



CCJE-BU (2017)1

Strasbourg, 12 January 2017

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

**Questionnaire for the preparation of the CCJE Opinion No. 20 (2017):
“The role of courts with respect to uniform application of the law”**

Please in your answers do not send extracts of your legislation but describe the situation in brief and concise manner.

Comments on what are also happening in practice, and not only on point of law, will be much appreciated.

Introduction

The first section deals with the concept of the uniform application of the law in the way, in which it possibly exists, is understood and is operated in different member states of the Council of Europe.

The second section proceeds to discuss the role of the legislative and executive powers in ensuring the uniform application of the law through adoption of consistent legislation and executive acts.

The third section highlights the role of courts in ensuring the uniform application of the law through consistent court case law. **This section, due to the mandate of the CCJE, is the key section of the Opinion.**

The Bureau and the Secretariat of the CCJE would like to strongly thank you for your cooperation and contributions.

1. Concept of the uniform application of the law

1.1 Is there in your country a concept of the uniform application of the law? Is it formal, established at the level of the Constitution and/or legislation, or rather informal, discussed and set at various level and applied in practice through common understanding? Is it a combination of both approaches, to various extents?

Answer to 1.1

1.1. Yes, we have in Romania a formal concept of unification of law, both in the Romanian Constitution, inside the art 126, alignment 3 as well as in law 304/2004 with later modifications about judicial organization, in the dispositions of art 18 alignment 2 that stipulate that „the High Court of Cassation and Justice ensures the interpretation and uniform application of the law by the other judicial instances, according to its competency.”

Moreover the criminal and civil codes contain dispositions referring to the ensuring of a uniform judicial practise in respect to those pertaining to the recourse in the interest of law (art. 471-474/1 from the Code of Criminal procedure and art. 514-518 from the Code of civil procedure) and at the specific intimation of the High Court with respect to offer a preliminary decision in the court cases issues of law matters. (Art 475-477/1 from the Code of Criminal procedure and art 519-521 from the code of civil procedure).

1.2 What is understood in your country under the concept of the uniform application of the law? Is it understood in the form of:

- consistent legislation to be adopted at legislative level;
- uniform practices by the executive institutions and law enforcement bodies;
- Uniform case law developed by courts.

Please explain each point and indicate the relative importance of each point.

1.2. The concept of uniform application of law in Romania is seen by the way in which the laws are applied by the courts of law, but also by applying the decisions with an interest wo the law or the decisions with a view of solving some law cases as they are pronounced at the High Court of Cassation and Justice.

For the time being legislative adoption of coherent legislation in many domains is aggravated by the way in which the changes are perceived and understood at the immediate reality level, as some needs for correction of some recent laws appear, especially in the administrative and fiscal legal department, which makes a unified application of law in this field to be harder to achieve.

1.3. What is the rationale of the uniform application of the law in your country and which kind of outcome for the population it is supposed to produce?

1.3. The uniform application of law in Romania is necessary for ensuring trust for all the citizens in the justice system, for the simplification of social and economic processes, jurisdictional procedures and the transparency of the justice act.

This process ensures the raising of awareness inside the society that there is need for consolidation of the new dispositions introduced in the codes of procedure in order to get a uniform application of law, which reflects into the obey of equality principles for all citizens versus law, and the consequences as known by the law makers.

2. Role of the legislative and executive powers in ensuring the uniform application of the law

2.1 Are there in your country formal or informal requirements for ensuring the uniformity in the legislative process?

2.1. Indeed, there are, at formal level in Romania, demands regarding the standardization of the legislative process included in Law 24/2000 regarding the norms of legislative technique for establishing legal acts, republished in 2010. Article 2nd, paragraph 1 of the law provides: “the legislative technique ensures the rationalization, unification and coordination as well as the content and juridical form appropriate for each law”

2.2 Is there a hierarchy of laws?

2.2 Indeed there is a hierarchy of the laws: the Constitution, the qualified laws, laws, decrees, government resolutions, orders, and internal regulations.

