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The Role of the Supreme Court of Mongolia for Ensuring Uniformapplication of Law[1]

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Abstract

Concepts of unity of law and unified application of law were the main goals of the revised version of Mongolian Judiciary Law in 2021 based on changes of Constitution in 2019. Constitutional Court decided that some provisions of the Law on the Courts of Mongolia, the Law on Administrative Litigation, the Law on Criminal Procedure, and the Law on Civil Litigation violated the relevant provisions of the Constitution of Mongolia. Those provisions related to the scope of the Supreme Court of Mongolia. Therefore is to examine the grounds for not complying with the Constitution of Mongolia mainly based on civil procedure matters and from a comparative view.

Keywords

Implications of the Revised Version of Mongolian Judiciary Law on the Scope of the Supreme Court after the Changes of Constitution in 2019, Civil Procedure

1. Unification of Law and Ensuring It

The primary purpose of the Supreme Court to establish a unified application of law throughout Mongolia was covered in the Constitutional amendment (Constitution of Mongolia, 1992), late amended in 2019, the revised version of Law on Judiciary[2] in 2021, and amendments to the procedural laws. Concepts of unity of law and unified application of law which have similar meanings belong to the category of vague terms in legal science. It is necessary to clarify what participation is needed from legislative bodies and the judiciary to achieve this ideal purpose.

In the practice of the supreme courts of some countries, unity of law is dis-

[1]Mongolian State Law Review, VOLUME 103, Nu.1, Special edition, p. 60-79.
[2]State Information Compilation (2021) No. 5.

cussed when there is a necessity to transfer the assessment made in one field of the legal system into another field (Baldus Manfred, 1995). In this case, there will arise issues that keep the same level of regulations in terms of concept and transfer the assessment of the different fields of law to another. For instance, the Constitutional court of the Federal Republic of Germany considers that institutions included in the basic structure of the constitution have a duty to ensure the unity of the legal system before all citizens, and it is transferred to apply some interpretation of the constitutional concept into ordinary law[3].

1.1. Theory of Law and Concept of the Unity of Law in Civil Law Science

At the level of legal theory, unity of law, unified systematization of positive law, and unity of the organic system of law and concept, all have the sole purpose to present legal norms, concepts, and understanding to law users in a unified way. As Kelsen states, some theories serve the above mentioned purpose of creating a basic norm, such as creating opportunities for combining into one legal norm which has supreme power when briefing positive legal norms. Additionally, they create the necessity to provide unification with supports of unified codification or within the level of organic structure, ensuring the internal integrity of the legal system, creating the "collective consciousness of the nation", creating coherence between the unity of legal institutions and unity of law, unifying law via general parts of the regulation, establishing the unity of the system in which the content of legislation does not contradict, and implementing combined interest of the state. It is obvious that these branches of legal philosophy solely are not sufficient to establish the unity of the legal system and application of the law.

1.2. Theory of Unity of Law in Science of State and Law

State and legal positivists criticize the theory about representing the unified interest of state developed by Jellinek who is a researcher from the 19th century. This currently has no sociological basis and cannot be determined objectively; instead, the state is a conflicting interest of plural ethnic groups. On the contrary, he explains that a variety of organizations that exercise state power do not hinder to constitute a unified state if the state clearly regulates and delimits the powers of the units in its organizational structure through the objective legal system. He also assumed that this separation of power and further hierarchical system of power are the roots of the will of the state not to have conflict, and the basis for the unification of the target unit called the state (Baldus Manfred, 1995).

The pure theory of law by Austrian researcher Kelsen, states that a "unified system of law is an expression of the united will of the state" and puts forward the hierarchical pyramidal structure of the legal system and the theory of "basic" norms[4]. According to Kelsen's view, the basic norm is an expression of the formal unification of the legal system. As he stated, concepts that require a pure

[3]BVerfG 12, 45/54/.

