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UDK 342.722:347.962.6; 340.142:341.645(4)
CERIF: S 112, S 155
DOI: 10.51204/Anali_PFBU_21201A

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INCONSISTENT ADJUDICATION – A VIOLATION OF THE RIGHT TO FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECtHR does not review decisions of national courts of the States Parties to the European Convention. However, it has developed a pattern in its case law to find a violation of the Convention on the grounds that the fair hearing lacked if there was a case law inconsistency at the level of national jurisdiction. The ECtHR case law was settled in a Grand Chamber case against Turkey in 2011. To find a violation under Article 6 of the Convention the ECtHR requires two tests. Firstly, it must establish the existence of a profound and long-standing inconsistency in the domestic case law, and secondly, the ECtHR raises the issue of a mechanism aimed at removing the inconsistency. If the mechanism does not exist, or if it applied ineffectively, the ECtHR finds a violation of human rights. The author suggests the ECtHR should revisit its jurisprudence.

Key words: *Inconsistent case law. – Human rights. – Violation. – Tests. – Leading case.*

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1. THE ISSUE

The European Court of Human Rights (the Court or ECtHR) "does not sit in review of the decisions of national tribunals, correcting errors of law or fact that may be present in their rulings" (Schabas 2015, 271). This clear principle, which has been labelled as the fourth instance doctrine, nevertheless finds contradictions in certain *dicta* of the Court's judgments, in which the Court undertook to scrutinise stances of the judiciary of a State Party to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Thus, for example, in the case of *Beian v. Romania* the Court established that the highest judicial authority of the respondent state became the source of legal uncertainty. That situation was created because the highest court "delivered diametrically opposed judgments".[1] Similarly in *Zielinski and Pradal and Gonzalez and Others v. France*, the Court stated it could not discern why conflicting domestic courts' decisions required a legislative intervention, which was not foreseeable.[2] Such statements in the Court's judgments run counter of the above-mentioned principle, at least at first glance. In both cases mentioned the Court found a violation of human rights under the Convention. If it does not review errors of national tribunals, what are the reasons that led the Court to declare that the highest judicial authority in a State Party to the Convention created legal uncertainty by issuing conflicting judgments, or that there were serious consequences of conflicting decisions by the domestic courts?

It has been remarked in academia that the Court "draws a link to a fair trial and the requirement of legal certainty flowing from the rule of law and that it also 'protects from unreasonable contradictory interpretation arbitrary changes in jurisdiction'" (Grabenwarter 2014, 139). Legal certainty is in jeopardy if the judgments rendered at the domestic level of jurisdiction of a State Party to the Convention are contradictory. Therefore, it appears that conflicting domestic case law provides grounds for the Court to find a violation of human rights under the Convention. This is not a unique aspect of the Court's scrutiny of national judiciary of the States Parties to the Convention. Popović (2019, 42–57) argues that the Court developed a pattern of finding violations in cases in which the judgments of national tribunals lacked sufficient and proper reasoning. The Court did so in cases

[1] ECtHR, case 30658/05, Beian v. Romania, 2007, pars. 39 and 36.

[2] ECtHR case 24846/94, 34165/96 to 34173/96, Zielinski and Pradal and Gonzalez and Others v. France (GC), 1999, par. 59.

in which complaints were raised under Article 6 of the Convention. It was in cases concerning the same Article that the issues of inconsistent domestic case law were addressed.

2. THE EVOLUTION OF THE COURT'S CASE LAW

2.1. Earlier Cases

In a case against France on which the Grand Chamber ruled back in 1999, the applicants had brought proceedings in cases concerning special difficulties allowance. The Court of Cassation quashed 25 judgments rendered in appeal and directed the cases to another court of appeals in April 1992. In October 1993 the Court of Appeals of Besançon ordered a fresh hearing of the cases.[3] New legislation intervened while the domestic courts' proceedings were still ongoing. In November 1993 a bill was introduced in Parliament, concerning the calculation of the special difficulties allowance. Its provisions were detrimental to the applicants. The bill became law in January 1994, while the applicants' cases were still pending. Subsequently, the Court of Cassation ruled against the applicants on their second appeals.[4]

The applicants complained under Article 6 of the Convention about the lack of fairness of the proceedings and pointed to a Court's judgment of 1997 in *Papageorgiou v. Greece*, in which the Court found a violation of Article 6 on the grounds that it disapproved legislation with retrospective effect.[5] The Court also referred to *Papageorgiou* so as to take its crucial stance that "the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice". It was established that the new legislation "endorsed the position taken up by the State in pending proceedings".[6] The crucial stance in the Court's reasoning was that it was impossible to "discern in the facts of the case why the conflicting court decisions required legislative intervention while proceedings were pending".[7] In other words, the Court was unable to

3 Zielinski, pars. 10–22.

4 Zielinski, pars. 23–38.

5 See, Zielinski, pars. 50–51, and ECtHR, case 97/1996/716/913, Papageorgiou v. Greece, pars. 34–40.

6 Zielinski, pars. 57 and 58.

7 Zielinski, par. 59.

find compelling grounds of general interest as the motives of the legislation adopted in 1994, which had implications on pending cases. The Court stated in the same paragraph of the judgment that in a three-tier system of national jurisdiction, such as the French one, it was the task of the Court of Cassation "to resolve conflicts between decisions of the courts below". The new legislation frustrated the role of the Cassation Court, which led the ECtHR find a violation of Article 6 of the Convention in regard to the right to a fair trial.

This was the first time that the Court's case law tackled the issue of rendering inconsistent rulings at the national level of jurisdiction. Notably, it was not the mere existence of incoherence in domestic case law, which led the Court find a violation of Article 6, but rather the fact that a legislative intervention hampered the mechanism for the administration of justice to resolve it in the regular way.

