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JUDICIAL LAW-MAKING AND THE UNIFORM APPLICATION OF LAW AFTER ECJ'S JUDGMENT IN THE *HANN INVEST* CASE – A MISSION FOR CROATIA AND THE LESSON FOR OTHER MEMBER STATES

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ABSTRACT

The Member States of the European Union employ various mechanisms to ensure the uniform application of law. While appeals and supreme court precedents are regarded as the common methods for resolving case law conflicts, other procedures like preliminary rulings and pilot judgments also play a role. In Croatia, the adoption of binding legal positions at higher courts' and the Supreme Court's sectional meetings has historically been a significant tool for maintaining jurisprudential consistency.

The European Court of Justice (ECJ) in the Hann Invest case challenged this system. The ECJ's Grand Chamber ruled that internal judicial procedures requiring a registration judge's approval violate the right to effective judicial protection and undermine judicial independence, the core principle of the rule of law. This ruling presents a significant challenge for Croatia, which has long struggled with conflicting court decisions and inconsistent application of the law.

This paper explores the implications of the Hann Invest case for Croatia, and possibly for some other states, particularly those with legacies of socialist and communist pasts. It questions whether binding legal positions should in any event be prohibited under European law and examines the underlying issues contributing to the problem of ensuring consistency in case law. Ultimately, this analysis seeks to understand how these challenges can be resolved to facilitate further integration of Croatia's legal system within the EU framework.

Keywords: *case law, consistency, European Court of Justice, Hann Invest case, judicial independence*

1. WHY IS THE UNIFORMITY OF CASE LAW IMPORTANT, AND HOW DOES IT RELATE TO THE RULE OF LAW?

The uniform application of the law has long been and still is a pivotal issue in contemporary legal systems. A substantial body of literature has explored the role and

interpretation of case law within the common law tradition[1], while shifts in the functions of supreme courts in civil law jurisdictions towards courts that primarily serve the public function have opened a whole new debate about the proper way of ensuring the uniform application of law.[2] In Central and Eastern Europe (CEE) the problem came into focus also because of the integration of the CEE countries into the European Union (EU) and Council of Europe (CoE), formations which had shown deep respect for rule of law and its inherent values.

The simplest answer to the question of why uniform application of law is important is that it guarantees legal certainty and equality before the law, both essential to the rule of law.[3] While it is easy to make a logical connection between the legal certainty and equality before the law, the problem is more prominent with explaining the notion of the rule of law (*imperium legum*[4]). Namely, the rule of law has many meanings, and it is understood differently across cultures and different historical contexts.[5] Any attempt to define it comprehensively in just a few sentences would likely miss its full scope, as well as the benefits it offers for countries wishing to become stable democracies. However, in the context of the European Union, where the rule of law is proclaimed as one of fundamental values and where it has been strongly defended by the European Commission, and many

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1 About the origins of civil law and common law legal families see Ortolani, A., *Civil Law*, and Shivprasad, S., *Common Law,* in: Siems, M.; Jen Yap, P. (eds.) The Cambridge Handbook of Comparative Law, Cambridge University Press, 2024, pp. 211-256. About the doctrine of precedent see Duxbury, N., *The Nature and Authority of Precedent,* Cambridge University Press, 2008. About the U.S. Supreme Court precedents see Hansford, T. G.; Spriggs II, J. F., *The Politics of Precedent on the U.S. Supreme Court,* Princeton & Oxford, 2006.

2 Aleš Galič was questioning the functions of supreme courts and one of his important points is that the division into cassation, revision and appeal courts is not a reliable basis for understanding the functions of supreme courts in civil law jurisdictions. What matters according to Galič is the function which supreme courts serve, and that function can be predominantly public or private. So, according to Galič the most important criterion is whether supreme courts act in public or private interest. See Galič, A., *The Functions of the Supreme Court Issues of Process and Administration of Justice,* in: Ereciński, T. *et. al.* (eds.), Studia Iuridica, Vol: 81, Warsaw, 2019, pp. 44-86.

3 Of course, the need to ensure uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law. See Consultative Council of European Judges (CCJE) Opinion no. 20 (2017) on the role of courts with respect to the uniform application of the law (Strassbourg, 10 November 2017, CCJE(2017)4).

4 *Imperium legum* (rule of law i.e. the empire of laws and not of men) should not be confused with „rule by law", i.e. „*Rechtstaat*". About the rule of law and its importance see, for instance, Sellers, M., *What is the Rule of Law and Why Is It So Important?*, in: , Ernst M.H., Ballin H. (eds.), Democracy and Rule of Law in the European Union. Essays in Honour of Jaap W. de Zwaan, Flora A.N.J. GoudappelAsser Press / Springer, 2016, pp. 3-15. About the main differences between the Rechtsstaat and the rule of law see Krygier, M., *Rule of Law (and Rechtstaat)*, in: Silkenat, J. E.; Barenboim, P. D. (eds.), Ius Gentium: Comparative Perspectives on Law and Justice 38, Springer, 2014., pp. 45-61.

