted the publishers from civil liability for the reproduction of statements made at press conferences, provided that they were reporting on a matter of public interest in an unbiased and objective manner, distinguished themselves from the source of the statement, and gave an opportunity to the person concerned to comment on the statement. However, the domestic courts decided that in this case of posting a hyperlink to defamatory information, the standard of objective liability applied, irrespective of the question of whether the author or publisher acted in good or bad faith and in compliance with their journalistic duties and obligations.

The ECtHR noted that:

> the very purpose of hyperlinks is, by directing to other pages and web resources, to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other. Hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet. They do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website.[11]

Taking into account this and other reasons, the ECtHR decided that the domestic authorities violated the applicant's freedom of expression by applying the standard of objective liability, which was not used in similar non-digital circumstances.

In the C–264/14 case,[12] the European Court of Justice (ECJ) was faced with an issue regarding the taxation of transactions where traditional currency was exchanged for virtual currency – Bitcoin. The ECJ had to decide whether in this context virtual currency could be characterised as security and tangible property or fall into the same category as traditional currency. In this discussion, the purpose of virtual currency was also recognised as a relevant factor. The ECJ noted that:

> [t]ransactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions […] the 'bitcoin' virtual currency has no other purpose than to be a means of payment and that it is accepted for that purpose by certain operators.

[10] *Magyar Jeti Zrt v. Hungary*, Application no. 11257/2016, Judgment of 4 December 2018.
[11] Ibid., paras. 73–4.
[12] Case C-264/14, *Skatteverket v. David Hedqvist* [2015] ECLI:EU:C:2015:718.

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This led the court to the conclusion that this virtual currency is neither a security conferring a property right, nor a security of a comparable nature.

Case No. C-360/13 of the same court concerned the legality of making digital cached copies of copyrighted material on the internet.[13] Among other things, the court considered the application of EU law, according to which an act of reproduction is exempted from the reproduction right on condition that it is temporary, it is transient or incidental, it is an integral and essential part of a technological process, its sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and has no independent economic significance. Although, the purpose of a copy is a separate condition according to this rule, the court recognised the purpose of the disputed copies in consideration of other factors. The judgment states:

> As regards the other criterion mentioned in paragraph 39 above, an act of reproduction can be regarded as 'incidental' if it neither exists independently of, nor has a purpose independent of, the technological process of which it forms part […] the *technological process in question wholly determines the purpose* for which those copies are created and used, although, as is apparent from paragraph 34 above, that process can function, albeit less efficiently, without such copies being made. Secondly, it is apparent from the documents before the Court that internet users employing the technological process at issue in the main proceedings cannot create the cached copies outside of that process […] It follows that *the cached copies neither exist independently of, nor have a purpose independent of, the technological process* at issue in the main proceedings and must, for that reason, be regarded as 'incidental'. [emphasis added]

Another example is case No. C–390/18,[14] which revolved around the issue of applicable domestic law for a new sort of business provided by the Airbnb Ireland company. This issue was determined by answering the question: Can this new sort of economic activity be treated as the profession of a real estate agent? Doubts were substantiated, among other things, by the fact that apart from the service of connecting hosts and guests using an electronic platform, Airbnb Ireland offers hosts a certain number of other services, such as a format for setting out the content of their offer, with an option for a photography service, an optional tool for estimating the rental price with regard to market averages taken from that platform, and many other supplemental services. The ECJ took into account the purpose of those services – according to the court:

> …it follows that an intermediation service such as the one provided by Airbnb Ireland cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation. None of the other services […] above, taken together or in isolation, call into question that finding.

[13] Case C-360/13, *Public Relations Consultants Association Ltd. v. Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195.

[14] Case C-390/18, *Airbnb Ireland UC* [2019] ECLI:EU:C:2019:1112.

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> On the contrary, *such services are ancillary in nature, given that, for the hosts, they do not constitute an end in themselves, but rather a means of benefiting from the intermediation service* provided by Airbnb Ireland or of offering accommodation services in the best conditions [emphasis added].

