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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”

ANSWERS - C R O A T I A

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?

In the Constitution there is provision that Supreme Court is highest court in the State and that its duty is to secure the uniform application of the law. This is also repeated in Article 20. of Law on Courts.

In the Law on Courts, Article 40., it is a provision which says that conclusions of Assembly of judges on certain points of law are obligatory to all panels of the court (courts of appeal and Supreme Court). There is no such provision for first instant courts.

The opinions of higher and supreme court are not obligatory in formal way for lower courts (only by strength of its argument). In practice lower courts will follow the case law of higher courts because if they do it differently in regular circumstances their decisions will be revised.

Deprivation form case law of Supreme Court or different case law of different courts of appeal is ground for extraordinary appeal. (Revision).

Every 3 month Supreme Court organizes join meetings with representatives of courts of appeal of general and specialized jurisdiction where topics of mutual interest are discussed and conclusions are published on SC web site.(Article 27. Law on Courts).

It is expressively sad in Article 27. Law on Courts that such conclusions must not in any way diminish independence and freedom of a judge in deciding cases.

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.

Uniform case law developed by courts.

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

It is not possible to explain other three points because this concept enshrined in them does not exists in practice. For the third point please see answer under 1.1.

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 rationale is legal certainty and legitimate expectations of the natural and legal persons. It is common remark for the work of the courts that at lower levels legal certainty is very dubious and that parties are not sure what will be the outcome of the dispute in same and very similar factual circumstances. Problem is even more visible in different courts of same level and jurisdiction.

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?

No. The problem which really exist that different laws are regulating same issues in different way so courts are faced with the problem of finding out what law should be applied and how.

2.2 Is there a hierarchy of laws?

Yes. Constitution, Internatinal Treaties, Laws, 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?

Constitution is the highest law in the County. All laws have to be in the conformity with the Constitution. International instruments are applied after the ratification through the Parliament. Exceptions are EU regulations which are applied directly if the nature of the Regulation is of such nature.

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

***Contradictions between national laws are solved by the courts if such question arises in the particular case. Then court is using all principles regarding relations between different laws (lex posteriory rule, lex specialis rule etc.)
If there is contradiction between national law and international treaty international treaty has to be applied.***

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?

***Laws are changed to often in Croatia especially fundamental laws which have been changed in last 10 years for several times, especially Civil Procedural Law, Criminal Procedural Law, Bankruptcy Law, Enforcement Law, Law on Courts, Property Law, Civil Obligation Law etc.
In preparing and proposing laws predominant role is kept in hands of the Ministries and the Government.***

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?

Yes, the general orders delivered by the Government are binding to the Courts. Also Government can deliver so called "Orders with legal power" which can replace laws or amend existing laws but only for the period of one year.

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

Please see answer under 2.5. And YES such practice of changing laws to often contributes to legal uncertainty in great extent.

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?

Case law is not source of law. Regarding binding character of case law please see answer under 1.1.

- 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?

The binding role of case law or legal opinions expressed in judgments of courts of appeal or Supreme Court has semi-formal character.

As it has been expressed under 1.1. there is no obligation for judges of first instant courts to follow the case law of their courts, and there is no formal obligation to follow case law of courts up to court hierarchy. But in practice judges of first instant courts are following the case law of courts of appeal because in the contrary up to appeal it is very likely that their decisions will be squashed.

For panels and judges of courts of appeal (second instant courts) their case law is binding for them. If panel or judge in its decision will depart from the case law the issue will be raised before the Department Assembly of judges and its decision on the question (delivered by majority vote) raised is obligatory to all judges and panels of the court until same question will be raised again. Second instant judges and panels are not in obligation to follow case law of the Supreme Court but if their decision will depart from SC case law it is reason for the extraordinary appeal.

The same situation is in the Supreme Court.

The case law of the SC has no formal binding character for judges and panels of lower courts but in practice courts are following it to avoid unnecessary squashing of judgments.

In any particular case lower court must follow instructions of higher court regarding procedural matters and evidence to be examined but are not in obligation to accept understanding of the law expressed by higher court.

- 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?

Please see answer under 3.2.

- 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.

YES. There are commercial courts, misdemeanour courts and administration courts. All those specialised first instant courts have one court of appeal on national level.

The relation between this first instant courts and their court of appeal are the same as explained under 3.2.

The system of extraordinary appeals or similar instruments allows Supreme Courts to hear the cases proceeded before two levels of specialised courts.

System diverts in some extent in administrative system of justice because against judgment of High Administrative Court only Prosecutor General can lodge request for extraordinary review of the judgment.

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?

The system of unification of case law as explained under 3.2. is determined by Constitution and Law on Courts and procedural laws.

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?

Judgments are obligatory to judges and panels of the particular court with exception to judges of first instance courts.

Judges are in practice following the case law of higher courts. If they do not follow it, it is very likely that under the appeal procedure their decisions will be squashed or changed.

Performance of judges is followed in different aspects and one of them is percentage of squashed decisions. If this percentage is considerable judges final appraisal result could be low and this could affect his/hers chances for promotion or even disciplinary responsibility even that so far never happened in practice of High Judicial Council

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

Judges are following case law of higher courts by virtue of strengths of its arguments and they are aware of necessity to raise level of legal certainty in the justice system.

