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THE CONSTITUTIONAL ROLE OF THE SUPREME COURT OF THE REPUBLIC OF MACEDONIA SEEN THROUGH THE PRISM OF THE RULE OF LAW PRINCIPLE

Abstract

The article focuses on the provisions of the Judiciary Act relating to the principal standpoints and legal opinions as tools which the Supreme Court of Republic of Macedonia uses to practice its constitutional role in providing uniformity in the application of laws by the courts. The methodological instrument applied to the analysis is the Rule of Law Checklist adopted in March 2016 by the Venice Commission within the Council of Europe. Legal certainty, legality and independence of judges are the parameters by which the compliance of those legal provisions to the Rule of Law principle is being assessed.

Key words: *Supreme Court, Rule of Law, Principal views*

I. INTRODUCTION

The role of the Supreme Court in ensuring uniformity in the application of laws by the courts is an affirmation of one country's commitment to ensure the Rule of Law in its broadest sense. It is not a mere coincidence that this function of the Supreme Court is set out in the Constitution itself.[1] In fact, the Supreme Court is established by the Constitution, which determines it as the highest court in the country, exercising judicial power together with lower courts which are established by law. The Constitution does not specify how the Supreme Court shall perform this role, leaving the matter to be regulated by laws. However, taking into consideration that the Constitution is a harmonious entirety wherewith a political system is established, and an organization of state power whose ultimate goal is achievement of the fundamental values of the constitutional order, one of which is the Rule of Law, the goal of this paper is to perceive and to assess the legal provisions that regulate this matter particularly through the prism of the principle of Rule of Law.

What is the principle of Rule of Law and what are the indicators according to which can be assessed whether a particular state respects this principle and to what extent? There are several systems of indicators[2] through which the Rule of Law is measured as an indicator of good governance and of the level of respect of freedoms and rights in a country. Although they differ in approach and scope, more or less they are mutually correlated.[3]

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[1] The Constitution of the Republic of Macedonia, Article 101

[2] World Bank's World Governance Indicators project (WGI), Heritage Foundation Index, Freedom House, World Justice Project (WJP)

[3] Versteeg, M. and Ginsburg, T. (2016), Measuring the Rule of Law: A Comparison of Indicators. Law Soc Inq. doi:10.1111/lsi.12175

In March 2011, the Venice Commission within the Council of Europe adopted a Report on the Rule of Law with an enclosed Rule of Law Checklist, whose detailed and final version was adopted in March 2016.[4] This particular Checklist, being the most comprehensive and most appropriate tool for assessment of the Rule of Law in a country from the perspective of its constitutional and legal frameworks, will be used in the assessment of specific legal solutions wherewith the constitutional role of the Supreme Court of the Republic of Macedonia is regulated.

II. THE IMPLEMENTATION OF THE CONSTITUTIONAL ROLE OF THE SUPREME COURT OF THE REPUBLIC OF MACEDONIA - *LEGAL FRAMEWORK*-

The division of state powers into legislative, executive and judiciary is a fundamental value of the constitutional order of the Republic of Macedonia. [5] In the system of separation of powers, judicial power is exercised by courts. [6] The courts are autonomous and independent. Courts judge on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. [7] The types of courts, their jurisdiction, the establishment, abrogation and the procedures they follow are regulated by laws adopted by a majority vote of all the representatives in the parliament. [8] According to Article 3 of the Judiciary Act[9], the objectives and functions of the judiciary include impartial application of law regardless of the position and status of the parties; protection, respect and promotion of human rights and fundamental freedoms; ensuring equality, non-discrimination on any grounds and legal certainty based on the Rule of Law.

Under Article 101 of the Constitution, the Supreme Court is the highest court in the country, providing consistency in the application of laws by the courts.

The unity in the application of laws by the courts is primarily achieved through the organization of courts and legal remedies. Regulations governing organization and jurisdiction of courts are essential in providing maximum assurance that the trial will be lawful, fair, efficient and within a reasonable time. Within the organization of the courts, The Supreme Court is the highest court in the country and its competence is exercised throughout the State. The types of courts and their competence, as well as the establishment and abolition of courts in the country are regulated by the Judiciary Act (Law on Courts), while legal remedies, including extraordinary remedies which are decided by the Supreme Court, are regulated by the relevant procedural laws.

