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THE UNIFORM APPLICATION OF LAW- EU STANDARDS AND CHALLENGES IN SERBIA

The uniformity of case law remains an imperative in process of strengthening the rule of law all around the world. In spite of differences in status that case law has in the hierarchy of the sources of law in particular country, from the perspective of citizens, uniform application of law ensures the equality before law and the possibility to, based on earlier decisions in identical or similar cases, predict the outcome, duration and costs of the decision-making process. That possibility is essential for access to justice. In parallel, from the angle of judges, uniform application of law is an important border line between their freedom of judicial discretion and possibility and/or obligation to follow earlier decisions in similar cases. In the context of achieving EU standards in the process of accession negotiations with EU, a decision of authorities on how to regulate conditions, processes and means to ensure the uniform application of law does not depend anymore only from legal tradition and wishes of legal professionals and stakeholders. This became obvious also for Serbian authorities in the process of constitutional changes aimed at strengthening independence of judiciary, where balancing judicial independence and uniformity of case law appears as a one of the greatest challenges.

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1. Uniform application of law and the Rule of Law principle

Without any doubt, the process of application of law significantly overcame simple "put the facts under the legal provision" mechanism. It opens numerous questions related to qualitative elements of the Rule of Law concept, usually interpreted through the supremacy of law over arbitrary power and the universal application of law by the courts. Probably the best explanation of the qualitative requirements of the written laws was given by Radbruch (Radbruch, 1946:107) in form well-known as the Radbruch Formula (*Radbruchsche Formel*). Analyzing the role and competences of the judge in case he deciding in certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that "the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law". He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that "where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all." He concluded that positive law cannot be defined otherwise as a rule that is precisely intended to serve justice. Based on Radbruch Formula, numerous modern authors attempted to find a balance between equality before law and justice.[1] In interpretation of Fuller, there are eight requirements of the rule of law. Laws must be general (specifying rules prohibiting or permitting behavior of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past); Laws must be clear in order to enable citizens to identify what the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes. (Murphy, 2005: 239-262) According to Fuller, law is "the enterprise of subjecting human conduct to the governance of rules". When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act.

[1] See more in: F. Hayek, *The road to Serfdom*, Routledge Classics, 2001.

They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke.[2]

Nevertheless, fulfillment of certain quality requirements of laws is not an absolute guaranty that these laws will be uniformly applied as Fuller a bit naïve anticipated.

For the citizens, as participants or potential participants in court proceedings, is of the crucial importance to anticipate the key elements of the judicial procedure:

- Major outcome of the proceeding based on relevant regulations and earlier case law in similar cases;
    - Indicative duration of the procedure;
    - Indicative costs of conducting the procedure.

A legal system which guarantees this to its citizens can be evaluated as a system with high level of legal certainty and equality before law.

It seems that the issue of uniform application of law should be seen mostly in the context of three questions:

- How (if any) the case law is ranked in the hierarchy of the sources of law in particular country?
- Where is the border line between internal independence of a judge and a need to ensure equality before law?
- To what extent is case law accessible?

2. EU standards on the uniform application of law

The uniform application of the law and the harmonization of case law are issues where there is no uniformity in regulation. These differences are mostly related to the type of

[2] He also considers a moral component of the rule of law, arguing that the rule of law provides some normative grounds for thinking that citizens have a moral, but conditional obligation to obey the law. "Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted"(242-243)

legal system of the country concerned, as well as to legal tradition. In common law countries this is done, mostly, by the rule of precedent. In continental or civil law systems, freedom of judges in interpretation of legislation is more limited. Additional factor can be also the potential obligation to align its legal system with international standards. The last mentioned is typical for candidate countries in the process of accession negotiations with EU.

The European standards in this regard are created mostly by the Council of Europe, on three parallel tracks- through recommendations of the Committee of Ministries as well as through opinions of the Venice Commission and the Consultative Council of European Judges (hereinafter: CCJE).