2.3 How the conformity of national laws to treaties and other international instruments is ensured? How the latter are applied in your country: directly or through national implementing legislation?

2.3 In the legislative process in Romania, state subject to the rule of law, member of the European Union, of the European Council, of NATO, the drafting of laws harmonises both with the treaties and other international instruments as well as with the bilateral and multilateral treaties. Up to the moment of ratification of the international instruments, these have a direct implementation and from the moment they are ratified and transposed in national laws, they are implemented in accordance with the national law provisions.

2.4 What are the arrangements in cases of contradictions between national laws, or between national law and treaty?

2.4. Article 20, paragraph 2nd of the Romanian Constitution provides that “in case of disagreements between the pacts and treaties regarding the fundamental human rights, in which Romania is a member, and the internal laws, the international regulations prevail except for the case in which the Constitution and the internal laws contain more favourable provisions”.

2.5 How usually law making process is carried out in your country? Which of the powers of the state has in practice dominant role in this process?

2.5 During the law drafting process there is general and special legislative initiative at the level of the Ministry of Justice that either advocates or endorses a law that they do not draft. There is also initiative in drafting the laws from the members of Parliament, Parliament groups that can submit their initiative at the Parliament’s chambers and follow the procedures expressly provided by the law.

The drafts of the bills made by the ministries, or by the Ministry of Justice are submitted to the Romanian Parliament that allocates them to either the Senate of the Chamber of Representatives according to the laws and parliamentary regulations, establishing the decisional board. Within the Boards, there are juridical commissions at each level. The legislative process takes place with the participation of the initiator of the law, of observers who are specialized in the respective field and after asking for their opinion a report is adopted, drafted, and then submitted to the full Board to be adopted. The project then reaches the decisional Board where it follows the same procedure (juridical commission, vote and report) and then is submitted to the full Board. There is a prior constitutionality control and an ulterior one, through the mechanisms expressly provided by the law.

Thus, the Romanian Parliament is the only legislative Board and only when it is closed for the Parliamentary holidays the Government has the possibility of adopting resolutions, which are going to be submitted to pass by the Parliament afterwards.

2.6 Are acts of the executive power source of law in your country and in that respect are they legally binding for the courts?

2.6. Indeed the deeds of the executive power are sources of law and can be brought up before the Court that is before the administrative and fiscal Courts within the courts of law, Court of Appeal, the High Court of Cassation and Justice.

2.7 In your opinion, are laws too often amended in your country and does it affect the legal certainty in the country?

2.7. Indeed, in some subjects such as public acquisitions, fiscal areas, there are many modifications and this makes it difficult for the law to be uniformly enforced.

3. Role of courts in ensuring the uniform application of the law

3.1 Has the court case law in your country binding legal effect and is it a source of law? If yes, to what extent? To the same extent as the national legislation?

3.1. Yes, the uniformization of the case of law in decision making in the interest of the law and of the prior decisions for settling questions of criminal and civil law, delivered by the High Court of Cassation and Justice is a source of law meaning that the court of competent jurisdiction when is notified with a similar cause will resolve them based on the decisions taken by the Supreme Court these being binding decisions published in the Official Gazette just like the laws, the regulation norms of the codes expressly underlining their obligation.

3.2 If the court case law in your country does not have binding legal effect, to which extent it is recognised as important for judges, at formal or informal level?

3.2. Not necessary, see answer from 3.1

3.3 In either case, have the courts a role to unify in any way the case law, and if yes, which courts and in which way? Are there special arrangements within each court – or between different courts at horizontal or vertical level within the hierarchy of courts – to ensure uniformity?

3.3. At internal regulations level. The internal regulations of the courts of competent jurisdiction in Romania there includes in the 4th section, norms regarding the unification of the judicial practices, both at horizontal and vertical level.

