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ПРАВОВІ ЗАСОБИ ЗАБЕЗПЕЧЕННЯ ЄДНОСТІ ЗАСТОСУВАННЯ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНУ

Анотація. *Забезпечення єдності судової практики є реалізацією принципу правової визначеності, який, будучи складовою принципу верховенства права, забезпечує розумну прогнозованість судових рішень. На теоретичному рівні питання єдності судової практики здебільшого стають предметом досліджень у контексті судової реформи та судоустрою, проте комплексні дослідження з цієї проблематики у царині сучасного кримінального судочинства майже відсутні. Метою дослідження є встановлення системи правових засобів забезпечення єдності судової практики. Методологічну основу дослідження склали загальнонаукові та спеціальні методи, а саме: діалектичний, системний, формально-юридичний та логічний методи. Авторами надано короткий огляд теоретичних положень, що визначають соціально-правову цінність єдності правозастосовної практики. Проаналізовано поняття «єдності судової практики» у царині кримінального провадження та наголошено на використанні у власному дослідженні підходу до розуміння єдності судової практики як синоніму однакового (усталеного) застосування процесуальних та матеріальних норм в однорідних категоріях судових рішень, що ухвалюються в перебігу кримінального провадження. Розглянуто питання реалізації дискреції при прийнятті судового рішення та її співвідношення із стандартом «узгодженості судового рішення». Встановлено, що межа дозволеної різності у застосуванні закону є досить гнучкою та неформалізованою. Установлено, що якість закону не може оцінюватися у відриві від практики його застосування. Авторами наголошено й на інструментальній ролі судової практики у загальному механізмі забезпечення однаковості правозастосування. Висловлена позиція щодо ролі роз'яснень Пленуму Верховного Суду в загальному механізмі забезпечення єдності судової практики. Встановлено, що система правових засобів забезпечення єдності застосування закону у царині кримінального провадження складається з сукупності взаємопов'язаних між собою елементів. Результати дослідження можуть бути використані при подальшій науковій розробці проблеми забезпечення єдності судової практики, науковому обґрунтуванню пропозицій, спрямованих на удосконалення чинного законодавства України, що регулює питання, які стали предметом даного наукового дослідження.*

Ключові слова: *судова практика, єдність судової практики, якість кримінального процесуального закону, система правових засобів, розбіжність судових рішень, суддівська дискреція.*

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LEGAL MEANS OF PROCURING THE UNITY APPLICATION OF THE CRIMINAL PROCEDURE LAW

Abstract. *Ensuring the unity of judicial practice is the implementation of the legal certainty principle, which is considered as the part of the rule of law, ensures the predictability of court decisions. At the theoretical level, the issues of the unity of judicial practice are mostly the subject of research in the context of judicial reform and the judiciary, but comprehensive research on this issue in the field of modern criminal justice is almost absent. The purpose of the study is to establish a system of legal means to ensure the unity of judicial practice. The methodological basis of the study was based on general and special methods, namely: dialectical, systematic, formal-legal and logical methods. The authors provide a brief overview of the theoretical provisions that determine the socio-legal value of the unity of law enforcement practice. The concept of "unity of judicial practice" in the field of criminal proceedings is analyzed and it was emphasized the usage of the approach of understanding the unity of judicial practice as a synonym of equal (adjustment) application of procedural and material norms in homogeneous categories of court decisions, which are adopted in the course of criminal proceedings. It is established that the limit of permitted differences in the application of the law is quite flexible and informal. It is established that the quality of the law cannot be assessed in isolation from the practice of its application. The authors also emphasize the instrumental role of judicial practice in the general mechanism of ensuring uniformity of law enforcement. A position was expressed on the role of explanations of the Plenum of the Supreme Court in the general mechanism of ensuring the unity of judicial practice. It is established that the system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interrelated elements. The results of the study can be used in further scientific development of the problem of ensuring the unity of judicial practice, scientific substantiation of proposals aimed to improve the current legislation of Ukraine, which regulates the issues that have become the subject of this research.*

Keywords: *judicial practice, uniformity of judicial practice, quality of criminal procedural law, system of legal remedies, discrepancy or court decisions, judicial discretion.*