The subject matter of this paper are certain provisions in the Judiciary Act regulating the constitutional role of the Supreme Court to ensure uniformity in the application of laws by the courts. Namely, Article 37 of the Judiciary Act regulates the work of the General Session of the

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4 CDL-AD(2016)007-e Rule of Law Checklist, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e, last visited 27.04.2017

5 The Constitution of the Republic of Macedonia, Article 8, Paragraph 1, Indent 4

6 The Constitution of the Republic of Macedonia, Article 98, Paragraph 1

7 The Constitution of the Republic of Macedonia Article 98, Paragraph 2

8 The Constitution of the Republic of Macedonia Article 98, Paragraph 4 (amendment XXV)

9 Judiciary Act "Official Gazette of the Republic of Macedonia " No.58/06, 35/08,U.No.256/07,U.No.74/08,150/10,U.No.12/11

Supreme Court according to which the Supreme Court of the Republic of Macedonia at a general (en banc) session, inter alia:

- Determines general standpoints and principle legal opinions on issues of importance to ensuring uniformity in the application of laws by the courts, on its own initiative or on the initiative of meetings of judges or judicial departments of the courts;

- Considers issues regarding the work of courts, law enforcement and jurisprudence. Principal positions and principal legal opinions determined by the Supreme Court of the Republic of Macedonia at a general session are mandatory for all the court panels of the Supreme Court of the Republic of Macedonia. The Supreme Court of the Republic submits an annual report on the established general standpoints and principle legal opinions on issues of importance to ensure consistency of application of laws by courts to the Judicial Council of the Republic and publishes it on the website of the court.

This phenomenon - the authorizations of the Supreme Court to issue interpretive positions relating to important legal issues, created *in abstracto*, regardless of the specific case brought before the Supreme Court, which develops in the legal systems of South-Eastern Europe under the influence of the Soviet model[10] based on centralism and formalism, is almost unknown to the western world. [11]

Principal standpoints of the Supreme Court in Macedonia are initially mentioned in the Law on Amending the Charter of organization of regular courts.[12] In this Act, Article 1, paragraph 4 provides that the Supreme Federal Court, as the highest judicial authority in Federal Macedonia, takes care of "*exact fulfillment of laws and their uniform application"* and Paragraph 5 of the same article stipulates that "*The Supreme Federal Court adopts preliminary decisions in court practice that are mandatory for regular people's courts.*" Later on, the Judiciary Act of general jurisdiction enacted in 1965, in Article 36,[13] sets the competence of the general session of the Supreme Court to determine principal standpoints and principal legal opinions on issues of importance for uniformity in the implementation of the national laws by the courts of general jurisdiction, but the law doesn't determine whether they are binding on all courts or only on the Supreme Court.

Although the Supreme Court of the Republic of Macedonia as the highest court in the country, since 1991 has to shape jurisprudence on completely different constitutional grounds than in the previous system, this tool for harmonization of case law by the Supreme Court (by inertia or not) continues to linger through legislation.

Judiciary Act of the Republic of Macedonia, although repeatedly amended, has never been subject to assessment by the Venice Commission of the Council of Europe. On the other hand, in the case of Serbia, a country with which we share common legal past hence it is useful to draw a parallel, the Venice Commission pleaded three times in the last 10 years on the occasion of

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10 Article 43 of the Constitution of the USSR from 1924 authorizes the Federal Supreme Court to issue authentic interpretations on issues related to federal legislation. This solution is kept by the modern Russian Federation: Article 126 of the Constitution of the Russian Federation available at: http://www.constitution.ru/en/10003000-
8. htm last visited 27.04.2017

11 Zdenek Kühn The authoritarian legal culture at work: The passivity of parties and the interpretational statements of supreme courts, available at: http://hrcak.srce.hr/file/44712

12 Law on Amending the Charter of organization of regular courts of Federal Macedonia, enacted by the Presidency of the People's Assembly of Macedonia at a session held at 28 May 1945, Official Gazette No.9/45

13 Official Gazette of SRM No.42/65

legislative changes on the Law on organization of courts[14] and three times had negative comments on the fundamental issue of determining the legal standpoints and opinions of the Supreme Court of Cassation. In the opinion[15] dated 24.06.2002 on the Law on regulation of courts, experts Natalie Fricero, Professor at the Faculty of Nice and Giacomo Oberto, a judge in Turin, stated that they strongly oppose to such a system of imposed interpretation and that " The Supreme Court should provide uniformity of application of law more through the persuasiveness of the rationale of its decisions, rather than through the power of any kind of arrêts de règlement which had been out thrown in Western societies two centuries ago."

In the opinion 467/ 2007 from 19.03.2008[16], referring to the draft Law on judges and the Law on regulation of courts, in paragraph 109 experts state the following: "*Article 31 states that "The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts". It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction."*

In the opinion br.709 / 2012 from 11.03.2013[17] concerning the draft amendments to the laws on judiciary of Republic of Serbia, in paragraphs 103 to 110, the Venice Commission has again criticized the authority of the Supreme Court to carry general positions and opinions in the form of general legal standpoints, separately of specific cases, as a method of ensuring equal application of the law by the courts, because it gives to the Supreme Court of Cassation the power to create common rules, which is in conflict with the principles of separation of powers and independence of judges.

