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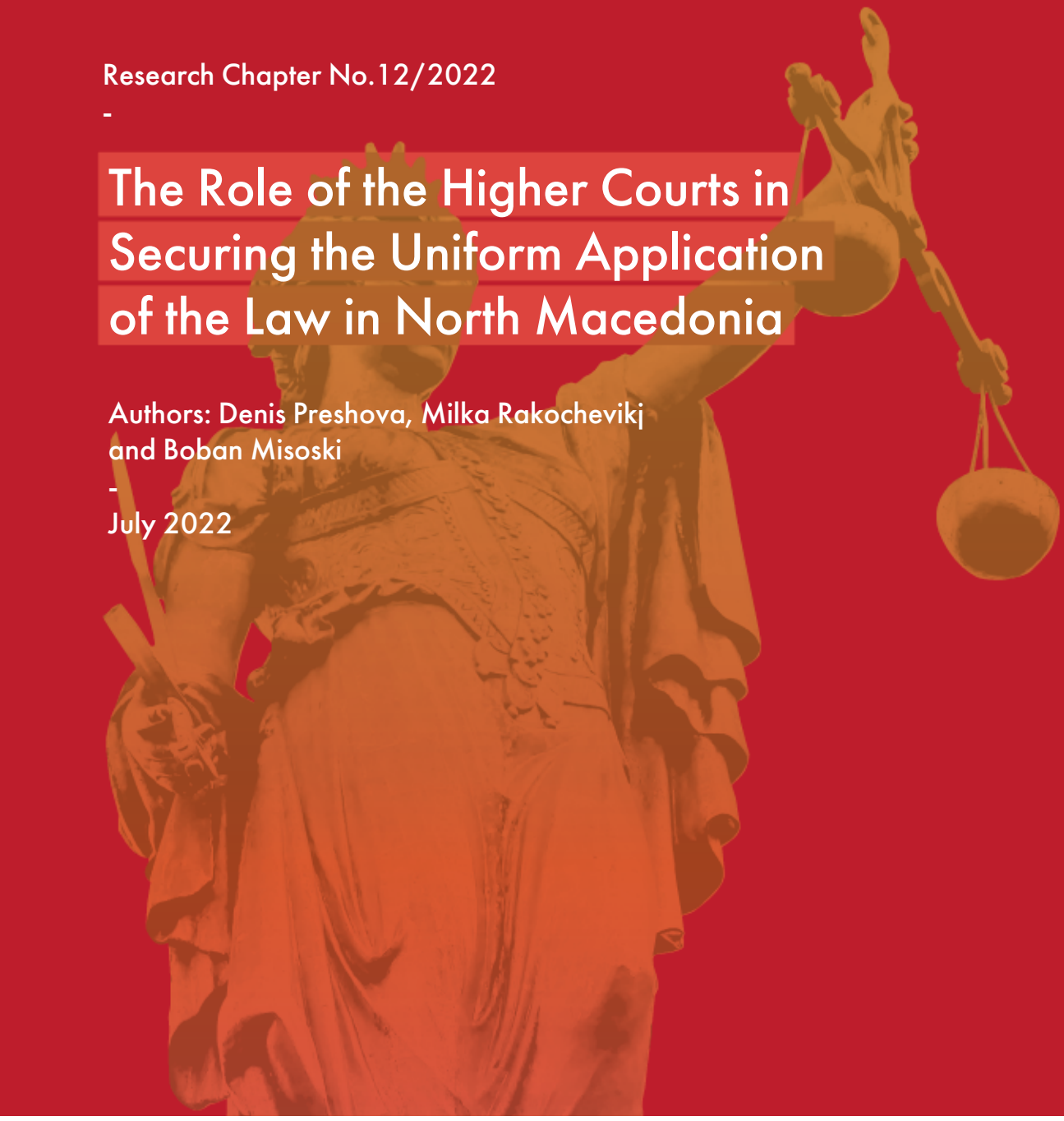

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THE ROLE OF THE HIGHER COURTS IN SECURING THE UNIFORM APPLICATION OF THE LAW IN NORTH MACEDONIA

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INTRODUCTION

In discussions over the level of authority and trust in the judiciary usually the question of independence from the other two branches of power as well as the issue of (in)existence of political influences take central stage. Nevertheless, one frequently omitted aspect of the actual judicial work seems to strongly influence the perceptions and trust in the judiciary. Namely, to which extent the judiciary can secure equality before the law and legal certainty in administering justice. Thus, it could be argued that the methods and instruments for securing uniform application of the law by the courts play an important role in shaping the perceptions of the legal community and the broader public regarding the judiciary.[1] The public tends to react to a conflicting case law, especially when it occurs within a single court, as this leaves an impression of certain partiality or bias. The legislative solutions as well as the judicial practice in managing this uniformity are rather telling of the state of judicial culture and reflect certain underlying notions on the role and status of the judiciary within the constitutional and political system.

It is well known that the uniformity in application of the law as well as the uniform case law, also including the status of precedents within the respective legal order, is one of the crucial criteria whereby we distinguish the civil (continental) law from the common law legal systems. However, even among the civil law systems there tends to be a difference in the approach especially influenced by the socialist past of certain countries. In this sense, the manner in which uniform application of the law is being achieved is rather indicative of the survival of certain features of the so-called socialist legal tradition in some post-socialist countries.[2]

The European Union (EU) so far seems to ignore this issue, whereas some of the regional international organizations have addressed it but rather tangentially touched upon the issue of uniformity. While there are rather developed standards on the 'European model of judicial independence'[3], there is still a lack of uniform application of the law and as a consequence there are certain countries, even in the EU, that still abide by methods incompatible with the separation of powers and the rule of law.

North Macedonia represents one of those countries in which the traditional method of the socialist legal

1 See for instance, Opinion No. 20 (2017), The Role of Courts with Respect to the Uniform Application of Law, Consultative Council of European Judges, CCJE(2017)4, Strasbourg, 10 November 2017, para. 6.

2 On the notion of socialist legal tradition see for instance A. Uzelac, Survival of the Third Legal Tradition? (2010) *49 Supreme Court Law Review (2d).*; R. Manko, Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law in R. Manko, C. Cercel and A. Sulikowski (eds) *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress 2016); Z Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011); M. Bobek, 'The Fortress of Judicial Independence and The Mental Transitions of The Central European Judiciaries' (2008) 14 *European Public Law*.

3 For more on these standards see for instance M. Bobek and D. Kosař, "Euro-products' and Institutional Reform in Central and Eastern Europe: A Critical Study in Judicial Councils' in M. Bobek (ed*) Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015); D. Preshova, I. Damjanovski, and Z. Nechev, 'The Effectiveness of the `European model` of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms' (2017) *Asser Institute CLEER Papers.*

tradition of securing uniform application of the law still endures, thus reflecting the resilience of these features that directly shape the current judicial culture. Not only is this mechanism for securing uniform application of the law at odds with the separation of powers and the rule of law in general, but it is also confining the individual independence of judges to a degree that seriously distorts the perception of the role of judges in developing the law. So how is it possible to still have such remnants from the previous regime after 30 years of 'transitioning' to a liberal-democratic system based on, among other values, the separation of powers and the rule of law? What is so controversial about the present methods of securing uniform application of the law and how are they manifesting the outdated understanding of this type of uniformity?

This paper, covering the third dimension of the judicial culture in North Macedonia, aims to provide answers to these questions by exposing the basic controversies regarding the uniform application of the law in the country. Building upon the general features of the dominant judicial culture outlined and analyzed in the first paper,[4] here we tackle the specific manifestation of the highly problematic self-perception of judges and the role of judiciary in developing the law, which include the rather anachronous hierarchical mentality and 'objectivity' of law.[5] During the process, the argumentation has been based on the research of the international standards as well as the comparative analysis of some of the other post-socialist countries and the conducted focus group with seven judges from different jurisdictions and instances in North Macedonia. The argumentation is structured and presented in three sections. The first section discusses the general traits of the mechanism of securing uniform application of the law in the international and comparative perspective, placing it in the specific post-socialist context. The second section deals with the 'traditional' mechanism for securing uniformity in North Macedonia, the principled legal opinions and the legal opinions of the Supreme Court of the Republic of North Macedonia (hereinafter the Supreme Court). The third section analyses the (in)existence and (in) effectiveness of the existing system of appeals and the extraordinary legal remedies within the civil and criminal procedure in North Macedonia. The paper ends with a conclusion summarizing the main points and recommendations for addressing the existing shortcomings in light of the uniform application of the law.

