THE NATURE OF UNIFYING OPINIONS OF CZECH SUPREME COURTS

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Abstract:
The aim of this paper is to discuss the notion of the so called 'unifying opinion' – an instrument of the Czech supreme courts for unification of Czech case law. This instrument is said to be a relic of socialist legal systems – surviving in the legal systems of post-communist countries. It has been subject of criticism from some of the Czech as well as foreign legal theorists, especially due to the fact that it seems to be a significant flaw in the division of powers concept, an inherent element of the *Rechtstaat* (State of Law). Does this instrument of unifying opinions pose any threat to the modern notion of *Rechtsaat*?

I. Introduction

Judicial decision-making in democratic countries is governed by general principles of law such as legal certainty, formal equality and foreseeability of judicial decision-making. These principles demand certain quality of the judicial decisions which may be seen in fulfilling the principle that "like cases should be judged alike". To ensure that it will be done so, there are the supreme courts that are called to "unify the case-law". Although the Czech Republic does not belong to the countries that openly adhere to the doctrine of precedent, Czech case-law does have a certain degree of normative value that makes the judges to respect it. This paper is not concerned with the questions of precedent in the Czech Republic, however interesting and topical this may have been. It is to be concerned with a special instrument managed by Czech supreme courts (I use the plural here to refer to the Supreme Administrative Court of the Czech Republic – dealing with administrative matters – and the Supreme Court of the Czech Republic – dealing with all other matters: civil and criminal), the so called unifying opinions.

II. Unifying opinions defined

Unifying opinions are abstract interpretations of law given without any actual contact to one concrete case. These interpretations are drawn from the experience of past judicial decision-making and they are based on a presupposition that the supreme courts monitor and analyze lower courts' case-law. [1] These opinions are given by the court, usually by the full court (or the Plenum) or by a so called extended bench (a bench of judges consisting of more judges than needed for standard decision-making; in Czech they are called "senates"), on matters of a particular kind outside the standard decision-making, independently on any particular case. According to Czech laws, the supreme courts should monitor and analyze the decisions of lower courts and based on these decisions and to ensure the uniform decision-making issue *opinions*, or as one of the translations of the cited law puts it *rulings of an exemplary nature*. [2] These opinions presuppose that the case-law of lower courts on like matters is not alike and that the lower courts interpret one and the same law or situation differently. The supreme courts' task here is to show which one of such arising possible interpretations is supposed to be the correct one and should be applied consequently by the lower courts. Although these opinions are not formally binding, they influence the lower courts' decision making with the simple fact that they

show the way in which the supreme courts will be deciding from now on. To avoid overruling of their decisions, the lower courts tend to adhere blindly to these opinions (and supreme courts' case-law in general) without discussing them. What makes the unifying opinions so special is their complete independence on any concrete case. The supreme court thus formulates opinions *in abstracto,* as legislature does.

III. History

Socialist legal systems insisted on centralized control of almost every part of social life. Courts and their activities were no exception. In the first half of the twentieth century (during the so called First Republic of Czechoslovakia), the case-law used to be published in private case-law reports. This custom originating in Austro-Hungarian tradition was replaced in the 1950s by centralized case-law reports. In these reports only some of the decisions were published – those that should be known to wider (expert) public – and those that seemed to be "wrong" were banned from publishing.[3] Czechoslovakia, as one of the Central European countries that followed the socialist soviet model of centralized legal system, adopted the idea that the Supreme Court should issue directives to explain the right meaning of controversies in law. [4] These "directives for the correct interpretation of statutes and other legal enactments" as they were called appeared for the first time in Czechoslovakian legal system in 1953. Since 1960s the statutes used the term "opinions given to ensure the uniform interpretation of statutes". [5] These directives could be issued without any connection to any concrete resolution of a dispute. The unification of the case-law was characterized as "putting finishing touches to legal norms organized by the state".[6] They fulfilled the central government's standpoint that judges should be taught the proper interpretation of socialist statutes and that they should be systematically led to apply the law in the socialist way.
After 1989 these unifying opinions remained in legal system of Czechoslovakia (and later the Czech Republic) as well as of other post-communist countries.