[4]Hans Kelson, Theory of Pure Law, 2nd ed.

normative solution/rational solution that leads to the unity of law/have consequences of building unity of state at the sociological level, further, creating internal coherence of the legal system and interdependence of content. Later, although this theory was accepted worldwide, commonly applied theories that aim to solve conflicts of the legal norms are conflicting with each other, and real issues, such as new regulations conflicting with higher level norms, same level regulations conflicting with each other, etc., remain unsolved by the pure theory of law.

To solve these conflicts, some researchers suggest weighing the interests behind the curtain by using the principle of annulling conflicting norms and filling the legal gap[5]. For instance, Savigne recommended obliterating the legal gap through application by analogy. Later, Kelsen combined the concept of the unity of legal system by researcher A. Merkl into his pure theory of law and suggested a solution to establish unity of legal dogmatic and the content of the entire legal system (Baldus Manfred, 1995). According to this, any legal solution should have logical linkage when reflected in the law and unity of law is defined by clarifying, applying analogies, generalizing, and transferring cognitive results to structures.

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In this way, unity in law becomes flawless and the process of outward appearance applies to both the legislative/enforcement bodies of the state. According to the above-mentioned statement, it is rendered that the unity of law is able to be implemented through the interpretation of laws or mainly by the activities of the judiciary.

1.3. Participation of the Judiciary in Ensuring the Unity of Law

The application of the law is a comprehensive notion that indicates preparing a solution to be given by the legal system in a particular case. The duty to establish the theory of law application is not only assigned to legal science, but also it should be assigned to the judiciary. The main function of legal science is to provide legal education, and it indirectly affects the application of the law by the legislation and judiciary via the implementation of this function. This principle is also applied in the theory of law application. The function of legal science is to provide legal education, and it indirectly affects the application of the law by the legislation and judiciary via the implementation of this function. This principle

[5]Karl Engisch, Einfbhrung in das juristische Denken, 11. Auf I., 188/235.

is also applied in the theory of law application. The function of legal science also covers studying and criticizing the methods of substantial legal application.

In most legal systems, there is no law to apply or interpret the law. However, Article 5 of the Civil Law of Mongolia and two thirds of Article 1 of the Civil Law of Switzerland have covered the slightest regulations in this regard. Even though the theory of law application is not mentioned in the Constitution, it states that the rule of law which is the primary principle of the Constitution should be served in courts and law users. Furthermore, the constitutional principle of equal treatment and establishing legal certainty requires that similar cases should be decided in the same way, the requirement to clearly write down how the law is interpreted, establishing internal judicial supervision and legal certainty. Within this sense, it is possible to deliver a critical opinion on the judgment in the democratic rule of law.

Based on the abovementioned statement, legal science should support the legislative process and application of the law and does not need to establish it. However, legal science must provide criticism and assessment of the application of laws by administrative bodies and courts after studying the application of law in judicial practice. Hence, it is obvious that the application of law in judicial practice is crucial for us. As for a methodology of law application, the methodology of applying the law of all courts, including the Supreme Court, should be at the theoretical level.

In this situation, it is possible to strive for the ideal purpose of having no internal contradictions in legislation. Also, the Constitution itself should be understood and applied without any ambiguity, consequently, the possibility of establishing the unity of the legal system may arise. However, within the context of the "product" of legal interpretation, which is not physically delivered, the court will decide what "unification" is, and this will be a conscious constitutive factor, not a detriment to the unity of the legal system.

2. Judicial Reform and Role of the Supreme Court, Comparison

Within the scope of legislative reform in 2002, the role of the supreme court was mainly considered through amendments to the Constitution[6] made in 2019, the Revised version of the Law on Judiciary (State Information Compilation, 2021) in 2021, along with the amendments made to the procedural laws for improving the system of judicial review. The process of reviewing cases by the Supreme Court significantly changed with several amendments in 2021. It is obvious that general conditions for reviewing cases by the Supreme Court are aimed to review legal disputes that are fundamentally important for further developing laws, establishing unity of law from the changes in LOJ, article 172.2 of Civil Procedure law[7], article 123.2 of Administrative Procedure law, article 40.1 of the Criminal

[6]Constitution of Mongolia, State information, 1992, No.1; amended on December 14, 2000 and November 14, 2019.