Several years elapsed before the Court faced another case involving the issue of inconsistent domestic adjudications. The case was *Beian*, given judgment in 2007. The applicant was a former conscript, who was barred from military training, on political grounds, under the Communist regime in Romania. He was assigned to various military units as a construction worker. After the fall of the Communist regime a statute was adopted, recognising such work as forced labour and granted compensation for it. The applicant brought proceedings to that end, but was refused by the administration. He initiated court proceedings to annul the unfavourable administrative decision. In the first set of proceedings the Court of Appeal ruled in his favour, but the High Court of Cassation and Justice quashed the ruling. In the second set of proceedings the judgments of both courts of appeal and cassation were against the applicant. The High Court of Cassation and Justice dismissed the applicant's appeal on 13 May 2005, on the grounds that the applicant's work had not been performed under the authority of the Labour Department, which would have qualified him for compensation under the relevant statute of 2002.[8]

However, in an identical case, where judgment was given in December 2003 and in which the claimant had performed work that did not fall under the authority of the Labour Department, the High Court of Cassation and Justice ruled in favour of the claimant, stating that "it was not in dispute" that the claimant had performed forced labour.[9] Moreover, in no less than eighteen other judgments given in identical cases, between November 2003

[8] Beian, pars. 6–22.

[9] Beian, pars. 22–23.

and June 2006, the High Court of Cassation and Justice delivered rulings to the same effect. Nevertheless, during the period between November 2003 and May 2006, the same cassation instance rendered twenty judgments to the opposite effect, holding that the conscripts who had not performed the work under the authority of the Labour Department did not qualify for compensation under the statute of 2002.[10]

The applicant in *Beian* complained *inter alia* under the Article 6 of the Convention of "a breach of the principle of legal certainty".[11] Ruling on the merits, the Court stated that "uncertainty (was) an important factor to be taken into account when assessing the State's conduct" as regards protection of human rights. The Court established the absence of a mechanism for ensuring consistency of the domestic case law of the respondent state. In the absence of such a mechanism the High Court of Cassation and Justice "delivered diametrically opposed judgments" concerning the scope of the statute in question, i.e. Law 309–2002, providing compensation for forced labour. The highest national tribunal has become the source of "profound and lasting divergences complained of by the applicant".[12] The Court also noted, with reference to *Zielinski* par. 59, that it was the role of the highest court in a State Party to the Convention to resolve conflicts in the case law. Eventually, the Court's conclusion was that the highest judicial authority of the respondent state became the source of legal uncertainty, undermining the confidence in the country's judicial system.[13] On that grounds the Court found a violation of Article 6 of the Convention.

2.2. Cases in 2009

In 2009 there were several cases before the Court addressing the issue of incoherent domestic case law of a State Party to the Convention. One of them was the *Tudor Tudor v. Romania* case. It was not principally an Article 6 case, since its core issue was the restitution of expropriated real estate. The applicant, who was opposed to the restitution, raised the complaint under Article 6 of the Convention. The applicant bought from the State the apartment that he lived in, and which had previously been nationalised by the Communist government of Romania. The former owner of the apartment

[10] Beian, par. 24 – rulings to the same effect; par. 25 – rulings to the opposite effect.

[11] Beian, par. 27.

[12] Beian, pars. 33–38.

[13] Beian, pars. 37 and 39.

claimed restitution of his property, so that the situation evolved into one in which two titles were in conflict – the former owner's title deed was confronted with the applicant's purchase contract.[14] Like in almost all other ex-communist states, this was a typical situation in many cases in Romania at the turn of the 21st century. The cases were all given judgments by the High Court of Cassation and Justice, which rendered contradictory rulings in identical cases. This is what made the applicant file a complaint with the Court under Article 6 taken alone and in conjunction with Article 14 of the Convention, on the grounds that the same tribunal adopted conflicting rulings in identical cases. It was indeed the Court of Appeals that created inconsistency in the domestic case law. The High Court of Cassation and Justice, as the court of last resort, failed to rectify it and only confirmed the contradictory judgments of the appellate court instead.[15]

The Court's crucial stance in *Tudor Tudor* was twofold. Firstly, there was "no definitive settlement of the interpretation given by the courts to various aspects of the restitution laws". Secondly, "in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case law ..... (created) continual uncertainty".[16] The Court found a violation of Article 6 of the Convention on such grounds. This calls for comments.

The Court's first statement established the existence of inconsistent case law. In the second statement the Court mentioned the absence of a mechanism that would ensure consistency of the case law within the national jurisdiction. The Court indeed previously discussed in the judgment a remedy known as extraordinary appeal, which lies with the Procurator General, finding, however, that it contradicted in itself the principle of legal certainty.[17] The remedy in question is a relic of Communist law, which cannot serve the purpose of protecting human rights in a State Party to the Convention. The mechanism of ensuring consistency of the case law is quite simply the consistent practice of the court of the last resort in a respondent state. The domestic courts' practice, as approved by the High Court of Cassation and Justice, created legal uncertainty because of its inconsistency. The most appropriate remedy to avoid incoherence of court practices consists of following previous rulings in identical cases, i.e. following precedents. Failure to follow a clear precedent is an example of the

14 ECtHR, case 21911/03, Tudor Tudor v. Romania, 2009, pars. 5–12.

15 Tudor Tudor, par. 22.

16 Tudor Tudor, par. 30 for the first, and par. 31 for the second statement.

17 Tudor Tudor, par. 29.

ideological prejudice towards precedent in ex-communist countries. It has been widespread (Popović 2017, 5–7). Regretfully, the Court was not explicit at this point.