Within these provisions it is mentioned that at the level of each section or jurisdiction there are going to be organized monthly meetings of the judges to discuss the law questions that have triggered different solutions or brand new questions of law, the judges draft their studies and the opinions about the discussed questions are recorded in the meeting minutes following the model of the semester minutes that are analysed during the meeting of the Appeal Court.

In the situation in which, in a case that he has to award a solution to, a judge notices very complex and brand new juridical questions and estimates that the courts will keep receiving similar cases that can be awarded non-uniform solutions; the judge

can request the President to organize an ad-hoc meeting of all judges that are to solve some similar cases.

The procedure for quarterly meetings is established by the Judge Department from the Superior Council of Magistrates at these may be invited also judges from the special section from the High Court of Cassation and Justice, to discuss issues of non-uniform practise at national level.

The courts of law must complete and update the portal by publishing.

3.4 Are there specialised courts in your country? Is there a hierarchy of specialised courts if such system exists? Is it possible to challenge final judgments of specialised courts before superior judicial body (Supreme Court or court with a similar role). If yes, please explain in short.

3.4. Yes, there are specialized courts of law, specialized sections to the courts of law, tribunals, courts of appeal as well as specialized sections in certain matters, such as intellectual property law.

Yes, their decisions are challenged using ordinary means of appeal in court, courts of appeal or High Court of Cassation and Justice.

For example, the judgment of the juvenile specialized Court in Brasov in criminal matters can be appealed at the Brasov Court of Appeal, Criminal Division for cases involving minors, using the procedure provided by law, judging the devolution character of the appeal and also by using evidence.

3.5 Is the unification of case law (mentioned in the question 3.3) determined by the Constitution, laws, and by-laws or by long lasting practice?

3.5. The unification of the practice is an exclusive prerogative of the High Court of Cassation and Justice laid down in the Constitution and in the Organic Law, and for other courts of law founded in the regulation.

3.6 Are judgments of such courts (mentioned in the question 3.3) obligatory to follow for:

- judges/panels of that court;
- all judges in the country;
- Are there any consequences for judges if they do not follow case law of higher court?

3.6. The decisions of the High Court of Cassation and Justice in the matter of law practices uniformization are mandatory for all judges in the country and their application failure to comply, is considered a disciplinary offense, punishable by law.

3.7 If judgments of such courts are not obligatory, what kind of practical effect they may have?

3.7. Lower court decisions are not binding for the other, but they respect the decisions of the Supreme Court.

3.8 What are the procedures, if any, applied when there are contradictions or deviations in the case law between different courts or different levels within the same court including superior courts (appealing, rendering legal opinions of court departments, preliminary rulings *in abstract* etc.)?

3.8. It was explained by the response from section. 3.3.

3.9 Either in the case when the case law has binding legal effect, or in the case when it is not binding but otherwise has some impact, in which, if any, situations would it be regarded as permissible or maybe even necessary to depart from the case law?

3.9. The removal of a non-unitary jurisprudence is taken by the decisions of the High Court of Cassation and Justice.

3.10 What is the role of the Supreme Court or any other highest court in your country in establishing uniformity of application of law? Please explain how it is possible to access the Supreme Court and are there any discretionary powers in granting right to hear the case, and what would be the criteria for such possibility (filtering criteria)?

3.10. The High Court of Cassation and Justice plays the main role in the practice of standardization, using appeal in the interest of the law, or by referral to a judgment prior to unravelling a question of law. Regarding the appeal in the interest of the law, this is introduced by the General Prosecutor's Office attached to the High Court of Cassation and Justice ex officio or at the request of the Minister of Justice, the leading board of the High Court of Cassation and Justice or the management boards of appeal courts, asking the Supreme Court to rule on points of law that have been resolved differently by other courts. This is going to be judged in a panel of 25 judges whose speciality is different in accordance with the matter of law that has to be solved, their assignment is random, and one reporting judge is nominated.

The report will include the different solutions given to the matter of law and the arguments that they are founded on, jurisprudence relevant to the Constitutional Court, of the High Court of Cassation and Justice, European Court of Human Rights, the Court of Justice from The European Union and the opinion of consulted specialists, if the case may be as well as the doctrine.

