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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 is 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. 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?

The concept of uniform application of law is established at the level of the Fundamental Law (i.e. the Constitution). According to Article 25 of the Fundamental Law, the Curia, the highest judicial authority of Hungary, guarantees the uniform application of law, its uniformity decisions are binding on all courts.

Act CLXI of 2011 on the organization and administration of courts contains more detailed provisions on how the Curia is to fulfil its constitutional duty: “In carrying out the functions delegated under Article 25(3) of the Fundamental Law the Curia shall adopt uniformity decisions, perform the analysis of cases resolved by final decision, and publishes Curia decisions of principle and court decisions of principle.” (§ 25)

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.

In Hungary, “uniform application of law” primarily refers to uniform case law developed by the courts.

To a lesser extent, the concept includes uniform practices by executive institutions and law enforcement bodies.

The concept does not include consistent legislation as legislation (the “making” of law) is not understood as the application of law.

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?

It is supposed to produce legal certainty for citizens.

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

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

There are formal requirements. An Act of Parliament (Act CXXX of 2010 on the adoption of legal acts having the force of law) contains detailed uniform rules about the preparation, adoption and promulgation of statutes and subordinate legal acts.

2. Is there a hierarchy of laws?

Yes.

According to Article T (3) of the Fundamental Law (i.e. Constitution), legal acts having the force of law [for the list of such legal acts see answer to question 2.6] may not be contrary to the Fundamental Law.

According to Article 15 (4) of the Fundamental Law, Government decrees may not be contrary to Acts of Parliament.

According to Article 18 (3) of the Fundamental Law, decrees issued by the members of the Government may not be contrary to Acts of Parliament, Government decrees and decrees of the Governor of the Hungarian National (Central) Bank.

According to Article 23 (4) of the Fundamental Law, decrees issued by the heads of autonomous regulatory agencies may not be contrary to Acts of Parliament, Government decrees, decrees of the Prime Minister, ministerial decrees or decrees of the Governor of the Hungarian National (Central) Bank.

According to Article 32 (3) of the Fundamental Law, municipal decrees (i.e. decrees issued by local authorities) may not be contrary to any other legal act having the force of law.

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?

The conformity of national laws with international treaties is ensured in two ways:

ex ante: during the preparation of the law, conformity with international and European law must be ensured (according to Act CXXX of 2010 on the adoption of legal acts having the force of law),

ex post: the conformity with international treaties is verified by the Constitutional Court (see answer to question 2.4).

International law is applied indirectly, through national implementing legislation. According to Art. Q(3) of the Fundamental Law (i.e. the Constitution): “Hungary shall accept the generally recognized rules of international law. Other sources of international law shall be incorporated into Hungarian law upon their promulgation by [national] laws.”

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

The Constitutional Court verifies if legal acts having the force of law (see answer to question 2.6) are in conformity with the Fundamental Law (i.e. the Constitution).

According to Art. 24 of the Fundamental Law, the Constitutional Court has power to

- review, upon the initiative of any judge, of laws to be applied in a specific case with regard to their conformity with the Fundamental Law;
- review, on the basis of a constitutional complaint, of laws applied in a specific case with regard to their conformity with the Fundamental Law;
- review, on the basis of a constitutional complaint, of court decisions with regard to their conformity with the Fundamental Law;
- review laws with regard to their conformity with the Fundamental Law at the initiative of the Government, one-fourth of all Members of Parliament, the President of the Curia, the Prosecutor General, or the Commissioner of Fundamental Rights [ombudsman];
- examine the conformity of national legislation with international treaties.

The Constitutional Court has the power to annul

- any law or statutory provision that is contrary to the Fundamental Law or an international treaty;
- any court decision that is contrary to the Fundamental Law.

The Curia has the power to verify the legality of municipal decrees and may annul such decrees if appropriate.

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?

It is the Parliament that has the power to enact statutes (Acts of Parliament), but the government, members of the government, local authorities and other executive organs can also adopt subordinate legal acts having the force of law.

See answer to question 2.6.

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

According to Article T (2) of the Fundamental Law (i.e. Constitution), legal acts having the force of law include

- the Acts of Parliament (statutes),
- government decrees,
- decrees of the Prime Minister and other ministers,
- decrees of the Governor of the Hungarian National (Central) Bank,
- decrees of the heads of autonomous regulatory agencies,
- municipal decrees,
- decrees issued by the National Defense Council during a state of national crisis
- decrees issued by the President of the Republic in a state of emergency.

Apart from Acts of Parliament, these are acts of the executive power and they are legally binding on the courts. (But judges/courts can apply to the Constitutional Court for the verification of the conformity of a given legal act with the Constitution.)

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

Yes, laws are all too frequently amended, even during the period of *vacatio legis* (i.e. between the enactment and the entry into force) and often shortly after their entry into force. Naturally this has a negative impact on legal certainty.