It is indeed the court of the last resort within the jurisdiction of a State Party to the Convention that, through its rulings, ensures the case law consistency. In this respect the Court expressed its stance clearly both in *Zielinski* and in *Beian*, stating that it was the role of the highest court within a country to resolve conflicts between decisions of the courts below. Notably, in *Tudor Tudor* the Court made a statement that contributed to the defining of the whole pattern of the incoherent case law, by insisting on "profound and long-standing differences in approach". It went hand in hand with "profound and lasting divergences" of the case law, to which the Court referred in *Beian*.

In another case, where the judgement was given in the same year, the Court dealt with the issue of inconsistent adjudications at the domestic level. The complaint in *Plechanow v. Poland* was about "the result of the shortcomings in the decisions of the domestic courts and the lack of legal certainty".[18] The Court stated that there was no need to give rulings on the complaints under Articles 6 and 13 of the Convention, because it found a violation of Article 1, First Protocol. The Court did so on the grounds that "the Supreme Court failed to have a uniform case law" and with reference to *Zielinski*.[19]

In the case of *Stefan and Stef v. Romania* the inconsistency of domestic case law in Romania was once more in question. The applicants sought inscription to the Bar in the county of Maramures, but they were refused. They subsequently lost their cases before ordinary courts trying to annul the decision of the Bar. Before the Court they complained of an alleged violation of the principle of legal certainty.[20] The Court established that the practice of the highest judiciary instance of the respondent state lacked consistence on the issue raised in the applicants' cases. As a consequence, the Court found a violation of Article 6 of the Convention, making references to its previous rulings in *Zielinski* and in *Beian*.[21]

The issue of profound and long-standing divergences in domestic case law of a State Party to the Convention also appeared in *Iordan Iordanov and Others v. Bulgaria*. In an internal inquest, the three applicants, former

18 ECtHR, case 22279/04, Plechanow v. Poland, 2009, par. 73

19 Plechanow, par. 107.

20 ECtHR, case 24428/03, 26977/03, Stefan and Stef v. Romania, 2009, pars. 5–19 for the facts and par. 27 for the complaint (the text of the judgment is in French).

21 Stefan et Stef, pars. 33–37.

high-ranking officers in the Bulgarian police, were found responsible for bugging a public prosecutor's residence. Having been fired from the police on the grounds of this offense, they brought court proceedings against the administration, but eventually lost their cases before the Supreme Court of Administration. However, the same court ruled in favour of their colleague, B.B., in an identical case. Out of five judges on the bench in the applicants' cases, four sat when the ruling was passed in favour of their colleague.[22] The applicants' basic complaint under Article 6 of the Convention was that the Supreme Administrative Court violated the principle of legal certainty by issuing contradictory rulings in their cases and in the case of B.B.[23]

The Court put forward that the Convention provisions imply the principle of legal certainty as one of the fundamental elements of the rule of law and referred to its own rulings in *Beian* par. 39 and *Zielinski* par. 59.[24] In subsequent reasoning, the Court stated that there had been profound and continuing divergences in the case law of the Supreme Court of Administration. The divergence was not limited to the contradiction between the rulings given in the applicants' cases and the one of B.B. At the same time the Court noted the existence of a mechanism of ensuring uniform court practice in Bulgarian law, which, however, had not been applied in relation to divergences of the domestic case law affecting the applicants. On the grounds of the existence of a long-standing legal uncertainty (*incertitude jurisprudentielle persistante*), which deprived the applicants of the essential guarantees of a fair trial, the Court found a violation of Article 6 of the Convention in the applicants' case.[25] The judgment in *Iordan Iordanov* is firmly in line with the previous Court's case law on the subject. As the applicants pointed out a single judgment rendered in favour of their colleague as evidence of incoherence in the national case law, the Court did not find it satisfactory. It went further on to examine whether the incoherence in the domestic case law was long–standing and only ruled in the applicants' favour after having established that to be true.

Still another case of the same category was *Vinčić and Others v. Serbia*. The case originated in a strike at the Serbian national flag carrier. An agreement was ultimately reached between the company's management and the employees who had been on strike, providing for the payment of certain benefits to the employees. Since the management failed to meet the

[22] ECtHR, case 23530/02, Iordan Iordanov and Others v. Bulgaria, 2009, pars. 6–14 (the text of the judgment is in French).

[23] Iordan Iordanov, par. 41.

[24] Iordan Iordanov, par. 47.

[25] Iordan Iordanov, pars. 50–53.

obligation stipulated in the agreement, the employees brought proceedings before the competent ordinary court claiming the benefits. Seventeen claimants were successful, while others were refused and filed in appeal. The District Court of Belgrade, which had jurisdiction over the appeal, issued conflicting judgments in identical cases stemming from the same set of facts. The District Court's rulings were final, because there was no room for appeal on points of law before the Supreme Court of Serbia. The claimants nevertheless sought an advisory opinion of the Supreme Court, which the latter refused to issue, stating that it was a matter of the District Court harmonising its own case law.[26]

The applicants invoked Articles 6, 13 and 14 of the Convention, complaining about the rejection of their claims by the District Court at final instance and "the same court's simultaneous acceptance of identical claims filed by their colleagues".[27] The Court declared the applications admissible and ruled on the merits as regards Article 6 of the Convention. The respondent government argued before the Court that "judicial precedent was not a binding source of law in Serbia, and emphasised that the domestic courts were independent in their work".[28] The respondent government's argument mirrored the usual stance of legal doctrine in Serbia. The dominant attitude today is that only the so-called general legal acts can be regarded as sources of law, whereas the individual acts (e.g. court judgments) are consumed by their implementation and therefore not binding (Marković 2020, 21–22).[29] To this the Court responded, referring to *Tudor Tudor* par. 29, that the conflicting interpretations of the law stemmed from the same jurisdiction and involved the inconsistent adjudication of claims brought by multiple persons in identical situations. The conflicts were not institutionally resolved and created a state of continued uncertainty. The Court also reiterated stances of its own case law, namely that the judicial uncertainty deprived the applicants of the fair hearing of their cases and decreased the public confidence in the judiciary. On that grounds the Court found a violation of Article 6 of the Convention.[30] The Court's position affirmed the doctrine of precedent, although without mentioning it. It was unacceptable from the standpoint of the Convention system of protection of human rights to

[26] ECtHR, case 44698/06 ....., Vinčić and Others v. Serbia, 2009, pars. 6–21.