INTRODUCTION

The unity (or coherence) of judicial practise is one of the fundamental values of modern justice. One of the key principles of legal certainty in the concept of the rule of law is manifested, among other things, in ensuring the *unity of judicial practise* in understanding the relevant legal rules by courts taking into account the specific situation and in accordance with general guidelines in its interpretation contained in judicial practise. A single approach to the application of the law best meets the requirements of predictability, the rule of law and the effective protection of human rights [1]. Conversely, according to the case-law of the European Court of Human Rights (ECtHR), inconsistencies in judicial decisions destroy public confidence in judges, which is an integral part of the rule of law and constitutes the ground to implement the right to a fair trial (Article 6 § 1 of the

Convention for the Protection of Human Rights)¹. Thus, in the context of modern legal understanding, which does not reduce the right to law, the court decision as a result of law enforcement activities in a state governed by the rule of law is actually required to comply with judicial practise or “established case law” [2]. In view of this, the legislator, scientific experts of leading democracies and international organisations pay great attention to finding and approving effective mechanisms to ensure the unity of judicial practise. Among the international legal acts, a valuable guideline in the field of ensuring the unity of judicial practise is the CCJE Opinion No. 20 “On the role of courts in ensuring the uniform application of the law” (Strasbourg, November 10, 2017) (hereinafter – the Opinion of the CCJE). The CCJE Opinion states, in particular, that in a state governed by the rule of law, citizens have a legitimate expectation that they will be treated like everyone else and that they can rely on previous judgments in similar cases, and thus citizens may provide for the legal consequences of their actions or omissions (paragraph 5) [3]. In other words, for a judgment in a state governed by the rule of law to meet the requirements of the rule of law, it must be reasonably foreseeable. It is no coincidence that the ECtHR also links the right to a fair trial enshrined in Article 6 of the CPC to the requirements of uniform application of the law. Many states seek to ensure the uniformity of their case law, arguing that the judiciary is independent in its proceedings, but that its decisions should be predictable rather than chaotic. That is why the courts of lower instances in most cases rely on the decisions of the courts of higher instances [4].

In Ukraine, the issues of ensuring the unity of judicial practise have long been in the focus of priority attention of both state institutions, practitioners and the scientific community. Back in 2015, the official political document recognised the insufficient level of unity and consistency of judicial practise as one of the main factors of low efficiency of the justice system, which necessitated the development of a system of coordinated mechanisms to promote unity of practise². In this context, a number of legislative and organisational measures have been taken, in particular, reforming the judicial system, improving the legislation governing the procedural powers of the court of cassation, and others. However, despite the constant attention paid to the issue of coherence of judicial practise, the problem of diametrically opposed judicial positions on similar legal issues today, unfortunately, is not resolved. Although the unity of judicial practise is an indicator of the professionalism of judges, most of its achievement depends on legal factors – the existence of a coherent system of remedies that allow ensuring unity in the application of the law, and thus unify judicial practise. This necessitates the study by scholars of issues related to the means of ensuring the unity of judicial practise at the systemic level.

1. MATERIALS AND METHODS

The methodological basis of the study was a set of modern general scientific and special methods used in legal science. At the same time, first of all, the authors proceeded from the fact that the system of methods should be associated with the recognition of the

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, No 995_004. (1990, January). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004/ed20131002#Text

² Decree of the President of Ukraine No 276/2015 “On the strategy of reforming the judiciary, the judiciary and related legal institutions for 2015-2020. (2015, May 20). Retrieved from <https://zakon2.rada.gov.ua/laws/show/276/2015>

existence objectivity and the need for development of legal phenomena – unity of judicial practice, legal means to ensure unity of judicial practice, socio-legal expectations at the present stage of development of society, etc. The general level of methodology is represented by the method of materialist dialectics, which has not lost its relevance so far, as it requires comprehensiveness and objectivity to the knowledge of real phenomena, as well as their links with practical activities in criminal proceedings. The choice and use of specific methods of the research process depended on the stage of cognition and the goal, which was set at a certain stage of cognitive activity.