4 D. Preshova, *Judicial Culture and the Role of Judges in Developing the Law in North Macedonia* (2021) Research Chapter No. 23/2021, Project Working Paper Series, available at: https://idscs.org.mk/en/2021/09/20/judicial-culture-and-role-of-judges-in-developing-the-law-in-north-macedonia/

5 For instance, on this sort of objective perception of the law see S. Rodin, Discourse and Authority in European and Post-Communist Legal Culture (2005) 1 *Croatian Yearbook of European Law and Policy* 1, 6.

1. UNIFORM APPLICATION OF THE LAW IN THE INTERNATIONAL AND COMPARATIVE CONTEXT

The transition of the former socialist countries in the Western Balkans (WB) to democracy has had its direct impact on the judiciary, notwithstanding the fact that the socialist legal tradition was not heavily ideologically imbued in former Yugoslavia.[6] Taking into consideration that basically none of these countries went through a judicial lustration and that there was a certain level of continuity, at least when it comes to the composition, it could be argued that a form of disorientation and confusion characterized the judiciary, particularly during the initial transitional period. Contradictory signals were sent and received pushing in different directions, which rather frequently led to situations in which judicial independence was misrepresented and distorted.

In the specific context of the judicial decision making and uniformity, for instance, there were two tendencies which could be observed even nowadays as well. The first one is related to the perception of judges that their role is to merely apply the law and that they are obliged to strictly abide and follow the decisions of the higher courts since they know the law best – *iura novit curia* taken literally.[7] Consequently, such a tendency was preserving the socialist paradigm within the judiciary related to the hierarchical mentality, or as some label it as inquisitory paternalism.[8] The second tendency is the result of the (mis) understanding of judicial independence by certain judges. According to this view, judicial independence encompasses a liberty in boundless decision making without properly taking into consideration the decisions and reasoning of the higher courts, treating the references to their case law as an interference with their independence. Such a stance has even invited comments that the judiciary is 'too independent'.[9] Both tendencies are at the heart of the statement that we have many lawyers that know legal acts even by heart, but not so many that understand the law.[10] Under such circumstances of confusion over the true subjects of transformation in the judiciary, certain remnants of the socialist past, such as the 'traditional' methods of securing

6 Uzelac (n 2) 380.

7 Zdenek Kühn, The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts (2006) *Croatian Yearbook of European Law and Policy* 2, 19, 22.

8 On this see A. Uzelac, Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost (2020), Jaksa Barbić (ed.) *Novine u parničnom procesnom pravu* (Hrvatska akademija znanosti i umjetnosti, Zagreb 2020) p. 118.

9 F. Emmert, The Independence of Judges a Concept Often Misunderstood in Central and Eastern Europe (2002) 3 *European Journal of Law Reform* 4, 405, 407. Kühn (n 2) 218 "It is a problem of unique to post-Communist countries that domestic scholarship and the judiciary sometimes take too 'literally' the dogma that a judge is free to refuse precedent."

10 J. Zobec and L. Cernic, Authoritarian Mentality in Slovenia in M. Bobek (ed) *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015) p. 143.

uniform application of the law,[11] went under the radar of the judicial reforms fervently induced by the EU and international organizations, first in Central and Eastern Europe, and then in the WB. It could be argued that this happened because of the lack of understanding of the context of democratic centralism and unity of state power. They have paved the way to an instrumentalist perception of the role of the law and the judiciary in the socialist settings which served as the underlying logic of the methods and instruments of securing uniformity deeply at odds with the fundamental liberal democratic values of separation of powers, rule of law and individual independence of judges.

The EU has hardly ever mentioned anything about this type of uniformity in its country reports, even in the previous cycles of enlargement, nor does it have any standards in this regard when it comes to the negotiating chapter 23 as part of the accession talks with Montenegro and Serbia. The Council of Europe, on the other hand, has voiced, albeit rather recently, through its consultative bodies, certain concerns over the still existing contentious instruments of securing uniformity in post-socialist countries.[12] The Venice Commission in several of its opinions drew the attention to the problematic aspects of this type of uniformity, particularly in relation to the individual independence of judges and separation of powers.[13] However, it was with the Opinion No. 20 of the Consultative Council of European Judges (CCJE)[14] that this body articulated certain standards and pinpointed the shortcomings of some of the existing patterns in former socialist countries.

According to this Opinion, there are generally four formal avenues for achieving uniformity of application of the law and those are through: (1) the regular system of appeals in individual litigations;

11 On the traditional methods see Uzelac (n 8) 117 ff.

12 Even though The European Court for Human Rights deals with cases involving a divergent case law of national courts from the perspective of legal certainty in its respective case law, it has yet to define any standards or rules on the actual mechanism of securing uniform case law or uniform application of the law by national courts. See for instance *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], App. no. 13279/05, §§ 49-58, 20 October 2011, or more recently *Svilengaćanin and Others v. Serbia,* App. no. 50104/10, 50673/10, 50714/10 et al., §§ 78-83, 12 January 2021.

13 Venice Commission, Opinion Serbia Ukraine Hungary Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, paras. 50-53; Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, CDL-AD(2014)030, paras. 33-34; Venice Commission, Opinion on the Draft Law On The Judiciary and the Draft Law on the Status of Judges of Ukraine CDL(2007)038 para. 20 and para. 78; Venice Commission, Opinion on the Draft Laws on Judges and on the Organization of Court of the Republic of Serbia CDL-AD(2008)007, para. 109. However, see a contentious opinion provided by the Venice Commission on the so-called uniformization judgements of the Supreme Court of Albania given the binding effect of these judgements: "In uniformisation judgements, the plenum of the Supreme Court decides on the provisions of the law, which have been interpreted differently by various appeals courts or – preventively – when such diverging interpretations are likely. These decisions have the force of binding precedent and should allow deciding similar cases more quickly. Given that uniformisation judgements are not abstract but are given in individual cases, the Venice Commission's delegation did not object to this practice." Venice Commission, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, CDL-AD(2014)016, para. 23.

14 Opinion No. 20 (n 1).

(2) special appeals as part of the powers of public prosecutors to bring issues of uniformity before the supreme court; (3) preliminary reference procedure in ongoing cases; and (4) interpretational statements generally made by the general session or separate departments of the supreme courts.[15] In addition to the formal ones, there are also semi-formal and informal mechanisms that are related to meetings of judges within a court or between different courts which could be institutionalized or taking place in different non-institutionalized settings.[16] In choosing and designing the specific mechanisms for securing uniformity, a delicate balance needs to be struck between the uniformity and individual independence of judges, taking into consideration the certain level of flexibility required for the development of the law and case law.[17] In this regard the Opinion warns against the shortcomings of the interpretational statements, especially considering the separation of powers and the adequate role of the judiciary.[18]

The Kyiv Recommendations of the OSCE – ODIHR[19] have also addressed the issue of uniformity and related it to the internal independence of judges. This document clearly stipulates that any issuance of directives, explanations or resolutions by higher courts needs to be discouraged and, in case of their existence, they should not be binding for lower court judges.[20] It is noted that such acts of the higher courts could have an adverse effect and encroach upon the individual independence of judges and their decision making freedom.

Against the background of the international standards, uniformity in most developed legal systems in Europe is achieved through the means provided by the regular or special system of appeals and less frequently through the preliminary reference procedure.[21] However, there are still countries in Europe in which the interpretational statements, usually taking the form of principled

15 Opinion No. 20 (n 1) para. 16.

16 Opinion No. 20 (n 1) para. 17-19.

17 Opinion No. 20 (n 1) para. 30-38. See for instance the comment of the ECtHR: "Case-law development is not, in itself, contrary to the proper administration of justice, since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement": *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, App. no. 36815/03, § 38, 14 January 2010.

18 Opinion No. 20 (n 1) para. 28.

19 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE-ODIHR, 2.11.2010.