[27] Vinčić, par. 44.

[28] Vinčić, par. 54.

[29] However, the older doctrine was more subtle and less hostile to the case law; *cf.* Geršić 2011, 175–179.

[30] Vinčić, par. 56.

maintain inconsistent case law at the domestic level of a State Party to the Convention. Such inconsistency provided grounds for finding a violation of human rights.

2.3. Chamber Cases Posterior to 2009

Two chamber cases against Serbia followed *Vinčić*. In *Rakić and Others v. Serbia* the applicants were twenty-nine Serbian police officers, residing and working in Kosovo. They were allegedly entitled to double salaries, but received only increased salaries, which made them file a claim with the ordinary court, for the difference between the double salary and their increased salary. Some of them were successful in the first instance, but all appeals failed. However, in seventy-three other judgments the District Court of Belgrade, being the jurisdiction of appeal, ruled for the plaintiffs in identical cases. The respondent government submitted in evidence six Supreme Court of Serbia judgments in which that court ruled against the plaintiffs in cases of the same type. There was nevertheless inconsistency in the Supreme Court's case law, which led to its Civil Division meeting on 23 September 2008, in order to resolve the issue of inconsistency of judgments in this type of cases. The meeting adjourned *sine die* and the session never resumed.[31]

The applicants complained under Article 6 of the Convention about "the flagrantly inconsistent case-law of the District Court of Belgrade".[32] The Court declared the applications admissible and ruled on the merits. The respondent government tuned its argument, if compared to the one in *Vinčić*. Notably, there was no mention of precedent, but the government nevertheless insisted that the "domestic courts were independent in dispensing justice". To this the government added that "the inconsistency alleged by the applicants did not relate to any prior systemic and/or grave injustice".[33] The government tried to contest a specific element in the Court's case law. The impression is that pointing out that there had been no systemic injustice was aimed at proving the lack of the long-standing or persistence of the incoherence in the national case law of the respondent state.

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31 ECtHR, case 47460/07 ....., Rakić and Others v. Serbia, 2010, pars. 6–17.

32 Rakić, par. 31.

33 Rakić, par. 42.

The Court reiterated its previous stances, referring to *Vinčić* par. 56 and *Tudor Tudor* par. 29. Some divergences in interpretation of law could be accepted, but not to the detriment of guarantees of fair trial enshrined in Article 6 of the Convention. Therefore, the Court used the same formula we have already seen in *Vinčić*. A state of continued uncertainty was created because the conflicting interpretations stemming from the same jurisdiction and involved the adjudication in cases brought by multiple persons in identical situations. On that grounds the Court found a violation of Article 6 of the Convention in this case.[34]

Very similar to *Rakić* was the case of *Živić v. Serbia*, which also ended in a chamber judgment, rendered in 2011. The facts in *Živić* were almost identical to those in *Rakić*. The applicant was a Serbian police officer, living and working in Kosovo, entitled to a salary greater than the amount he regularly received, which made him sue for the difference. The applicant won the case in the first instance, but the appellate court reversed the judgment. The appellate court nevertheless produced contradictory adjudications on the same issue, therefore the applicant complained of the flagrantly inconsistent case law.[35]

The respondent government reiterated the arguments invoked in *Rakić*, whereas the Court remained faithful to its principal stance from that same judgment. The Court referred to *Rakić*, reproducing the wording of the crucial parts of that judgment. Its holding was that there had been a violation of Article 6 of the Convention on the grounds of judicial uncertainty created by the inconsistent domestic case law. In support of such a stance, the Court made references to a whole line of its judgments on the subject of inconsistency of domestic case law, invoking *inter alia Rakić* par. 44, *Zielinski* par. 59, *Vinčić* par. 56, *Beian* par. 34–40, *Tudor Tudor* par. 29, *Iordan Iordanov* par. 47–48.

In *Stefanica and Others v. Romania* the eighteen applicants were former employees of a Romanian bank that collectively dismissed employees while undergoing restructuring, leading to the applicants losing their jobs. They brought proceedings before the ordinary court, seeking the severance pay to which they were entitled by law. Having won in the first instance, they lost on appeal filed by the defendant. The applicants complained under Article 6 of the Convention about inconsistent adjudications in domestic case law.[36]

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34 Rakić, pars. 43–44.

35 ECtHR, case 37204/08, Živić v. Serbia, 2011, pars. 5–15 and 27.

36 ECtHR, case 38155/02, Stefanica and Others v. Romania, 2010, pars. 5–12 and 24.

The Court reiterated its stance from *Beian* par. 39, that the principle of legal certainty is implied in the Convention and constitutes one of the basic elements of the rule of law. In the present case an inconsistent approach of the domestic courts to the interpretation of requirements for implementation of the law on compensatory payments for collective dismissal from work was established. The Court further concluded, with a reference to *Vinčić* par. 56, that the difference in interpretation of national law by different county courts led to "judicial uncertainty in the adjudication of similar civil claims".[37] On that grounds the Court found a violation of Article 6 of the Convention in this case. For all of its most important features, confirmed by relevant references to the previous Court's case law, *Stefanica* belongs to the Court's mainstream approach as regards the issue of inconsistent case law.