From the angle of the CCJE, there are formal, semi-formal and informal mechanisms with regard to the role of courts in achieving consistent case law. There, appeal procedures appear as a formal mechanism; Semi-formal mechanisms include e.g. regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court; informal consultations among judges can be qualified as informal mechanism. These semi-formal and informal mechanisms are intended to promote the uniform application of the law, but conclusions drawn in these contexts cannot infringe the independence of the individual judge. The CCJE recommended introduction of "filtering criteria" in order to enable access to supreme court only for cases of precedential value to be adjudicated by a supreme court. "At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes." (CCJE, Op. No. 20, par. 17-22) It should be mentioned that this is not an innovative approach, having in mind the guidelines included in the Recommendation CM/R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Article 7 (c)), that says: "Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims".

In parallel, the CCJE recognized importance of the appellate courts in systems where access to supreme court is limited. "Consequently, in the CCJE's view, it cannot be automatically imposed on a supreme court to intervene as soon as there are divergent decisions on the level of appellate courts. It can be expected in numerous cases that the uniform application of laws should in due time be achieved on the level of appellate courts." (CCJE, Op. No. 20, par. 25)

However, the main position of the all relevant bodies is that consistency in the case law needs to be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts. Recommendation CM/Rec (2010)12, par. 23 stipulates that "superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law."

This issue has also been treated from the aspect of internal judicial independence, that, from the angle of the Venice Commission, means that "every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts." (CDL-AD (2007)003, par. 61)

The Venice Commission particularly dealt with this issue from the aspect of the powers of higher courts in creation of the case-law of the lower ones. "Giving to the Supreme Court the powers to supervise activities of general courts (Article 51, § 1) seems contrary to the principle of independence of those general courts. While the Supreme Court must have powers to overrule, or to amend, judgments of lower courts, it should not supervise them." (CDL-INF (1997)06, par. 6). In the opinion on the draft of the Constitution of Ukraine, the Venice Commission says: "According to the system of judicial independence high courts ensure consistency of case-law in the entire territory of a country through their decisions in individual cases. Lower courts will have, even when contrary to the *Common law* heritage as a part of the *Civil law* system they are not formally obligated by judicial precedents, the tendency to follow the principles developed in decisions of higher-instance courts, in order to avoid their decisions being vacated on appeal. Additionally, special procedural rules may ensure consistency between different judicial powers. This draft basically proceeds from this principle. It provides to the Supreme Court (Art. 51.2.6 and 7) and, in a narrower sense, to the plenum of the Supreme Specialized Courts (Art. 50.1) a possibility to send

"recommendations/explanations" on the issues of application of the legislation to lower courts. This system probably does not stimulate emergence of the truly independent judiciary in Ukraine but implies the risk that judges behave as civil servants who are liable to orders of their superiors. Another example of hierarchical approach in the draft involves broad powers of the President of the Supreme Court (Art. 59). It seems that he is exercising these particularly significant powers on his own, without any need to address the plenum or the presidency." (CDL-INF (2000)5 under the title „Establishing of strictly hierarchical judicial system")

The Venice Commission concludes that individual accountability of a judge, exclusively based on the outcome of the proceedings further to the application to the ECHR, is contrary to the principle that allows a judge to freely interpret the law and assess evidence in individual cases, in compliance with the European standards. In line with those standards, a wrong decision may be contested through appellate procedure and through individual accountability of a judge, except in case of gross negligence of the judge. „Disciplinary liability of a judge should cover substantial violations of the code of professional conduct that have impact on the reputation of the judiciary. Disciplinary liability of a judge should not include the contents of their decisions or judgments, including differences in legal views among courts; or cases of judicial error; or of criticism of courts. ." (CDL-AD (2007)003, par. 40) On the same page stands the CCJE, saying that, "legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary." (CCJE, Op. No. 20, par. 39)

It seems that the most important step forward with respect of defining the borderline between internal independence of a judge and a need to ensure uniform application of law was made by CCJE in several opinions, but mostly in the Opinion No. 20 adopted in 2017.