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

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?

Only so-called uniformity decisions of the Curia are binding on all courts.

Uniformity decisions are not decisions in individual cases, but rather contain abstract statements about the correct interpretation of law and explanatory notes (i.e. explanation of the reasons underlying the abstract statements).

The Curia also publishes so-called “Curia decisions of principle” (Elvi Bírósági Határozat, abbreviated as EBH) which are only binding on the Curia. These are decisions given in individual cases. If a judicial panel of the Curia intends to deviate in a point of law from a previous Curia decision of principle, a uniformity decision must be adopted (in order to overrule the previous Curia decision of principle).

Other court decisions do not have a binding effect.

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?

Court decisions which do not have a binding effect usually have persuasive authority, i.e. lower courts tend to follow the case law of higher courts.

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?

To promote and ensure the uniform application of law, the Curia

adopts uniformity decisions,
performs the analysis of case law (i.e. cases resolved by final decision) in working groups,
issues Curia decisions of principle and
selects and publishes lower courts’ decisions of principle.

Each of these methods is regulated in detail in Act CLXI of 2011 on the organization and administration of courts.

Uniformity decisions

A uniformity procedure is to be conducted:

- a) if a new uniformity decision or the amendment or withdrawal of a previous uniformity decision is required on an issue of principle to improve the case law or to ensure the uniform application of law, or
- b) if a panel of the Curia intends to deviate in a point of law from a previous decision of another panel published as a Curia decision of principle or from a court decision of principle.

In the second case the panel (which intends to deviate from a Curia decision of principle or a court decision of principle) initiates a uniformity procedure and suspends the proceeding until the uniformity decision is adopted.

A uniformity procedure can be initiated by:

- the President or head of division of the Curia, or their deputies, or by the president of a regional court of appeal;

- the president of a panel of the Curia in the case b) described above;
- the Prosecutor General.

The President of the National Office of the Judiciary (OBH) does not have the right to initiate a uniformity procedure, but he/she may notify the President of the Curia if in his/her view a uniformity procedure should be conducted in order to ensure the uniform application of law.

The person who initiates a uniformity procedure must specify in the motion for the uniformity decision the issues and the reasons for requesting the uniformity decision, and in the case b) described above he must also make a recommendation as to the substance of the decision.

Each division of the Curia has a uniformity panel: there is one in criminal law, one in civil and commercial law and one in administrative and labour law. The uniformity panel is chaired by the President of the Curia, the Deputy President of the Curia, the head of division or the deputy head of division. The uniformity panel consists of the chair and four members. Members are selected by the chair of the uniformity panel.

If a uniformity procedure concerns the uniformity panels of different divisions, the chair of the uniformity panel appoints judges from each division affected. Such uniformity panels consist of a chair and six members, chaired by the President or Deputy President of the Curia.

The person who initiates a uniformity procedure may not be the chair of the uniformity panel, except for the case when all judges of the affected division of the Curia participate in the uniformity panel (see below). In the case b) (see above), members of the uniformity panel are selected in the following way: no majority is allowed for members of the panel which intends to deviate in a question of law from a Curia decision of principle or a court decision of principle, or for members of the publication panel which decided to publish the Curia decision of principle or the court decision of principle. (On publication panels see the section on Curia decisions of principle below.)

All judges of the affected division of the Curia participate in the uniformity panel if the purpose of the uniformity procedure is:

- a) the amendment or withdrawal of a previous uniformity decision; or
- b) to decide an issue of principle to improve (develop) the case law.

In this case,

the chair of the uniformity panel is the President or the Deputy President of the Curia, the uniformity panel adopts its decisions with a two-thirds majority of the members present. (In other cases, the uniformity panel adopts its decisions by a simple majority.)

Uniformity decisions are also published on the website of the Curia, see <http://kuria-birosag.hu/en/uniformity-decisions>

Working groups analysing case law

The Curia establishes working groups which have the duty to analyse the case law on a given topic and to prepare non-binding summary opinions on the result of their investigation.

The topics to be investigated are determined annually by the President of the Curia, following consultation with the divisions of the Curia. The heads of divisions of regional courts of appeal and courts of appeal, the heads of the administrative and labour regional colleges, the President of the

National Office of the Judiciary (OBH), the Prosecutor General, law faculties and the Bar Association may also present recommendations.

On the topics recently analysed by the working groups see the English summaries at <http://www.kuria-birosag.hu/en/forum-sententiarum-curiae-current>

The chair and the members of the working group are appointed by the President of the Curia, separately for each subject, from among the judges of the Curia, based on a recommendation by the heads of the divisions. The chairperson of the group may invite judges of lower courts and external experts having theoretical or practical knowledge of the questions/field of law examined.