5 About the long history of the rule of law and different understandings of the meaning see the book edited by Costa, P.; Zolo D. (eds.) *The Rule of Law, History, Theory and Criticism*, Springer, 2007.

times upheld by the Court of Justice of the European Union (ECJ), it is probably best to say that the rule of law is cultural commitment that is essential for political stability and long-term economic development.

The rule of law principle requires all public bodies to act within the boundaries established by law, in accordance with democratic values, respect for fundamental rights and under the supervision of independent and impartial courts. It also embraces principles such as legality, separation of the law from arbitrary power and effective judicial protection.[6] Legal certainty is also an integral part of the rule of law, ensuring stability and predictability in both governance and legal proceedings. To a great degree, legal certainty is linked up with effective judicial protection and the system of precedent. In Community law, which also embraces the system of precedent, the system of precedent is viewed as a rational and sensible step that has ultimately led to a more effective regime of the entire Community law.[7] In reality, it is a fundamental characteristic of all developed legal systems as good judges look for guidance from past experiences. Not only it is natural for judges to follow the pattern of conduct laid down by their predecessors but also practitioners too must know what the expected outcome of the legal trouble is. Otherwise, they could never explain to their clients where they stand with their cases.[8] Furthermore, the greater the reliability of the previous decisions, the greater becomes the desire to follow them, whether the follower is a judge, lawyer or a layman.[9]

The concept of precedent could be also tracked in the jurisprudence of the European Court of Human Rights (ECtHR). While the precedents established by the ECtHR are not considered formally binding, they are generally adhered to, and lawyers know that the ECtHR rarely departs from its own decisions.[10] The coherence and discipline demonstrated by the ECtHR is actually astonishing and

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6 See para. 18(3-6) of the judgement of the ECJ of 16 February 2022 in the case Hungary v. European Parliament and Council of the European Union (Case C-156/21., Hungary v European Parliament and Council of the European Union, ECLI:EU:C:2022:97, 16/02/2022.). The Court has clearly stated that the laws and practices of Member States should comply with the common values on which the Union is founded such as freedom, democracy, equality and respect for human rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

7 About the precedent in the law of the EU and the relationship between national and community courts see Craig, P.; De Búrca, G., *EU Law, Text, Cases and Materials*, Third Edition, Oxford, 2003., pp. 449-451.

8 See Hosten, W. J.; Bosman, F.; Nathan, C., *Introduction to South African Law and Legal Theory*, Butterworth, 1980, p. 225.

9 *Ibid*.

10 See Wojtyczek, K., *Precedent in the system of the European Convention on Human Rights*, in: Florczak-Wator, M. (ed.), Constitutional Law and Precedent. International Perspectives on Case-Based Reasoning, Routledge, 2022, pp. 233-250.

remarkable, given the sheer number of decisions it issues annually.[11] It could be also said that it is therefore unsurprising that the Court expects a certain level of judicial effectiveness, discipline and uniformity in case law from national justice systems.

In well-known judgement in case Beian vs. Romania the ECtHR correctly stated that it is hard for the judicial system which is based on a network of trial and appeal courts not to have an issue with the divergence in case law, but also that the profound and lasting divergences within the system are contrary to the principle of legal certainty, which constitutes one of the basic elements of the rights to a fair trial, the procedural human right which is crucial for upholding all guarantees stemming from the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.[12] If divergences in case law persist, parties can hardly know where they stand, which then contributes to deterioration of public confidence in the courts and the overall perception of fairness and justice.[13] Above all, taking a case to a court is both time and money consuming and in a situation where the system is unable to secure the uniform application of law, expectations of the parties can easily become unmet.

Croatia's accession to the EU and inclusion in European judicial processes gave Croatian law one new momentum and it triggered many changes in Croatian legislation.[14] One significant change was the need to understand and implement the right to a fair trial within the court system. It is therefore not surprising that the Croatian Constitutional Court has repeatedly determined violations of the right to a fair trial due to courts arbitrarily delivering decisions that depart from established case law without reasonable justification or any justification at all. In one of the cases, the Constitutional Court stated that the lack of a mechanism ensuring consistency leads to a violation of the principle of legal certainty and undermines

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11 At present the total number of pending applications before the ECtHR exceeds 60 000. See statistical report of the ECtHR [https://www.echr.coe.int/statistical-reports], Accessed 15 March 2025.