Case No. C–62/19 involved questions related to the legality of a smartphone application 'STAR TAXI – driver', which was used in the field of transportation services.[15] The dilemma in this case was of a similar kind to the one in the Airbnb Ireland case: Is the law for a traditional sort of business applicable to a new type of business? Accordingly, the similarity of this application to traditional taxi services had to be assessed. The ECJ emphasised the purpose of the disputed services from more than one perspective. First, it was noted that the direct contractors of the disputed Star Taxi App were legally authorised professional taxi drivers and the *purpose* of the contracts with drivers is:

> …to provide the drivers with an IT application, called *STAR TAXI – driver*, a smartphone on which the application has been installed, and a SIM card including a limited amount of data, in exchange for a monthly subscription fee […] Star Taxi App does not exercise any control over the quality of the vehicles or their drivers, or over the drivers' conduct.

The court recognised this as a material difference distinguishing this case from an earlier similar dispute regarding the intermediation of a taxi transportation service – in the precedent, the purpose of the intermediation service was to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons wishing to make urban journeys. In the precedent, the ECJ decided that the service was to be classified as a 'service in the field of transport', but the Star Taxi App was classified differently. Furthermore, the ECJ concluded that the disputed decision of the domestic authorities (which was restricting) related to:

> …intermediation services, the *purpose* of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, it does no more, in broadening the scope of the term 'dispatching' […] so as to encompass that type of service, than to extend to that information society service a pre-existing requirement for prior authorisation applicable to the activities of taxi reservation centres [emphasis added].

5.4 ACTUAL HARM: DOES GOING ONLINE AFFECT THE EXTENT OF HARM/DAMAGES MADE BY THE DISPUTED ACT?

It is natural that a lawmaker chooses to forbid certain actions or inactions when they violate someone's individual rights, cause damage to values protected by law,

[15] Case C-62/19, *Star Taxi App SRL v. Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General and others* [2020] ECLI:EU:C:2020:980.

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or raises the risk of these occurrences. The line of lawfulness turns interference with someone's interests into an illegal violation of someone's individual rights. There are multiple examples of this criterion, such as violating property rights by damaging private property, violating the freedom of expression by imposing a fine for a published opinion, and so on. Illegal damage to values protected by law can sometimes have no interference with an individual's rights, but be in violation of what is often called public interest. Examples of the latter can be violations of environmental law, animal cruelty, tax evasion, and so on. But sometimes the law forbids actions that do none of these – the prohibition to drive under the influence of alcohol or without a seatbelt; to disregard safety requirements on building construction sites, and so on. Although this behaviour does not necessarily violate someone's individual rights or cause damage to values protected by law, it raises such risks; therefore this sort of legal regulation can be justifiable.

Although these considerations can usually be found in the process of lawmaking in parliaments, it is hard to find strong reasons to neglect them in the judicial interpretation of the law. Naturally, they are most relevant when the law is unclear and there are no precedents in similar cases or distinguishing the cases is considered. Disputes with a digital element are no exception.

In *Savva Terentyev v. Russia*,[16] the ECtHR found a violation of Article 10 of the ECHR because domestic authorities convicted the applicant and suspended the prison sentence for an offensive internet comment against police officers. Perhaps the most important reason the ECtHR relied on was the fact that the domestic courts did not evaluate the actual consequences of the comment, but merely relied on its text:

> …applicant posted his comment on an individual blog of his acquaintance, […] courts, however, do not appear to have ever attempted to assess whether Mr B.S.'s blog was generally highly visited, or to establish the actual number of users who had accessed that blog during the period when the applicant's comment remained available […] the applicant's comment had remained online for one month before the applicant, who found out the reasons for a criminal case against him, removed it […]. Although the access to the impugned statement had not been restricted, it drew seemingly very little public attention. Indeed, even a number of the applicant's acquaintances remained unaware of it, and, it appears it was only the criminal prosecution of the applicant for his online publication that prompted the interest of the public towards his comment […]. It is also important to note that, at the time of the events under examination, the applicant does not appear to have been a well-known blogger or a popular user of social media […], let alone a public or influential figure […], which fact could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements. In such circumstances the Court considers that the potential of the applicant's comment

[16] *Savva Terentyev v. Russia*, Application no. 10692/09, Judgment of 28 August 2018.

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> to reach the public and thus to influence its opinion was very limited […] although the wording of the impugned statements was, indeed, offensive, insulting and virulent […], they cannot be seen as stirring up base emotions or embedded prejudices in an attempt to incite hatred or violence against the Russian police officers […] The Court furthermore discerns no other elements, either in the domestic courts' decisions or in the Government's submission, which would enable it to conclude that the applicant's comment had the potential to provoke any violence with regard to the Russian police officers, and thus posed a clear and imminent danger which required the applicant's criminal prosecution and conviction.