[7]Civil Procedure Law, adopted on January 10, 2002, Journal of State Information, 2002, No.8 Amendment on 2021: https://legalinfo.mn/.

Procedure law. It is possible to conclude that the initial goal of the procedural law of establishing justice in the case of a dispute is ranked after the main goal of the unified application of the law of the court of review. According to this, it is possible to conclude that the early goal of the procedural law of building justice is ranked after the primary purpose of establishing a unified application of the law of the Supreme Court when the dispute arises.

2.1. Article 172.2.1 of the Civil Procedure Law

Article 25.7.5 of the revised version of the Lawon Judiciary of Mongolia states that in order to ensure uniform application of the law, the Supreme Court shall adjudicate rulings of appellate instance courts as cassation instances for eliminating differences at the primary and appellate instance courts on application of law. It should be clarified whether the these legal provisions of the Supreme Court reviews cases for ensuring uniform application of the law within the scope of eliminating differences at the primary and appellate instance courts on application of the law, complying with the Constitution.

The appellate court may apply different law that is applied in the decision of the first instance court when legally justified. According to article 48 of the Constitution, power of this court is to supervise law application of first instance courts. In the situation where the application of the law of the first instance and the appellate court is different, there will not be a "difference in the application of the law" in the true sense. Because the powers and functions of the appellate court granted by the Constitution are to review the decisions of the courts of first instance under its jurisdiction at the legal and factual level. Article 29.1 of the Law on Judiciary states that the appellate instance court consists of provincial and capital city courts and the appellate instance administrative court. Provincial and capital city courts and the appellate instance administrative court ensures unity of law in the territory under its jurisdiction. Hence, applying laws different from the courts of the first instance is its power provided by the Constitution and other laws, but the application of the law should be clearly understood by the participants of the cases when resolving the same legal disputes. Therefore, in the literal sense, the fact that the first and appellate court decisions differ from each other does not undermine the unity of law application. It is not the only case where this occurs.

It should be distinguished from the concept of a worse position of rights. If the reviewing court changes the decision in a way that is not beneficial to the appellant, it is interpreted as a reformatio in peus. And the researchers suggest that such a phenomenon of worsening the position of rights within the scope of ordinary procedure for resolving civil cases in court should be prohibited (Buyankhishig, 2021).

However, there is a risk of losing the unity of law application in the true sense if the appellate court applies the law differently than previously applied or deviates from the law application practice of the higher court. According to the experience of foreign countries, the risk of conflicting decisions is referred to as

a situation that the ruling of an appellate court deviates from decisions of a higher court, other courts of the same level, or another panel of the same court, and situation of establishing general principles and the conditions for establishing abstract legal norms[8].

The power of an appellate court is at first reviewing whether the court of first instance applied the law correctly (Joachimski, 2004, at 242). Within this power, it is appealable to the Supreme Court without additional criteria when there is an occurrence of a difference in law application according to article 172.2 of Civil Procedure law, article 123.2 of Administrative Procedure law, and article 40.1 of the Criminal Procedure law. On the one hand, this leads to the negative effect of reviewing every appellate court ruling that deviates from the decision of the court of first instance, regardless of whether it complies with the law or not. On the other hand, it is not possible to review cases in a situation if there is no different application of the law but has a conflict in the fact or there has no difference in the decisions of the first instance and appellate courts, but the law was applied differently from the decisions of other courts that resolved similar disputes. Thus, appellate court decisions that are different from the practice of other courts or its previous practice, create the risk of mislaying the uniform application of the law. It may create interest in clarifying law application by appealing to the Supreme Court for participants of the case when the appellate court applied a different law from the court of the first instance. But the difference in the application of the law is often considered as an *element of public interest* that is discussed in the horizontal axis. There is no precise regulation in article 172.2 of Civil Procedure law, article 123.2 of Administrative Procedure law, and article 40.1 of the Criminal Procedure law in this regard. These are embodiments of the policy of limiting the scope.