12 See *Beian v. Romania* (2007) para. 36-38, app. 30658/05.

13 See Opinion of the CCJE on the role of courts with respect to the uniform application of the law (note 3).

14 In the realm of the law of civil procedure, it is worth noting that the Croatian Code of Civil Procedure (Zakon o parničnom postupku, "Službeni list SFRJ" br. 4/77., 36/77., 36/80., 6/80., 69/82., 43/82., 58/84., 74/87., 57/89., 20/90., 27/90., 35/91., "Narodne novine" (Official Gazette) br. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/11., 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.) was amended several times following the established violations of Art. 6(1). Likewise, the Law on Enforcement was revised in response to the European Court of Justice's decision in *the Zulfirkapašić and Pula Parking case* (See judgements in Case C-484/15., *Ibrica Zulfikarpašić v Slaven Gajer,* ECLI:EU:C:2017:199 and Case C-551/15., *Pula Parking d.o.o. v Sven Klaus Tederahn*, ECLI:EU:C:2017:193). Finaly, the core focus of this paper is yet another decision by the European Court of Justice, which is certain to drive further legislative changes.

public trust in the judiciary, a fundamental element of a state that upholds the rule of law.[15] In Vusić v. Croatia, the ECtHR found that the Croatian Supreme Court issued contradictory decisions, which is incompatible with the principle of legal certainty and the Court's established case law.[16]

On the other hand, it is no wonder that problems with ensuring consistency in case law are significant. Croatia's adherence to the European Union has led to an unprecedented infusion of thousands of pages of *acquis communautaire* into its legal landscape. Barbić has noted more than once that approximately one hundred thousand pages of *acquis* have been incorporated into the Croatian legal system, resulting in significant inconsistencies.[17] Under these conditions, having effective mechanism to ensure the consistency of case law is crucial, and the lack of such means makes achieving legal certainty and the rule of law impossible.

This issue thus appears more important than ever, especially in countries where legal culture is still being shaped by post-socialist legal discourse.[18]

However, by rejoining Europe, Croatia reaffirmed the importance and relevance of case law and the principle of legal certainty, and this stance has spilled over into legal practice. Among Croatian lawyers, the reliance on case law has become highly significant, with both domestic and international precedents frequently used to support arguments in various briefs and motions. It is neither unusual nor uncommon for Croatian lawyers to cite decisions from the European Court of Human Rights, just as the Croatian Constitutional Court frequently does. However, as Croatia ranks high among the countries that violate Convention, the practical

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15 See decision of the Croatian Constitutional Court U-III/374/2008, para. 10. The interpretations of the Croatian Constitutional Court regarding the consistency in case law match the views of the European Court of Human Rights.

16 *Vusić v. Croatia* (2010), Application no. 48101/07, Judgement of 1 July 2010.

17 See Barbić, J., *Pravosuđe i vladavina prava u Hrvatskoj* (Administration of Justice and the Rule of Law in the Republic of Croatia), Godišnjak Akademije pravnih znanosti Hrvatske (Yearbook of the Croatian Academy of Legal Sciences), Vol. XIII No. 1, 2022., pp. 161-172.

18 Post socialist legal discourse in Croatia and within extended - Eastern European context has been examined by Rodin, who concludes that the culture of the Croatian legal profession remains deeply rooted in the formalist legal tradition. In such a system courts often refuse to acknowledge that judicial decisions carry social consequences and play a role in shaping policy. As Rodin aptly observes, this approach renders adjudication non-transparent, makes the prediction of outcomes challenging, and opens the door to undeclared policies pursued sporadically by courts or even individual judges. See Rodin, S., *Discourse and Authority in European and Post-communist Legal Culture,* Croatian Yearbook of European Law & Policy, Vol. 1 No. 1, 2005, pp. 12-13. See also Kühn, Z., *Interpretational Statement of Supreme Courts in Central and Eastern Europe*, 2016 [https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/], Accessed 1 April 2025.

impact of this reaffirmation is still to be seen.[19] The problem can even be tracked in the political life. Newspapers often bring news about two judicial panels delivering opposing decisions regarding the same matter.[20]

There is no need to mention that this kind of situation, especially if it is long lasting, has a bad impact on equality before the law and the rule of law as a fundamental feature of democratic societies, despite the fact that, as some would observe, the relationship between the rule of law and democracy is quite complex, as there are many versions of democracy and the rule of law has been differently understood in different times.[21]

2. OBSERVATIONS ABOUT BINDING LEGAL POSITIONS IN CROATIAN LAW FROM HISTORICAL PERSPECTIVE

The CCJE Opinion no. 20 (2017) on the role of courts with respect to the uniform application of the law[22] categorizes the means for ensuring the uniform case law as formal, semi-formal and informal. Formal methods include appeals, interpretative statements, and preliminary rulings on specific legal points. Semi-formal mechanisms consider institutionalized judge meetings to discuss issues and sometimes issue guidelines. Informal mechanisms include unofficial consultations among judges to build consensus on legal questions.

As might be expected, CCJE favors formal mechanisms and among the formal mechanisms, a proper filtering system of appeals has a prominent place. That is perfectly in line with the primary role of supreme courts, which is to resolve contradictions in law.[23]

But it is also acknowledged that making law *in abstracto* may have a positive impact on uniformity of the case law and legal certainty. However, this method of ensuring consistency in case law defies the rule of law principle, which considers

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19 See ECtHR recent statistical data [https://www.echr.coe.int/statistical-reports], Accessed 15 March 2025.