20 Kyiv Recommendations (n 19) para. 35.

21 See for instance R.R. Verkerk and C.H. (Remco) van Rhee, The Supreme Cassation Court of the Netherlands: Efficient Engineer for the Unity and Development of the Law in C.H. (Remco) van Rhee and Y. Fu (eds) *Supreme Courts in Transition in China and the West* (Springer 2017) p. 84-85; T. Domej, Squaring the Circle: Individual Rights and the General Interest Before the Supreme Courts of the German-Speaking Countries in C.H. (Remco) van Rhee and Y. Fu (eds) *Supreme Courts in Transition in China and the West* (Springer 2017) p. 136-137; C. Schmaltz, Harmonization of case law in Germany and the role of the ECHR and the Constitutional Court in it in *Harmonization of the case law: Relationship between legal certainty and judicial independence*, Друштво судија Србије, p. 52-70; I. Griss, Harmonization of Case Law in Austria in *Harmonization of the case law: Relationship between legal certainty and judicial independence*, Друштво судија Србије, p. 44-51.

legal opinions, take a dominant place in securing uniformity of application of the law by the courts. Even though this institutional inertia from the socialist past has been abandoned in few of these countries, mainly in Central and Eastern Europe, still in most of countries that came out of the dissolution of the former federation, Yugoslavia, this mechanism takes the central stage despite all its shortcomings.[22] Such shortcomings are to be seen in the strong criticism on these statements or opinions as they are usually delivered *in abstracto*, thus not specifically related to a pending case, representing a quasi-legislative activity of a supreme court and without a 'contradictory' procedure whatsoever in which the parties would have a possibility to present their case and arguments.[23]

22 On the practice in Central and Eastern Europe see the contributions in C. Kortmann, J. Fleuren and W. Voermans (eds) Constitutional Law of 10 EU Member States The 2004 Enlargement (Kluwer 2006). See also for an interesting account of the situation in the former East Germany in J. Bell, *Judiciaries in Europe* (Cambridge University Press 2006) p. 130 -132; On the origins of this mechanisms in former Yugoslavia see A. Uzelac and A. Galič, Changing Faces of Post-socialist Supreme Courts: Croatia and Slovenia Compared in C.H. (Remco) van Rhee and Y. Fu (eds) *Supreme Courts in Transition in China and the West* (Springer 2017) p. 210-212. Manko designates them as an example of the legal survival of the socialist period, see R. Manko, Survival of the Socialist Legal Tradition? A Polish Perspective (2013) 4 *Comparative Law Review* 2, 19.

23 Uzelac (n 8) 125-143; Zobec and Cernic (n 10) 141-143; Kühn (n 7) 23-25; Rodin, Functions of Judicial Opinions and the New Member States in N. Hulls, M. Adams and J. Bomhoff(eds) The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond (Asser Press 2009) 377-379.

2. UNIFORMITY THROUGH PRINCIPLED LEGAL OPINIONS IN NORTH MACEDONIA

North Macedonia perfectly fits the above description and it is one of the more telling cases when it comes to the uniform application of the law. The introduction of separation of powers and the rule of law as fundamental constitutional values has obviously failed to affect the traditional mechanisms for achieving uniformity, essentially reflecting the perception of judges of their role and place in the system still trapped in the previous regime, thus displaying the existing gap between the formal procedures and rules and the informal practices and perceptions. Therefore, the remainder of this section will be devoted to the legal framework and specific shortcomings of the dominant formal mechanism for securing uniform application of the law and the so-called interpretative statements also known as principled legal opinions of the Supreme Court.

2.1 The legal framework of North Macedonia on the uniform application of the law

The Constitution of North Macedonia stipulates that the Supreme Court, as the highest court in the country, has the exclusive constitutional mandate to ensure the uniform application of the law (statutes) by the courts.[24] In this manner, the Constitution emphasizes the public function of the Supreme Court perceived as "safeguarding and promoting the public interest in ensuring the uniformity of the case law and the development of law."[25] However, since the establishment of the Higher Administrative Court in 2010, the Supreme Court has been stripped from any possibility to secure or even influence the uniform application of the law in the administrative disputes. Consequently, this constitutional mandate has been reduced only to civil and criminal cases. On the other hand, the constitutional drafters have added another limitation of this constitutional mandate of the Supreme Court. The mandate for the uniform application of the law is limited to statutes, but disregards other legal acts, which results in a narrow definition of the notion of law in this regard.

24 Art. 101 The Constitution of the Republic of North Macedonia. For more on this issue see E. Lokvenec, Улогата на Врховниот суд во обезбедување на единството во примената на законите од страна на судовите (diss.), March 2020, p. 155ff.

25 Opinion No. 20 (n. 1) para. 21.

The uniform application of the law is further regulated with the Law on Courts[26] which devotes only one provision on this matter. Article 37 regulates the powers or competences of the Supreme Court plenary meeting and foresees that the plenary meeting "adopts principled positions and principled legal opinions for the purpose of uniform application of statutes by the courts upon its own initiative or upon an initiative of the meeting of judges or judicial departments of courts." According to this statutory provision, these positions and opinion are binding only for the departments of the Supreme Court. It is interesting to note that this provision is basically identical with the wording of the provisions of the respective laws devoted to regulating the organization of the judiciary from 1965, 1976 and 1995, as well as the Constitution of the Socialist Republic of Macedonia from 1974,[27] thus clearly manifesting the continuity of this mechanism of securing uniformity. Nevertheless, the legislator only mentions this competence and power of the Supreme Court without providing any further regulation of the different procedural and substantive aspects of this mechanism of securing uniformity. Consequently, all these issues are left for the Supreme Court itself to regulate through its Rules of Procedure (Rules),[28] which is problematic on its own, especially taking into consideration that it is a question of constitutional mandate of this court.

The Rules have partly filled the gap caused by the legislative underregulation as some questions regarding this mandate remain unanswered. The Rules distinguishes between the principled position and principled legal opinion. The former is adopted on questions deemed important for securing uniform application of law, while the latter is adopted on issues revealing the existence of diverging case law in the application of the law.[29] The principled legal opinions, according to the Rules, are adopted by the general session upon a proposal from the departments of the Supreme Court by a majority of all judges and they need to be reasoned and published on the website of the court, but not in the Official Gazette.[30] The dissenting opinions are not published although they could be included in the meeting minutes.[31] It is interesting to note that there are also principled legal opinions which have been adopted lately by a prior initiative of attorneys at law, thus circumventing this rule.[32]

26 Law on Courts "Official Gazette of Republic of Macedonia 58/06, 62/06, 35/08, 150/10, 83/18, 198/18 and Official Gazette of Republic of North Macedonia 96/19".

27 Art. 36(2)(1) Law on Courts of General Jurisdiction "Official Gazette of Republic of Macedonia 42/65; Art. 51 Law on Ordinary Courts, "Official Gazette of Socialist Republic of Macedonia 10/76; Art. 35(1)(1) Law on Courts "Official Gazette of Socialist Republic of Macedonia 36/95"; Art. 414(1)(1) The Constitution of the Socialist Republic of Macedonia of 1974 "Official Gazette of Socialist Republic of Macedonia 7/74".

28 Rules of Procedure of the Supreme Court of Republic of North Macedonia "Official Gazette of the Republic of North Macedonia 14/22".

29 Art. 63 Rules (n 28). Hereinafter the principled position and principled legal opinion will be referred to as principled legal opinions.

30 Art. 53(2), 64-65 Rules (n 28).

31 See Art. 62(4), 65(3) Rules (n 28).

32 See for instance The Principled Legal Opinion of the General Meeting of the Supreme Court from 14 December 2020; and The Principled Legal Opinion of the General Meeting of the Supreme Court from 13 December 2021.

However, not only has the Supreme Court tried to fill the gap, but it has also gone a step further by having its Rules foresee additional types of legal opinions, in addition to the principled legal opinions, which are not mentioned by the Law on Courts[33] but regulated by the Judicial Rulebook.[34] Those are the legal opinions of the respective departments of the Supreme Court as well as of the joint meeting of the departments, but also of all other courts which have such specialized departments. These legal opinions are adopted by the Supreme Court far more frequently than the principled legal opinions. Actually, in most cases the issues are brought to the general session to be decided by a principled legal opinion only if the issues are not resolved at the departmental level or their joint meeting.

It should be noted that there are also other instruments for achieving uniformity as part of the systems of appeals (ordinary and extraordinary legal remedies) such as the extraordinary revision and, to a certain extent, the request for the protection of the legality.[35] Nevertheless, it seems that the uniform application of the law is predominantly secured through the legal opinions and principled legal opinions of the departments and general session of the Supreme Court, respectively.[36]

This brief overview of the legislative framework demonstrates that the uniformity mechanism through (principled) legal opinions has been deeply entrenched in the legal order of the country. Even though there were modest attempts to open the topic of abolishing this uniformity mechanism, there was hardly any active support for such a legislative step since it is perceived as part of the judicial culture that has been there for a long time, as seen by the legislative continuity.

2.2 Internalizing and perpetuating the hierarchical mentality through the traditional mechanism for uniform application of the law

Judicial law-making, more generally, and securing uniformity, specifically, is done through litigation and deciding cases, including through the ordinary and special system of appeals.[37] This seems to be taken for granted in developed European legal systems.[38] However, some of the countries of Central and Eastern Europe as well as the WB appear to have difficulty in abiding by this premise in their respective legal systems, leaving the impression

33 Art. 91 Law on Courts (n 26).

34 Art. 68 Judicial Rulebook "Official Gazette of Republic of Macedonia 66/13". This provision has also added the conclusion as another type of decision taken *in abstracto* by the court departments, especially of the Supreme Court.

35 These mechanisms will be further discussed in the subsequent section. The focus group also indicated that there also informal meeting between the four appellate courts which are occasionally attended by Supreme Court judges.