Beizaras and Levickas v. Lithuania is another example of this sort of reasoning.[17] In this case, the ECtHR found a violation of the fourteenth article of the Convention because the domestic authorities refused to prosecute authors of serious homophobic comments on Facebook without an effective investigation beforehand. The applicants were two young men, one of whom had posted a photograph of the couple kissing on his Facebook page. This online post went viral and received hundreds of virulent homophobic comments (containing, for example, calls to 'castrate', 'kill', and 'burn' the applicants).

At the applicants' request, a non-government organisation upholding the rights of LGBTQ+ people (of which they were members) lodged a complaint with the prosecutor's office against thirty-one of these comments, asking the prosecution service to open an investigation for incitement to homophobic hatred and violence. The ECtHR agreed with the aforementioned NGO's position that 'the number of comments could constitute a circumstance determining the gravity of the crime or the extent of the culprit's criminal liability, but that it did not constitute an indispensable element of the crime under the above-mentioned provision of the Criminal Code'. The ECtHR continued to evaluate this by noting, while the comments were in the public sphere, what was the 'potential reach of comments on the Internet, as well as the danger they may cause, especially when published on popular Internet websites'; and that 'the photograph had "gone viral" online and received more than 800 comments'. It was mentioned that 'the potential impact of the medium concerned is an important factor'. Besides these circumstances, which can be found in the digital space, the judgment also includes a notion that 'the comments on the first applicant's Facebook page […] affected the applicants' psychological well-being and dignity, thus falling within the sphere of their private life'. Although the ECtHR mentioned that 'the posting of even a single hateful comment, let alone a comment that such persons should be "killed," on the first applicant's Facebook page was sufficient to be taken seriously', the whole of the reasoning does not eliminate the real possibility that the court's final conclusion could have been different if the comments were not as serious and their reach was significantly lower.

[17] *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, Judgment of 14 January 2020.

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The judgment by the Grand Chamber of the ECtHR on 20 January 2020 in *Magyar Kétfarkú Kutya Párt v. Hungary* concerns a curious example of a new unique form of political campaigning enabled by internet technologies.[18] The ECtHR found that Hungarian authorities violated the freedom of expression of the applicant (the political party Magyar Kétfarkú Kutya Párt (MKKP)) by holding it liable for making available a mobile application allowing voters to share anonymous photographs of their ballot papers. The events occurred in a referendum related to the European Union's (EU's) migration relocation plan. The referendum was initiated by the Hungarian government, and the applicant, being an oppositional party, was campaigning against the referendum, encouraging voters to destroy their ballot papers. One of the ways the MKKP conducted the campaign was by making available a mobile application called 'Cast an invalid ballot', which enabled users to upload and share with other users, anonymously, photographs of their ballots or a photograph of the activity they were engaged in instead of voting. The ECtHR found that the domestic authorities imposed penalties for this act without a clearly prescribed law. The law, on which courts relied, established a principle of the exercise of rights in accordance with their purpose. The ECtHR stated that:

> having regard to the particular importance of the foreseeability of the law when it comes to restricting the freedom of expression of a political party in the context of an election or a referendum […], the Court takes the view that the considerable uncertainty about the potential effects of the impugned legal provisions applied by the domestic authorities exceeded what is acceptable under Article 10 § 2 of the Convention.

Here, the ECtHR decided on a matter that at first sight might seem to concern only the text of the statute – liability for an offence can be estimated as unprescribed by law when the statute does not expressly prohibit such behaviour. On the one hand, this can be said about the discussed case, but on the other hand, the law could also be regarded as abstract, and the ECtHR admits that in other cases some level of vagueness in the law can be tolerated, as long as it is clarified in the domestic judicial case law. With that in mind, the quote displays that the context where the freedom of expression was exercised involved political activities with the potential of significant societal impact. This impact might even concern the fundamental values of democratic order. In this case, an indirect equivalent of considered acts (the issuing of a mobile application) might have been some sort of physical display of analogical photographs, perhaps communicating them through less modern channels of communication. But in this case, the online factor was not decisive. The court followed a traditional path of legal reasoning, which coincidentally led to an unregulated field; therefore, there was a need for a new rule to be established

[18] *Magyar Kétfarkú Kutya Párt v. Hungary*, Application no. 201/17, Judgment of 20 January 2020.