20 Recently we even have a situation where the Supreme Court is struggling to reach a uniform decision. The issue at question relates to the well-known problem of Swiss Franc Denominated loans. The scale of the problem is so large that the ECJ has repeatedly been dealing with CHF loans in the context of the Unfair Terms Directive (93/13/EEC). See, for instance, Manko, R., *Unfair terms in Swiss franc loans Overview of European Court of Justice case law*, European Parliamentary Research Service PE 689.361 – March 2021.

21 See Gowder, P., *The Rule of Law in the Real World*, Cambridge, 2016, pp. 158-161.

22 See note 3.

23 See Opinion, note 3, pp. 4-5.

the protection of human rights and the separation of powers as one of the most important virtues of democratic societies.

Any mention of socialism and communism in the eyes of the people from the West could eventually lead to the (false) conclusion that Croatia was underdeveloped Soviet-type country fifty years ago. The truth, however, is different. In reality, especially since mid-1970s, Yugoslavia and the Socialist Republic of Croatia could be described as relatively liberal and progressive countries, with many laws that closely followed the developments in Western nations.[24] The issue of application and interpretation of laws is another matter, as one must consider that private ownership over the means of production did not exist in Yugoslavia, and that preserving the unity of the socio-political system was the primary goal of the ruling elites at that time. All companies and big businesses were indirectly controlled by the Communist Party and considering that the state ownership of land and production means was widely spread, most economically important disputes could hardly reach the courts.[25] At that time, primarily due to restrictions on private ownership, the courts were left with mostly criminal and low value civil cases. As a result, the judiciary did not enjoy high social esteem, nor was its work considered particularly important by the citizens.[26]

But despite the small number of cases, the uniformity of case law was also an issue. Even the Constitution of the Socialist Republic of Croatia emphasized that the

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[24] One could say that this is the case both with Code of Civil Procedure from 1976. and Civil Code from 1978. The latter is especially important as it was essentially, as Tot mentions, an amalgam of various comparative legal institutes and rules, borrowed on the one hand from Romanesque legal systems (French and Italian law) and, on the other hand, from Germanic legal systems (primarily Swiss and German, and later Austrian law). It also included elements of institutes taken from legal systems that, at the time, belonged to the socialist legal tradition, along with additions from certain international conventions and even traces of influence from the common law tradition. More about influences from comparative law on Yugoslav Civil Code see Tot, I., *Poredbenopravni utjecaji na Zakon o obveznim odnosima* (Comparative Legal Influences on the Law on Obligations), [https://www.researchgate.net/publication/366812060], Accessed 15 March 2025.

[25] Uzelac points out that at that time, just as now, international trade disputes were mostly handled by international arbitration or political negotiations. See Uzelac, A., *Survival of the Third Legal Tradition,* Supreme Court Law Review (2010), 49 S.C.L.R. (2d), pp. 377-396.

[26] *Ibid.* One might easily guess what followed the bloody dissolution of Yugoslavia and the political changes of the 1990s. The overhaul of the legal system, reintroduction of private property, and numerous legal issues arising from the inability to adapt the system to new circumstances led to a significant increase in court cases, resulting in big delays and backlogs. At the same time, as Uzelac correctly observes in his paper cited in a previous reference, people who had to turn to the courts to protect their rights often faced decentralized proceedings, excessive formalism, poor process planning, procedural indiscipline, impersonal appellate review, endless remittals, and a lack of accountability for delivering final judgments which have all been depicted as characteristic features of the socialist civil justice system.

primary role of the Supreme Court of Croatia was to establish general statements and legal interpretations to ensure the uniform application of laws by courts on the territory across the Republic.[27]

The question whether case law could actually be considered a source of law was one of the most contentious issues.[28] Higher court decisions were not formally binding on lower courts, but in practice, just like in the common law countries, lower courts often considered them for various reasons. What is even more interesting is that the role of courts in shaping the law after the World War II was very significant due to numerous legal voids created by the change in political regime and the annulment of laws that existed before and during the World War II. There is evidence that issues such as the general statute of limitations for monetary claims or the objective liability of companies for damages caused by their employees to third parties were firstly established in post war judicial practice, only later to became legal rules.[29] Even at that time law students and entire legal community could easily familiarize themselves with the common law system of precedent. The available legal literature, primarily books on maritime and commercial law, devoted considerable attention to the law of precedent and its role in promoting the values of uniformity, consistency, and certainty.

Still the fact remains that the case law was never regarded as the formal source of law in Croatia. Back then, courts were constitutionally obliged to render judgments based on the Constitution, laws, and self-governing general acts, while now it is different as they administrate justice according to the Constitution, law, international treaties and other valid sources of law.[30]

Nevertheless, the official standpoint at that time was that judicial practice did not carry the force of law but could only influence court decisions if judges were willing to adopt its reasoning.[31] Until 1954. it was different with so called judicial

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27 See Art. 410 of the Constitution of the Socialist Republic of Croatia (Official Gazette, No. 8-86/74).