Thus, the dialectical method as a universal method of studying social and legal phenomena allowed stating that the quality of legislation and the practice of its implementation are in objective unity, interconnection and interdependence. The dialectical method is based on such methods of information cognition as data synthesis and analysis, as well as abstraction and the principle of convergence from abstract to specific concepts. To generalise and develop a holistic vision of the concept of unity of judicial practice, a set of methods of theoretical cognition was used, which together with dialectical method form a system of research methodology. The system method allowed to consider a set of legal means to ensure the unity of judicial practice as a system, the elements of which, being interconnected and interdependent, are used to solve a specific problem – ensuring the unity of judicial practice in criminal proceedings, which, in fact, is the integrative quality that characterises the very system of these tools. The method of abstraction was used to set out the legal positions of the ECtHR relevant to the issue of ensuring the unity of judicial practice, to highlight their essence. Formal-legal method is used to clarify the conceptual and categorical apparatus of research (in particular, the concept of “unity of judicial practice”), the establishment of structural elements of the unity of judicial practice, formed by law enforcement practice (acts of law enforcement by higher courts): 1) court decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law; 2) decisions (rulings) of the Supreme Court that resolve existing differences in judicial practice (disputed issues of law enforcement). The logical method (methods of analysis, synthesis and induction) allowed analysing the problematic issues of uniform application of the law in similar legal relations and to identify legal means of ensuring the unity of judicial practice, which is a necessary condition for overcoming the problem of diametrically opposed judicial positions on similar legal issues. The comparative legal method was used in the study of approaches to the vision of the phenomenon of divergence of court decisions, formalised in some international legal acts. The method of idealisation and modelling allowed developing a theoretical model of legal means to ensure the unity of judicial practice and others. At the same time, all scientific research methods were used in interconnection and interdependence, which contributed to the comprehensiveness, completeness, objectivity of the study and laid the foundation for further scientific research of the analysed issues and professional scientific discussion aimed at finding and approving effective mechanisms for unity of national case-law.

During the study it was stated that theoretical and applied issues of the unity of judicial practise were considered in the works of many experts of different times, who studied the legal status of the Supreme Court (Ukraine) and covered issues related to ensuring the unity of judicial practise, including: N. Bobechko [5], M. Demenchuk [6].

2. RESULTS AND DISCUSSION

2.1 *On the value of the unity of judicial practise*

Consistency of case law is one of the key provisions in the context of ensuring the rule of law at the legislative level, in particular, its integral components, such as legal certainty and predictability and the principle of equality before the law (paragraphs 50, 51, The Report on the Rule of Law of 2011) (The Report on the Rule of Law of 2011) [7]. Even in pre-revolutionary times, the famous Russian jurist M.M. Korkunov stressed that one of the main conditions of justice is the application of laws to all equally, and this is impossible without the same, established judicial practises [8]. The mentioned CCJE Opinion states that in a state governed by the rule of law, citizens have a legitimate expectation that they will be treated like everyone else, and that they can rely on previous judgments in similar cases, and thus citizens can provide legal consequences of their actions or inaction (item 5). In other words, for a judgment in a state governed by the rule of law must be reasonably foreseeable to meet the requirements of the rule of law. It is no coincidence that the ECtHR also links the right to a fair trial enshrined in Article 6 of the Convention¹ to the requirements of uniform application of the law. Many states seek to ensure the uniformity of their case law, arguing that the judiciary is independent in its proceedings, but that its decisions should be *predictable* rather than chaotic. That is why the courts of lower instances in most cases rely on the decisions of the courts of higher instances.

The socio-legal value of a single application of the same substantive or procedural rule in such legal relations is both in the predictability of the legal consequences of certain actions or omissions, and manifested in the minimisation of corruption risks in criminal proceedings (equality in the exercise of discretion on certain legal issues limits “unfair” law enforcement in its “manoeuvring” within the law receiving illegal benefits); ensuring compliance with a reasonable time frame of trial (the existence of sustainable case law as a guide in complex law enforcement issues can significantly reduce the court decision-making process), preventing unjustified loading of the judicial system (“single case law reduces the likelihood of appeals due to predictability of the court's position in the case; .. helps to reduce the burden on the courts, because people, knowing how such cases were resolved in the courts, will be able to understand the futility of court proceedings and refrain from going to court in certain cases” [4]). The vector of the public importance of the uniform application of the law is aimed at increasing the level of public confidence in the court. Conversely, as stated in the CCJE Opinion, the repeated adoption of conflicting judgments (the French version of the Opinion translates the term “conflicting” as “*contradictoire*” (contradicting, conflicting)) may create a situation of legal uncertainty that reducing trust in the judiciary, while this trust is an important element of the rule of law. The only application of the law determines public confidence (paragraph 6 of the CCJE Opinion) [9]. At the same time, the nature of the discrepancy between court decisions is by no means anomalous, but quite objective. After all, as the ECtHR noted in its judgment in *Tudor v. Romania* (2009) [10], differences in judicial decisions are by their nature an integral consequence of any judicial system based on a network of courts of first instance and appellate courts built on the principle of territorial jurisdiction. This is how