It may create interest in clarifying law application by appealing to the Supreme Court for participants of the case when the appellate court applied a different law from the court of the first instance. But the difference in the application of the law is often considered as an element of public interest that is discussed in the horizontal axis. There is no precise regulation in article 172.2 of Civil Procedure law, article 123.2 of Administrative Procedure law, and article 40.1 of the Criminal Procedure law in this regard. These are embodiments of the policy of limiting the scope of the jurisdiction of the Supreme Court to review disputes by law. If we consider the position of other researchers viewed these amendments as the phenomenon that describes the Anglo-American which is a filter system or mechanism of judicial precedent that officially entered the legal soil of Mongolia for the first time. Thus, it should be clarified whether it conflicts with the legal culture and tradition of Mongolia (Tserendolgor, 2021). She emphasized the opinion No. 20 on the role of courts with respect to uniform application of the law by the Consultative Council of European Judges which states that "In the CCJE's view, the public role of a supreme court, which consists of providing guidance pro futuro thus ensuring the uniformity of the case law and

[8]Hefller in Zöller, ZPO, 28. Auflage, §543, Rn. 11-13.

the development of law, should be achieved through a proper filtering system of appeals" (CCJE, 2017). It is concluded that the scope of the jurisdiction of the Supreme Court to review disputes by law and the purpose of resolving cases by way of review procedures of the Supreme Court stipulated in the revised version of the Law on Judiciary, is in compliance with the purpose of "ensuring uniform application of the law".

However, it is questionable whether a revised version of article 172.2 of Civil Procedure law is the proper method to reach this above mentioned purpose. Compared to the previous article 172.2.1 of Civil Procedure law, cases reviewed by the Supreme Court are drastically mitigated under the abovementioned law; as a result, the load on the TSC will decrease significantly. I conclude that in the scope of a former law, the court's activities which were operating on a larger scale based on the ground of "failure of a court to apply the applicable law, application of law that should not be applied", were temporarily suspended, and only a small amount of complaints were acceptable even though there were many complaints from the participants of the case. From this situation, many participants in legal relations and a small number of researchers started to consider reviewing filters which represent the filtered system and mechanism of judicial precedent, as inappropriate.

For instance, a regulation of the court that has not conducted regular stare decisis will review the case only on the ground of the "difference between the decisions of the first court and the appellate court" and not reviewing other cases, is a legal element of common law system that countries applying judge made legal norms. And it indicates that these differences between the decisions of the above two courts are vital like "legislation".

Since our domestic legal system adopted many abstract general laws following the continental legal system tradition, the main role of the TSC has always been to review the legality of the decisions of the appellate court. Hence, article 172.2.1 of Civil Procedure law abstractly determined as "failure of a court to apply the applicable law, application of law that should not be applied". The Supreme Court interpreted these provisions by focusing on the law. "Applicable law" is interpreted as laws regulating the disputes between participants of the case, "Law that should not be applied" is interpreted as laws irrelevant to the disputes between participants of the case, "Applied incorrect interpretation of a law" is interpreted as the relevant provision was understood and applied in a different context and meaning than that prescribed by the law (Supreme Court of Mongolia, 2014). It is apparent that there is ground for rendering two-level decisions unreasonable since reviewing the main source was legislation. Thus, article 176.2.4/5 of Civil Procedure law states the consequence of annulling both the decision and rulings. But Article 176.2 of the Civil Procedure law has remained on a larger scale than the filter of the precedent law. In other words, accepting the cases with "discrepancy" and annulling both decisions that should be removing differences. Nevertheless, the stare decisis doctrine of case law declares only one of these two decisions as the applicable norm.

