

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 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**

1.1 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?

It is stated that the Republic of Turkey is a "rule of law" in Article 2 of our Constitution, after reiterating "equality before law" principle in article 10, "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other agencies and individuals. Laws shall not be in conflict with the Constitution" is included in Article 11.

Besides, "The Council of Ministers may issue regulations governing the mode of implementation of laws or designating matters ordered by law, provided that they do not conflict with existing laws and are examined by the Council of State" in Article 115 of the Constitution, "The Prime Ministry, the ministries, and public corporate bodies may issue by laws in order to ensure the application of laws and regulations relating to their particular fields of operation, provided that they are not contrary to these laws and regulations" in paragraph 1 of Article 124, "Recourse to judicial review shall be open against all actions and acts of the administration" in Article 125 were included.

Besides legal administration principle and equality before law principle, by settling hierarchy of norms and including judicial review, the fact that the uniform application of the law in our country, being valid for each of three powers exercising sovereignty, was especially put forward for executive power as an obligation and judicial power was set as a control mechanism in this connection should be indicated.

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:

The concept of the uniform application of the Law in our country has importance in terms of its meaning given in three chapters below.

- consistent legislation to be adopted at legislative level;

It should be pointed out that the legislative power before our Constitution, by means of making regulations to put equality before law and rule of law principles into practice, is responsible of constituting legal infrastructure to ensure the uniform application of the law.

- uniform practices by the executive institutions and law enforcement bodies;

Besides actions and acts of the executive power, it is obligatory for the executive power to act in compliance with equality before law, legal administration, hierarchy of norms principles to put the uniform application of the law into practice in its regulatory proceedings.

- uniform case law developed by courts.

In relation to "Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution" provision in paragraph 4 of Article 138 of the Constitution, it should be included that judicial power acts as an inspection body with regard to the uniform application of the law. As it is stated, though all three points have indispensable importance in rule of law, it may be

indicated that judicial power that its inspection aspect comes into prominence is relatively more important.

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

- 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?

The uniform application of the law, by means of guaranteeing equality before law and legal certainty principles, results in guaranteeing security of the law and rule of law thus. Application of rule of law has importance since it results in people being subjected to equal treatment before actions of the legislative, executive and judicial powers.

## **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?

The principle of conformity with the Constitutional norms of the legislative power while issuing laws and inspection of whether or not this conformity is properly fulfilled by the Constitutional Court form legal conditions to ensure the uniformity in the legislative process.

- 2.2 Is there a hierarchy of laws?

There is. As given above, in Article 11, 115 and 124 of the Constitution, hierarchy of norms was set up between Constitution, Law, Regulation and by-laws.

- 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?

By including "International treaties duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional. In the case of a conflict between international treaties in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail" provision in paragraph 5 of Article 90 of the Constitution, the conformity of national laws to treaties and international instruments was set up.

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

According to the Constitution, international treaties carry the force of law. In the case of a conflict between international treaties in the area of fundamental rights and freedoms and the domestic laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail.

- 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?

Authorized body for the legislative process is the Parliament. Council of Ministers and deputies are entitled to present a bill.

Importance of the executive body outweighs in the process of bill of law and enactment of the bill proposed. The executive body can strengthen its role in legislative arrangement by means of issuing decree law, regulation and by-laws.

- 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?

Acts of the executive power are not source of law. Besides not being binding for courts, all kind of acts of the executive power are subjected to judicial review.

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

In the areas that have not reached stability yet, laws can be relatively too often amended. This sometimes has negative effects on legal certainty.

### **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?

"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution" provision is included in the last paragraph of Article 138 of the Constitution.

Additionally, "case law unifying decisions are binding for Plenary Sessions of the Court of Cassation, its chambers and courts of justice" provision in paragraph 5 of Article 45 of the Court of Cassation Law, "Chamber and sessions of the Council of State and administrative courts and administration shall abide by these decisions" provision in paragraph 4 of Article 40 of the Council of State Law are given.

Therefore, court decisions are binding. On the other hand, needs stemming from legal situations showed up by court decisions guide law-maker to enact and enactment is not rare by virtue of court case law.

- 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?

Court decisions are binding for everyone.

- 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?

To ensure uniformity in judicial decisions, case law unifying establishment is set up and this duty is under the authority of the Court of Cassation and the Council of State. Pursuant to the Court of Cassation and the Council of State Laws mentioned above, case law unifying decisions are also binding for courts.

- 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.

In our judicial system, there are specialised courts in terms of the field such as family, juvenile, labour, commercial, cadastral, tax courts, these courts are subjected to general appeal/objection procedures too.

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

Unification of court case laws is done by case law unifying decisions of the Supreme Courts mentioned above.

- 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?

Pursuant to Article 45/5 of the Court of Cassation and Article 40/4 of the Council of State given above, case law unifying decisions are binding for judiciary as courts of first instance and supreme courts.

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

- 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 abstracto* etc.)?

Contradictions or deviations between court decisions are resolved by Supreme Courts in court of appellate review.

- 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?

There is no application permitting departure from the case law. However, in changing conditions, courts can amend their case law.

- 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)?

In our country, there is a two-level system of appeal. First level is court of appeals. While for most of the cases to be heard upon objection, these courts are the final decision maker, some of the decisions can be appealed to supreme courts, second level of the system (Court of Cassation, Council of State). The matter that which contradictions fall under the authority of court of appeals or supreme courts is set up by law, courts of first instance do not have determinative judicial discretion in this connection.

Duties of these courts are legality review in general.

- 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?

Decisions of the European Court of Human Rights are directly accessed via ECHR website (HUDOC) in English and in Turkish for some decisions. Besides, the Human Rights Department of the Ministry of Justice and Presidencies of the Court of Cassation and Council of State have ECHR decisions and case law guides translated in Turkish and publish them. While, free access is possible for some of these sources electronically, some are accessed in printed format for a nominal fee.

ECHR decisions concerning the interpretation/application of the European Convention of Human Rights carrying the force of law pursuant to paragraph 5 of Article 90 of the Constitution are binding in our domestic law as case law norm and it has many decisions of courts of first instance and supreme courts referring ECHR's decisions. By this means, it should be reiterated that the ECHR decisions have increasing impact on evolvement of the case law in our domestic law.

- 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.

Court case law and mentioned international case laws are accessible for concerned ones via websites and periodical or non-periodical publications.

- 3.13 Is the access to such database free of charge?

The ECHR decisions are freely accessed through the websites of the Human Rights Department of the Ministry of Justice and Presidencies of the Court of Cassation and Council of State. Printed works (book, journal etc.) are accessed for nominal fee.

- 3.14 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?

Courts are not the only source of information. It is possible to access information and case laws through electronic publishing and books of independent and commercial entities (publishing houses).

- 3.15 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?

The biggest difficulty for the unification of the case law is to reach consensus. It takes time to assemble different views and make them uniform.

- 3.16 Any other point you wish to raise.