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according to judicial precedent, which was drafted with regard to the extent of damages from interference with the applicant's freedom of expression.

On 13 May 2014, the ECJ adopted a famous decision in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* – case No. C-131/12,[19] regarding the right to be forgotten. This decision basically established that individuals have the right to request search engines, such as Google, to remove certain links from their search results if the information is outdated, irrelevant, or infringes their privacy rights. This decision includes the following statement: 'the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous'.

What this precedent contrasts with in a non-digital environment is the legal status of the paper archives of newspapers. If the right to be forgotten rule was universal, there would be very little reason not to enforce it for public libraries and other archives. However, it was constructed and recognised only when the traditional paper archives attained a counterpart in a digital environment. This counterpart – internet search engines – differs mostly in terms of the ease of access to the requested data for a non-professional domestic user, which means that interference with a person's right to privacy in digital archives (i.e., search engines) is much greater than the same interference in non-digital archives, such as public libraries. This ECJ case is an example where the extent of harm/damages made by the disputed act in a digital environment had an enormous significance compared with other judicial cases.

5.5 AFTER WE FINISH

5.5.1 *Established Theory*

It is an understatement to say that some research has been conducted on legal reasoning or the impact of the internet: there is a plethora of academic publications tackling particular legal issues in the digital space. Among other things, they include artificial intelligence (AI) liability,[20] data protection and privacy,[21] copyright

[19] Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* [2014] ECLI:EU:C:2014:317.

[20] E.g., G. Borges and C. Sorge (eds.), *Law and Technology in a Global Digital Society: Autonomous Systems, Big Data, IT Security and Legal Tech* (Cham: Springer Nature, 2022); G. Borges, 'Liability for AI systems under current and future law: an overview of the key changes envisioned by the Proposal of an EU Directive on Liability for AI' (2023) 24 *Computer Law Review International* 1, 1–8; P. H. Padovan, C. M. Martins, and C. Reed, 'Black is the new orange: how to determine AI liability' (2023) 31 *Artificial Intelligence and Law* 1, 136–67.

[21] E. K. Cortez (ed.), *Data Protection Around the World: Privacy Laws in Action* (The Hague: T.M.C. Asser Press, 2021); S. O'Leary, 'Balancing rights in a digital age' (2018) 59 *Irish Jurist*, 59–92; D. J. Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008).

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law,[22] and others. However, very few address the issue of legal reasoning in this context. Naturally, a substantial number of findings on this topic are applicable to disputes in the field of modern internet technologies. It would be beyond the format of this publication to list all of the relevant insights on legal reasoning, but some of them are noteworthy because they focus on the matter of *refreshing* the law.

In legal disputes, the question 'what difference does going online make' (if at all) can be particularly hard to answer when judicial precedents can be found and they appear to come from similar cases. Often most of the material facts can be similar, except the online factor. Legal literature provides some insights into when precedents must be followed and when departed from.

Changes in the social, moral, and economic contexts are among the most widely mentioned reasons to overrule a judicial precedent.[23] Other, more detailed, justifications for a departure from precedents by overturning them include subsequent changes or developments in the law that undermine the rationale of the earlier decision; a need to bring a decision into agreement with experience and with facts newly ascertained; the precedent can be shown to have become a detriment to coherence and consistency in the law; a mistake exists in the precedent; the precedent is unworkable or badly reasoned; the departure can be justified by the possible significance of intervening events or the possible impact of settled expectations;[24] and where there are serious and objective reasons and where 'the new solution better reflects the *ratio legis*, changed circumstances or altered legal views'.[25] In summary, it can also be said that overruling a precedent, when deciding a case based on how it was resolved earlier is suitable for the former, but not the present situation, and in light of new circumstances, the same empirical results that were reached in the precedent case cannot be achieved in the present case using the same measures. Every time we consider a departure from a precedent, it is useful to evaluate the role of the judicial precedent's prerequisites in the particular case – how strong could the legal expectations have been, could the departure have been predicted, and so on.[26] Chris Reed is one of the few authors who have analysed in depth the issue of the legal significance of the internet (as a factor requiring different legal treatment).[27] In

[22] L. Bently et al., *Intellectual Property Law*, sixth edition (Oxford: Oxford University Press, 2022); P. Goldstein and B. Hugenholtz, *International Copyright: Principles, Law, and Practice* (Oxford: Oxford University Press, 2019).