28 See Goldštajn, A., *Privredno ugovorno pravo*, Informator, Zagreb, 1980, pp 39-40. It worths noting that the opponents of recognizing the case law as a significant source of law at that time emphasized that such a status and attribute was not granted to judicial practice by any regulation, and that the system of precedent is not aligned with the constitutional position courts have within the judicial system. It should be noted also that in addition to Goldštajn, comprehensive interpretations of the system of precedent were at that time provided by Pallua. See Pallua, E., *Pomorsko uporedno pravo* (*Maritime Comparative Law*), Rijeka, 1975.

29 *Ibid.*

30 See Art. 115 of the Constitution of the Republic of Croatia (Official Gazette, No. 56/90., 135/97., 8/98, 113/00., 124/00., 28/01., 41/01., 76/10., 55/01., 5/14., 85/10.).

31 In academic literature this is pretty much unchanged. For instance, in the leading book on civil law (Vedriš, M.; Klarić, P., *Građansko pravo*, Official Gazette, 2008., p. 23.) it is explicitly stated that a judge who is convinced that a higher court has rendered a correct decision is expected to follow that

practice guidelines which were issued at the meetings of the judges of the supreme courts of republics (regarding the application of republican laws) and the Supreme Court of Yugoslavia (concerning the application of federal laws).[32] Those guidelines had significantly greater legal authority than ordinary court rulings, as they were binding not only on all the chambers of the supreme courts but also on all lower courts.[33] As these guidelines did not carry the force of law, courts could refuse to apply them only if they found them to be contrary to the law.[34]

This system significantly changed after the enactment of the 1954 Law on Courts, which prescribed that the legal positions adopted at sessions of judicial departments or at general sessions of the supreme courts were not binding for courts that did not participate in their adoption and that such legal interpretations were binding only on the chambers that were part of the department sessions.[35]

Without delving into the versions of the law governing the organization and jurisdiction of courts in Croatia from 1954 to the present, including the period after Croatia gained independence, and before addressing the Hann Invest case, it suffices to say that the concept of legal positions with precedential authority has persisted into modern times. Only at one point, the 2000 amendments of the Law on Courts reformed the system by specifying that legal positions adopted at the level of second-instance courts hold no binding authority, as issuing binding interpretations does not fall within the judiciary's role, which is primarily to enforce rather than create law. Additionally, it was argued that imposing an obligation on judges to apply interpretations adopted at court meetings undermines the independence of individual judges.[36]

However, this new rule was short lived as later amendments reinstated the previous system, despite heavy academic criticism. Simply put, it was argued that issuing decisions *in abstracto* at court department meetings should not be given any kind of quasi-legislative authority.[37]

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ruling in similar cases, thereby avoiding the likelihood of having his decision overturned by the higher court.

32 This rule was introduced by the 1946 Law on the Organization of People's Courts.

33 See Zuglia, S., *Građanski parnični postupak FNRJ (Civil Procedure of the People's Federative Republic of Yugoslavia)*, Zagreb, 1957, pp. 60-63.

34 *Ibid*. In such cases, however, the courts were required to provide valid reasons when departing from the guidelines.

35 See Triva, S., *Građansko procesno pravo*, Narodne novine 1965, p. 35.

36 See Uzelac, A., *Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost (Uniform Application of Law in Croatian Civil Procedure: Tradition and Modernity*) in: Barbić, J. (eds.) Novine u parničnom procesnom pravu, HAZU, Zagreb, 2020, p. 129.

37 See Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2004, p. 124.

Along these lines, it must be mentioned what is the current legislative solution. Art. 38 and 39 of the Law on Courts[38] give the right to county courts and specialized courts (High Commercial Court, High Administrative Court, High Criminal Court, High Misdemeanor Court) to hold section meetings during which different matters of interest to the work of sections may be examined. These issues concern the organization of the internal court activities, disputed points of law, the harmonization of case law and issues relevant to the application of the legislation in each field of law. Sectional court meetings are convened by the president of a section or the president of the court when necessary or at least once every three months. The first two paragraphs of Art. 40 of the Law on judicial bodies provide:

1. *A section meeting or a meeting of judges shall be convened where it is found that there are differences in interpretation between sections, chambers or judges regarding questions relating to the application of the law or where a chamber or a judge of a section departs from the legal position previously adopted.*

2. *The legal position adopted at the meeting of all the judges or of a section of the Vrhovni sud (Supreme Court), of the Visoki trgovački sud (High Commercial Court), of the Visoki upravni sud (High Administrative Court), of the Visoki kazneni sud (High Criminal Court), of the Visoki prekršajni sud (High Misdemeanour Court) or at the meeting of a section of a Županijski sud (County Court) shall be binding on all the chambers or judges at second instance of the section or court concerned.*[39]