The CCJE, in its Opinion no. 10, has stated that "Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries." Consequently, the CCJE anticipates taking case law into consideration when rendering decisions as useful and important. More articulated, the

CCJE stated in its Opinion no. 20 (2017) that: "…while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated." Contrary, when relying on case law, due consideration should be given to the context and circumstance of the case wherein they were adopted. (CCJE Op. No. 20, par. 32-37)[3]

The case law development is not, in itself, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice of the EU or the ECtHR) often result in the need to adjust the domestic case law as well. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a well-established case law, shall not be reopened. "Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons."[4] *Sahin and Sahin v Turkey*, App. No. 13279/05, 20 October 2011, par. 58. and CCJE Op. No. 20, par 30-31.

[3] See also: The Recommendation k) from the same Opinion and the CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 49.

[4] See: *Sahin and Sahin v Turkey*, App. No. 13279/05, judgment on 20 October 2011 CCJE Op. No. 20, par 30-31.

3. ECtHR and uniform application of law

The European Court of Human Rights, in a number of judgments, emphasized problems that occur because of uncoordinated case-law. Thus, in the case *Živić v. Serbia*, the European Court concluded that uncoordinated case-law results in a deep and persistent legal uncertainty, which further leads to do the violation of Article 6 of the Convention.[5] Somewhat more extensive stand was taken in the case *Vinčić and others v. Serbia*. Institutionally unresolved inconsistent adjudication of claims brought by many persons in identical situations creates the state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence, clearly, being one of the essential components of a State based on the rule of law.

The ECtHR tried to define rules and conditions when conflict of decisions constitutes breaching of the Art.6. Thus, deciding in *Şahin and Şahin v. Turkey*, the Court stated that, under certain circumstances, conflicting decisions of domestic courts, especially courts of the last instance, can constitute a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR. "Thereby it has to be assessed whether (1) "profound and long-standing differences" exist in the case law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect. The CCJE welcomes the development which emphasizes the close link between the uniformity and consistency of case law and the individual's right to a fair trial. "(CCJE, Op. No. 20, par. 8) Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.[6]

In such a situation the judicial uncertainty in question has in itself deprived the applicants of a fair trial.[7] In the above-mentioned judgment *Şahin and Şahin v. Turkey,* the Court points out that once identified, conflicts of case-law should, in principle, be settled by establishing the interpretation to be followed and harmonizing the case-law, through mechanisms vested with such powers.[8] ECtHR has held that conflicting court decisions or judgments are an inherent trait of any judicial system "which is based on a

[5] *Živić v. Serbia*, App. No. 37204/08, judgment: on 13 September 2011, § 46-47.

[6] *Brezovec v. Croatia* App. No 13488/07, judgment on 29 March 2011.

[7] Vinčić and others v. Serbia, applications Nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07,4022/08, 4021/08, 29758/07 and 45249/07, judgment: on 01/12/2009, § 56.

[8] Nejdet Şahin and Perihan Şahin v. Turkey, App. No. 13279/05, judgment: on 20 October 2011, § 79.

network of trial and appeal courts with authority over the area of their territorial jurisdiction." [9]

The ECtHR has analyzed consistency of case law also from the aspect of public confidence in judiciary and found that consistency of case law "guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts." However, it went on to state that if there were persistent conflicting decisions, this could create "a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law."[10]

The reasons for the judgment must not be just a mere formality. „Judges should provide clear reasons for their decisions in a language that is clear and understandable".[11] When the reasons for a judgment are in question, it is also necessary to mention certain positions of the European Court of Human Rights. Namely, in the decision *Taxquet v. Belgium*[12], the Court took the stand concerning the issue of the reasons for the guilty verdict by a jury, but thereby giving its understanding of reasons for a judgment in general. In the last judgment in this criminal matter, the Court held that the verdict by the lay jury does not have to contain reasons for the verdict, because the Convention on the Protection of Human Rights and Fundamental Freedoms does not require a jury to provide reasons for its decision and, therefore, that thereby there was no violation of Art. 6 of the Convention. All that is required is that the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.