Thus, in our system, which is the core of the problem is the written legislation and the basic principle of the court's operation is the rule of law principle, it is questionable that limiting the powers of the Supreme Court as eliminating the difference in the law application between the two lower courts. There is no option "whether to respect the law" or "not" in case of wrongly applied law in two-level courts. In addition, the lack of review in many other cases is evident from the comparison of old and new regulations. The issue of lowering the overload of the TSC may be an important aspect for the revised versions of these regulations. This is caused by article 172.2 of the former Civil Procedure law and other equal regulations that had wide application. For instance, the participant in the case may easily have the opportunity to appeal to the Supreme Court, based on his or his lawyer's "legal" point of view regarding the misinterpretation of the law when there is a lack of official interpretation. However, it is implemented by transferring TSC to stare decisis operation of case law which cannot be a sufficient guarantee of "enforcement of the law" in a country with a large number of written laws. And it is proven by the circumstances that many cases are not acceptable to the Supreme Court.

On the contrary, it is appropriate to provide the power to review disputes that principally have fundamental significance which are becoming issues in a large number of cases understanding that review is conditioned by public interest, along with the replenishing article of 172.2 of the Civil Procedure Law with the vague terms with necessary goals and objectives of TSC, such as "developing the law" and "ensuring the uniform application of the law". The public interest in developing law as unified is understood to be that it aims to prevent different decisions of appellate courts by reviewing commonly concluded contracts at model and process levels at once, expressing a unified position on numerous similar cases.

However, Article 172.2.1 of the Civil Procedure Code is aimed at eliminating differences in the decisions of courts with mutual supervision at courts of a lower level, and not at keeping the whole legal practice as unified. Thus, it is not possible to conclude that it is an operation to ensure the above mentioned uniformity application of the law.

2.2. §172.2.3. The Circumstance in Which the Court Applied the Law by Interpreting Differently Than the Interpretation of the Supreme Court

Article 25 of LOJ, Article 172.2.3 of Civil Procedure law mentioned that the ground of the court applied the law by interpreting differently than the interpretation of the Supreme Court. Thus, it should be refined whether it leads to the application of interpretations that are inconsistent with the law, thereby contradicting the principle of enforcement of the law. Even though the above mentioned ground is one criterion of the TSC accepting cases, this does not mean that the court's decision will be compared to the official interpretation of the TSC when it is reviewed. According to the above-mentioned statement, proce-

dural and substantive laws are still applied in cassation instances. Though, it is a factor to review whether the interpretation of the appellate court complies with the law and whether it needs to be updated when the appellate court rulings deviate from the interpretation of the TSC. In other words, it is an opportunity to double-check the previous method of interpretation when reviewing the legality of a decision that does not comply with the interpretation.

In comparison, when reviewing disputes in the Federal Supreme Court of Germany /BGH/, based on the combination of the following indicators, which are 1) legal disputes contain common fundamental issues; 2) the decision of the supervisory court is necessary for the further development of law or the establishment of unified court practice. Article 543.2 of CPC of Germany explains disputes contain common fundamental issues as courts have reached contradictory solutions from each other or deviated from the decision of the higher court. Further, there will be a situation where legal certainty will be lost due to these different decisions[9]. In this case, the Federal Supreme Court/BGH/will accept the dispute for review and will review the complaint only if there is a violation of rights according to article §545.1 of CPC of Germany.

Violation of rights expressed by violation of procedural rules or incorrect application of substantive legal regulations[10]. Different requirements shall be applied to substantive and procedural complaints. The complaint for review is considered reasonable when the procedural error would have affected the appellate court's decision. Since the presumption of law applies in this situation, respondents to the review complaint are obliged to prove that the error did not affect the decision at all. Based on the above, the higher court with the continental legal tradition is conducting a review directing to the legal regulation when reviewing the grounds of the complaint even in situations where it deviates from its own practice.

But within the scope of a revised version of the regulation, it also remains unclear whether the Supreme Court will exercise review directing to the legal regulation or based on the stare decisis doctrine that descends from the previous Supreme Court's decision, which checks rationale if there is a difference that decides whether or not it will be bound by the previous Supreme Court's decision and interpretation like the Anglo-American courts. In the framework of the previous law, the regulation with the content of "...applied incorrect interpretation of a law..." is now replaced by composition in Article 25 of LOJ and Part 1.3. of Article 172.2.3 of the Civil Procedure law. If these conditions are reflected as a criterion at the level of filing a case by complaint in order to reduce the overload of TSC, and in terms of the content examination, TSC reviews back its own interpretation of the law, it will be a more clarified provision with no difference in principle from the previous law.