This kind of opinion given by the supreme court does not seem to be known in Western-European countries. The supreme courts do usually give some kind of explanatory opinions in case the individual benches of judges of the supreme court adopt different interpretations of the same or similar subject-matter. This kind of explanatory opinion is a traditional instrument of unification of the case-law in continental legal systems. The Czech Republic is no exception: apart from the unifying opinions discussed, Czech supreme courts use several instruments to unify case-law of lower courts and discrepancies between interpretations of the same statute by separate benches of the supreme court. First of all there are the decisions on extraordinary judicial remedies. For the purpose of this paper and because of the lack of another expression for this specific Czech term, let me call them *appeals*. These are decisions on real cases. All of these decisions are published online and some of them in an official supreme court case-law report. I believe that this is a sufficient way to let the lower courts know what the supreme court's legal opinion is. The second instrument is designed to unify the decision making within the supreme court. There are special procedures to be followed when a bench reaches such legal opinion in a decision that differs from legal opinions in prior decisions of the court. In such a case, the decision should be made by an extended bench that has the competence to change the so far used legal opinion in favour of a new one. This latter instrument may be found in different shapes and sizes in other European countries' supreme courts and because of translational problems they are sometimes confused with what I call here the unifying opinions. This instrument is common and traditionally appears within the supreme and

constitutional courts throughout continental Europe. Unifying opinions stand very far apart.

IV. Prospective and Retrospective Judicial Decision-making

The decision-making of the continental supreme courts can be divided into two groups: retrospective and prospective. [7] Retrospective are such decisions that deal with past decisions of lower courts: *appeals* or cassation. These decisions are bound to particular cases and apart from the usual consequences of judicial decisions do not constitute any future obligations. Therefore, retrospective are such supreme court decisions that judge the accuracy or correctness of lower courts decisions. Prospective decision-making focuses on the future: creation of precedent comes first, judicial remedy second. Prospective element in these decisions seeks to create a new interpretation or modify an old one. The aim of the prospective decision making is to unify future case-law. [8] Since the middle of the twentieth century continental supreme judiciary tends to focus increasingly on the prospective element of their decisions. Both these elements – retrospective and prospective – are present in the decisions on the *appeals*: they judge or evaluate the correctness of the lower court decision and at the same time their rationales may contain new statutory interpretations or a new legal opinion.

In this respect unifying opinions differ from all the other kinds of decisions of the supreme courts: they do not contain any retrospective element at all but only a prospective one. The aim of unifying opinions is to create a future quasi-obligation or for lower courts, although they are not formally binding.

V. Normative or Informative?

This point brings us to the very nature of the unifying opinions. Do they just unify all that has been said to similar matters in prior court decisions into one piece of paper or do they have a special normative character? Let me discuss the arguments for both of these approaches.

Unifying opinions may contain two kinds of information: they may inform in one piece of paper on what were the benches' legal opinions in prior decisions or they may choose and stress only one of the interpretations and inform the courts what the "correct" one is. If they are only informative, should they not be rather published independently in law journals? The simple fact that this is not the case may bring us to the conclusion that unifying opinions are not only informative: they may have a certain normative value. The arguments in favour of their normative nature are supported by the fact that the unifying opinions are given at the full court sessions or at least by extended benches of the court. This is one of the factors that in Alexander Peczenik's continuum of normative values enhances the normative value of a judicial decision (decision of the Plenum is more binding that that of an extended bench, decision of an extended bench is more binding than a decision of an individual bench). [9] For a lower court, a decision given by the full court is a clear sign that the whole court shares this opinion and that individual benches of the supreme court will most probably follow it.

Therefore, it may seem obvious that unifying opinions are rather normative than just informative. It is accepted that judicial decisions do reach a certain degree of normativity. Judiciary's main function within the legal system is to protect rights by solving disputes. A

concrete dispute, a real problem or an actual infringement of rights legitimizes the courts to interpret (or even create) and apply the law. [10] It is the immediate connection to the individual real situation that can sustain later normativity of the decision. Unifying opinions are abstract, not concrete interpretations of law. In this sense, they are not judicial decisions and therefore they should not bear the same normative value as the standard judicial decisions.

From the wording of the statutory provisions on these opinions it may seem clear that these opinions are after all decisions *sui generis*. Although not in the form of a judgement or a resolution, they are decisions of an extended bench or the full court session which gives them higher degree of respectability. When something is stated by the full court (that is all the judges of the supreme court) should it not be more important than a judgement given by a single bench of judges?

To whom are the unifying opinions directed? Apparently, they are not directed to the individual benches of the court; as was already mentioned, there are other instruments to deal with the discrepancies between the decisions of the individual benches. Or are they directed at the lower courts? Again, there are other sources to find out what the court's legal opinion is. A question arises: are the unifying opinions of any use at all?

VI. Advantages of the Unifying Opinions

When I overlook the fact that unifying opinions are adopted without any real link to a case – therefore seem to be a little unsystematic – they do have several advantages. Continental legal systems are not systems of precedent. What seems to acquire certain degree of normative value is the so called "steady case-law": bulk of judicial decisions that deals with the like cases alike, not a single decision – a precedent. The judges of lower courts should respect this steady case-law (that is either to follow it in their own decision-making or to discuss it and pose cogent arguments in case they do not agree with it). But in a judge's everyday amount of work, to study all these supreme courts' decisions to find out what the steady case-law is, is almost impossible. This is the case when it is far more easy to look into one single text of a unifying opinion to find what the actual supreme court's opinion on a subject-matter is.