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, No 995_004. (1990, January). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004/ed20131002#Text

the judicial system in Ukraine works and, of course, may allow different application of the same rule of law by different courts, and therefore there is a need to ensure the unity of judicial practise – precisely in order to bring it, so to speak, to a common denominator [11]. However, the same decision of the ECtHR states: “The Court considers that although the Convention does not oblige the State to return confiscated property and even more so to dispose of it in accordance with its prerogatives of property rights, once the State has taken a decision, it must be carried out with clarity and coherence, with reasonable consistency, in order to avoid, as far as possible, uncertainty and ambiguity among the persons whose powers include measures to implement it. In this context, it should be emphasised that uncertainty – whether legislative, administrative or resulting from government practises – is an important factor to consider when assessing the conduct of the State (paragraph 26). ... The Court considers that, in the absence of a mechanism to ensure consistency in the practise of national courts, such profound and long-standing differences in approaches to case law concerning matters of importance to society are such as to create a state of permanent uncertainty (para. 30)” [12].

2.2 Methodological remarks on the “unity of judicial practise”

Before proceeding to the definition and consideration of the system of legal measures, the authors consider it necessary to make a number of methodological remarks on the very subject of security – “unity of judicial practise”. In the literature there are different approaches to defining the very concept of *unity* of judicial practise. Without aiming at their careful analysis, only note that the dominant is consideration of unity as the same approach to the application of legal norms to similar in nature factual circumstances [2]. There is also an understanding of the unity of judicial practise as predictability, consistency in the order of consideration of homogeneous categories of court cases and its results, which consists in similarity (likeness) of interpretation, specification of legal norms, overcoming gaps in legal regulation by analogy, and based on substantive and procedural rights, in particular, the rule of law [4]. In the mentioned Conclusion, the CCJE uses as identical concepts “uniform application of the law”, “uniform application of the law”, “unified application of the law”, “uniform (or unity) judicial practise”. In this study, the authors believe it possible to consider the unity of judicial practise in the field of criminal proceedings in its substantive sense as a synonym for equal (established) application of procedural and substantive rules in homogeneous categories of court decisions made in criminal proceedings. Moreover, the Law of Ukraine “On the Judiciary and the Status of Judges”¹ refers to the same application, namely – the Supreme Court ensures the uniform application of law by courts of different specialisations in the manner and order prescribed by procedural law (Part 2 of Article 36). The demand for this quality of practise is extremely important in view of the above. The key conditions for assessing the similarity or difference of court decisions are: the application of the same rule; similarity of the factual circumstances established in the course of the proceedings (selection of those circumstances of a particular proceeding that are significant in determining whether it falls under the disposition of the procedural rule, the unequal application of which is questioned). Such an established similarity of factual circumstances is a condition of the

¹ Law of Ukraine “On the Judiciary and the Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

relevance of the judicial precedent with which another court decision is compared. As stated in paragraph 38 of the CCJE Opinion, the relevance of the case-law presupposes that the previous case was in fact based on fundamentally similar facts. In cases of recourse to case law, due regard must be paid to the context and circumstances of the case at the time the decision was taken. Appropriate attention should be paid to the analysis of relevant case law, including the development of appropriate case differentiation techniques. There may be cases where a case is involved in a category of cases that are likely to fall under a previous court decision, but a more detailed and critical analysis shows that such a previous court decision is not really a relevant court precedent. The application to two different disputes of different ways of resolving them cannot be considered a conflict within the case law, if it is justified by differences in the relevant factual situation.

