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SOME THOUGHTS ON UNIFORM JUDICIAL PRACTICE /Деякі нотатки з приводу універсальної юридичної практики/

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1. The importance of the uniformity of judicial practice

Equality of persons before the court and before law, the protection of legitimate expectations, justice, legal clarity and other principles of a state under the rule of law require for similar cases to be adjudicated in a similar way, so that by following the existing judicial practice, people could forecast what other relevant cases might result in. Uniform judicial practice is a pursuable worth. Let us provide just several aspects demonstrating the importance of securing a uniform judicial practice:

- uniform judicial practice ensures the equality of persons;
- uniform judicial practice contributes to the stability of the legal system. Stability generates predictability and, at the same time, creates legal security for persons, seeking protection of their rights in courts;
- while settling cases, courts do not simply apply legal norms, but come to decisions of ethical nature and decisions concerning social values. Uniform judicial practice displays which values are given priority by the court, and which social interests are considered to be more important than the others. Whereas, if the judicial practice is not uniform, it remains unclear which values the courts consider as essential;
- non-uniform judicial practice demolishes the authority of the judiciary and does not contribute to the promotion of the public trust in courts;
- uniform judicial practice helps reduce the workload of the courts because persons can observe in what way similar cases are settled; they may also estimate the negative perspectives of winning the case and decide not to address the court;
- uniform judicial practice lessens the probability for the decision to be appealed against, because it is possible to predict how different circumstances will be qualified by a court of a higher instance.

When speaking about securing the uniformity of judicial practice, it is impossible to bypass the doctrine of the judicial precedent. There is different point of view regarding the judicial precedent in common law countries and the countries of continental law system. In the countries where a system of common law exists, the meaning of the judicial precedent is explained by the principle of *stare decisis:* "*stare decisis et non quieta movere*", which translates as "*to stand by decisions and not to disturb settled matters*". The principle *stare decisis* comprises of two main rules. The first rule is such that judgments of a court of a higher instance are binding on the courts of a lower instance, and must be followed by them. According to the second rule, a court of a higher instance may not deviate from its earlier practice either, except for instances when exceptional circumstances exist.

In the countries of the continental law system, the doctrine of *stare decisis* is not formally recognized, because to some extent it is against the principle, which states that the legislator has exclusive legislative rights. However, many countries strive to ensure the continuation of their jurisprudence, and state that even though the judiciary is independent when hearing cases, their judgments must be predictable and not chaotic. For this reason, in practice, the courts of lower instances often rely on the judgments of the courts of higher instances. Furthermore, presently an even more evident establishment of judicial precedent is noticeable in the countries of tradition of continental law as well.

That can be also said about Lithuania — one of the countries belonging to the continental law tradition. Although traditionally the doctrine of the judicial precedent was not formally recognized in the national legal system, in one of its more recent decisions, the Constitutional Court of the Republic of Lithuania took a major step towards the implementation of the doctrine of *stare decisis* by stating that:

"in order to ensure <…> the continuity of the jurisprudence, the following factors (along with other important factors) are of decisive importance: in analogical cases, courts are bound by their own judgments; the courts of lower instance are bound by judgments of courts of a higher instance, which had been passed in certain categories of cases — by the judicial precedents in those categories of cases; while reviewing judgments of courts of lower instances, courts of higher instances must always analyze such judgments according to the same legal criteria; the criteria must be clear and known *ex ante* to the legal subjects, *inter alia*, to the courts of lower instances (therefore, the jurisprudence of the courts must be predictable); the judicial practice in respective categories of cases must be corrected and new judicial precedents in such categories of cases may be adopted only when it is inevitably and objectively necessary; such adjustment of judicial practice (the deviation from the precedents, which used to bind the courts, and the creation of new precedents) must always be properly (clearly and rationally) reasoned in the respective court decisions"[4].

2. Means to ensure the uniformity of judicial practice.

It is far from simple to ensure a uniform judicial practice. All countries have more courts than one. Often even several judicial systems exist, the competence of which might collide: courts of general competence, administrative courts, labour courts, family courts, commercial courts, etc. A considerable amount of cases and many different judges rendering judgments condition the fact that judicial practice is becoming hardly transparent. Therefore, there is a need for legislative and organizational measures to help ensure a uniform judicial practice. Such measures might be for instance: (1) availability to appeal against judgements; (2) other procedural means of unification of judicial practice; (3) the accessibility of judicial decisions; (4) the clarity of the language of judicial documents etc.