[23] See, e.g., M. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge: Cambridge University Press, 2014), p. 175; A. Ross, *On Law and Justice* (Clark, NJ: The Lawbook Exchange Ltd, 2004), p. 86.

[24] S. Brenner and H. J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992* (Cambridge: Cambridge University Press, 1995), p. 8.

[25] C. Baudenbacher and S. Planzer (eds.), *International Dispute Resolution. The Role of Precedent* (Stuttgart: German Law Publishers, 2010), p. 17.

[26] J. Baltrimas, 'Judicial precedent: authority and functioning', Summary of Doctoral Dissertation (2017), pp. 28–9.

[27] C. Reed, 'Online and offline equivalence: aspiration and achievement' (2010) 18 *International Journal of Law and Information Technology* 3, 248–73.

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his paper 'Online and offline equivalence: aspiration and achievement', Reed lays down insightful observations on when the online factor is sufficient for a different legal treatment and proposes a methodology for the rules of behaviour regulation: (a) identifying the various interests that the rule needs to take into account; (b) analysing the ways in which the new rule is likely to affect those interests; and (c) evaluating the resultant balance of interests to decide if it is equivalent to the off-line situation.[28] Although this test of interest-balancing is undoubtedly valuable for legal reasoning, the judicial judgments adopted after Reed's paper was published display a large set of supplemental modes or reasoning. In addition, the question of whether going online makes a difference is sometimes followed by the question of whether going online *still* makes a difference (or not). This issue is presented in the following section.

5.5.2 *Differences That Vanish*

Sometimes 'going online' makes a difference that is not permanent. Established precedents on the matter of a certain online phenomenon can become outdated if the underlying reasons for those precedents are no longer applicable because of technological developments. So, an important question to keep in mind is how judicial precedents on this matter function. It was already mentioned that with important changes precedents might become obsolete, which is partly illustrated by most of the cases presented in this chapter.

The presented cases show the significance of the purpose of the disputed object or actions and the significance of the actual extent of the harm from the act under consideration. But the theory on precedents in many of these cases provides an important notice – transferring to a digital environment is not the last step. *Going online often does make a difference but after we are there, developments of modern technologies can continue making changes.*

In the *Pihl v. Sweden* case,[29] the ECtHR found that an application regarding an alleged failure by domestic authorities to hold a service provider responsible for the content of third-party comments on a blog was inadmissible. The applicant included a complaint that, although a defamatory comment on the internet was removed and a new post was added on the blog by the association stating that the earlier post had been wrong and based on inaccurate information, according to the applicant, it was still possible to find the old post and the comment on the internet via search engines. The court responded to this by pointing out that 'the applicant is entitled to request that the search engines remove any such traces of the comment (see the ECJ judgment of 13 May 2014, *Google Spain* and *Google*, no. C-131/12, EU:C:2014:317)'. This offers room to speculate what would the ECtHR's view be if

[28] Ibid., p. 256.
[29] *Pihl v. Sweden* [ECHR], Application no. 74742/14, Judgment of 9 March 2017.

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this case had taken place before the ECJ established the right to be forgotten. There cannot be a definitive answer, but if we strictly follow the rules of formal logic, this alternative hypothetical scenario should turn out differently (if there were no other decisive circumstances).

An even stronger example of the relevant developments is the case of *Ashcroft v. American Civil Liberties Union*, et al. 535 U.S. 564 (2002) presided over by the Supreme Court of the US. In this case the legality of the Child Online Protection Act (COPA) was reviewed. This act restricted publishing indecent material on the internet that can be harmful to children. One of the reasons mentioned in this case was a statement by the Court of Appeals that prior community standards jurisprudence 'has no applicability to the Internet and the Web' because 'Web publishers are currently without the ability to control the geographic scope of the recipients of their communications'. It was argued that 'COPA is "unconstitutionally overbroad" because it requires Web publishers to shield some material behind age verification screens that could be displayed openly in many communities across the Nation if Web speakers were able to limit access to their sites on a geographic basis'. The Court noted that 'given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in Hamling and Sable, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression'. However, in today's world there are numerous cases where courts impose restrictions on the content on the internet that confine it to certain geographic locations. Contemporary technology is much more capable of controlling the geographic scope of the recipients, which makes the aforementioned US Supreme Court's reasoning in this *Ashcroft v. American Civil Liberties Union* case basically obsolete.