36 Also noted and confirmed by a senior judge in the discussion in the focus group.

37 Kühn (n 2) 218-221; Kühn (n 7) 24-25; and Uzelac (n 8) 145.

38 Kühn (n 7) 24.

that certain remnants of the socialist legal tradition are still present even after three decades.

The continuity in the existence of the traditional mechanism of securing uniformity in North Macedonia, that was pointed out above, is not problematic taken on its own. However, it could be argued that it is rather telling in terms of the features and perceptions shaping the current judicial culture. In this sense, there are three lines of arguments based on the separation of powers, the rule of law and the individual independence of judges, which demonstrate the incompatibility of principled legal opinions regarding the proper role of the judiciary and the development of the law in a liberal democratic system. Many of these arguments are supported by the discussion in the focus group with seven judges from different jurisdictions and judicial instances.

The first argument is that the principled legal opinions are a quasi-legislative act of an administrative unit of the Supreme Court, the general session, instead of a true judicial decision made within a proper judicial proceeding.[39] The opinions represent an interpretative statement of the law and how it should be applied and interpreted by the departments of the Supreme Court,[40] but in practice, also by all other courts in the country. That way, they have a much broader effect than a judicial decision characterized by an *inter partes* legal effect. Legal opinions frequently serve the purpose of filling legal lacunas encountered by the courts in their practice.[41] They are adopted *in abstracto,* essentially answering a legal question posed in the proposal or initiative, without a proper factual background of a pending case and without a possibility for parties to present their arguments or to reflect a pluralism of opinions on the legal question. In some instances, the legal opinions are rather short and frequently fail to provide an adequate reasoning or present the reasons for adopting such an opinion.

The perception of a quasi-legislative charter of the principled legal opinions has been confirmed in the focus group as two judges from different judicial instances, basic and appellate, made the following claims:

> *"If the Assembly adopts the so-called authentic interpretation of statutes even though it has nothing to do with their application or implementation, then I do not see a problem with the Supreme Court adopting principled legal opinions. Therefore, I do not see why there would be a conflict with the separation of powers"*[42]

> *"I perceive the legal opinion as a general act in determining how a certain provision needs to be applied and interpreted in cases where there are certain dilemmas or diverging interpretations."*

39 See on a similar argument in the case of Croatia in Uzelac (n 8) 125-143.

40 On the same stance in Poland see R. Manko, Is the socialist legal tradition 'dead and buried'? The continuity of certain elements of socialist legal culture in Polish civil procedure in T. Wilhelmsson, E. Paunio, A. Pohjolainen and H. Yliopisto (eds) *Private Law and Many Cultures of Europe* (Kluwer Law International 2007) p. 91.

41 See Lokvenec (n 24) 197-198.

42 For more on the controversy revolving around the authentic interpretation and perception of judges see Preshova (n 4) 18-19.

This brings the legal opinions directly at odds with the separation of powers doctrine, which is the fundamental value of the constitutional order of North Macedonia, as courts according to this doctrine do not have any legislative competences or powers whatsoever. Essentially the notion of principled legal opinions is rooted in a system based on the unity of power doctrine under which the instrumental role of the judiciary, particularly of the Supreme Court along with its controlling and overviewing functions, and of the law in reaching the socialist goals and legality has been an underlying rationale.[43]

In this manner, one can observe the gap between a formal doctrine of separation of powers and the informal perception and partly informal judicial practice which shape the judicial culture in North Macedonia. It could be argued that judges, based on their views on the principled legal opinion as uniformity mechanism, do not seem to grasp this situation, thus reflecting a certain lack of adequate understanding of the role and position of the judiciary within a system based on separation of powers.[44] This claim is confirmed by the very fact that judges do not recognize the particularly problematic features of both the authentic interpretation and the principled legal opinions.

The second line of arguments is concerning the legal character and nature of the legal opinions which are in contradiction with the rule of law. Namely, there is neither a proper classification and categorization of the legal opinion nor is it clear from which moment they start or cease to produce effect. There are no rules on these aspects and on the possibility for retroactive effect of these opinions. As a matter of fact, they could also involve a retroactive application even to court cases which have originated before a relevant opinion was adopted.[45] Another problematic aspect needs to be disclosed since there are no specific conditions under which the Supreme Court initiates a procedure for the adoption of legal opinions. This is left to the discretion of the judges and the departments of the Supreme Court. This creates a possibility for a procedure to be initiated without the issue being ripe enough and as result of the incomplete overview of the development and evolution of the matter at hand, that might lead to an outcome of a legal question being addressed prematurely. Therefore, we cannot really speak of a settled case law as the issue might originate from a case at the first instance, as it occasionally occurs. Furthermore, legal opinions cannot be challenged in any manner or form as they are not general legal acts and thus can neither be brought before the Constitutional Court[46] nor challenged in any

43 Uzelac and Galič (n 22) 211: "The main role of the supreme courts was to protect (socialist) legality and control the courts within their territory" The Constitution of SRM 1974 (n 27) Art. 268 and 273; and Uzelac (n 8) 131.

44 More generally on this misconception of the role and status of judges Preshova (n 4) 9-14 Unfortunately this sort of misconception is perpetuated also by some researchers and NGOs, see for instance *Unifying the Court Practice in Macedonia: Practice vs. Challenges*, Center for Legal Research and Analysis 2015, p. 48-49.

45 Uzelac (n 8) 132.

46 Order of the Constitutional Court of NRM, U.br. 53/2010 from 26 May 2010. For more on this see Lokvenec (n 24) 194-197. On the situation in Croatia Uzelac (n 8) 129, 134-135.

other form before domestic or international judicial instances. The only way to abolish or change them is by adopting a new opinion.[47] Lastly, the principled legal opinions are adopted at the general session meaning that it is voted upon also by judges which are not specialized in the specific area of law from which the legal question that needs to be resolved originates. This creates a potential situation in which the specialized judges might be outvoted in the process of adopting such an opinion.[48]

Interestingly, although some of these aspects have been noted by certain judges participating in the focus group, the abidance to this mechanism of uniformity has still been clearly stated within the discussion. As a matter of fact, one issue upon which everyone agreed was that there should be a clear rule on the binding effect of legal opinions.

The third line of arguments are related to the claimed encroachment upon the individual independence of judges through the traditional uniformity mechanism.[49] Principled legal opinions represent a prime instance of centralistic and collectivist decision making through court administrative structures, such as the general session of the Supreme Court or departmental meetings in the case of legal opinions, effectively confining the individual judicial decision making based on free judicial interpretation of the law and facts. Consequently, this form of top to bottom abstract uniformity and development of the law defies the need for bottom-up development and discourages the much-needed initiative from the lower court instances and the creative role of judges from these instances hence reminiscing the notions of judiciary, law and democratic centralism from the previous system.[50] One could object this claim by pointing out the rather narrow binding force of principled legal opinions limited to the departments of the Supreme Court, while the legal opinions are not even binding for the judges of the respective department that had adopted them. However, this would ignore the manner in which these opinions are being adopted and that is through a majority vote. Understandably, this raises the issue of the independence in decision making of judges who have not voted for a principled legal opinion and who are being bound by opinion that he or she disagrees with. On the other hand, also judges from lower instances perceive them as binding despite the formal rule and the fact that many cases would not end up before the Supreme Court. Thus, they are not deciding solely based on the Constitution, statutes and ratified treaties and their interpretation thereof, as prescribed by the Constitution,[51] but also

47 See for instance The Principled Legal Opinion of the General Meeting of the Supreme Court of the Republic of North Macedonia from 28 April 2021 and The Principled Legal Opinion of the General Meeting of the Supreme Court of the Republic of North Macedonia amending The Principled Legal Opinion of the General Meeting from 28 April 2021, from 24 February 2022.

48 Zobec and Cernic (n 10) 142; Uzelac (n 8) 131, 143.

49 Kyiv Recommendations (n 19) para. 35. Uzelac (n 8) 143.

50 On the meaning of democratic centralism in this context see Uzelac (n 8) 118-119, 131; for East Germany Bell (n 22) 130-131

51 Art. 98(2) The Constitution of RNM.

with one eye, or even both, looking at the principled opinions and views of the higher courts, especially of the Supreme Court, frequently replacing their own. However, this begs the question of why then the judges strictly follow the legal opinions if they encroach upon their independence.

There are several reasons that might serve to answer the motivation of judges which were also noted in the focus group. The first one has to do with the possible negative repercussion as part of the procedure and criteria for evaluation of judges. The discussion in the focus group confirmed this reason as one judge from the higher judicial instances stated that principled opinions and departmental legal opinions are abided by, generally, not because of the persuasiveness of the arguments presented in these opinions but because they are coming from the highest court of the country, and it might negatively influence the individual judicial evaluation. The same also applies for the cases that only reach the appellate courts. Such a framework within which the criteria for judicial evaluation as set out in the Law on the Judicial Council[52] and the Methodology on the qualitative criteria for the assessment of judges,[53] contrary to the international standards,[54] are also related to the reversal rate and have a detrimental effect in drawing judges towards conformity.