In modern legal conditions, when axiomatic is not even the admissibility of discretion in criminal proceedings, but its mandatory presence as a means of ensuring justice in the administration of justice, the subject of discussion of scholars and practitioners has shifted to the problem of specific procedural mechanisms for optimising its boundaries. Given that in the states of continental law, to which Ukraine belongs, in the conditions of rapid development of law and the need for its “correct” application, the importance of judicial practise as a determining guideline for interpreting the law and eliminating legislative gaps, it seems possible to talk about law enforcement discretion within not only the law but also judicial practise. In this sense, *the standard of consistency of a court decision* in resolving issues of law with other existing decisions made in similar legal and factual circumstances, as one of the regulators of law enforcement, is in great demand. When making different criminal procedural decisions, the nature and degree of the implemented discretionary component are different, which depends on a number of factors: the degree of certainty of the hypothesis of the legal norm and alternative legal behaviour options laid down by the legislator in its disposition; the nature of the factual grounds to which the law links the possibility of a decision; in general, the settlement of these factual circumstances by positive law.

“Discretion” or “discretion marked with zero” is inherent only in a few legal situations. This applies to cases where the law contains an imperative indication of the necessary course of legal conduct in the presence of any legal facts that are not subject to assessment in the event of their reliable establishment. At the same time, the hypothesis of a legal norm, which formulates the grounds for making criminal procedural decisions, is absolutely definite and does not require an assessment of the established circumstances in terms of, for example, their sufficiency for a particular legal conclusion. Such situations may include, in particular, the closure of criminal proceedings in the event that an investigator or prosecutor establishes the entry into force of the law abolishing criminal liability for an act committed by a person; the existence of a sentence on the same charge that has entered into force, or a court decision to close criminal proceedings on the same charge; refusal of a victim, his representative from the accusation in criminal proceedings in the form of a private accusation, etc. (paragraphs 4, 6, 7, part 1 of Article 284 of the CPC¹). In other cases, as a rule, the legal regulation of the grounds and conditions of criminal procedural decisions causes a certain state of factual or legal uncertainty,

¹ Code of Criminal Procedure of Ukraine. (2010, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>

overcoming which requires the decision-maker to apply some degree of discretion to ensure the effective conduct of criminal proceedings. Given the different types of discretion that can be exercised during the adoption of a procedural decision, and the limited requirement of uniformity purely in matters of law, it is necessary to identify the following situations where a single approach to resolving the case is in demand:

1) realisation by the law enforcer of discretion in a situation of “bringing” of the established facts in compliance with the corresponding legal norms formulated with use of estimation concepts, open lists of cases or exceptions;

2) the exercise of discretion regarding the choice of the appropriate legal norm to be applied in establishing specific facts. It is both a matter of applying a legal analogy to overcome a certain legal uncertainty (gaps in criminal procedural law (in particular, in the absence of a procedure for implementing legal law – Part 6 of Article 9 of the CPC¹), and choosing a legal norm based on a critical analysis of regulations. designed to resolve the established factual circumstances (within the principle of legality formulated in parts 3, 4 of Article 9 of the CPC), the application of a broad interpretation of the law on a particular case, taking into account the general principles of criminal proceedings and ECtHR practise, etc.;

3) the exercise of discretion as to the expediency of making a specific procedural decision or committing a procedural action in the event of the establishment of certain facts. The discretionary component here is manifested not only in the possibility of interpreting the facts as falling under the regulations with which the law associates the possibility of a particular type of procedural decision, but also in determining the appropriateness (need) to take certain legal measures in this case. Dispositions of those norms that contain the words “may”, “exercise”, “if deemed necessary”, “if necessary”, etc. are given a similar variant. Moreover, the choice in such cases is limited to only one option, enshrined in law. As an example, there is the question of: obtaining samples for examination (Article 245 of the CPC²); court decision on a shortened procedure for trial (Part 4 of Article 349 of the CPC); appointment of an examination in court (Part 2 of Article 332 of the CPC); conducting certain investigative actions, etc.;