3. A BRIEF REVIEW OF THE COURT'S REASONING

A new pattern emerged in the development of the Court's approach to the phenomenon of inconsistent adjudications in domestic case law of States Parties to the Convention. Its main feature is that the Court finds a violation of Article 6 of the Convention if the inconsistency in the administration of justice is established at the level of the national jurisdiction. It is therefore important to raise the question of the modes of reasoning that enabled the Court to resolve the issues of incoherent case law. Several concepts were applied for that purpose. These were fairness, legal or judicial certainty, as well as the combination of them. Public confidence in the judiciary should also be added.

Fairness of proceedings is the only concept rooted in the Convention text. It applied at the beginning of the evolution, in *Zielinski*, where the issue of inconsistent domestic case law was a topic attached to the main issue. The crucial element in the set of facts was the legislative intervention, which obstructed the fairness of the proceedings. The role of the highest judicial instance of a State Party to the Convention in resolving conflicts of decisions of the lower courts was a *dictum* in *Zielinski*, which germinated in subsequent judgments.

The Court's stance in *Zielinski* was repeated in *Beian*, which stands at the beginning of the Court's case law on inconsistent adjudications in domestic judgments. In the ruling in *Beian*, the concept of judicial uncertainty was put forward in the reasoning, accompanied by the idea of undermining public

[37] Stefanica, pars. 31, 34 and 35.

confidence in the judiciary. In the Court's view the highest judicial instance of the respondent state created uncertainty by issuing contradictory judgments in identical cases. That is what undermined the public confidence in the judiciary.

The concept of judicial or legal uncertainty as grounds for finding a violation under Article 6 of the Convention persisted in the Court's reasoning, as evidenced by the approach, for instance, in *Vinčić* and in *Živić*. In some judgments it went in parallel with fairness. Examples can be found in *Stefanica*, *Rakić* and *Iordan Iordanov*. The two concepts are linked, because the fact of creating uncertainty deprives an applicant of the fairness of proceedings at the domestic level of jurisdiction. Notably, the notion of undermining public confidence in the judiciary can by no means stand alone. The undermining of confidence is inevitably only an effect of either actions or omissions. In certain countries, of which Romania is an example, diminishing trust in judiciary institutions has provoked crisis to date (Calin 2020, 211–212). By creating judicial uncertainty, which affects the fairness of proceedings, domestic courts undermine the public confidence in the judiciary. Although used as early as in *Beian*, this concept has never stood alone, as shown by the examples of *Vinčić* and *Živić*.

4. SETTING THE CASE LAW

4.1. The Case of Nejdet Şahin

Among the cases discussed so far only *Zielinski* received a Grand Chamber judgment. This case was a forerunner. The real beginning of jurisprudential developments came with *Beian*, some years later, where the notion of inconsistent case law was attributed primordial importance. All other cases were chamber cases, nonetheless, demonstrating the Court's consistency and following its previous judgments. The Grand Chamber of the Court had the opportunity to revisit the previous case law and determine its position on different issues of importance in a case against Turkey, given judgment in 2011, which had a peculiar set of facts, based on an accident. The case was *Nejdet Şahin and Perihan Şahin v. Turkey*.[38]

[38] ECtHR, case 13279/05, Nejdet Şahin and Perihan Sahin v. Turkey (GC), 2011.

4.2. The Grand Chamber Judgment – Majority View

The applicants in *Nejdet Şahin* were the parents of an army pilot who had lost his life, along with other servicemen in a plane crash in the line of duty. The applicants were entitled to his pension and had a dispute with the Pension Fund Authority about its increase. They appealed against the Authority's decision first to the Ankara Administrative Court and then to the Supreme Military Administrative Court. At the hearing before the latter the applicants produced evidence on inconsistent case law of the Ankara Administrative Court. In applications lodged by four families of servicemen who had died in the same accident as their son the Ankara Administrative Court ruled in favour of the claimants. The Supreme Military Administrative Court took no account of the applicants' submission, which made them claim that its decision was given contrary to the constitutional principles of equality before the law and consistency of the law.[39]

The Grand Chamber judgment in *Nejdet Şahin* had a special part devoted to the relevant domestic case law and practice. The elements of interest for the coherence of domestic case law were explained in detail, because they represented the core issue of the case.[40] In brief, the Ankara Administrative Court had found in favour of the victims' families in fourteen cases based on the facts of the same event and the Supreme Administrative Court upheld the judgments. Since one of the chambers of the Ankara Administrative Court declined jurisdiction to hear an appeal against a decision, lodged by the family of a sergeant who had died in the same plane crash, the case was brought before the Supreme Military Administrative Court, which dismissed the family's appeal.

The Turkish court system includes a mechanism to ensure consistency of the domestic case law – the Jurisdiction Disputes Court, provided for by the Constitution and relevant legislation.[41] It was established to resolve the inconsistency of the case law, which was at the origin of the present case. The Jurisdiction Disputes Court delivered three decisions concerning the subject matter of *Nejdet Şahin*. They interpreted the existing law, eventually concluding in December 2006 that the Supreme Military Administrative Court had jurisdiction in the applicants' case.[42]

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39 Nejdet Sahin, pars. 9–19.

40 Nejdet Sahin, pars. 25–32.

41 Nejdet Sahin, pars. 20–24.

42 Nejdet Sahin, pars. 30–32.

The applicants filed a complaint with the ECtHR under Article 6 of the Convention, alleging that the proceedings before the domestic courts had been unfair. In their view "the possibility that the same fact could give rise to differing legal assessments from one court to another was in breach of the principles of equality before the law and consistency of the law".[43] The case of *Nejdet Şahin* was first given judgment by a chamber, almost unanimously, that there was no violation of human rights protected by the Convention. The decision was taken by six votes to one. The only dissident in the chamber was the author of this text, who at the time was a sitting judge of the ECtHR. His arguments were almost identical with the statements in the applicants' complaint to the Grand Chamber, except for the fact that he was moreover of the opinion that the case encompassed an element of denial of justice.