The second reason is related to the huge workload of judges. The so-called orientation and clearance rates[55] coupled with the lack of administrative and technical capacities are overburdening judges who, as a result, do not have much time for digging deeper in contentious legal issues that require serious time-consuming research and analysis. In this way they are demotivated in exercising their judicial discretion as part of their individual judicial independence and take the easy way out. This is a reason that was rather emphasized in the focus group by all judges.

The third reason is revealing some of the remnants of the social past and have to do with the avoidance of authoritative decision-making accompanied by formalism and textualism.[56] It is perceived as much safer to follow the opinion and guidelines of a higher authority, thus avoiding accountability especially when being aware that the case at hand might reach the Supreme Court. The judges feel the safest when they resolve the case on formal

52 Art. 80 and 86(1)(1) Law on the Judicial Council of the Republic of North Macedonia, "Official Gazette of Republic of North Macedonia 102/19".

53 Art. 12(2), 13 Methodology on the qualitative criteria for the assessment of judges, Judicial Council of RNM from 18 December 2022.

54 For instance Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the CoE, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, CDL-AD(2014)030, para 33, 34; Venice Commission, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, CDL-AD(2014)038, para 22; Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDLAD(2010)004, para 68-72; CCJE, Opinion No 1, 2001, para 66, CCJE and CCPE, Challenges for judicial independence and impartiality in the member states of the CoE, SG/Inf(2016)3rev, para 71; Kyiv Recommendations (n 19) para. 35 and etc.

55 See more on this in the quantitative criteria set with Art. 85 and 86 Law on the Judicial Council (n 52).

56 P. Cserne, Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case? in M. Bobek (ed) *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015) p. 23-42; Kühn (n. 2) p. 140, 153.

grounds, strictly following the text of the legal act and complying with the positions and opinions of the higher courts. Interestingly, this stance of judges was reflected in the focus group by judges from different jurisdictions and judicial instances.

> *"Who am I to challenge a legal opinion of the Supreme Court on an issue that has passed three filters and instances and reached the Supreme Court? What kind of arrogance that would be on his or her part?"*

> *"The perception is that expressing a disagreement with a legal opinion or view of a higher court would mean going up against the wall."*

However, if done in a constructive manner and supported by a thorough reasoning and arguments, such disagreements are crucial for the development of the law and the evolution of the case law as this is supposed to be initiated by the judges of lower courts. Even though judges are completely conscious of the possibility for a 'constructive disagreement'[57] and understand the logic behind presenting arguments for deviating from the case law and the opinions of the higher courts, the instances of this taking place in practice are still particularly rare. Accordingly, it could be argued that the constructive disagreements are trapped between the two misunderstandings of judicial independence characteristic for post-socialist countries. These result in either fetishizing uniformity and conformity basically imposed from above, often supported by the broader public, or disregarding the opinions and arguments of higher court instances. Such a situation is essentially determined by a fear from repercussions, especially within the evaluation of the judicial work, and a distrust and low esteem for the higher judicial instances mainly due to previous contentious judicial appointments to these courts of persons with a questionable capacity and experience in the judiciary. Under these conditions, the hierarchical mentality or the inquisitory paternalism are being fed and perpetuated. This represents a reflex from the periods of democratic centralism and unity of state power under which we had an instrumental approach to law and courts,[58] dictating that the single right answer is basically imposed not by the force of arguments but as result of the position and status.[59] Perhaps a well-functioning constitutional court with a proper constitutional complaint could have reduced the negative consequences and provide an external safety net for the protection of the fundamental values, unfortunately North Macedonia does not have such a constitutional court.[60]

57 M. Bobek, The Fortress of Judicial Independence and the Mental Transition of the Central European Judiciaries (2008) 14 European Public Law 1, p. 108.

58 More elaborately on this see Kühn (n 2) 109 -114.

59 Kühn (n 7) 20: "the "right" answer is achieved through a "one-way" process and is backed entirely by threat and force."

60 For the role of the Constitutional Court of RNM in shaping the judicial culture see Preshova (n 4) 21-24. For a positive role of the constitutional court see for Czechia M. Bobek, Quantity and Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe and for Germany (2009) 57 *The America Journal of Comparative Law* 33, 46; and for Germany see Schmaltz (n 21) 63, 65-66.

3. THE ROLE OF THE SUPREME COURT IN SECURING UNIFORM APPLICATION OF THE LAW AND UNIFORMITY AND CONSISTENCY OF THE CASE LAW IN CIVIL AND CRIMINAL PROCEDURE

3.1 The functions of the Supreme Court and the uniform application of the law

The overview of the legal framework on uniformity in North Macedonia has shown that the constitutional mandate of the Supreme Court, as the highest court in the judicial pyramid, is to provide for uniform application of laws by the courts.[61] This mandate is further operationalized with the Law on Courts by regulating, in a very general manner, the role and competences of the Supreme Court in the judicial system[62] but also, when it comes to the system of appeals, with particular provisions provided in the procedural laws. The role of the Supreme Court in this sense, irrespective of the wide range of mechanisms set, should be primarily fulfilled through strict adjudication in individual cases, which is the case in the developed legal systems. In that regard, there should be a rather restrictive approach to instruments and mechanisms for obtaining uniform application of law outside the sphere of adjudication, which will allow concentration on the uniform interpretation and development of the law strictly through the case law. The extent to which the Supreme Court will manage to perform its function will mainly depend on the approach of conceptualization of the system of appeals or legal remedies in a particular judicial procedure. In that regard, the main question that arises is what is the desired function of the Supreme Court in one judicial system, whether to serve the individual interests of the parties or to serve the public goals?

The supreme court has a specific position to foster further development of the law and to contribute to the uniform application of the law. In order to fulfil its constitutional mandate, the supreme court is expected to deliver highly authoritative decisions – based on the persuasive reasoning and arguments - meant to guard the unity of the law and to shape the development of the law.[63]

In civil matters, for instance, the Supreme Court of North Macedonia is recognized as a court of revision (*revizija*, *second appeal*), understood as a

61 Art. 101 Constitution of Republic of North Macedonia.

62 See art. 35 and art. 37 Law on Courts (n 26).

63 On the definition of a Supreme Court see C.H. (Remco) van Rhee and Yulin Fu, 'Introduction' in Cornelis Hendrik (Remco) van Rhee, Yulin Fu (Editors), *Supreme Courts in Transition in China and the West* (Springer 2017) p. 2.

final appeal on points of law and aimed at providing for uniform application of the law. Different from the civil procedure, the uniformity function of the Supreme Court in the criminal procedure is less pronounced as there is no direct instrument in the form of a second appeal that is directly aiming to achieve uniformity, with the request for protection of legality being the only indirect mechanism.

Generally, the second appeal (revision) as a legal remedy should serve two purposes: to control the correctness and legality of decisions and procedures before the lower courts and to establish and maintain the unity and consistency of the case law.[64] In this context, traditionally, procedural theory emphasizes that the second appeal has a dual function: to ensure the correctness and legality of lower court decisions and to contribute to the permanent realization and maintenance of the unity of the legal order through a unified and equal application of the law.[65] The first, so-called private function of the second appeal, is primarily aimed at realizing the individual interests of the parties, while through the second, so-called public function, higher goals are achieved in order to ensure unity and predictability in the application of the law and its development.[66],[67] Therefore, it is quite right to note that the role of the second appeal is far wider than what it means to achieve substantive legal justice. It is a typical legal remedy that not only serves the interests of the parties, but also harmonizes and promotes the judicial, and in general, the legal practice, strengthens the trust in the judiciary and achieves legal certainty.[68]

But does the highest court have the capacity to perform both functions with equal quality? Given the unenviable situation of the courts of highest instance, especially in the countries of Central and Southeast Europe, it seems that it does not, which is why the question which function should prevail is becoming increasingly relevant in the procedural theory lately.[69]

64 M.Marković, *Građansko procesno pravo, knjiga prva - Parnični postupak, sveska druga, Parnične radnje*, Niš, 1973, p.355.

65 S. Triva, V. Belajec, M. Dika, *Novo parnično procesno pravo*, Zagreb 1977, p. 115; B. Poznić, *Građansko procesno pravo*, Beograd 1978, p. 307,; S.Triva, M.Dika, *Građansko parnično procesno pravo*, Zagreb 2004, p. 719.

66 On the private and public function of the legal remedies see J. A, Jolowicz, *On Civil Procedure* (Cambridge University Press 2000) p. 316 -320.