The affected division of the Curia holds a discussion about the summary opinion prepared by the group and, if approved, the opinion is published on the website of the Curia. See <http://kuria-birosag.hu/en/jurisprudence-analysing-working-groups>

Relying on the findings of the summary, the head of the relevant division of the Curia may propose – *inter alia* – the opening of a uniformity procedure, or may lodge a legislative initiative at the President of the National Office of the Judiciary (OBH) through the President of the Curia.

Curia decisions of principle

The Curia has four special panels (each consisting of 5 judges) to select and publish Curia decisions of principle and court decisions of principle:

- a publication panel on general private (civil) law,
- a publication panel on commercial law (including company and insolvency law),
- a publication panel on criminal law and
- a publication panel on administrative and labour law.

If a judicial panel of the Curia adopts a decision on a matter of principle in a case that concerns a large number of citizens or that raises fundamental issues of public interest, the presiding judge shall, after the decision is executed in writing, notify the head of the Division affected. The head of Division submits the decision to the publication panel which decides whether to publish the decision as a Curia decision of principle. As written above, a decision published as a Curia decision of principle has binding effect for the Curia only.

Court decisions of principle

If the President of the Curia or any head of any division of the Curia is informed that a lower court has adopted a decision that fits the above-mentioned criteria, and the conditions for the commencement of a uniformity procedure or for the publication of a Curia decision of principle (on the same issue) are not satisfied, they submit the decision to the publication panel affected which decides whether to publish the decision as a court decision of principle.

The role of lower courts

Lower courts [in the order of hierarchy: regional courts of appeal, courts of appeal, district courts] also have certain duties to ensure and promote the uniform application of law:

If a judge or a judicial panel of a regional court of appeal, a court of appeal, an administrative and labour court or a district court has adopted a decision that concerns a matter of principle, such decision of principle shall be presented to the president of that court when it becomes final.

The presidents and heads of divisions of regional courts of appeal and courts of appeal as well as the presidents of administrative and labour courts and district courts must monitor on an ongoing basis the decisions adopted by the courts they supervise.

If the president or the head of division of a regional court of appeal or a court of appeal (or the head of an administrative and labour regional division) finds – on the basis of the decisions submitted to him by judges or judicial panels or other cases decided by the court or on the basis of inspections or any other information – that

a decision of principle has been adopted, or
 there is a contradictory judicial practice in matters of principle, or
 final judgments have been adopted on the basis of contradictory doctrine in the court they direct or in a court they supervise (or in a court attached to the administrative and labour regional college),

he must notify the president of the higher court and must submit the decisions in question and any other document that may be necessary.

Before such notification the president or the head of division of the regional court of appeal or court of appeal (and the head of the administrative and labour regional division) may consult the judges of the division (or the administrative and labour regional division) affected.

To promote the coherence and consistency of case law, divisions of courts (including administrative and labour regional divisions)

monitor the practice of the courts within their jurisdiction and publish a formal “opinion” where there is any dispute regarding the correct application of the law on any matter [such opinions contain abstract statements, are not binding, but have a persuasive authority], and

participate in the working groups established by the Curia to analyse the case law if so requested by the chairperson of such working group.

The heads of divisions of regional courts of appeal and courts of appeal may make a recommendation

to the head of division of the Curia or the president of the regional court of appeal for the initiation of a uniformity procedure, or

to the President or head of division of the Curia for the publication of a court decision of principle.

Judges of the Curia participate in the meetings of the divisions of regional courts of appeal and courts of appeal (and in the meetings of administrative and labour regional divisions).

A representative of the regional court of appeal attends the meetings of divisions of courts of appeal within its area of jurisdiction.

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.

At the level of district courts (i.e. the lowest level of the court system), there are specialised Administrative and Labour Courts. At the higher levels of the court system (i.e. courts of appeal, regional courts of appeal, Curia), there are only specialised administrative and labour divisions within the courts. Even if a judgment becomes final at the level of the Administrative and Labour Courts (e.g. in the case of judicial review of administrative decisions), it is possible to apply to the Curia for a review of the decision.

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

The various methods to promote the uniform application of law are determined and regulated in detail in Act CLXI of 2011 on the organization and administration of courts.

In addition, Article 25 of the Fundamental Law also provides that the Curia, the highest judicial authority of Hungary, guarantees the uniform application of law, its uniformity decisions are binding on all courts.

**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?**

As already mentioned, only uniformity decisions of the Curia are obligatory to follow for all judges/courts of the country. Decisions of the Curia published as “Curia decisions of principle” are obligatory to follow for all judicial panels of the Curia, but not for other courts. (It happens that a regional court of appeal refuses to follow a Curia decision of principle, or one judicial panel of a regional court of appeal follows a Curia decision of principle, while another panel of the same regional court of appeal does not.)