However, when it comes to criminal proceedings conducted before professional judges, who decide on guilt, the Court notes that the accused's understanding of his conviction stems primarily from the reasons given in the judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions. Reasoned decisions also serve the purpose of demonstrating to the parties that

[9] Cupara v. Serbia, App. No. 34683/08, judgment on 12 July 2016.

[10] See: Albu and others v. Romania, App. No. 34796/09, judgment on 12 May 2012 and Nejdet Şahin and Perihan Şahin v. Turkey, App. No. 13279/05, judgment: on 20 October 2011.

[11] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* § 59-65.

[12] Taxquet v. Belgium, App. No. 926/05, judgment on 13 January 2009 and 16 November 2010, taken over from:

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{%22itemid%22:[%22001-101739%22]}, accessed in June 2017.

they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defense. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case, therefore, courts are not obliged to give a detailed answer to every argument raised in the proceedings, it must be clear from the decision that the essential issues of the case have been addressed.[13] The reasons by which the court was guided when handing down the judgment must be specified to the accused, at least concerning the basic items, and this cannot be satisfied by mere publishing of the judgment, when the court will in brief outline announce the reasons it was guided by in handing down the judgment. In other words, as it is noted "reasons for a judgment must in a clear, concrete and logical way shed light upon the interpretation of facts and the law...and for a judgment to accomplish its purpose, must be explained so as to convince the parties and anybody else in its objectivity and properness by the power of its arguments".[14] In this respect Austrian experiences may be of great importance in this area.[15]

4. Sources of law according to the Constitution of the RS and the role of case-law

The problem of uniformity in application of law has been recognized by European Commission in the Screening Report[16] and consequently addressed in the AP CH23. The EC recommended (recommendation 1.3.9.) the Serbian authorities to "improve consistency of jurisprudence through judicial means (consider simplification of the

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[13] Thaman, S. (2011) Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium. *Chicago-Kent Law Review, vol. 86, No. 2*, p. 625; Doobay, A. (2013). The right to a fair trial in the light of the recent ECtHR and CJEU cases. *ERA Forum*, p. 6. When this judgment is in question it is interesting to mention its impact on the national legislation of Belgium. Namely, the original judgment of the European Court was made to the prejudice of Belgium, because the Court held that Article 6 of the Convention had been violated, and that the judgment handed down by the jury must include the reasons for it. After that, the Belgian legislator responded and introduced in the legislation the provision according to which the jury is obliged to formulate the basic reasons for its decision (Thaman, 2011: 624). Otherwise, a similar solution is also contained in the Spanish legislation. However, after that, the European Court took a completely opposite stand.

[14] Bejatović, S. at al. (2013) *Priručnik za primenu Zakonika o krivičnom postupku (Manual for Application of the Criminal Procedure Code).* Belgrade: Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, pp. 327-328.

[15] Knežević, M. (2017) Project "Judicial Efficiency", component 1 – standardization of case-law, comparative law report, part one: Austria, Novi Sad.

[16] Screening Report for Chapter 23, available on: https://www.mpravde.gov.rs/files/Screening-report-chapter-23-serbia%20Official%20(3).pdf, last accessed on September 14th 2018.

court system by abolishing courts of mixed jurisdiction and possibility to file an appeal before the Supreme Court of Cassation based on legal grounds against any final decision) and by ensuring complete electronic access to court decisions and motivations and their publication within a reasonable amount of time."

In order to address this recommendation, Serbian authorities include activity 1.3.9.1. in the AP CH23 which says: "Conduct analysis of the normative framework which regulates: the issue of binding of jurisprudence, right to legal remedy and jurisdiction for deciding on legal remedy; publishing judicial decisions and judicial reasoning taking into account the views of the Venice Commission."