67 In the exercise of its private function, the court of highest instance is focused on ensuring the regularity and legality of the procedure in each individual case. The essence of the private function is in fact to provide maximum guarantees that justice will be provided in each case. In performing its public function, the court is primarily focused on the effects that the decision will produce, and in that sense it is focused on the future - to ensure the predictability and consistency of case law for future disputes. Nevertheless, when exercising the public function, it would be wrong to consider that the individual interests of the parties are not taken into account. In this case, their realization is only subordinated to the public interest. See further, A. Galič, Reshaping the Role of Supreme Courts in the Countries of the Former Yugoslavia', in Uzelac, A. & Van Rhee C.H. (eds.) *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters* (Cambridge/Antwerp/Portland: Intersentia, 2014) p. 292; M. Bratković, Revizija po dopuštenju : hrvatske dvojbe i slovenska iskustva, Zbornik radova s II. međunarodnog savjetovanja „*Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća*", Split 2016, str. 323.

68 А. Јакшић, *Грађанско процесно право*, Београд 2009, стр. 594.

69 See A. Galič, A Civil Law Perspective on the Supreme Court and its Functions, conference paper presented at "The functions of the Supreme Court – issues of process and administration of justice" Warsaw, 11 – 14 June 2014, (http://colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Ales-Galic.pdf), p. 5 *et seq*.

3.2 The system of the second appeal in the civil procedure and the public function of the Supreme Court

Under the applicable law, in the civil procedure in North Macedonia there is a dual track regarding the admissibility of the second appeal, i.e., a hybrid model of the second appeal. A second-instance final decision can always be subject to review by the highest court if the dispute meets the value, the causal or the procedural criteria for admissibility. In all other cases and only as an exception, a decision may reach the court of highest instance if the appellate court allows the second appeal under requirements provided by law. Given the regime of admissibility of the second appeal in terms of the function to be fulfilled, there was a legislative attempt for slight transformation of the role of the highest court in order for its public function to be emphasized. However, whether such attempt was successful is another question.

Although, there is no difference in the terminology used in the Civil Procedure Act (CPA), depending on the goals the second appeal principally strives to accomplish, whether it is the individual justice in a particular dispute or the uniform application of the law and harmonization of the case law, two different types of revision can be distinguished: the "ordinary" revision and "the leave to file a revision". The focus of the ordinary second appeal is set on the interests of the parties for obtaining a rightful decision in each individual case, while the focus of the leave to file a revision is set on exercising the public function of the Supreme Court regarding the control of the uniform application of the laws and maintaining stability of the case law.[70]

The latter is a typical formal mechanism for achieving consistency of the case law, since it was introduced as a specific legal remedy aiming to achieve certain legal and political goals in a manner that would create optimal conditions for the Supreme Court to be able to fulfil its duty to provide a unified application of the laws and harmonization of the case law. The leave to file a revision was introduced in 2005, expected to be an efficient tool in the hands of the Supreme Court that should affect the uniform application of the law and the consistency of the case law.[71]

This legal remedy was instituted to serve the wider public interest. In that regard, with the leave to file a revision, the importance of the issues that can be raised before the Supreme Court goes beyond the interest of the parties in each individual case. Here, the goal is focused on accomplishing or preserving the uniformity of the case law or providing an opportunity for the highest judicial authority to deliver its opinion on important legal issues and to

70 See art. 372 of CPA.

71 This new form of second appeal was based neither on value nor on a closed list of technical criteria, but on the constitutional function of the Supreme Court to safeguard the uniform application of the law and the legal equality of citizens. Uzelac and Galič (n 22) 219.

contribute to further development of the law.[72]

With the initial regulation from 2005, its admissibility was determined by fulfilling several requirements.[73] At first glance, the provision appeared to be precise, which led to the conclusion that the regulation of the leave to file a revision should not cause problems in its implementation. However, due to its generality, different views occurred in the practice of the appellate courts regarding the fulfilment of the requirements for its admissibility. Considering that the leave to file a revision at that time was *novum* in our procedural system, and due to the different interpretations regarding its admissibility in the judicial practice, promptly after the beginning of its application, the Supreme Court rendered a legal opinion according to which the appellate court that granted the leave to file a revision in the reasoning of the judgment is obliged to define in a clear and explicit manner the substantive or procedural legal issue and why it is considered to be important for ensuring uniform application of the law and consistency of the case law as well as to cite the final judgments rendered by the same or another court on the same legal issue that differ from each other.[74] This legal opinion was translated into a legal provision with the Law on Amendments of the Civil Procedure Act from 2010, but these changes were more of editorial than of essential nature.

When it comes to the effect of the introduction of this mechanism, the practice so far has shown that the current concept of the leave to file a revision has not proven to be particularly functional, so the general opinion is that it has failed to fulfil its task as intended. Although, we do not operate with an exact number of granted and filed extraordinary revisions,[75] it is assumed that the number of granted leaves to file a revision is rather small, especially if the total number of cases that annually reach the Supreme Court is taken into account.[76] On the one hand, the appellate courts rarely grant leaves to

72 A. Galić, The Role of the Supreme Court in Creating Precedents in Slovenian Civil Procedure, *Los recursos ante los Tribunales Supremos en Europa [Appeals to Supreme Courts in Europe], Barcelona: Difusión Jurídica y Temas de Actualidad* 2008, p. 264.

73 First, the leave to file a revision can be filed only in disputes in which the revision is granted (it cannot be filed in disputes where the CPA or other law explicitly prescribes that filing a revision is not admissible); second, this legal remedy can challenge only a judgment against which a revision cannot be filed according to the criteria *ratione valoris*; third, if the appellate court granted the leave to file a revision due to its findings that the decision in the dispute depends on resolving a substantive or procedural issue relevant for securing the unified application of the law and harmonisation of the case law; fourth, the appellate court stated in the reasoning of the judgment the legal issue on which basis it granted the leave to file a revision; and fifth, the appellate court stated in the reasoning of the judgment the reasons why it considers that a particular legal issue is important for securing the unified application of the law and harmonisation of the case law. *Arg. ex*. art. 372 (4) of CPA.

74 Legal opinion rendered at the session of the Department of Civil Matters of the Supreme Court of the Republic of Macedonia held on 08.07.2008. According to the opinion, analysing the judgments of the Appellate Courts that granted the leave to file a revision, the Supreme Court has concluded that the requirements provided with the CPA regarding the admissibility have only been partially met: the requirements are met only in relation to the part of the provisions declaring that the appellate court should grant the leave to file a revision in its tenor. Regarding the part of the provision that stipulates the content of the reasoning of the judgment, the requirements are not met.

75 The Supreme Court does not keep separate records regarding the leaves to file a revision, nor the appellate courts state that data in their registers.

76 According to the information shared by a judge of the Supreme Court, until 2011, the Supreme Court has decided on the merits only in two cases that reached the Supreme Court through the mechanism of leave to file a revision. С. Алиу, Измените на Законот за парничната постапка (ЗПП) во однос на ревизијата, Деловно право, бр. 24, Скопје 2011, p. 66.

file a revision, and on the other, the Supreme Court frequently rejects them, if filed. This has also been confirmed by the discussion of a senior judge in the focus group commenting on the unwillingness of judges to have a proactive role in this mechanism of securing uniformity of the case law and application of the law by the courts.

From the aspect of the function that the Supreme Court should perform as the highest judicial instance when deciding on a second appeal, the procedural regime of admissibility of the second appeal is still perceived so that the individual interests of the parties are set in the forefront, having in mind that the leave to file a revision is regulated as something subsidiary in relation to the ordinary second appeal.

In that regard, although the criteria for admissibility of the "ordinary" second appeal are considered to be practical mechanisms for the selection of cases that reach the Supreme Court because of their suitability for rapid triage and reduction of the number of second appeals, they are not appropriate for selecting which dispute should proceed to the highest court in terms of the public function of the second appeal. This is due to the fact that such criteria do not open the door of the Supreme Court for all legal issues relevant for the uniform application of the law and the consistency of the case law. The value of the dispute is not always an indicator that a particular issue is important in that sense – such issues can arise equally in disputes of significant value, as well as in those that do not reach the value threshold. The same applies to cases where the second appeal is admissible due to the social component of the dispute – in such cases questions that are important for the exercise of the public function of the second appeal do not arise on a regular basis.

Considering the constitutional mandate of the Supreme Court for unified application of the laws, and thus realization of the constitutional principle of equality of all before the law, which practically reflects the public function of the second appeal, an alteration of the model of the second appeal should be considered *de lege ferenda*, where the public function of the revision will be set in the prime focus. Such solution would ensure the realization of the task of the highest court in ensuring unity and predictability in the application of the laws and the consistency of the case law for future disputes. In that regard, the role of the second appeal should evolve so that the strict adjudication would be primarily at the service of the public goals.