4) the exercise of discretion to choose one of the legally permissible options for legal conduct in the event of the establishment of certain facts. Moreover, this variability concerns both the choice of a certain value (size) of one of the parameters (characteristics) of a generally sufficiently defined action (restriction) [12] (for example, determining the amount of collateral within the limits specified in Part 5 of Article 182 of the CPC, etc.) and its overall quality characteristics (for example, the choice of one of the precautionary measures listed in Article 176 of the CPC, additional obligations listed in Part 5 of Article 194 of the CPC) [13-14]. In such procedural decisions, the discretionary component is most pronounced. It seems that the conclusions in which this type of discretion is implemented can be the least unified in judicial practise. After all, it is the set of specific circumstances of a case (*ad hoc*) that determines the nature of the decision. Analysing the problem of the allowed limit of differences in law enforcement, and finding out whether the existence of two court decisions in which the same legal norm is applied differently in similar factual legal relations is permissible, the CCJE in the Opinion noted the following

¹ Code of Criminal Procedure of Ukraine. (2010, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>

² *Ibidem*, 2010

two aspects. First, differences in interpretations can be perceived as an integral feature of the judicial system, consisting of a certain network of courts [15; 16]. That is, different courts may come to different, but nevertheless rational and reasonable conclusions regarding a similar legal issue with similar factual circumstances (paragraph 8). And this is understandable given the individual uniqueness of the actual composition of each case, and accordingly only the relative ability to typify the legal relationship according to their actual composition. Secondly, in certain circumstances, contradictory decisions of national courts, especially courts of the highest instances, may constitute a violation of the requirement of a fair trial, as set out in Article 6 § 1 of the ECHR (paragraph 9 of the CCJE Opinion).

As a limit beyond which the discrepancy is unacceptable, the CJEU names two criteria: quantitative – “longevity” and qualitative – “depth”. As for the qualitative criterion, in the authors’ opinion, the search for depth should take place through the prism of the nature of the impact of the decision on the restriction of human rights and freedoms or the realisation of its legitimate interests. From the perspective of modern postulates of the criminal process, permeated by the principle of proportionality, the existence of two similar in fact court decisions, in which to different persons in the same circumstances legal norm was applied differently (with different aggravating consequences for human rights and freedoms) is a clear manifestation of injustice, non-compliance with equality before the law. In other words, if there is already a judgment in which, under such factual circumstances, the balance between personal and public interests has been ensured by choosing the least detrimental restriction on human rights and freedoms, a subsequent judgment with greater burdens (or more aggravating) will not be compatible with the requirements of the proportionality of the application of restrictions, and therefore with the requirements of fairness in the sense in which this concept is provided by Article 6 of the ECHR [17]. And the more common is such a different approach in practise to the application of a particular rule, the greater the scale of the danger. It seems that the Grand Chamber of the Supreme Court proceeded from these positions when formulating the criteria of exclusivity of a legal problem (which is essentially a consequence of the same difference of practise, lack of a single correct approach to law enforcement due to certain defects of law). The legal opinion set out in the ruling of the Grand Chamber of the Supreme Court of June 4, 2018 (case No. 638/11484/17)¹ states that the exclusive legal problem must be assessed in the light of quantitative and qualitative dimensions. *The quantitative* illustrates the fact that it is present not in a particular case, but in an indefinite number of disputes that either already exists or may arise in the light of a legal issue on which the problem of uncertainty arises. In terms of *qualitative criteria*, the exclusivity of the legal problem is evidenced by the following circumstances: 1) the cassation appeal is motivated by the fact that the courts committed significant violations of procedural law, which made it impossible to consider the case in accordance with the requirements of fair trial; 2) the rules of substantive law were applied by the courts of lower instances so that there is a question of *compliance with the principle of proportionality*, i.e. ensuring a proper balance between the interests of the parties in the case.

Thus, the limit of permissible differences in the application of the law is quite flexible

¹ Grand Chamber of the Supreme Court No. 638/11484/17. (2018, June). Retrieved from <http://reyestr.court.gov.ua/Review/74506027>.

and informal. However, in any state governed by the rule of law, there must be a system of necessary measures to ensure a unified approach to the application of the law in such factual circumstances (preventive and restorative).