Side observers might ask themselves what these legal positions look like, do they look like regular law provision, how many legal positions courts deliver annually, how often they are published, etc. A look at the Croatia's Supreme Court's website reveals that issuing legal positions was quite common practice until the midst of last year. For instance, since 2019 until now, the Civil Department of the Supreme Court held 27 sessions during which at least one legal position per session was adopted, sometimes more, with up to five positions adopted in a single session.[40] Positions cover a wide range of issues, mostly those relating to different issues with the substantive law (statutory limitation), but there are also many legal positions that resolve procedural issues and situations. For instance, in the most recently published minutes from a session held on May 27, 2024, two legal positions were adopted, both related to the issue of statutory limitations. The first position states

[38] The Law on Courts (Zakon o sudovima, Official Gazette, No. 28/13., 33/15., 82/15., 82/16., 67/18., 126/19., 130/20., 21/22., 60/22., 16/23., 155/23., 36/24.).

[39] This is the translation provided in the English version of the Judgement of Court of 11. 7. 2024. in joined Cases C-554/21 (*Hann-Invest d.o.o.*), C-622-21 (*Mineral-Sekuline d.o.o.)* and C-727/21 (*Udruga KHL Medveščak Zagreb*), ECLI:EU:C:2024:594.

[40] See the web page of the Supreme Court of the Republic of Croatia [https://www.vsrh.hr/].

that a claim for compensation for land taken for road construction without due legal process is subject to the general statute of limitations under art. 225 of the Civil Obligations Act. The second position concerns the parties' right to modify and increase the claim during the proceedings and the interruption of statute of limitations.[41] Apart from civil law and civil proceedings, there are many positions in relation to criminal proceedings as well.

Any lawyer can easily recognize that the legal positions mentioned essentially mirror the structure of rules that can be found in ordinary legislation. It would be incorrect to say that these positions are delivered without considering some real-life cases as this is pretty much impossible, but the fact remains that they are established *in camera*, without any involvement from the parties or lawyers. Another point is also worth noting: these legal positions lack context: no one knows who prompted the creation of the legal position, which judges were involved in the decision making, and, and as Uzelac correctly observes, the only known details are the court and the date of the session.[42] While it seems that the Supreme Court publishes legal positions without a big delay, the search of the web pages of the numerous county courts reveals that in most cases there is no information on their case law or the legal positions. There is no need to point out how troublesome this is for legal professionals who have problems investigating what might be the rule which is applied before certain courts.

While it would be wrong to assume that binding legal positions and statements are without any positive impact on consistency in case law[43], it remains an old concern that this kind of instrument for ensuring uniform case law contradicts the rule of law, and especially the constitutional principle of the separation of powers.

The issue is more pressing today as Croatia now, after many years of normative struggle, has finally established a clear system for seeking leave to appeal at the Supreme Court, a model aligned with the fundamental idea that supreme courts should predominantly serve their public function by ensuring uniformity of case law and developing the law through decisions of precedential value.[44]

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41 See the minutes of the second session of the Civil Division of the Supreme Court of the Republic of Croatia, Su-IV-123/2024-5 dated May 27, 2024. It could be said that many legal positions address the issue of statutory limitations, which is, needless to say, one of the regular legal issues in the field of civil law.

42 See Uzelac, A., *op. cit.*, note 36. The situation is the same for civil and criminal legal positions.

43 The CCJE (note 3), accepts that „binding interpretive statements *in abstracto* could have positive impact on uniformity of case law, but also that the uniformity of the case law and the development of law should be achieved through the proper filtering system of appeals".

44 Bratković was repeatedly writing about the role of the Supreme Court and the need to set up a mechanism which would allow the Supreme Court to serve his constitutional role. In that regard see his book

3. THE HANN INVEST CASE AND ITS CONSEQUENCES FOR CROATIA AND THE LEGAL SYSTEMS OF THE MEMBER STATES

Next, we will consider the problem that emerged before the Grand Chamber of the Court of Justice of the European Union in the Hann Invest case.

The Hann Invest case arose from three separate requests for a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union. All requests came from the Zagreb based High Commercial Court (Visoki trgovački sud) after panels of the court dismissed appeals and upheld the first instance judgements in insolvency cases.[45] However, as the High Commercial Court serves as the second instance court in commercial matters, within its internal organization it has a special department - a registration service with a registration judge who is appointed by the court president and is then authorized to check whether decisions, before they are served to the parties, depart from the previously established case law or show any inconsistencies in legal interpretation. If the registration judge identifies the problem, he is authorized to request the judicial panel to resolve the inconsistencies and amend the decision, or if the judicial panel refuses to alter the decision, the registration judge can refer the case to the section meeting. As we observed above, the Law on Courts prescribes that legal positions adopted at a section meeting are binding on all chambers and judges at the second instance.