Given the aforesaid, it is apparent that the system of appeals in the civil procedure in North Macedonia has formally provided an optimal mechanism for securing uniform application of the law and consistency of the case law. Still, such instrument did not function in the practice as intended. One of the reasons for such a failure was the unwillingness of the judges to give the opportunity for its successful implementation in the procedural system, sticking to formalism and textualism as part of the hierarchical mentality, as well as avoiding making authoritative decision in cases where there is a disagreement with the stance and opinion of a higher court. Accordingly, it seems that behind their strict position lies a high even unconditional

appreciation of the legal opinions rendered by the higher courts (especially those rendered by the Supreme Court), as a dominant instrument for uniform application of the law and the uniformity of the case law. In that respect, the discussion of the focus group pointed to what we think is an upsetting fact of judges perceiving the principled legal opinions rendered by the Supreme Court as the only formal mechanism for achieving consistency of the case law. Regarding the principled legal opinions rendered by the Supreme Court as a tool for securing uniform application of the law, they are still perceived by the judges as a substantial and key mechanism in that sense.

3.3 Securing uniformity of application of the law in the criminal procedure in North Macedonia

According to the Constitution, judges in adjudicating case are bound only upon the constitutional provisions, statutes and ratified treaties. In this sense, the dominant perception is that the settled case law of higher court is not a source of law, and some judges even think that referencing this case law is a form of interference with their individual independence. However, if we evaluate the criminal justice system, we can observe several important legal instruments that are very influential on the judicial decision making and discretion during the judges' process of determination while deliberating on the decisions of the courts, which leads us to the conclusion that despite the fact that judges, under the strict legal doctrine, are highly independent while delivering their specific legal reasoning in concrete cases, there are still several jurisprudential instruments that might have some obvious or incandescent influence on the decisions of the courts.

The activity of the Supreme Court in the field of rendering principled legal opinions is observed as one of the most influential among the specific instruments that might influence the judges' decision-making process and introduce the legal practice, i.e., the case law, as a source of law. In addition, there are several other instruments that might have significant impact on the criminal case judges' while deliberating their specific court decisions, such as the activity of the Supreme Court in the field of adjudication cases upon a submitted request for extraordinary legal remedy, as well as the specific decisions of the appellate courts towards the first instance's courts in regard to their jurisdiction of control and correction over the first instance criminal courts' decisions.[77]

In order to evaluate the impact of these legal instruments on the jurisprudence of the courts and whether these instruments can be observed as important fact for the establishment of legal

77 For the process of adjudication and the judges' process of delivering the court decision see V. Kambovski, B. Misoski, D. Ilikj Dimoski, *Court Law*, 2-nd edition, Faculty of Law "Iustinianus Primus", Skopje, 2020, p. 251-257.

precedents, or better said case law, as a source of law, at least as a secondary authority, for the judges, we must initially evaluate the position and level of compulsoriness of these instruments. Henceforth, we should subsequently evaluate the real impact in the court practice of these instruments by analyzing the practice of the lower courts' judges while they are delivering their legal opinions for one specific case (regardless of whether these opinions are of procedural character in regard to the determination of the defendant's guilt or in regard to the type and severity of the imposed criminal sanction).

3.3.1 The role of the principled legal opinions in the criminal procedure

First of the abovementioned list of instruments to analyze is the activity of the Supreme Court as the highest court in the judicial hierarchy, as well as its influence in the field of uniform application of the criminal law in specific cases. Under the provisions of the Law on Courts[78] in article 37, only the Supreme Court is authorized to deliver principled legal opinions in regard to the legal matters that are important for uniform application of the law. These principled legal opinions in practice can be delivered upon their sole initiative, or upon initiative of the lawyers, initiative by the presidents of the lower courts, or initiative of the judges' departments or judges' meetings of the lower courts, all of them through the respective departments. However, these general legal opinions and general legal stands delivered by the Supreme Court are only mandatory for the Supreme Court's departments in which they are delivered or, if they are delivered on a general session of the Supreme Court, they are mandatory for all councils of the Supreme Court. Even though these general legal opinions and general legal stands are published on the Supreme Court's website, they do not produce formal obligation for lower courts to follow within their adjudication process. This means that these general legal opinions and general legal stands are considered by the lower courts as either a mere instructive tool and guideline for the implementation of the criminal law within their daily caseload, or some sort of a commentary for clarification of the legal provisions of the Criminal Code or Law on Criminal Procedure.

However, although these general legal opinions and general legal stands are non-binding for the implementation of the law in the specific cases by the lower courts, we were in fact able to observe that in many court decisions these general legal opinions and general legal stands are respected *in fine* by the judges while adjudicating the specific cases at first or second instance courts.

In order to evaluate the reasons for such observed practice we attempted to determine several factors. First and maybe the most important factor is the quality of the general legal opinion or general legal stand. This factor practically means that the Supreme Court in its general legal opinion or general

78 Law on Courts (n 26).

legal stand tackles such legal issue that in practice creates ambiguity and there is unequivocal practice by the lower courts while implementing such legal provisions from either Criminal Code or Criminal Procedure Law standpoint. Due to this, such general legal opinions or general legal stands delivered by the Supreme Court, albeit non-binding on lower courts, are considered as useful tool for the lower courts, since they provide practical guidelines and clarification of the law, essentially eliminating dichotomy of the legal provisions. Hence, they are observed as acceptable mechanism for unification of the court practice by the lower courts, especially if one takes into consideration that they represent another relic from the socialist legal tradition.[79] It could be argued that the judges of the lower courts are voluntarily relinquishing their legitimate judicial discretion and uncritically abide not only by the decisions and opinions of the Supreme Court, but also by the appellate courts' decisions. In this manner, they tend to avoid making authoritative decision and thus elude accountability.

The second factor that has emerged from the judges' commentaries observed during the focus groups is the fact that in most cases lower court, judges do not critically examine such general legal opinions or general legal stands by the Supreme Court and accept them as they are, simply because they were delivered by the Supreme Court which is at the apex of the hierarchy of the criminal courts structure, which is why these opinions must be accepted as correct and justified. Unfortunately, such acceptance of these principled legal opinions delivered by the Supreme Court by lower courts' judges further implies that in their judgments, these judges do not try to find any additional arguments whether such general legal opinions and general stands are accepted in their specific case and they simply take them as granted. It is needless to mention that such a practice is practically unacceptable because, regardless of the fact that they serve into the unification of the implementation of the legal provisions, they fail to provide additional quality to the courts' decisions and do not represent a possibility for improvement of both the jurisprudence and the judges' independent position.

Henceforth, such practice may even lead towards legal mistakes, where noncritical implementation of such principled legal opinions in one specific case may generate obvious mistakes into the legal rationale.[80] It is needless to mention that lower courts' judges may and should differ in their decision from such Supreme Court's general legal opinions and general legal stands if they can provide sufficient rationale and legal background in a specific case to support their different stand

79 Zobec and Cernic (n 10) 138; Uzelac (n 2).

80 It is needless to mention that the quality of some of the general legal stands or general legal opinions is sometimes misguided and may provide wrongful interpretation of the legal doctrine. Obvious proof for such unclear doctrinal interpretation of the legal provisions by the Supreme Court can be observed in its general legal opinion in regard to the legal stand of 21.1.2015 where the Supreme courts provides unclear rationale behind its decision. Similar comments regarding producing legal ambiguity may raise Supreme Courts' Conclusion from 7.12.2021.

point[81]. This stand does not preclude the fact that Supreme Court's principled legal opinions should not be considered by the lower courts' judges while adjudicating a specific case, on the contrary, it states that it is advisable not to take these opinions for granted or even fetishize them, since such attitude of the judges could lead towards self-censorship and degradation of their independent role.

Such practice of asserting these Supreme Courts' legal opinions might in fact lead towards the creation of a culture of judges who have neither the intent nor the interest to resolve the case in legal and just manner and are only interested in having as many as possible, if not all, decisions upheld by the higher courts, simultaneously disregarding the defendants' rights and the main essences of the fair criminal trial.

3.3.2. The system of appeals in the criminal procedure and the uniform application of the law

The provisions of Articles 457 to 462 of the Law on Criminal Procedure[82] provide one additional possibility both for the intervention of the Supreme Court into the "clarification" of the legal provisions and their "proper" interpretation and for the unification of the application of the criminal law further in specific cases. This possibility is observed through the Supreme Courts' decisions upon submitted request for protection of the legality as an extraordinary legal remedy. This request as determined as extraordinary legal remedy and as defined within the Law on Criminal Procedure means that it can be submitted only by the State Public Prosecutor – the highest prosecutor in the hierarchy, in cases when the State Public Prosecutor has found that the law has been violated by the lower court's decisions. This extraordinary legal remedy could be submitted regardless of the phase of the criminal trial in which the alleged violation to the law has occurred, and regardless of the outcome of the criminal case. Delivered upon the submitted request for protection of the legality, the Supreme Court's decision is considered as an efficient tool for uniform application of the law by lower courts imposed by the Supreme Court. However, since this decision is mandatory only for the specific case upon which it was submitted, it also does not provide general impact on the rest of the criminal cases led before the courts in North Macedonia. This essentially means that such extraordinary legal remedy does not directly aim at uniformity of the case law or application of the law, since it tries to remedy a breach of the law in a specific case. However, its indirect effect is related to securing uniformity of application of the law and in most cases it is closely observed and obeyed in the further practice by lower instance courts.