There was much more hesitation in the Grand Chamber, which delivered its judgment by ten votes to seven. The Grand Chamber ruled that there was no violation of Article 6 of the Convention and explained at length the principles, followed by the majority of judges, that led to the conclusion of no violation.[44] The essence of those principles consists of two tests that guide the Court in assessing whether there is a violation in cases concerning inconsistent domestic case law. They are: a) the existence of a profound and long-standing differences in the case law, and b) the existence of a machinery provided for by the domestic law to overcome inconsistencies. As for the machinery, the Court noted that its supervision extended to the application of the machinery in a particular case, as well as to the effects of such application.

Having thus established the principles, the Court proceeded to their implementation in the case at hand.[45] The Court's reasoning dealt with two main issues. The first was whether there had been conflicting decisions at the national level of jurisdiction, and the second was whether the conflicting decisions had resulted in a violation of Article 6 of the Convention. The considering of the mentioned issues was preceded by the Court's preliminary remarks, made in paragraphs 59 and 60 of the judgment. The Court used distinguishing of *Nejdet Şahin* from previous cases concerning inconsistent case law as an opportunity to examine the past. The crucial difference was that in the present case the disparities of the case law at the national level of jurisdiction existed "between the judgments of two hierarchically unrelated, different and independent types of court".

43 Nejdet Sahin, par. 35.

44 Nejdet Sahin, pars. 49–58.

45 Nejdet Sahin, pars. 59–96.

Turning to the first of the above-mentioned tests, the Court concluded that it was faced "with a very rare case where the circumstances and consequences of the same event – a plane crash – were interpreted differently by the domestic courts". At this point the Court posed the decisive question, whether the conflicting rulings of domestic courts on the issue arising from the same event constituted a breach of Article 6 of the Convention? In this regard the Court observed that the conflicting judicial decisions "were the result of simultaneous intervention by the ordinary administrative courts and the Supreme Military Administrative Court in cases raising essentially the same issue".[46]

The Chamber had concluded that the intervention of the Jurisdiction Disputes Court settled the matter and introduced consistency in the case law. To this the Grand Chamber disagreed, noting in paragraph 76 of the judgment that despite the decision of the Jurisdiction Disputes Court "the ordinary administrative courts continued to accept cases similar to that of the applicants' and to rule on the merits". Somewhat surprisingly, the Court stated further on that the role of the Jurisdiction Dispute Court was "not to resolve conflicts of case law", save in exceptional situations. This was accompanied by the Court's observation that conflicts of case law "should be settled by establishing the interpretation to be followed and harmonising the case law through mechanisms vested with such powers".[47]

At this particular point the Court's idea of distinguishing *Nejdet Şahin* from the previous cases concerning inconsistent domestic case law came into play. The differences in decisions rendered at the level of domestic jurisdiction did not arise between the courts within a hierarchy, but from two independent domestic jurisdictions. In the Court's view the discrepancies in approach in such situations may be tolerated, provided that they are based on rational and reasoned conclusions, despite the fact that they concerned "the same legal issue raised by similar factual circumstances".[48] The domestic judgments concerning the applicants were duly reasoned, so they could not claim to be victims of denial of justice. On the grounds of these considerations, the Grand Chamber found no violation of Article 6 in this case. It remains unclear from the judgment, however, why the distinguishing of the case at hand from previous rulings should occur at all. What was the fundamental reason for distinguishing the cases in which independent jurisdictions at the domestic level produced incoherence of the case law from all other cases in which inconsistent adjudication occurred at the national level of jurisdiction?

46 Nejdet Sahin, pars. 67 and 71.

47 Nejdet Sahin, pars. 79–80.

48 Nejdet Sahin, pars. 86–88.

4.3. Grand Chamber Minority Position

The minority of judges sitting in the Grand Chamber dissented.[49] The dissenters did not question the tests mentioned above, which represented the principles enabling the Court to reach a decision in a case of inconsistent case law. Their main stance was that the result of the second test was negative, for in their view the relevant effective mechanism of removing inconsistency from the case law was indeed missing in the national law of the respondent state. The dissenting judges remarked that in this case "the lack of an effective mechanism for harmonising the case law not only lacked but, worse, perpetuated conflicts of case law", the fact that resulted in an impression of arbitrariness.[50]

The dissenters further insisted that the flagrant inconsistency of the domestic case law existed in "the same branch of the court system", namely in the administrative jurisdiction. The dissenting judges were contesting the test of the existence of mechanism of settling the disputes at the national level. Their conclusion was that such a mechanism was ineffective in this case. Therefore, they stated that "the resolution by the Jurisdiction Disputes Court of the conflict between the two courts was theoretical and illusory".[51] There was in fact no binding decision of the mechanism aimed at settling jurisdictional disputes, which gave rise to judicial uncertainty that the national legal system of the respondent state was unable to accommodate. In brief, the dissenters were of the view that a violation of the applicants' right to a fair hearing was caused by a malfunctioning of the machinery put in place to resolve conflicts of jurisdiction.[52]

4.4. The Rule in *Nejdet Şahin*

Despite the criticism it is susceptible to and the distinguishing on which it relies, the Court's reasoning in *Nejdet Şahin* laid down a rule to be followed. It found a clear expression in scholarship: "divergencies in the case law of the courts within a legal system are acceptable provided that domestic law provides for a mechanism for overcoming them and that mechanism is

[49] Nejdet Sahin, Joint Dissenting Opinion of Judges Bratza, Casadevall, Vajić, Spielmann, Rozakis, Kovler, and Mijović.