Another undeniable advantage of these opinions is the great possibility for a supreme court to unify such subject-matters that cannot come to the supreme court by the usual procedural way [11] or those that do not come to the supreme court at all. [12] The arising problem in this case is this: if the courts make such decisions, does it not exclude them from the hierarchy of the judicial system in a way and makes them to become some kind of "general management of the judiciary"? And what does it do to the concept of independence of the judiciary?

VII. Unifying opinions and the place of the judiciary in *Rechtstaat*

The division of powers concept is an inherent element of a modern democratic state that adheres to the rule of law, or the continental version of it – the *Rechtstaat* – the state of law. The judiciary – one of the three powers – seems to be the most sensitive to being independent. The independence of the judiciary is an often discussed issue; the points of view ranging from a demand of an absolute independence (including the administration of the judiciary and no normative value of judicial decisions) to the necessary interconnection

to the remaining two powers. In the Czech Republic, the independence of the judiciary is often simplified to a statement that the judiciary is bound (is dependent on) by the statutes and by nothing else. This approach may lead to an over-reliance on legal rules, a kind of excessive legal positivism. [13] Such approach that is not much different from strict formalism is a heritage of the communist centralistic and formalistic idea of state management. The idea of normative value of the judicial decisions is still a brand new concept that is only slowly finding its way to Czech legal thinking. This fact points at a very interesting paradox: on one hand the Czech legal theory seems to oppose such normative value (or any degree of bindingness) of judicial decisions, on the other hand it does accept this specific legal institution of unifying opinions that puts the judiciary into a role not different from that of the legislature. [14] The nature of unifying opinions was even strengthened by recent legislation that seems to enhance the authority of legal opinions of supreme courts.[15] They should be aimed at providing authoritative information on how to apply the law correctly, by which we come back to the socialist directives. And such a situation may be considered a violation of division of powers. The courts are not administrative bodies that are governed by the administrative rules of superiority and inferiority that would entitle the superior courts to issue binding directives on how to deal with a particular subject-matter. The superiority-inferiority relationships among courts of different levels are those of the possibility of a judicial remedy – but always within a process of dealing with an individual dispute.

I agree with Šimíček [16] that when there is a sufficient way to unify the case law such as the decisions on *appeals* and opinions given by the extended benches, the unifying opinions as such seem to be unsystematic and redundant. It may be even dangerous to the system if it was agreed that they do have higher normative value than regular decisions of benches. Moreover, unifying opinions "steal" the space for a legitimate and open discussion about certain subject-matters before they are actually decided by the court. [17]

VIII. Unifying Opinions and the Ministry of Justice

As another aspect of the unifying opinions that points at their rather unsystematic nature is the fact that an adoption of this opinion can by initiated by the Minister of Justice. Czech statutory provisions [18] entrust the Ministry of Justice with the state administration of the supreme courts and all the lower courts. The Ministry should monitor and analyze the courts' activities, especially from the point of view of adherence to basic legal principles and judicial ethics. Should the Ministry come across discrepancies in judicial decision-making, it is entitled to give impetus to the Supreme Court to adopt a unifying opinion. The supreme courts are under no obligation to adopt an opinion just because the Minister of Justice asks them to. But a question arises: what will happen if the courts do not "obey"? Minister's dissatisfaction with such fact may have certain consequences. Suddenly, the supreme courts (and impliedly the Chief Justices as the official heads of the courts) seem to be in a position inferior to the ministry (where is their independence now?) and the minister's discontent may lead to the Chief's suspension.

This actually happened in the Czech Republic in 2006 when the Minister of Justice suspended Iva Brožová, the Supreme Court Chief Justice and as one of the reasons for his decision he stated that the Supreme Court does not fulfil its role in ensuring the uniformity of the case-law because it does not adopt enough unifying opinions. But, as the spokesman of the Supreme Court said in 2008, such claim only proves that there is a lack of knowledge about how the unifying of the lower courts' case-law actually works. [18]

Czech statutory provisions provide other instruments by which case-law can be sufficiently unified and these were already discussed. When the supreme court uses these instruments (which, moreover, do have the necessary link to a real case) there is no need to adopt the unifying opinions. This again brings us to the conclusion that if not necessarily wrong, the unifying opinions are at least redundant.