5.6 THE IMPLICATIONS

In legal practice, it is very common to follow a collection of universally recognised legal principles, such as the principle of proportionality, *nullum crimen sine lege*, *pacta sund servanda*, *in dubio pro reo*, *ignorantia legis neminem excusat*, and many others. In this, they are taken as a given, and it is rarely asked who (and when) created those principles. The usual first answer could be that they were crafted by ancient Roman legal scholars or (and) forged in judicial practice. Should it not be encouraged to keep raising the questions: Are we done with drafting legal principles? Are they all already discovered? Perhaps some of them already exist between the lines of judicial case law and the only step left is to give them the title of 'principles'.

If we do not require the sanction of the lawmaker to present the title 'principle', there is no other more reliable source for discovering legal principles than the tendencies in judicial case law. With proper respect to David Hume's guillotine, it cannot be denied that, when the statutory law is not amended, there is no better way to predict future judicial decisions than on the basis of past judicial decisions – to

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predict what will be done by recognising what is being done. Articulating those tendencies can help initiate a discussion about whether what the courts are doing should be amended. If we come to the conclusion that there is no such need, more extensive reasoning can better help reflect the reasoning process that took place in the judge's intuition or maybe even help her come up with a better solution overall. This consideration is reminiscent of a big-picture question concerning the goals of methods for legal reasoning overall: What are they? What should they be? If those goals include a more representative articulation of the judge's thought process and help to achieve a more just and beneficial judgment, then the search for principles that are yet to be given the title of 'principles' should be carried out.

In this chapter, two main tendencies of judicial practice were found – the relevance of the purpose or function of the disputed object or actions and the extent of harm. Judicial practice in the future has the tools to keep 'polishing' these and, perhaps, one day title them principles. The first has the potential to be worded as a principle that 'similar actions or objects in different contexts receive a similar legal treatment if their purpose and function does not differ'. The second – 'an act that is incompatible with the text of law but causes no harm or any risk of it will be treated as lawful'. The latter also might have the potential to be worded *a contrario* – 'an act which causes harm or the risk of it will be treated as unlawful, even if its incompatibility with the text of the law is vague'. Of course, these preliminary wordings are imperfect and legal professionals should be able to come up with significantly improved versions to describe the tendencies presented in this chapter.

5.7 CONCLUSIONS

The analysed cases illustrate that when faced with the task of resolving whether going online makes a difference, the courts, among other things, consider (a) the purpose and function of the disputed object or actions, and (b) the extent of harm/damages made by the disputed behaviour or act. These criteria might be helpful when analogical objects or actions can be found in a non-digital environment, which is already regulated by clearly established legal rules. The evaluation of similarities between cases according to these criteria focus on material facts and can be useful in concluding whether differences between similar cases in digital and non-digital environments are legally relevant or do not have more significance than the hair colour of the litigants.

The purpose and function of the disputed objects or actions can be relevant in comparison with the purpose and function of analogical objects or actions in a non-digital environment. If they are different, the 'online' case may receive a different legal treatment from its non-digital counterpart, and by contrast, when they are not different, they may receive the same legal treatment.

The extent of harm/damages made by the disputed act influences the conclusion about whether going online makes a difference in an intuitive way, which can be

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typical in all sorts of legal disputes – when there is no discernible harm, the behaviour can be treated as lawful. Correspondingly, when an act balances on the boundaries of legality according to the text of the law, it can be recognised as unlawful when this act causes considerable harm.

These findings also force us to propose a theoretical hypothesis: Can going online ever make a difference by itself? Perhaps a different legal treatment based solely on the difference of this circumstance is a rarity and can only be found when going online has other consequences (e.g., different levels of harm as a result of the illegal content being easier to access through the internet). However, since the presented study was not quantitative, further research would be necessary in order to confirm this statement.

The pure evaluation of whether going online makes a difference in itself is only part of the process arising from disputes in the context of technological innovations. There are important insinuations both before and after we begin the aforementioned evaluation. At the start, it is important to determine whether this test is appropriate at all. Afterwards, it must not be forgotten that developments of modern technologies can keep making differences perpetually. Accordingly, enforcers of the law and legal regulators must remain alert not to miss important developments, which might require them to supplement the system of the law based on new precedents.

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