There is a good reason to approve decision to address it in such a way. It seems that the formulation of Article 145, which stipulates that court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Laws, calls for a more detailed analysis, both in the light of improvement of access to justice and legal predictability. Namely, first the question of harmonization of this provision with Article 16 of the Constitution arises, which prescribes that „Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution."[17] Analysis of the two provisions makes it pretty obvious that the framer of the Constitution did not have a consistent approach in the determination of the hierarchy of the legal acts in the RS, since he/she, in Article 16, insists on the harmonization of ratified international treaties with the Constitution, but not also of the generally accepted rules of the international law although the term that undisputedly calls for a more precise interpretation is in question. In addition, as it can be seen from the above-mentioned provision, Article 145 does not recognize generally accepted rules of the international law as the basis of court decisions. Therefore, it would be appropriate to eliminate this constitutional vague wording and/or confusion already on the occasion of initial amendments of the Constitution.

When it comes to the role of case-law as the source of law, it is clear that the Serbian Constitution does not recognize case-law as the source of law. This is result of the interpretation of the principle of the freedom of judicial discretion as unlimited freedom that allows a judge to hand down completely different decisions in cases of identical or

[17] See more in: Škulić, M. (2009) *Krivično procesno pravo (Law of Criminal Procedure)*, Pravni fakultet Univerziteta u Beogradu (Faculty of Law of the University in Belgrade), Belgrade, pp. 28-31.

almost identical factual description. In this way, the equality of citizens before the law is threatened and the legal predictability is degraded. In other words, the principle is disrupted that laws of a country must be equally valid for all, except if objective differences justify the diversity, as Tom Bingham puts it.[18] This practically implies application of laws in the manner that will treat all the citizens in its territory in the same manner.[19]

Finally, within thus set general framework, the legislator is faced with the issue on how to ensure the basic preconditions for raising case-law to certain level of binding and how to improve its availability.

5. The status of the uniform application of law in the context of constitutional amendments

In order to establish an adequate normative framework for uniform application of law, the Serbian authorities include this issue on the list of topics that require different treatment in the Constitution itself. The Draft Constitutional Amendments[20] brought provision that addresses the hierarchy of the sources of law as well as uniform application of law (a bit confusing) together with principle of the independence of the judiciary as well as the principle of legal certainty.

According to this provision, *"*a judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts". Commenting this provision, the Venice Commission stated that, "despite all the controversies around this solution, its main positive goal is the requirement that even an ordinary judge, not only a constitutional judge, should see the act on which s/he adjudicates within the context of the constitution, as a structural and axiological keystone in the system of law." The Commission especially focused on the sentence "*other general acts",* and concluded that itself, not a problem if the wording "*other general acts*" refers solely to secondary legislation, such as regulations issued by the

[18] More about this: Bingham, T., *The Rule of Law*, London, Penguin books, 2011.

[19] Blanuša, A. (2017): Ujednačena sudska praksa kao temelj pravne sigurnosti i pospešujući faktor za direktne strane investicije, u (Uniform case-law as the foundation of legal security and stimulating factor for direct foreign investments, in): Bejatović, S.; Vukadinović, R., Turanjanin, V.: Pravna sigurnost kao pospešujući faktor za direktne strane investicije (Legal certainty as the stimulating factor for direct foreign investments), Kragujevac, 2017, p. 259.

[20] See: https://www.mpravde.gov.rs/files/Draft%20Amendments%20to%20the%20Constitution%20of%20Republic%20of%20Serbia.pdf, last accessed on September 10th 2018.

executive as authorized by law. (CDL-AD (2018)011, par. 25-27) The Commission here practically underlines necessity to keep judges subordinated only to constitution, laws and international treaties, but not to act of the executive power other than secondary legislation.

Somehow, the issue of the position of generally accepted rules of international law was "resolved" by left them out from the text. Despite the relatively frequent raising this issue by several authors in last ten years, the Commission has not found it worthy of analysis.