IX. Conclusion

Unifying opinions seem to be based on a presumption that individual cases are just an impulse to not a purpose of judicial decision-making because the purpose of these opinions lies in stating general solutions (e.g. interpretations of a legal norm) that go beyond individual cases. [20] This way the supreme court becomes a creator of legal norms (as legislation). It was not a purpose of this paper to deal with the matters of courts as creators of norms and let it be sufficient to say that in case of the courts actually contributing to the creation of legal norms, it may be done so only in the course of fulfilling their foreground function: the resolution of disputes and protection of rights.

I am convinced that the judiciary's role in the protection of rights is based on concrete cases, real rights and interests of real people. Within this presupposition the courts may be considered as creators of norms of a kind. They may formulate legal principles and their decisions may serve as precedents in the Anglo-Saxon meaning of this word. To formulate interpretations of statutes or principles independently on concrete cases goes beyond the scope of judiciary's competence. The relationships between courts are those of judicial remedies not of administrative superiority and inferiority. The supreme courts cannot issue binding directives on specific interpretations of statutes. Every court, even the court of first instance has the right on its own interpretation of a legal norm (supported by relevant arguments, of course) and no directive can "steal" the space for an open discussion before the question actually arises.

[1] Kühn, Zdeněk, Bobek, Michal, Polčák, Radim (eds.), *Judikatura a právní argumentace*, Auditorium, Praha, 2006, p.50;
[2] See § 12 of Act No. 150/2002 Administrative court order, as amended and Act No. 6/2002 on judges and courts, as amended;
[3] Kühn, Zdeněk, *Stanoviska nejvyšších soudů: specifikum středoevropské právní kultury nebo komunistické reziduum?* 9 March 2009 <www.prf.cuni.cz/1948/texty/stanoviskans.doc>;
[4] Op.cit. sub 3;
[5] See § 26/1 Act No. 66/1952 on the organization of courts and Kühn, Zdeněk, Bobek, Michal, Polčák, Radim (eds.), *Judikatura a právní argumentace*, Auditorium, Praha, 2006, p.49;
[6] Zoulík, František, *Teoretické problémy sjednocování judikatury*, Právník, 1970, Vol. 109, p. 657;
[7] For a closer discussion of these two elements present in judicial decision-making both in civil-law countries and common-law countries see Kühn, Zdeněk, *Aplikace práva ve složitých případech. K úloze právních principů v judikatuře*, Karolinum, Praha, 2002, p. 301-305;

[8] Kühn, Zdeněk, Bobek, Michal, Polčák, Radim (eds.), *Judikatura a právní argumentace*, Auditorium, Praha, 2006, p. 51;
[9] Peczenik, Alexander, *The Binding Force of Precedent*. In MacCormick, N., Summers, R. S. (eds.). Interpreting Precedents. A Comparative Study, Aldeshot, Dartmouth, 1997, p. 462 et seq.;
[10] Kühn, Zdeněk, *Stanoviska nejvyšších soudů: specifikum středoevropské právní kultury nebo komunistické reziduum?* 9 March 2009 <www.prf.cuni.cz/1948/texty/stanoviskans.doc>;
[11] Those that do not comply with the conditions for the *appeal*. More closely see Kühn. Zdeněk, op.cit. sub 10;
[12] When none of the parties involved in the dispute does not use the possibility of *appeal* to the Supreme Court.
[13] Emmert, Frank, *The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe*, European Journal of Law Reform, Vol. 3, No. 4, 2001, p. 406;
[14] Kühn, Zdeněk, Bobek, Michal, Polčák, Radim (eds.), *Judikatura a právní argumentace*, Auditorium, Praha, 2006, p. 51;
[15] Gerloch, Aleš, Tryzna Jan, *Několik úvah nad rolí nejvyšších soudů v podmínkách demokratického právního státu*. In Šimíček, Vojtěch (ed.) Role nejvyšších soudů v ústavních systémech – čas pro změnu? Masarykova univerzita, Brno, 2007, p. 95-96;
[16] Šimíček, Vojtěch, *Mají nejvyšší soudy vydávat sjednocující stanoviska?* 9 March 2009 <http://jinepravo.blogspot.com/2007/05/maj-nejvy-soudy-vydvat-sjednocujc.html>;
[17] See Zdeněk Kühn's post to the discussion on Šimíček's article op.cit. sub 16;
[18] See § 123 of Act No. 6/2002 on judges and courts;
[19] *The Supreme Court of the Czech Republic Press Release from 29 February 2008,* <http://www.nsoud.cz/zpravy.php?start=25&limit=5>;
[20] Šimíček, Vojtěch, *Mají nejvyšší soudy vydávat sjednocující stanoviska?* 9 March 2009 <http://jinepravo.blogspot.com/2007/05/maj-nejvy-soudy-vydvat-sjednocujc.html>;