2.1. An availability of appeal

It is generally accepted that judicial practice is formed only when the courts themselves adjudicate cases. Therefore, judicial practice should not be influenced by administrative methods, for example, when a court of a higher instance gives courts of lower instances consultations of abstract (general) nature or adopts decisions containing instructions on how certain legal norms should be interpreted. The statutory law of the Republic of Lithuania still allows for the possibility of the Supreme Court or the Supreme Administrative Court of Lithuania to consult the judges of the courts of lower instances on questions of interpretation and application of laws For instance article 23 of the Law on Courts of the Republic of Lithuania [1] where it is stated that "the Supreme Court of the Republic of Lithuania [...] 2) shall analyse court practice in the application of laws and other legal acts and provide their interpretation in the form of recommendations; 3) may advise judges about the interpretation and application of laws and other legal acts". Currently such consultations are no longer provided; they have lost their practical value. The purpose of such consultations does not correspond to the nature of the judicial activities. Moreover, sometimes such consultations may risk to infringe upon the procedural independence of the court providing them, as if a case later reaches the court which has given the consultation, it might feel

bound by its earlier position.

Whereas namely the supreme courts generally safeguard uniform judicial practice, laws must foresee possibilities for all cases to reach the courts of final instance. Therefore, procedural laws must avoid absolute restrictions of appeal and cassation, when it is established by the laws that all cases of certain categories may not be appealed against. It seems that a much better solution is to ensure a possibility for every case to reach the supreme court, and balance the heavy caseload of the supreme judicial institutions by establishing a system of permissions — the court of last instance itself would decide, whether a complaint is admissible, while the law would simply lay down the main requirements for admission (i.e., when a significant legal issue is raised, when judicial practice is not uniform, etc.).

2.2. Other procedural means of unification of judicial practice

The hierarchical control of judgments may not be sufficient when, in the same country, deviating judicial practice is identified in the judgments of courts of different competence. For example, courts of general jurisdiction and administrative courts may interpret certain legal norms differently, or give different meaning to the same facts. Courts belonging to one system cannot repeal the judgments of courts belonging to a different system; therefore, a problem of securing uniform judicial practice may arise. In some countries, special mechanisms for solving such situations are created. For example, in Germany, a Common Senate of the Supreme Courts exists (germ. *Gemeinsamer Senat der Obersten Gerichtshöfe*), which decides upon questions when the supreme court of one competence intends to deviate from the jurisprudence of the supreme court of a different competence. There is still no such mechanism in Lithuania, but it might be possible to solve the latter problem by reopening a case which had already been solved (i.e., if substancial legal norms had been misapplied by the court). For instance article 153 of the Law on Administrative Proceedings of the Republic of Lithuania [2], where it is stated that "The proceedings may be resumed [....] in case of submission of clear evidence of the commission of a material violation of the norms of substantive law, or [...] when it is necessary to ensure the formation of uniform practice of administrative courts".

For instance, in Lithuania whereas there is deviation of judicial practice at both, the lower courts, and the courts of the highest instance, in such cases there is a possibility for an extended chamber to be formed or even for the case to be heard by the plenary session of the court (by all of the judges). Even though formally judgments in such cases have the same legal power as other judgments, in practice, courts of lower instances and also the court, which delivered the latter judgments, usually takes them into greater consideration. The latter judgments are also published in the periodical bulletins of judicial practice, which ensures that they are noticeable and accessible to a greater number of other courts and persons, and this is also an important mean of safeguarding a uniform judicial practice.

Deviations of judicial practice are also possible not only within the courts of general jurisdiction and specialized courts, but also within the latter courts and the Constitutional Court, which seems to be performing a completely different function. A widely known situation in Lithuania can be provided here as an example. The mentioned situation was related to the hearing of the criminal case of the ex-president of the Republic of Lithuania. He had been impeached from his office for violating the Constitution. The ground for such an impeachment was the conclusion of the Constitutional Court, stating, *inter alia*, that he had revealed a secret of the state [5]. Criminal responsibility is also established for the latter act. However, unlike the Constitutional Court, the Supreme Court of Lithuania considered that there had not been enough proof that the former president had disclosed a state secret, and, therefore, he was acquitted [6]. Undoubtedly, the Constitutional Court and the courts, which heard the criminal case, analyzed different aspects of the same acts of the former president. The Constitutional Court decided upon the questions of the violation of the Constitution and constitutional responsibility, while the courts, which heard