The main focus of the Commission with this regard was on the way that legislator choose to deal with uniform application of law, namely, with the sentence where legislator states that: "The method to ensure uniform application of laws by the courts shall be regulated by law." The Venice Commission confirmed that there is concern in Serbia regarding a lack of legal certainty due to inconsistent case law, but emphasized that this may have many reasons, not only a lack of effort by the judges to ensure that their decisions take the existing case law into account. From that point of view, the Commission welcomed the decision of the legislator to underline the importance of ensuring consistency in the case law in the Constitution, but expressed concerned about its wording used in order to do it and by the intentions of the phrase "*method to ensure*...". The special concern of the Commission refers to possibility of establishing some special body in charge of harmonization of case law, as was planned in the NJRS 2013-2018 (the well-known Certification Commission) The Commission see that as the task in the exclusive responsibility of judiciary.

At the same place, Venice Commission recalled earlier mentioned relation between the internal independence of judges and necessity to ensure uniform application of law and legal certainty.

Referring to its previous opinion, Commission recalled that "the need to unify practice should, in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases." (CDL-AD (2013)005, par. 105). The Venice Commission therefore recommended deleting the third paragraph of the proposed Amendment that refers to regulation of the harmonization of case law by law. This position is even a stronger in part of the Opinion which deals with the role of the Supreme Court, where Commission welcomed the definition of the Supreme Court of Serbia as the highest court in Serbia, but criticized the way on how the role of this Court is regulated. Namely, the

Amendment X says that the role of the Supreme Court is to ensure the uniform application of the law by the courts, but without any indication how this is to be done. Having this in mind, Venice Commission suggested adding specific wording in the Amendment: "The Supreme Court of Serbia shall ensure uniform application of the law by the courts *through its case law*."(CDL-AD (2018)011, par. 55-56)

However, Commission stated that, if it is felt that a reference to the need to ensure proper harmonization of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law. (CDL-AD (2018)011, par. 36).

6. Accessibility of case law as a precondition of the uniform application of law

The importance of publishing and availability of the case law have been underlines by CCJE that an adequate system of reporting case law is essential for ensuring uniform application of law. "At least judgments of the supreme courts and appellate courts should be published in order to make them known not just to the parties to the individual case but, so as to enable them to rely on these judgments in future cases, to other courts, lawyers, prosecutors, academics and general public." This can be done in paper and/or electronic form. The CCJE welcomes the practice to publish summaries of decisions, including factual background, so as to make the search for precedents easier. (CCJE Op. No. 20, par 40-42.)

The Serbian legal system entered in the most intense phase of judicial reform as well as in the screening phase without comprehensive, centralized, systematic and accessible data basis of case law. This makes the uniform application of law more complicated and prevents the judges in accessing previous decisions in similar cases. In parallel, this also made it difficult for the citizens, as participants or potential participants in court proceedings, to anticipate the key elements of the judicial procedure: major outcome of the proceedings based on relevant regulations and earlier case law in similar cases; indicative duration of the procedure; indicative costs of conducting the procedure.

Similar problems existed for lawyers, from whom the parties are often awaiting answers to these questions. Finally, an important advantage of easily accessible regulations and case law exists also in raising the quality of training for future judges, public

prosecutors, lawyers and civil servants responsible for law enforcement. Also, their role in harmonization

of case law is recognized by CCJE which concludes that the role of lawyers and public prosecutors in ensuring uniform application of laws is very important. "They should engage in a proper research of the case law and submit arguments for the applicability or, respectively, the inapplicability of previous decisions." (CCJE, Op. No. 20, par. 47)

The Venice Commission also recognized the sharing of case law by national courts as important for uniform application of law. The Commission concluded that the methods of doing so may vary, but cooperation between courts in this process is key and very effective if a suitable mechanism exists that enables it. (CDL-AD (2018)011, par. 35)

The AP CH 23 addressed an issue of accessibility of the case law through the activity 1.3.9.4. which obliges the Serbian authorities on improving access to regulations and case law, through establishment and promotion of comprehensive and widely available electronic databases of legislation and case law, with respect to the provisions governing data confidentiality and personal data protection, and bearing in mind the provisions of the Law on publishing laws and other regulations, the Law on Judicial Academy and the Law on Courts.