2.3 Regarding the definition of the system of means of ensuring the unity of application of the law in the field of criminal proceedings

Now turn to the subject of the study, namely – legal means of ensuring the unity of application of the law in the field of criminal proceedings. It is well known that the factors that affect the law enforcement process, and hence its outcome, are quite diverse: legal, organisational, economic, political, and others. Most of them, given their complexity and versatility, can be the subject of a separate study. As the role of the legal factor cannot be overestimated, within the limits of this work the authors will be limited to consideration of system of legal mechanisms of maintenance of uniform application of the law in judicial practise. In this context, first of all, turn to the above Conclusion of the CCJE, which states the diversity of means of ensuring the unity of judicial practise, their different nature and role in the overall mechanism of provision (formal, semi-formal and informal). Formal proceedings in appellate courts and, in particular, in supreme courts or courts of cassation have the most direct impact on the uniform interpretation and application of the law. Such proceedings in the supreme courts, for example, include: 1) consideration of an individual complaint of one of the parties to the proceedings; 2) consideration of a special complaint filed by a public prosecutor (or similar state body) to the Supreme Court (in civil cases) regarding an important legal issue in order to ensure uniform application of the law or development of law through judicial practise, and in most legal systems such appeal adoption of a declarative court decision that does not affect the rights of the parties; 3) providing an official interpretation of a purely abstract nature, without reference to complaints filed in a particular case; 4) adoption of a preliminary ruling on cases pending in relation to a narrowly defined legal issue, at the request of a lower court.

Semi-formal arrangements, as stated in the CCJE Opinion, include, for example, regularly scheduled meetings of judges of a particular court or judges of different courts of the same level with judges of a higher court. These meetings can be either purely informal or they can be institutionalised to some extent. Finally, there are exclusively informal mechanisms, such as informal consultations of judges, in order to establish consensus on various issues of procedural and substantive law, where case law contains differences. The level of consistency of law enforcement is primarily determined by the quality of the law. The interdependence of the quality of the rule of law and the practise of its application is quite obvious from the standpoint of the phenomenological approach to the study of the quality of the rule of law, to which the famous scientists L.B. Alekeeva, O.M. Larin and M.S. Strogovych (the latter provides for the separation and study of the relationship between the results of law enforcement and the construction of norms [18]) even in Soviet times in the study of quality and effectiveness of criminal procedure law. In essence, the vision of the phenomenon of the quality of law in a modern legal democratic society in the light of the concept of the rule of law is similar. Thus, in particular, in the already mentioned Report on the Rule of Law of 2011, the Venice Commission recognised the coherence of case law as one of the key elements in the context of ensuring at the legislative level all components of the Rule of Law (paragraph 50). Paragraph 51 also states that the core elements of the rule of law, such as legal certainty and supremacy of the law,

presuppose that the law has been applied in practise. It also means that it is suitable for use. Therefore, it is extremely important before the adoption of the law to assess its suitability for its application in practise, as well as to check a posteriori whether its application will be effective. In other words, the quality of the law cannot be assessed in isolation from the practise of its application. In the decision of “Oleksandr Volkov v. Ukraine”, the ECtHR noted that the existence of a specific and consistent practise of interpreting the relevant provision of the law was a factor that led to the conclusion that the provision was predictable (it is about “Goodwin v. The United Kingdom” [19]). Although this conclusion was made in the context of the common law system, the interpretation made by the judiciary cannot be underestimated in the systems of continental law while ensuring the predictability of legislative provisions. It is these bodies that must consistently interpret the exact meaning of the general provisions of the law and dispel any doubts as to its interpretation (paragraph 179) [20]. In view of the above, the unity of practise is one of the indicators of high-quality law in light of its compliance with modern legal standards of its legal certainty – the law should be as clear, predictable and consistent as possible. As aptly noted in the CCJE Opinion, courts will be better able to ensure uniform application of the law if the laws are logical, coherent, properly written, have clear wording, avoid unnecessary ambiguity and do not have internal contradictions. (p. 44). While contradictions in judicial practise are sometimes the result of ambiguous laws, which does not allow courts to reach a single and generally accepted interpretation (paragraph 46). However, as stated in paragraph 175 of the ECtHR decision in “Oleksandr Volkov v. Ukraine”, it may be difficult to formulate high-definition laws in certain areas, and a degree of flexibility may even be desirable to allow national courts to apply the law in the light of its assessment of what action is necessary in the particular circumstances of each case (see “Goodwin v. the United Kingdom”, decision of 27 May 1996, § 33, Reports 1996-II [19]). The logical consequence of the principle of general application of laws is that legislative acts are not always clearly formulated. The need to avoid excessive rigidity in wording and to respond to changing circumstances means that many laws inevitably have more or less vague wording. The interpretation and application of such acts depend on practise (see “Gorzelik and Others v. Poland” [GC], application No. 44158/98, § 64, ECHR 2004-I) [21]. Thus, certain qualitative characteristics of the law and the mechanisms established by it are a desirable and necessary condition (and therefore means) to ensure a unified approach to its application in practise. On the other hand, the instrumental role of judicial practise in the general mechanism for ensuring uniformity of law enforcement cannot be underestimated. Considering the issue of means of ensuring the unity of judicial practise, it seems necessary to comment separately on the explanations of the Plenum of the Supreme Court, which for many years served as a kind of guide in judicial practise. According to the current wording of paragraphs 10-1, 10-2 of Art. 46 of the Law “On the Judiciary and the Status of Judges”¹ the Plenum of the Supreme Court in order to ensure uniform application of law in certain categories of cases summarises the practise of substantive and procedural laws, systematises and ensures the publication of legal positions of the Supreme Court with reference to court decisions formulated, as well as the results of the analysis of judicial statistics and generalisation of judicial practise provides