III. THE PRINCIPLE OF RULE OF LAW

The idea of the Rule of Law is not a new one. The first evidence of European society governed by laws in terms of rules laid down in a permanent and publicly available form, come from late 7th and early 6th century BC Ancient Greece. By writing and publishing, Greek laws were no longer subject to arbitrary interpretation by the privileged classes, obstacles to their easy change were created and the courts were obliged to apply the letter of the law even in cases of countervailing equitable considerations.[18] When Herodotus compares the (military) supremacy of Greek poleis in respect of authoritarian hierarchy of Persia, he finds, among other things, that it derives from their egalitarian social structures. This is demonstrated through Demaratos address

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[14] Law on Organisation of Courts ("Official Gazette of Republic of Serbia", No. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011 and 101/2013)

15 Letter from the Association of Judges of Serbia No.8/2014, available at: http://www.ombudsman.rs/attachments/3294_3odgovor%20zastitnik%20gradjana%20kragujevac.pdf last visited 27.04.2017

16 Opinion of the Venice Commission No.467/2007, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)007-e pg.16, last visited 27.04.2017

17 Opinion of the Venice Commission No.709/2012, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)005-e pg.18 last visited 27.04.2017

18 John Maurice Kelly, A Short History of Western Legal Theory (Clarendon Press: Oxford 1992), цитирано според Theo J.Angelis и Jonathan J. Harisson, History of Rule of Law, World Justice Project, White Paper, available at: http://worldjusticeproject.org/publication/working-papers/history-and-importance-rule-law last visited 27.04.2017

to Xerex: "…*[*F]*or though free, yet they* [the Spartans] *are not free in all things, for over them is set Law as a master, whom they fear much more even than thy people fear thee."*[19]

Throughout the history of Western civilization, the idea of Rule of Law rather than Man as a limitation of voluntarism and authoritarianism, experiences its own successes and failures, but in a grand manner returns after the Second World War.

The need for adherence to and implementation of the Rule of Law as a universal value, has been confirmed by modern societies via several international instruments including: Article 134 of the Outcome Document of the World Summit of the United Nations from 2005[20]; in the Preamble and in Article 2 of the Treaty on European Union as a core value that will be shared between the European Union and its members;[21] in the New Framework for Strengthening the Rule of Law enacted in 2014, the European Commission points to the principle of the Rule of Law as the dominant organizational model of modern constitutional law by which the exercise of state power is to be regulated;[22] In the preamble to the Statute of the Council of Europe, Rule of Law is indicated as one of the three principles that underpin true democracy, along with individual and political liberty.[23]

The full implementation of the principle of Rule of Law remains an ongoing activity even in well-developed democracies. It is very important that this principle is taken as a priority to be considered in staggering legal and economic reforms that systems in transition are prone to, if there is a will to keep the democratic course. Hence, when officials say that it is "surpassed subject" or is "not measurable and not visible term" it should be an alarm that we have a problem in understanding the basic democratic tenets including the backbone of democracy - the Rule of Law.

The Rule of Law Checklist, which was in its final version adopted by the Venice Commission in March 2016, offers exactly such a measurable and practical approach in determining aspects of the Rule of Law. This Checklist lists and elaborates on several elements of the Rule of Law indicated by the international legal standards - Legality, Legal Certainty, Prevention of Abuse of Power, Equality before the Law and Non-discrimination, Access to Justice. The achievement of each of them is determined by several parameters. On this occasion, for the purposes of the article, we will focus only on some of them, the ones that make the use of principal views and legal opinions by the Supreme Court questionable as an instrument for uniform application of the laws by the courts.

Legality, as an aspect of the rule of law, generally involves supremacy of the laws in terms of general acts adopted by the competent legislative body, in a transparent, accountable, inclusive and democratic procedure, which in content and form are in accordance with the Constitution and the international law, and whose compliance with the Constitution is controlled

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19 Herodotus, Histories, VII. 104 available at: https://www.gutenberg.org/files/2456/2456-h/2456-h.htm#link72H_4_0001 last visited 27.04.2017

20 Resolution of the UN General Assembly, A/Res/60/1 available at: http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf (§ 134) last visited 27.04.2017

21 Consolidated version of the T**reaty on European Union and the Treaty on the Functioning of the European Union,** *Official Journal C 326 , 26/10/2012 P. 0001 - 0390* , available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT last visited 27.04.2017

22 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of LawCOM(2014) 158 final/2, available at: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf last visited 27.04.2017

23 Statute of the Council of Europe available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680306052 last visited 27.04.2017

by an appropriate and effective mechanism of control. Hence, the question arises whether in terms of the principle of legality it is possible that the Supreme Court, as holder of judicial, not legislative power, is authorized to issue interpretive principle views of the laws in the form of general standings and opinions, outside particular case, taking the opportunity by interpreting the law to create a new rule that is beyond the control of the Constitutional Court.[24]