Hence, these Supreme Court's decisions upon requests submitted in a specific case serve as an instrument for unification of the courts practice,

81 See Opinion No. 20 (n 1).

82 Law on Criminal Procedure "Official Gazette of Republic of Macedonia 150/2010".

and may in fact also be considered as a source for lower courts while deliberating the cases. This practice is generated since in every similar case, the State Public Prosecutor, if it finds similar violation to the law, may submit this request to the Supreme Court. Due to this fact, in most cases lower courts are *ex officio* considering such Supreme Court's decisions while deliberating their decisions in their cases. Such practice has also been mentioned by the members of the focus groups, who considered such practice of the State Public Prosecutor and the Supreme Courts as normal and acceptable practice for unification of the court decisions instead of a case of intrusion in their right to independent case trial.

Similar arguments with regard to cautious acceptance of such practice of the Supreme Court as a source of law can be given on this occasion, because in our analyses of the practice of the Supreme court while deciding in cases of submitted requests for protection of legality in certain cases, we have witnessed several occasions in which the Supreme court has delivered contentious decisions that were sometimes at serious odds even with the theoretical stand points and principles of the criminal procedure law.[83]

One other finding has emerged from the research of the practice of adjudication of the lower courts in North Macedonia and the evaluation of the impacts that play a significant role in the unification of the court decisions, as well as from the discussions with judges, which took place during the focus groups. Namely, it appeared that in most cases lower courts judges are finding useful to have some sort of a tool and guideline for determination of the criminal sanctions. This means that in most of the cases in order to achieve a unified sanctioning policy, judges find it beneficial to follow sentencing guidelines that would help and ease their decision-making process while determining the facts in a specific case and upon such determination to reach a decision upon the use of the most appropriate sanction in one specific case. Due to this, in most of the verdicts we can see a pattern of judges still following the provisions of this annulled Law on Determination of Type and Severity of the Criminal Sanctions[84] that has been annulled by the Constitutional Court as unconstitutional because it violated the independent position of the judges while determining the type and severity of the criminal sanction in a specific case.

Such tool for unification of the court practice, which instead of being as binding as the previously annulled law, serves as some type of guidelines in criminal justice system, is obviously well received as a practical tool for unification of the court decisions and as a tool for improvement of the level of trust in

83 It should be noted that the Supreme Court's decision upon the request for protection of the legality submitted regarding the extension of the detention in one high profile case, where the Supreme Court rendered a reasoning that while deciding on an appeal for imposed detention, the appeal does suspend previous court decision for detention and in this phase the defendants were released and as a result to this decision they absconded. Unfortunately, in this specific decision the Supreme Court did not use broader interpretation of the law in its essence and used narrow approach, that in fact allowed to defendants to flee from the trial.

84 Law on Determination of Type and Severity of the Criminal Sanctions "Official Gazette of Republic of Macedonia 199/2014"; and Constitutional Court's Decision, U. br. 169/2016, published in "Official Gazette of Republic of Macedonia 170/2017."

the courts and the confidence level of citizens in the courts and judges *in concreto*.[85] This was also noted during the discussion in the focus group:

> *"Many judges welcomed this Rulebook as it relieved them from the burden of determining the sanctions."*

Additionally, recalling a conversion held with a judge from a first instance a court, a senior judge participating in the focus group shared the interesting view of their peer:

> *"You know what, we do not need a rule of recusal anymore because with this Rulebook I can judge over a court case involving even my sister as it strictly frames my judicial discretion and there is no fear of partiality."*

Finally, it could be argued that the practice of the criminal law judges from the lower courts has pointed out that they do not feel a threat to their independent position if they follow the previous courts' practice, particularly, the practice of the higher courts. Contrary, they feel that they could benefit from such active role of the Supreme Court, and even from the introduction of some sort of legal standards that in fact limit their independent legal position while adjudicating the criminal cases. This judges' culture may also be attributed to the legal uncertainty and legal imperfections of the law or as an escape strategy from the covert political influence on their position. Hence, this judges' request for overregulation of the legal norms, which minimizes their filed of creative interpretation of the legal provisions in the spirit of the law and in its principles, results in judges limiting themselves in the process of creative interpretation of the legal provisions and becoming judges that are simple mouthpiece of the laws.

85 See A. Gruevska Drakulevski, B. Misoski, Comparative Analysis of the Mechanisms for Determination of the Sanctions: US Sentencing Guidelines, (2014) *Macedonian Journal for Criminal Law and Criminology*, No. 2, 2014; or O'Connell F., (2011), *Comparative Research into Sentencing Guidelines Mechanisms*, Research and Information Service Research Paper, Northern Ireland Assembly, NIAR 610-10, Paper 66/11, 16 June 2011.

CONCLUSION AND RECOMMENDATIONS

This paper has addressed the role of higher courts in securing uniform application of the law by the courts, as an issue that has been rarely discussed and analyzed in WB. While the ambition to thoroughly tackle this issue seemed realistic at the beginning of the research, the reality is that this is a rather insufficiently researched area which continuously opens new aspects at every attempt to dig deeper, thus requiring far more time and space. Nevertheless, analyzing the situation in North Macedonia, this paper builds upon the detected dominant features of the existing judicial culture in the country and places them in this specific context. In this sense, the issue of uniformity represents a prime example that reflects the negative consequences of the enduring remnants of the socialist legal tradition distorting the perception of the role of the judiciary in the development of the law and the individual independence of judges. The prevailing hierarchical mentality among judges continues to perpetuate the top to bottom development of the law effectually centralizing this task judges. More specifically, the traditional and dominant mechanism of uniformity in North Macedonia and the principled legal opinions of the general meeting of the Supreme Court were critically analyzed in terms of the contentious aspects related to the separation of powers, rule of law and individual independence of judges and their incompatibility with these fundamental values. Furthermore, it has been argued that the ineffectiveness and inefficiency of the existing system of appeals in the civil and criminal procedure in securing uniformity has also been the result of a judicial culture shaped by the legal survivals of the socialist period.

Once again there are voices, based on the ideas of the prevailing formalism and textual positivism, that propose legislative solutions to problems rooted in the judicial culture and untransformed mentality. Such a stance essentially ignores the fact that the legislator can only provide the tools and instruments and effectively the ones that need to operationalize them optimally are judges themselves. It is up to the judges to embrace their individual independence and judicial discretion, demonstrate willingness to overcome the fear and apathy and provide their input in the process of developing the law. Therefore, any legislative change will be unsuccessful in tackling the problem at hand unless incremental changes of the judicial culture are introduced and internalized. The prime avenue to achieve this goal is through the formal legal education and judicial training. Therefore, the relevant institutions, above all the Academy of judges and prosecutor, need:

- To introduce a special part in the respective curricula devoted to the mechanisms of securing uniform application of the law by the courts

in the international and comparative context, including the shortcomings of the interpretative statements of supreme courts.

- To acquaint the candidates with the notion of individual independence of judges and the notion of constructive disagreement in their relationship to the mechanisms for securing uniform application of the law.

- To devote a particular attention to the system of appeals in the civil and criminal procedure regarding their role in achieving uniformity of case law and application of the law.

- To adequately inform the candidates over the rationale and logic behind the development of the law and its cyclical nature by explaining the difference between top to bottom and bottom up development and evolution of the law.

Information about the project

The underlying objective of this project is to *complement the European Commission's process of vertical judicial Europeanization with an internal, horizontal, initiative that would combine an academic and practical approach in detecting and noting the main shortcomings of our judicial culture,* and through consultations with international and regional experts, outline recommendations for future steps in the Europeanization of judicial culture.

The project is coordinated by the **Institute for Democracy "Societas Civilis" Skopje (IDSCS)** from North Macedonia, in cooperation with **T.M.C. Asser Instituut** from the Netherlands, the **Judicial Research Center (CEPRIS)** from Serbia, and the **Albanian Legal and Territorial Research Initiative (ALTRI)**, and supported by the **Dutch Fund for Regional Partnership (NFRP)/Matra**. The project will be carried out and have impact in **Skopje (North Macedonia)**, **Belgrade (Serbia)** and **Tirana (Albania)**.

Information about IDSCS

IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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