the criminal case, decided upon the question of criminal responsibility. However, the grounds for one type of responsibility or another were the exact same circumstances, which had been proven by the Constitutional Court, but not by the Supreme Court. Therefore, different judicial authorities qualified the same facts differently, applied a different standard of proof, while at the same time this raised wide discussions in the public space and did raise some doubts in the judiciary. It is difficult to give an unambiguous assessment of this case. The applications of different standards of proof in different procedures, which comply with different rules of substantiation, are completely understandable and justifiable from a legal perspective. But to an ordinary citizen the question is left unanswered: did the former president disclose the state secret or did he not? That is why the uniformity of judgments of courts with different functions is still such a topical problem.

2.3. The accessibility of judicial decisions

For the judicial practice to be uniform, all judges must have the possibility to acquaint themselves with the procedural documents of other courts. Often, the parties of the case draw the attention of the courts of higher instances to deviating judicial practice. That is why judicial practice must be accessible to persons who are outside the judicial system as well. This requires for judgments to be published and easily found with the help of legal information search systems. Only when there is a possibility to access judgments, deviating judicial practice may be identified. In Lithuania, the procedural decisions of all courts (except the courts of the lowest instance) are available on the Internet. But in this case a different problem arises — because of the great number of published judgments the judicial practice is becoming hardly transparent as well.

According to the laws of Lithuania, the Supreme Court and the Supreme Administrative Court of Lithuania publishes bulletins, containing their judicial practice [1, articles 27and 32]. Such bulletins include the most important procedural decisions of a certain period. The Law on Courts of the Republic of Lithuania and procedural laws state that other courts, institutions and persons must take into consideration the interpretations of laws and of the application of legal norms, which are given in the judgments published in such bulletins, whenever they apply the mentioned legal provisions [1, articles 23 and 31]. But under no circumstances it should be interpreted that by being published in the bulletin a judgment becomes of greater importance. The legal power of the judgments of supreme judicial institutions cannot depend on the fact, whether it had been published in the bulletin or not. The practical importance of the mentioned bulletins is that they draw the attention of the lower courts to the most recent and topical position of the court of the highest instance on one issue or another.

2.4. The clarity of language of judicial documents

The clarity of the language of judicial decisions is an issue closely connected with the accessibility of judicial decisions mentioned above. Of course, judges, being the legal professionals, can and do understand even the most complicated legal language. From this viewpoint it may seem that the simplicity of language of judicial decisions is not directly connected with the unification of judicial practice. However, it should not be forgotten that an important aspect of accessibility of law, as enshrined in judicial decisions, is represented by their ready availability to the general public, which is usually not familiar with the specific legal terminology and may thus face difficulties when trying to understand the position of the court stated in a judgement. Taking into account the very purpose of the unification of judicial practice, its interconnections with the principles of legal clarity and equality before the law and court, it is no surprise that the Consultative Council of the European Judges has recently pointed to the desirability of the accessibility, simplicity and clarity of the language of judgements [3].

3. Limits of the unification of judicial practice

Even though uniform judicial practice is an aspired matter, it should not become an objective in itself and should not violate other principles of the state under the rule of law.

The purpose of the continuity of the jurisprudence is based upon the protection of human rights, the protection of legal expectations and the implementation of the principle of equality before the law and the court; therefore uniform judicial practice is a tool, rather than an aim. First of all, it must be taken into account that judicial practice is a reflection of the social life of a certain society during a certain period of time. Whenever the perception of social values changes, the judicial practice must change as well. If altering the existing jurisprudence would better safeguard human rights, the former judicial practice should not be considered as a value in itself, and it should undergo changes.

Secondly, it cannot be denied that errors may be found even in a uniform judicial practice, for example, when legal provisions are explained or applied in the same incorrect way. Such situations are especially likely when an interpretation of a certain legal question is provided by the international courts (the European Court on Human Rights, the European Court of Justice, etc.), and the interpretation that they provide differs from that of the national courts. In such instances the evolution of the jurisprudence is inspired by outside factors and, therefore, it is inevitable.