In parallel, the AP CH23 addressed above-mentioned recommendation also through the activity 1.3.9.2. which stipulates: "Defining rules which regulate anonymization of judicial decisions in different areas of law prior to their announcement in accordance to rules of European Court for Human Rights."

The main idea of this activity was to establish uniform rules and methodology of the anonymization of court decisions in line with relevant international data protection standards. Following this AP CH23 provision, the SCC established the working group for drafting the rules on anonymization. The working group defined the list relevant European standards, not only of the European Court of Human Rights, but also the EU Court of Justice and national courts of EU member states and EU legislation regulating data protection[21]. Amended rules should also serve as a model for other courts that their decisions are published on the website, or otherwise making available to the public.

[21] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (General data Protection Regulation; Directive (EU) 2016/680 of the

The Supreme Court of Cassation anonymize its decisions in accordance with the Rulebook on the replacement and omission (anonymization and pseudonymization) of data in court decisions since January 1, 2017. Since April 1, 2018 for courts of appeals shall start applying the rules on the anonymization of their court decisions.

One of the main obstacles in more progressive development of the case law databases is related to shared (and insufficiently clearly defined) responsibility for their establishment and maintaining between the Public Company Official Gazette, the Supreme Court of Cassation and the Judicial Academy. As a result, all the above entities worked on the development of bases in parallel, resulting in an uneven methodological approach and resource wasting, both financial and human.

The legal information system of the Republic of Serbia (hereinafter: LIS), as a unique database in electronic form, was established on January 1, 2014 on the basis of the Law on Publication of Laws and Other Regulations and Acts[22]. The management of this system was entrusted to the Public Company "Official Gazette". The RS Government Regulation on the LIS prescribes the way in which the LIS is established and managed, as well as its content, manner of management, exchange and submission of data and documentation, its access to that system and how it is used. In accordance with the Regulation, the LIS contains: selected court decisions and legal positions of the Constitutional Court, courts of general and special jurisdiction, as well as judgments of the ECtHR relating to the Republic of Serbia; references to the official gazettes in which the regulations relevant for rendering court decisions are published; references to official and unofficially scrutinized texts of the applicable regulations that are relevant for rendering court decisions; references to other acts that are important for rendering court decisions.

The database is available free of charge to all courts and prosecutors' offices; the State Attorney's Office; the Judicial Academy; the Ombudsman; the Data Protection Commissioner; the Ombudsman's offices of municipalities, cities, city of Belgrade and city municipalities as well as to the precisely listed entities, according to the

European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention , investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977 / JHA; Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime)

[22] Law on Publication of Laws and Other Regulations and Acts, "Official Gazette", No. 45/13.

Government's decision. However, beyond this list, access to databases is not free of charge, which significantly limits the positive effects of its existence.

In the middle of 2018, 23,832 court decisions, legal opinions and conclusions of courts of general and special jurisdiction, were published in the court practice, including the sentence contained in the court bulletins for which public announcement in the LIS was made by the Official Gazette, as well as the decision of the Constitutional Court and the ECtHR. The number of available decisions in the database increases by 2,500-3,500 new decisions annually.

The basis of court decisions of the Supreme Court of Cassation contains the case-law of this court, as well as the former Supreme Court of Serbia, appellate courts and courts of the republican rank (Administrative Court, Commercial Appellate Court and Misdemeanor Court of Appeal) containing over 5000 anonymized decisions.