Although the factual situation differs in all three cases[46], essentially the problem in Hann Invest relates to the question of judicial independence and impartiality. It is evident from the cases that the registration judge had the power to block the delivery of the judicial decision to the parties and thus hinder the decision making process, to send the case for reexamination in the light of their observations, and even to initiate the convening of a section meeting for the adoption of a legal position that would be binding on that judicial panel.[47]

Advocate general Priit Pikamäe (coming from Estonia) who eight months before the judgement of the Grand Chamber gave opinion on the case in which he found that the Croatian system of securing consistency in case law is compliant with Art. 19(1) of the Treaty of the European Union,[48] has correctly recognized that

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on the topic, Bratković, M., *Revizija po dopuštenju*, Organizator, Zagreb, 2003.

45 The Judgment of the Court of 11. 7. 2024. in joined Cases, *loc. cit.*, note 41.

46 *Ibid.,* para. 12-14.

47 *Ibid*., para. 64.

48 See Opinion of the AG Pikamäe delivered on 26 October 2023. in joined Cases C-554/21, C-622-21 and C-727/21, ECLI:EU:C:2023:816. See also heavy critique of the opinion by Selanec and Petrić in Selanec, N.B., Petrić, D., *Internal Judicial Independence in the EU and Ghosts from the Socialist Past.*

although the existence of the registrations judge is provided for by the Law on Judicial Bodies neither the Law on Courts neither the Rules of Procedure of the Courts[49] neither the relevant Article 177(3) contain the definition of the nature of the function of the registration judge, nor do they contain the rule according to which they have the power to suspend the registration of a decision of a judicial panel.

Indeed, Art. 177(3) of the Rules of Procedure of the Courts provides that "a case before a court of second instance shall be deemed to be closed on the date on which the decision is sent from the court office, after the case has been returned by the Case law Monitoring and Registration Service". This gives rise to another issue closely related to the rule of law. Namely, the phrase "tribunal established by law", which is well known and often used in jurisprudence of the ECJ and ECtHR, covers not only the legal basis for the existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it.[50] In the eyes of the ECJ the problem was particularly visible because the registration judge, who was not responsible for the cases in question neither participated in the cases in question, could intervene and influence the final content of judicial decisions. In the ECJ's view, the right to manipulate the outcomes of the cases is incompatible with the requirements inherent in the right to effective judicial protection, and this view was reflected in the judgment.[51]

The situation is more complex with large court meetings and issuing binding legal positions. Despite numerous objections which could be raised against legal positions and court sectional meetings, it must be pointed out that the ECJ does rec-

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Why the Court of Justice should not follow AG Pikamäe in Hann Invest, Croatian Yearbook of European Law & Policy, Vol. 20 No. 1, 2024, pp. 155-179.

49 Rules of Procedure of the Courts (Sudski poslovnik) Official Gazette, No. 37/14., 49/14., 8/15., 35/15., 123/15., 45/16., 29/17., 33/17., 34/17., 57/17., 101/18., 119/18., 81/19., 128/19., 39/20., 47/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22., 12/23., 122/23., 55/24., 136/24.

50 See *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)*, updated to 31 December 2017., Council of Europe/European Court of Human Rights, 2017. p. 35.

51 See para. 81: *In the light of all of the foregoing considerations, the answer to the questions referred is that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national law from providing for a mechanism internal to a national court pursuant to which:*

- *the judicial decision adopted by the judicial panel responsible for the case may be sent to the parties for the purpose of closing the case concerned only if its content has been approved by a registrations judge who is not a member of that judicial panel;*
- S*a section meeting of that court has the power to compel, by putting forward a 'legal position', the judicial panel responsible for a case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those belonging to that judicial panel and, as the case may be, persons from outside the court concerned, before whom the parties do not have the opportunity to put forward their arguments.*

ognize that achieving legal certainty through a mechanism allowing a judge who is not a member of the judicial panel to refer a case to a panel of that court sitting in extended composition is not inherently contrary to the European law.[52] What is contrary to the European law is to have "*a national legislation which allows a section meeting of a national court to compel, by putting forward a "legal position", the judicial panel responsible for the case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those belonging to that judicial panel and, as the case may be, persons from outside the court concerned, before whom the parties do not have the opportunity to put forward their arguments, is incompatible with the requirements inherent in the right to effective judicial protection and to a fair hearing*".[53]

The ECJ has clearly provided a comprehensive formula for a potentially legal way of resolving conflicts in case law within extended court meetings. As clearly stated in para. 79-80 of the judgement, if the case has not been deliberated by the judicial panel initially designed to resolve the case, if the circumstances in which such a referral may be made are clearly set out in the legislation and if the referral does not deprive the persons concerned of the possibility of participating in the proceedings before the large panel, the mechanism of legal positions adopted at the meetings of the court sections or in plenary sessions could be regarded as a legitimate way of resolving conflicts in case law.