The only consequence for a judge/judicial panel who/which fails to follow the case law of higher courts is that his/its decision may be annulled by a higher court. There are no disciplinary consequences of failing to follow the case law of higher courts, but judges are subject to regular evaluation (in the 3rd year after the appointment, then every 8th year), and, as part of the evaluation, the head of division obtains the opinion of the head of division of the court of second instance (appeal/review court) about the work of the judge. This means that a judge who keeps ignoring settled case law and therefore his decisions are regularly annulled by the appeal/review court may receive worse results in the evaluation process.

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

See answer to question 3.2.

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 abstracto etc.)?

See answer to question 3.3. The three most important methods to resolve contradictory interpretations of the law are

the adoption of a uniformity decision by the Curia,
 the adoption of an opinion by a division of a court,
 the analysis of the case law by a working group set up by the Curia (which may result in the recommendation of the opening of a uniformity procedure).

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?

If a court disagrees with a decision of any other court (whether lower or higher), the court may depart from the earlier decision except for uniformity decisions. There are no formally established criteria for the permissibility (or necessity) of such departure from earlier case law, but obviously this happens when the applicable statutory provisions are not clear, i.e. they allow for different interpretations.

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)?

See answer to question 3.3.

It is possible to apply to the Curia for the review of a final decision on the basis of an alleged violation of the law. There are rather complicated statutory provisions about the cases when review by the Curia is excluded. In the new Civil Procedure Act (enacted in 2016, to take effect from 1 January 2018) the Curia is granted discretionary powers to permit an application for review even in cases when review is prima facie excluded. The Curia will have such power if the review of the final decision is necessary

- a) to ensure the development or uniform application of law,
- b) because of the social importance of the point of law raised in the case,
- c) because the case should have been referred to the Court of Justice of the European Union for a preliminary ruling, but the court of second instance failed to make such a reference,
- d) because of deviation from the published case law of the Curia. (§ 409 (2))

In addition to review by the Supreme Court, final decisions in individual cases may also be challenged before the Constitutional Court for alleged violation of the Fundamental Law (i.e. the Constitution). This is called a constitutional complaint.

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?

As mentioned above, it is possible to challenge final decisions of courts before the Constitutional Court for alleged violation of the Fundamental Law (i.e. the Constitution). In interpreting the

Fundamental Law, the Constitutional Court takes into account and normally follows the case law of the European Court of Human Rights (ECtHR). In addition, regular courts (including the Curia) also take into account and refer to the case law of the ECtHR when relevant.

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.**

For judges, internal databases exist, for example a database with all decisions of the Curia and the regional courts of appeal.

For legal professionals (including judges, of course), case law is published in printed as well as online electronic format.

Printed

Important decisions of the Curia are selected and published in a monthly legal periodical (Kúriai Döntések, earlier: Bírósági Határozatok, BH for short). This contains not only uniformity decisions, Curia decisions of principle and court decisions of principle, but also other decisions in individual cases (in a somewhat shortened and edited version).

Important decisions of the regional courts of appeal are published in two legal periodicals (Bírósági Döntések Tára, BDT – monthly, Ítéletáblai Határozatok, ÍH - quarterly). (The two periodicals are published by two different publishing houses.)

Electronic, online

On the website of the judiciary (www.birosag.hu) there is an online database (Bírósági Határozatok Gyűjteménye – Collection of Court Decisions) accessible free of charge with almost all final decisions of all courts: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> This database is accessible to the general public, not only legal professionals. Within this database, it is possible to search for decisions according to the court, division of court, area of law, type of decision (uniformity decisions, Curia decisions of principle, court decisions of principle, opinions of divisions, individual cases etc), year of decision, identification number of decision, keywords. However, this database is not quite user-friendly, e.g. decisions are only available in Word format, decisions of different courts in the same case are not linked, etc.

In addition, there are also other online legal databases which contain the case law (as well as other legal information, e.g. statutes). These are more user-friendly, but access is based on subscription.

13. Is the access to such database free of charge?

Only the above-mentioned database on the website of the judiciary (www.birosag.hu) is accessible free of charge.

14. 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?

In addition to the database accessible free of charge on the website of the judiciary (www.birosag.hu), there are also providers operating on a commercial basis. These are two publishing houses (HVG Orac and Wolters Kluwer) which publish printed as well as online material.

15. 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?

Broad definitions and legal concepts may of course pose a challenge, but they have always been used in law (e.g. the concept of bona fides has been used since Roman law) and for a good reason: they allow courts some flexibility and may be useful when the need arises to fill gaps in statute law.

Probably the greatest challenge is the large number of cases courts have to deal with, even at the highest level. (Compare that the Supreme Court of the UK deals with less than 100 cases a year, whereas the Hungarian Curia deals with thousands of cases every year.)

16. Any other point you wish to raise.

None.