¹ Law of Ukraine “On the Judiciary and the Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

an explanation of the recommendatory nature of the application of legislation in resolving court cases. Meanwhile, the above-mentioned CCJE Opinion states in this regard that the public role of the Supreme Court, which is to provide guidelines for the future, ensuring the unity of judicial practise and the development of law, should be achieved through an appropriate system of filtering appeals. This approach is more acceptable than the development of law by developing binding explanations or general conclusions adopted in plenary sessions of the Supreme Court. Such instruments, which (still exist) in some countries, are adopted (unlike the instrument of previous decisions), without taking into account any real cases or cases under consideration, and without the participation of the parties to the case or their lawyers who could would justify their positions. Assuming the possibility of such instruments to have a positive impact on the unity of judicial practise and legal certainty, the CCJE considers that these instruments are a matter of concern in terms of the proper role of the judiciary in the system of distribution of state power (paragraph 28).

In the authors' opinion, the system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interrelated elements:

1. Criminal procedural law that meets the standards of its quality.
2. Judicial decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law.
3. Decisions (rulings) of the Supreme Court that resolve existing differences in judicial practise (controversial issues of law enforcement).
4. Legal regulation of the necessary degree of binding decisions of the Supreme Court and the possibility of derogation from its legal positions by lower courts, as well as the Supreme Court itself.

According to their functional purpose, these tools can be both preventive and restorative. However, most of them perform both functions. Thus, in particular, the decision of the Grand Chamber of the Supreme Court of an exclusive legal problem, although directly aimed at restoring the violated legal regime of legality, nevertheless warns in the future of incorrect application of certain legal norms by judges. Although certain elements are by their nature a variety of others, their separate consideration is methodologically justified given their special functional load in the general process of ensuring the unity of judicial practise.

CONCLUSIONS

The socio-legal value of a single application of the same substantive or procedural rule in such legal relations, first of all, is to exercise the right of everyone to a fair trial, guaranteed by Article 6 of the CPC, and also manifests itself in ensuring a reasonable trial judicial system, minimising corruption risks in the field of criminal proceedings, increasing the level of public confidence in the court and its authority in the state, guided by the rule of law. The system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interconnected elements, which are proposed to include the criminal procedure law that meets the standards of its quality; court decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law; decisions (rulings) of the Supreme Court that resolve existing differences in judicial practise (disputed issues of law enforcement); legal

regulation of the necessary degree of binding nature of the decisions of the Supreme Court and the possibility of deviation from its legal positions by lower courts, as well as the Supreme Court itself. The allocated legal means of ensuring the unity of application of the law are the direction of their further substantive research in order to formulate scientifically sound proposals for improving the criminal procedure law and the practise of its application.

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