[50] Nejdet Sahin, Joint Dissenting Opinion, pars. 3.

[51] Nejdet Sahin, Joint Dissenting Opinion, pars. 6 and 11.

[52] Nejdet Sahin, Joint Dissenting Opinion, pars. 12–18.

applied" (Harris *et al.* 2018, 433).[53] Identifying a violation of Article 6 of the Convention the Court consists of two tests. The first establishes profound and long-standing differences in the domestic case law of the respondent state. The second test concerns the existence of a mechanism provided for by the national law to overcome such differences.

The mere existence of a mechanism does not suffice, because the Court examines two more issues, namely whether the mechanism was applied in a particular case, and last but not least, whether its application was effective in the sense of removing inconsistency of the domestic case law. As for the second test it has been argued by scholars that "two courts, each with its own area of jurisdiction ... may well arrive at divergent but nevertheless rational and reasoned conclusions on the same legal issue". Such divergences should be tolerated "when the domestic legal system is capable of accommodating them" (Grabenwarter 2014, 140). The notion of accommodation of divergent case law within the judiciary of a member state is unclear in this approach. If the divergent case law persists, can the inconsistency be considered accommodated?

Notably, it remains an open question whether we should understand the accommodation as overcoming the inconsistency in the domestic case law, or just as the existence of a mechanism enabling its removal, irrespective of its application. The latter interpretation may not be adequate, and there is discord in scholarship. Some authors (Harris *et al.* 2018, 433) insist on the application of a mechanism of settling the case law divergencies, while others are satisfied with the mere existence of such a mechanism (Grabenwarter 2014, 139–140). As to the former opinion, it remains questionable whether the authors imply an effective application of the mechanism aimed at overcoming inconsistent case law. This seems to be the only acceptable meaning of the second test of the rule.

5. FOLLOW-UP CASES

The rule in *Nejdet Şahin* found implementation in subsequent Court's case law. One of the follow-up cases was *Stoilkovska v. The Former Yugoslav Republic of Macedonia*, which concerned an employee's liability in tort. Mrs Stoilkovska, the applicant, was condemned to pay damages to her employer. The core of her complaint filed with the Court was that the Macedonian

[53] The authors made reference to Stefanica, Nejdet Sahin as well as to ECtHR, case 76943/11, Lupeni Greek Catholic Parish and Others v. Romania, (GC) 2016.

Supreme Court accepted another employee's appeal on points of law in an identical case.[54] Ruling on the merits, the Court found a violation of Article 6 of the Convention in respect of fair trial. The Court made reference to *Nejdet Şahin* as the leading case.[55] Notably, the Court enumerated the applicable tests, however, referring to *Iordan Iordanov*. The issues to be assessed when ruling on legal certainty under Article 6 were: (1) whether there were profound and long-lasting divergences in the relevant case law, (2) whether the domestic law provided for a mechanism capable of removing inconsistency, and (3) "whether this mechanism was applied and if so what its effects were".[56]

Another follow-up case was *Çelebi and Others v. Turkey*, a chamber case against Turkey in 2016, which concerned the consequences of an earthquake.[57] Having lost their property in the catastrophe, the applicants sued the construction company for damages and lost their case at the national level of jurisdiction. Before the Court they invoked Article 6 of the Convention complaining of the inconsistency in the case law of the Cassation Court in similar cases. The Court referred to its own ruling in *Nejdet Şahin* as the judgment of principle.[58]

The case of *Çelebi* was nevertheless distinguished from the leading one because the inconsistency of the domestic case law stemmed from the judgments of one and the same court, the Cassation Court, which had rendered contradictory rulings in similar cases, while interpreting the rules on prescription in domestic law. The Court indeed returned to the rulings in *Zielinski* and in *Beian*, from which it had once distinguished the case of *Nejdet Şahin*. The contradictory adjudications were evident in the case at hand and the mechanism provided for in domestic law to overcome them was not effective. This led the Court find a violation of Article 6 of the Convention. The applicants were deprived of the fairness of proceedings because of the incoherence of domestic case law.[59]

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[54] ECtHR, case 29784/07, Stoilkovska v. The Former Yugoslav Republic of Macedonia, 2013, par. 17. For the facts see pars. 5–17.

[55] Stoilkovska, par. 38.

[56] Stoilkovska, par. 44, with reference to Iordan Iordanov, par. 49, in which the tests are clearly formulated.

[57] ECtHR, case 582/05, Çelebi and Others v. Turkey, 2016, pars. 6–20 for the facts and par. 38 for the complaint (the text of the judgment is in French).

[58] Çelebi, par. 52.

[59] Çelebi, pars. 53–67.

The Court's stance in this case calls for a short comment. Notably, the Court invoked the ruling in *Nejdet Şahin*, which it had once distinguished from *Zielinski* and *Beian*. After invoking the rule in the leading case, the Court made a reverse distinguishing of the case at hand, so as to return to the rulings in the two cases mentioned. The distinguishing of *Nejdet Şahin* from previous cases seemed to have been made to avoid following the previous rulings in *Zielinski* and in *Beian*. The Court had come full circle. In a judgment following the rule in the leading case, by way of another distinguishing, it returned to the rulings that had preceded the leading case.

In a Grand Chamber case in 2016, the Court was once again confronted with the issue of inconsistent domestic case law.[60] In 1948 the Greek Catholic Church of Romania was dissolved by a government decree and its assets, with the exception of parish property, were transferred to the State. In 1967, however, a church building and the adjoining courtyard, which had belonged to a parish of the dissolved church, were entered in the land register as ownership of the Romanian Orthodox Church in Lupeni. The Greek Catholic Church was again recognised in 1990. The legal status of the property that had once belonged to its parishes was to be determined by joint committees composed of clergymen of both the Greek Catholic Church and the Romanian Orthodox Church. If such a committee could not reach a decision, there was a possibility to bring judicial proceedings before ordinary courts.