The decision is taken just in the interest of law and has no further effects over examined judicial decisions and not relevant to the situation of parties that are under trial in court.

The solution of the law matters is mandatory for the law courts from the date of their publication in the Romanian Official Gazette, Section 1.

Effects of the decision terminates in the case of abrogation, finding of unconstitutionality or amending of legal provisions that generated the law matter to be solved, with the exception that it subsists in the new regulation.

In the second procedure, if during the trial, a panel of judges of the High Court of Cassation and Justice, the Court of Appeal or the court in charge of solving the cause in its last instance, noticing there is a matter of law, of whose explanation depends the settlement of the cause in question and on which the High Court of Cassation and Justice has not ruled in a prior judgment or through an appeal in the interest of law and that is not subject of appeal to the pending law, it may request from the High Court of Cassation and Justice to issue a decision that may in principle solve the matter of law with which it has been notified. The notification shall be sent to court in front of a panel of eight judges from the respective department, randomly assigned, and a judge is appointed rapporteur. The report will have similar contents as for the other procedures mentioned. Unravelling of the law matters is mandatory for the courts of law from its publication in the Official Gazette of Romania, Part I. Termination or modification of the effects of the decision are the same, such as in terms of the decision in the interest of law, as previously mentioned.

3.11 How is the case law of the European Court of Human Rights and other supranational courts or quasi-judicial bodies ensured and applied at national

level, and how such case law affects the unification of national case law in your country?

3.11. The jurisprudence of the European Court of Human Rights and other supranational courts has applicability under the conditions of article 20, alignment 2 from the Romanian Constitution and Community Treaties, sometimes it is applied directly, sometimes it is kept in mind as basis for national laws and applied through these laws.

The new codes of criminal and civil matters that have been adopted in 2010 and 2014 and that are also enforced now guarantee fully the application of the European Convention for defending Human Rights and Fundamental Freedoms, the jurisprudence of the European Court, Community Treaties, these have harmoniously regulated in accordance with several European states, but also as a consequence of Romania's condemnation at the European Court that led to the imposing of such norms.

3.12. In which way the court case law, including above-mentioned international case law, is assembled, published and made otherwise accessible for:

- judges;
- other legal professionals;
- General public.

3.12. The relevant jurisprudence for all courts from the Romanian judicial system is published on the portals: *just.ro*, *scj.ro*, in the newsletters dedicated to jurisprudence and cassation easily accessible to all judges, professionals and the large public in general.

3.12 Is the access to such database free of charge?

3.13. Access to this database is free.

3.13 Are courts the only source of information or there are more providers (on a commercial basis or through free access)? If the latter is the case, are such providers independent entities, and are they operating on commercial or not commercial basis?

3.14. There are also applications of jurisprudence, Jurindex, Lex Expert, the Legal Universe and on line professional platforms, accessible in exchange to a fee.

3.14 What are the challenges for the unification of the case law in your country? Does the quality of national legislation pose a challenge – for example the need in modern society to use relatively broad definitions and legal concepts?

3.15. Yes, unification of jurisprudence in Romania becomes a challenge, the quality of laws, imposing yet even more the functioning of these mechanisms, quality of laws, even if it has increased, based on the principles of transparency and after consultations with the entire professional law makers, however, it needs to control by means of these tools. Any other point you wish to rise. I believe that the unification of the national jurisprudence is a constantly challenging situation resulting from specific legal matters, from the way of comprehension of law, its application, and acceptance of the role and importance of law in a state law. I also assess that as realities do change, a simplified use of tools and procedures is needed, by increasing the dialogue among the three powers of state, with a view of ensuring the trust of the parties involved in the law court. The simpler the laws, the more coherent, predictable and of high quality, the easier it will be for them to be applied, by simplified procedures and alternatives, by the courts

of law, and the sides within the court of law will have to accept their quality, but also the Service of Justice.

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