On the other hand, it creates an inefficient mechanism to supervise interpretations that do not have the force of law in a legal system in which abstract gen-

[9]Heßler in Zöller, ZPO, 28. Auflage, §543, Rn. 13.
[10]Heßler in Zöller, ZPO, 28.Auflage, §543, Rn. 17.

eral laws applied in the situation of the supervision of the TSC are carried out within the framework of the stare decisis doctrine which does not exercise review directed to law, and the review is carried out only with the content of the decision which deviates from the previous interpretation of the TSC. It was mentioned that part 1.3 of Article 172.2.3 of Civil Procedure law demanded applying the interpretation of the TSC which is inconsistent with the law. If we explain these as only a phenomenon that legalizes the criteria for filing a complaint in the supervisory court and assume that review on ordinary laws will be implemented after the initiation of the proceedings, then there will be less risk of TSC apply an interpretation that in conformity with the law and not suitable for the legal relationship. However, in the system where judge-made law applies, the interpretation and decision of the Supreme Court are rendered as a legal act, and if it is interpreted that it will be implemented by the review directed to it, then it is considered as regulation is incapable of representation for our legal system.

❖ Article 172.2.1 of the Civil Procedure Code is aimed at eliminating differences in the decisions of courts with mutual supervision at courts of a lower level, and not at keeping the whole legal practice as unified. Thus, it can't be a method for ensuring uniform application of the law. Article 172.2.1 of the Civil Procedure Code should be in compliance with the principle of ensuring unified application of law stated in Article 25.1 of LOJ, and this regulation should not have the function of granting discretionary solution of the TSC.
❖ It is important to abolish the concept of "the Supreme Court making the final decision" in the legal consciousness of the public and to cultivate the attitude of accepting the decision of the first instance court as well.
❖ It is suitable to interpret that article 172.2.3 of the Civil Procedure Code only legislates the criteria for submitting a complaint for review to the court, and the review of ordinary law will be implemented after initiating proceedings.

3. Resume

On May 3, 2023 was held the session of the Constitutional Court of Mongolia. The Constitutional Court decided whether some provisions of the Law on the Courts of Mongolia, the Law on Administrative Litigation, the Law on Criminal Procedure, and the Law on Civil Litigation violated the relevant provisions of the Constitution of Mongolia. From this meeting of the Constitutional Court was concluded that sub-clauses 25.7.5.a and 25.7.5.b of Article 25 of the Law on Judiciary of Mongolia, Clauses 123.2.1 and 123.2.3 of Article 123 of the Law on Administrative Cases, Review of Criminal Cases Clauses 1.1 and 1.3 of Section 1 of Article 40.1 of the Law on Resolution, as well as Section 2 of Article 40.5 of the Law and Clauses 172.2.1 and 172.2.3 of Article 172 of the Law on Civil Procedure did not comply with Art. 14 and Art. 16 of the Constitution of Mongolia. They will be suspended till December 15, 2023.

In the conclusion, it is noted that there is a need to improve the regulations and remove the loopholes in the context of providing the right of citizens to be tried by a fair court in order to properly ensure the coordination between the

Law on the Judiciary of Mongolia and the criminal, civil, and administrative process laws.

- Within the scope of §172.2.1 of Civil Procedure law, to replace regulation with the meaning of ensuring uniform application of law following article 25.1 of LOJ.
- Within the scope of article 172.2.3 of Civil Procedure law, if it is explained as to review decisions deviating from the interpretation that complied with the law, and if there is an interpretation that does not comply with the law, a mechanism for the the Supreme Court is to review its interpretation compared to the law, creates the conditions that correctly determine the application of new regulations.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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