Thirdly, it is a well-known fact that in real life there are no situations, which are completely alike. Therefore, existing judicial practice must be followed only when it is estimated, whether the situations are common enough for them to be treated in the same way. On the contrary, if the one existing precedent were to be followed in many different situations, it would be the same as applying a legal provision, which regulates different legal relations.

Fourthly, even in similar cases, a judge may have important arguments, which may not have been analyzed earlier, and which may reverse the legal interpretation provided in previous precedents. A properly motivated disagreement with the existing judicial practice is an expression of the independence of courts. New legal motives may convince the courts of higher instances of the wrongfulness of the existing practices, and may result in the creation of new legal precedents. Therefore, every judge must not simply follow the existing practice by rule, but he or she must interpret it with creativity and apply it to the specific situation, and when reasonable grounds exist — disagree, giving reasons for it.

In any case, methods, which are meant for unifying the judicial practice, must never infringe upon the independence of a judge. The Constitutional Court of Lithuania has stated that the hierarchical system of courts must never be understood as a system, which restricts the procedural independence of the courts of lower instances. Even though the legal precedents of the courts of higher instances bind the courts of lower instances when they decide upon the same categories of cases, the courts of higher instances (and the judges of such courts) may not interfere with the cases heard by the lower courts by giving them advice or orders of obligatory nature on how a case should be settled, etc; such commands (both, obligatory and not), from the perspective of the Constitution, would be considered as action *ultra vires* [4]. In practice, this also means that when a court of a higher instance sends the case back to the court of a lower instance for it to be reheard, the higher court cannot give instructions on how a certain circumstance should be looked at, how certain legal provisions have to be applied or even in what manner the case should be decided — it has to be admitted that there have been such cases in the Lithuanian courts. When a case is sent back for retrial, it is possible draw the attention of the lower court to certain circumstances, which have to be analyzed, or to give certain criteria on how a legal provision is to be interpreted, but concrete commands are intolerable. Otherwise, it would also restrict the higher courts, which give orders or recommendations, themselves, because when such cases are appealed against, an impartial hearing at the appellate instance or the instance of cassation are no longer possible.

Conclusions

1. Although the doctrine of stare decisis is a traditional feature of the common law tradition, because of the general acceptance of the importance of the uniform judicial practice, formal recognition of judicial precedent can be presently noticed also in the countries with the continental law tradition.

2. The purpose of the continuity of the jurisprudence is based upon the protection of human rights, legal expectations and the implementation of the principle of equality before the law and the court.

3. Some of the legislative and organizational measures that may help to ensure a uniform judicial practice are: the possibility to appeal against judgements, special mechanisms for solving the divergences of judicial practice between the courts of different jurisdictions, possibility to hear cases by extended panels of judges, clarity and accessibility of judicial decisions.

4. Even being an aspired matter, the unification of judicial practice should not become an objective in itself. Necessary changes in established judicial practice may occur because of the change of relevant social values, errors found in the previous judgements, or other important reasons. Methods, which are meant for unifying the judicial practice, may in no way infringe upon the procedural independence of a judge.

Sources:

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РЕЗЮМЕ

В статті йдеться про уніфікованість (універсальність) юридичної практики. Аналізуються важливість і межі уніфікованості (універсальності) юридичної практики, а також деякі законодавчі та процедурні засоби, що здатні забезпечити таку уніфікованість (універсальність). Будучі прямо пов’язаною з такими визначальними принципами держави, побудованої на засадах верховенства права, як рівність всіх громадян перед законом і судом, чіткість судочинства і захист законних очікувань, наслідуваність юриспруденції є найбільшою цінністю. Отже, існує необхідність проведення відповідних законодавчих й організаційних заходів, які сприятимуть уніфікованості (універсальності) юридичної практики.

РЕЗЮМЕ

В статье рассматриваются вопросы унификации (универсальности) юридической практики. Анализируются важность и рамки унификации (универсальности) юриди-

ческой практики, а также некоторые законодательные процедурные шаги, способные обеспечить достижение такой унификации (универсальности). Будучи непосредственно связанной с такими основополагающими принципами правового государства как равенство всех перед законом и в суде, ясность юриспруденции и защита законных ожиданий, преемственность юриспруденции выступает наибольшей ценностью. Таким образом, существует необходимость обеспечить наличие таких законодательных и организационных мероприятий, которые способствуют обеспечению унификаций (универсальности) юридической практики.