One could argue that the principal views and opinions are not general acts in the sense that lower courts are not formally bound to act upon them. But, considering the hierarchical structure of the Supreme Court and the ability to revoke the judgments that contradict the principal opinions (which are mandatory for all departments of the Supreme Court), and thus to reduce the evaluation of the performance of specific judges, it is undisputed that the judges will adhere to them. Therefore, in theory the principal legal views are considered *de facto* source of law.[25]

Another important aspect of the Rule of Law which should be considered when analyzing the compliance of legal provisions on the principal positions and opinions with the principle of Rule of Law is **Legal Certainty**. What are the benchmarks that provide Legal Certainty? Above all, it is the availability and predictability of the law, where predictability does not only mean publishing acts before they take effect and general prohibition of retroactivity. The formulation of acts has to be done with sufficient precision and clarity to enable citizens and other participants in legal transactions to harmonize their work with them. In that context, the request for stability and consistency of the legal environment is fulfilled when changes of regulations are announced sufficiently in advance and consistently implemented. In other words, Legal Certainty exists when rules and regulations are known in public in advance and whether the public discussed about them and took part in their formulation. *When we speak of stabilized expectations, we are speaking about Legal Certainty.*[26] It is exactly that moment of unpredictability and retroactivity of the principal standings of the Supreme Court's that increases the legal uncertainty in their adoption.

Judicial independence, as a feature of Access to Justice, is another aspect of the Rule of Law throughout principal views and opinions can be considered. When talking about judicial independence, we generally think about the independence of the judiciary from the executive and the legislature. But, another important element of the judicial independence is the individual independence of judges in their decision-making in the application of laws or the so-called *internal* independence of the judiciary. The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law.[27] Also, the Recommendation CM / Rec (2010) 12 of 17.11.2010 by the Committee of Ministers of the Council of Europe, which is addressed to all Member States, in Chapter III concerning the internal independence of judges, states that:

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[24] More on this issue see Lokvenec E.., Analysis of selected general standpoints and legal opinions of the Supreme Court of Republic of Macedonia, Lawyer No. 289, May 2016, publication by Macedonian Lawyers Association

[25] Prof. PhD Janevski A., Prof. PhD Zorovska – Kamilovska T. Civil Procedure Law, Book I Litigation Law, Law Faculty Iustinian I, Skopje 2012 pg..54-55 Prof. PhD Spirovikj 0 Trpenovska Lj., Family Law, Law Faculty, University Ss. Cyril and Methodius, Skopje, 2004 pg.28 , Dr.sc Triva, Sinisa; dr.sc Dika, Mihajlo, Civil Litigation Procedural LAw, edition 7, pg.42-43

[26] Van Hoecke, M, Law as Communication, Hart Publishing, Oxford-Portland, Oregon, 2002, str. 65 , cited according to Dr. sc. Žaklina Harašić, Zakonitost kao pravno načelo i pravni argument, Zbornik radova Pravnog fakulteta u Splitu, god. 47, 3/2010

[27] **CDL-AD(2016)007-e Rule of Law Checklist, available at:**
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e стр. 37, &87 last visited 27.04.2017

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.

23. 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.

IV. CONCLUSION

One of the most important features of a State built on the Rule of Law is the equal application of the law and in terms of meeting that goal the role of the Supreme Court is undisputable. The analysis of specific legislation which regulates the harmonization of the case law in the Macedonian legal system, showed that principal legal standpoints and legal opinions, as a method of harmonization of the case law, are disputable when analyzed in background of the Rule of Law principle, for a number of reasons:

- Principal legal standpoints and legal opinions are contrary to the constitutional principle of separation of powers, and therefore contrary to the principle of legality because by bringing abstract legal notions and making them universally applicable in judicial proceedings conducted before the courts, the Supreme Court would take a legislative role with retroactive effect;

- Principal legal views and legal opinions are contrary to the principle of judicial independence, and therefore contrary to the Article 6 of the European Convention on Human Rights and Freedoms which stipulates that, *everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law*, which is not the case when the court is led not only by the law and the Constitution, but also by a decision taken by another body (the general session of the Supreme Court) which decides *in abstracto*, without examining the facts of the dispute;

- Principal legal views and legal opinions are contrary to Article 13 of the European Convention on Human Rights and Freedoms which stipulates the right to effective legal remedy which is not the case with principal legal views and legal opinions - against abstract views and opinions of the Supreme Court, the parties to the proceedings before the Court can make no claim;

Principal views and opinions of the Supreme Court, as an instrument for uniform law enforcement, are remains from a previous political system, which does not contribute to achieving legal certainty in a society. The conclusions of the analysis in this paper should be taken into account in future reforms in this area when comparative solutions of other countries in this regard should be taken into account.

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