The applicants in this case were three Greek Catholic Church parishes, which claimed recovery of their property. They won the case in first instance, but lost on appeal as well as on the appeal of points of law filed with the highest court of the country. The problem was whether the renewed recognition of the legal status of the Greek Catholic Church had incidence on the status of its property as regards inscriptions in the land registry. In the final judgment at the domestic level, a dissenting judge ruled in favour of the applicants. Before the Court the applicants complained *inter alia* under Article 6 of the Convention, invoking the principle of legal certainty.[61]

Examining the case on the merits as regards the compliance with the principle of legal certainty the Court pointed at the outset to its ruling in *Nejdet Şahin* as the leading case. The Court developed its stance in five items.[62] They were the following: (a) The principle of legal certainty was implicit in all Articles of the Convention. (b) The possibility of conflicting court decisions was an inherent trait of any judicial system based on a

[60] Lupeni Greek Catholic Parish, pars. 12–34.

[61] Lupeni Greek Catholic Parish, pars. 64 and 76.

[62] Lupeni Greek Catholic Parish, par. 116.

network of trial and appellate courts. (c) There is no acquired right of consistency of case law. (d) There is no conflicting case law, in terms of the Convention, if different treatment of disputes is justified by a difference of factual situations at issue. (e) The determining criteria for the Court are the profound and long-standing differences in the domestic case law, as well as the existence of a mechanism to overcome such differences. In all items except (c) the Court made reference to *Nejdet Şahin*.

By applying the above-mentioned principles to the case at hand, the Court first distinguished it from *Nejdet Şahin*, on the grounds that in the present case the disparities in domestic case law were not related to hierarchically independent courts. They originated in the case law of the highest domestic court. Despite the distinguishing, the Court took the stand that the principles established in *Nejdet Şahin* were applicable to *Lupeni Greek Catholic Parish and Others v. Romania*.[63]

The Court then turned to examine the issues of the existence of profound and long-standing differences in domestic case law of the respondent state, as well as to the use of a mechanism aimed at overcoming inconsistency in the case law.[64] The Court established profound and long-standing differences in domestic case law. The conflicting case law existed within the case law of the High Court of Cassation and Justice, and it was reflected in the judgments of lower courts that also delivered contradictory rulings. As for the second issue the Court noted the existence of legal uncertainty brought about by the inconsistent case law. The legal system of the respondent state was in principle capable of overcoming disparities in the case law, but the mechanism providing for it has not been used and the national authorities failed to clarify the whole situation. On such grounds, the Court concluded that the principle of legal certainty was undermined, which resulted in a breach of Article 6 of the Convention.

The Court's approach to the follow-up cases against Turkey and Romania, in which the rule in *Nejdet Şahin* applied, was basically the same. The Court distinguished the cases from the leading one, but nevertheless applied the rule of the leading case. Although complicated at first glance, this technique confirms the Court's main stance on the issue of inconsistent case law, which provides grounds for finding a violation of Article 6 of the Convention. The judgment in *Lupeni* clarified the second test of the rule in *Nejdet Şahin*. In paragraph 116 (e) the Court stated clearly that it supervised (1) whether the

63 Lupeni Greek Catholic Parish, pars. 117–118.

64 Lupeni Greek Catholic Parish, pars. 119–128 (profound and long-standing differences), 129–133 (use of mechanism), 134–135 (conclusion).

national law provided for a mechanism for overcoming inconsistency, and (2) "whether that mechanism has been applied, and if appropriate to what effect". This goes in parallel to par. 44 in *Stoilkovska* and par. 49 in *Iordan Iordanov*, although the formula used in those two cases tends to introduce a threefold test, by diversifying the second one.

6. CONCLUSION

The case law of the ECtHR on inconsistent adjudication in domestic judgments was set in *Nejdet Şahin*. The rule posed in that case relies on a twofold test. Firstly, the Court examines whether there is a profound and long-standing discrepancy in domestic case law. Secondly, the Court explores the existence of a mechanism in the judicial system of the respondent state, which serves the purpose of removing the discrepancy. The Court examines whether the mechanism has been properly used. If the application of the mechanism was unable to resolve the problem of inconsistent case law, the Court finds a violation of Article 6 of the Convention. Although the two tests appear to be clear, they are susceptible of further analysis. Notably, if the first test proves the existence of inconsistent case law, there is hardly a need to explore the second issue, for it is evident that either a mechanism for overcoming the inconsistency does not exist or it has not been properly used. An inefficient application of such a mechanism seems to have taken place in *Nejdet Şahin.* There might be room to revisit the rule established in the Grand Chamber judgment in the leading case.

Another issue concerning the mechanism aimed to remove inconsistency of the case law in a State Party to the Convention also deserves attention. In some follow-up cases the Court made a distinction from the leading case of *Nejdet Şahin.* The reason for the distinction was the fact that the inconsistency of domestic case law originated in the highest jurisdictional instance of the respondent state. It was different in the leading case, in which the discrepancy stemmed from two independent jurisdictions. If the inconsistency originates in one and the same court, it is the procedure within that court that should remove it, e.g. a plenary session of the highest court or the like thereof. The mechanism created for removing inconsistency in the domestic case law appears in such cases in a form different from the one in the leading case. Both forms of the mechanism, however, require jurisdictional decisions on the inconsistency to resolve the issue. Notably, it is only the outcome of the use of the mechanism that matters, and not its form. This raises the question of distinguishing based on the origin of inconsistency at the domestic level of jurisdiction. The form of the mechanism is not decisive, but exclusively the outcome of its application.

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Article history:
Received: 25. 2. 2021.
Accepted: 12. 5. 2021.