The third relevant case law database (e-JURIS) was established by Judicial Academy. e-JURIS is an educational e-ACADEMY module designed to facilitate judges and prosecutors to search the case law of the ECtHR and better understand the legal concepts that the Court applies.[23] Currently, there are 115 verdicts of the ECtHR related to the Republic of Serbia in the Serbian language. The database also includes tools that allow search for judgments by document collections, using filters, or by keyword. The search method has been harmonized with the instruments for searching the case-law of the ECtHR in Strasbourg - HUDOC. The publication can also be accessed by scanning the QR code. The database is intended for users already familiar with the ECtHR and the ECtHR case law. Compared to the HUDOC database, search is facilitated by the search instruments in Serbian. Each ECHR judgment located in e-JURIS is presented through 4 data groups: 1. Details - basic information on the decision taken from the HUDOC database with a brief summary of the judgment; 2. Verdict - the text of the verdict in Serbian and English; 3. Comments - a part reserved for a network of experts; 4. Source - review the judgment directly in the HUDOC source database that opens in a separate window on the right half of the screen (e-frame). The second part of the e-JURIS module is a cross-linking system that is conceived as an instrument for quick reference and training. It allows, without the prior knowledge of the ECHR, to come up with a case from the ECHR practice that may be relevant for solving the problem with which judges and prosecutors encounter in a specific case, in other words, to come up to

[23] Case law relevant from the aspect of human rights protection is available at the Internet address http://e-case.eakademija.com/ , last accessed on August 18th 2018.

the legal concepts applied by the ECHR in similar cases. All that is required to start the search is an article of the national law under which the established facts can be qualified.[24]

In order to overcome the problem of the parallel existence of the case law databases, the SPC signed the Memoranda of Cooperation with the Judicial Academy on August 21st 2015, which regulates exchange of decisions between their electronic databases.

By summarizing the facts about all three parallel systems, it is obvious that they continue to show serious deficiencies, reflected in an insufficient number of available decisions (SCC and e-JURIS bases) or limited access for free users and users who pay for annual LIS subscription (which is relatively high- approximately, the amount of average monthly salary).

7. Follow up and expected steps

In addition to what has already been said about actuality of this topic in the context of constitutional changes in Serbia, just a day before submission of this paper, the new Draft Amendments to Serbian Constitution[25] was published.

The revision of the previously published Draft which was subject of the Venice Commission Opinion, touched also the part dealing with uniformity of case law. Thus, the legislator chose the more instructive, instead of semi obligatory way to guide following the previous case law, using following wording: "A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, *taking into account the harmonized case law*." It seems that this wording does not corresponding to the intention of the legislator to instruct judges to consider need to have uniform case law. A bit different formulation: "A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, *taking into account the need of harmonization of case law*."

[24] See more in: Report No. 2/2018 on the implementation of the Action Plan for Chapter 23, available on: https://www.mpravde.gov.rs/files/Report%20no.%202-2018%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf, last accessed on August 24th 2018.

[25] Draft Amendments to Serbian Constitution, available on: https://www.mpravde.gov.rs/obavestenje/20887/radni-tekst-ustavnih-amandmana-u-oblasti-pravosudja-uskladjen-sa-preporukama-venecijanske-komisije.php, last accessed on September 14, 2018.

In accordance with previously mentioned suggestions of the Venice Commission, the legislator also amended the part dealing with competence of the Supreme Court and defined it using following wording: "The Supreme Court of Serbia shall ensure uniform application of the law by the courts *through the harmonization of case law*." From such a formulation, the role of the Supreme Court in harmonization of case law is more clear than it used to be in previous text.

According to planes of the competent ministry, the next step is official initiation of the procedure for changing Constitution. It is important to mention that in spite of constitutional amendments, a visible progress in respect improving normative framework in this field can be expected after legislative amendments after adoption of the new Constitution. Having in mind importance of this topic, it seems valuable to regulate it by separate law which should include all relevant aspects: the competent authorities, mechanisms of harmonization, accessibility, training, etc.

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