While it is hard to envisage what the expected amendments of the Law on Judicial Bodies and the Rules of Procedure of the Courts will look like, it should be expected that the working groups will sooner or later come up with proposals of the new normative solutions. Some quality remarks and in-depth views of the problem, even touching upon other mechanisms for reaching uniformity in Croatian law, have already been published and revealed so it will be interesting to track how things will develop.[54] Still, knowing the way the system had addressed one previous issue which arose after the ECJ's judgement in Pula Parking and Zulfikarpašić case, one should not expect big changes to the present system.

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52 *Ibid.,* para. 79-80.

53 *Ibid.*

54 See Uzelac, A., *Kraj obvezatnih pravnih shvaćanja – kako ujednačavati sudsku praksu nakon presude Suda EU? (The End of Mandatory „Legal Positions"– How to Unify Case Law after Judgments of the Court of Justice?*, in: Šago, D. (ed.), Zbornik radova X. međunarodnog savjetovanja „Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća", Sveučilište u Splitu, Pravni fakultet, 2024, pp. 32-38. See also Uzelac, A., *Što nakon Hann Investa? Posljedice odluke suda EU-a na domaći sustav ujednačavanja sudske prakse*, 2024. [https://www.iusinfo.hr/strucni-clanci/sto-nakon-hann-investa-posljedice-odluke-suda-eu-a-na-domaci-sustav-ujednacavanja-sudske-prakse], Accessed 1 April 2025.

Hann Invest is an important ruling for other Member States too, and not only post-communist states of Central and Eastern Europe, but also for those with long lasting peaceful development of societal norms and advanced democratic standards. De Werd, who discussed the problem of consistency and uniformity in case law by comparing the findings from Hann Invest with the current Dutch situation[55], mentions the case of Kuijt v. Netherlands in which the application concerned an alleged violation of Art. 6(1) because of the practice of the Dutch Supreme Court which allows judges "reservists" to sit in deliberations even when they do not form part of the formation to which the case has been assigned.[56] It should be observed that the difference with Croatian practice is that judges reservists do not take part in the final decision making but only participate in discussions, all according to transparent internal court rules.[57] While appreciating having sufficient safeguards against undue influence from within the court, De Werd finds that engaging in discussions among judges at internal court meetings is necessary to maintain the desired level of quality and consistency of court rulings, as well as that using the guarantee of independence as a stalking horse to avoid discussions with colleague judges has little ground to stand on.[58] Along these lines, having in mind that reaching broader consensus often will be inevitable to maintain desired level of uniformity, consistency and certainty within the legal system, for a Croatian policy maker it will be essential to think of the framework which will transform binding legal positions into opinions that will influence other decision making processes primarily with the clear and precise legal reasonings.

4. CONCLUDING REMARKS

The interpretation of law is a dynamic process that should always meet the requirements of courts and judges being independent and impartial. Binding legal positions have been for a long time viewed as a relic of the past, the remnant of the communism and authoritarian legal culture, something that could not only be tracked in Croatia, but also elsewhere in Europe.[59] In Croatian literature the problem was repeatedly mentioned and discussed but the main structure of the system which highly formalized the mechanisms of the undue internal influence has not

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55 See De Werd, M., *Blog: Uninvited oversight:judges watching judges – the ECJ Hann-Invest case*, 2024. [https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html], Accessed 1 April 2025.

56 See Application no. 19365/19 to the ECtHR made by *Johanna Kuijt vs. the Netherlands* of 4 April 2019.

57 See De Werd, *op. cit.*.

58 *Ibid.*

59 See Kühn, Z., *Interpretational Statement of Supreme Courts in Central and Eastern Europe*, 2016 [https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/], Accessed 1 April 2025.

changed in years. A long time ago, it has been clearly stated in academic literature that binding interpretive statements are not in line with democratic standards and the rule of law. Hence, historical observations of the problem, coupled with the long standing operation of the system of binding legal positions and interventions by the registration judge, offer no basis for supposing that the problem will be easily eliminated.

The system we used to have is the model which had grown out of centralism and formalism associated with the authoritarian model of power, the justice system model which had never embraced neither properly understood the system of precedent in the true sense of the word.[60]

De facto, after Hann Invest Croatia does not have the registration judges with functions and competences they used to have before, and this has become a well-known fact among the judges. De iure, nothing has changed yet, and even when it does, whatever the new legislative solutions will be, it is easy to envisage that the problem with ensuring consistency in case law will persist. It is just "hard to teach an old dog new tricks", so in the system which never embraced nor properly understood the concept of the precedent, it should not be expected that true positive changes can occur overnight.

Once the system becomes able to produce judgements with influential reasonings that will be readily embraced among legal professionals and even the wider public, things will start to change, and before that happens, the findings of the ECJ in the Hann Invest case will serve as significant guidance for the court system and the policy makers in Croatia and elsewhere in Europe.

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[60] As Duxbury puts it, the precedents are past decisions that are respected as guides for present actions, but not to the extent that judges must maintain outdated attitudes and a commitment to repeating their predecessors' mistakes. See Duxbury, N., *The Nature and Authority of Precedent*, Cambridge, 2008. p. 183.

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