Other practical effects and measures prescribed in laws with aim to promote uniform application of law are explained under 3.2. and 3.7.

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.)?

The Croatian legal system tries to face such problem with different approaches.

A: If there is different case law between different courts, especially between courts of appeal that is a ground without any limitations to lodge extraordinary appeal before Supreme Court. If SC finds that case law is really different in same factual circumstances SC will deliver judgment and in it solve such discrepancy in particular case and that will be precedent for all other future cases before SC.

B. If there is different case law before same court of appeal the problem can be solved as explained under A. Also in such cases president of court can call all judges of the certain department or all judges of a court if case law and the problem affect all judges to decide what proper case law is and how points of law in dispute should be applied. Opinion

adopted with majority vote of all judges of the Department or Court is obligatory to all judges and panels of the court.

C.If there is different case law before Supreme Court in such cases president of court can call all judges of the certain department or all judges of a court if case law and the problem affect all judges to decide what proper case law is and how points of law in dispute should be applied. Opinion adopted is obligatory to all judges and panels of the court. One of tools to avoid different case law at SC is a system where all rulings of Supreme Court before sending them out pass control in so called "CASE LAW DEPARTMENT" to establish is certain court ruling in harmony with so far existing case law. If particular ruling diverts form established case law this is indicated to the judge/panel .If judge/ panel stays with its opinion then mechanism explained above (Decision of Department Assembly or Assembly of Judges) takes place.

There is on system of preliminary ruling even though in new draft of Civil Procedure Act such possibility is proposed in case of large number of same disputes.

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?

It is allays possible to depart form established case law. Such situation will provoke appeal process and eventually extraordinary appeal procedures before SC where dilemma raised because of different case law will be solved.

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)?

According to Constitution Supreme Court is highest court in the Country and is role is to secure uniform application of the law.

Supreme Court in civil justice acts as highest court and it is possible to access the Court through extraordinary appeal which is always possible if value of the case is over 200.000 Kuna or 500.000 Kuna in commercial cases (1Kuna = 7,50 Euro). Also same kind of legal remedy is allowed if the case in question is labour case.

In other cases of lower value or other kind, parties can lodge extraordinary appeal if the solution in the case depends on solving the question which has general importance for unified application of the law or equity of all in application of law.

One of the reasons for such appeal is different case law of courts of appeal or if where there is no case law of supreme court, or where there is case law of supreme court but case law of court of appeal departs from its (SC) case law, or when from reasons of case law of ECHR it is necessary to establish case law of SC.

The SC firstly decides are there reasons to accept the extraordinary appeal and if panel of five judges finds that there are reasons and that there is need to reaffirm or establish case law SC will deliver competent decision.

If there is no such case SC will discard the extraordinary appeal with short reasoning that there are no grounds to hear the case. (It is in a way filtering criteria).

In criminal justice SC acts mostly as court of appeal but also there are some very limited possibilities to access to the Supreme Court.

The Supreme Court of Croatia serves as appellate court for county court's first instance judgments.

As cassation court, Supreme Court decides upon extraordinary remedies.

The request for extraordinary review of the final judgment is an extraordinary remedy that only defendant may file only against municipal court judgments.

The request for protection of legality is an extraordinary remedy that only prosecutor may file against final judgements.

The conditions for extraordinary remedies are narrow. The request for extraordinary review may not be filed against Supreme Court judgments. The request for protection of legality may be filed against Supreme Court decisions, but this happens very rarely.

Unification of court practice is not possible to the desirable extent because there is no court in Croatia that would decide upon appeals against first instance judgements. County court is an appellate court for municipal courts first instance decisions and Supreme Court is appellate court for county courts first instance decisions.

Extraordinary remedies do not cover all final decisions.

For these reasons, there is a need for one court that will have jurisdiction for all first instance judgments as judges of SC constantly argue but without much of success so far. If High criminal court (HCC) would be established and would have that jurisdiction then the Supreme Court could be cassation court for final decisions that comes from HCC - in that case the request for extraordinary review of the final judgment will be allowed because HCC is not the Supreme Court.

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?

Judgments and opinions in such judgments are obligatory to the court in particular case. Even if ECHR express in its judgment that there was breach of the Convention the case has to be heard again, and case law of ECHR is obligatory for all courts in that case.

Same effect has ruling of Constitutional Court if it finds breach of rights guaranteed by the Constitution.

The rulings have effect by virtue of its arguments.

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.

In Croatia there is data base "Supra-nova" with search engine where case law is accessible free of charge to all judges but as well to all general public without any charge. There are some restrictions in accessibility for searching data base outside of courts.

3.13 Is the access to such database free of charge?

YES

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?

There are also other providers of case law on commercial basis. The sources of information they provide are courts, Official Gazette and judgments of supranational courts.

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?

There are three main challenges. First challenge is quality and instability of national legislating. Second challenge was so far before creating data base “Supra-nova” accessibility of courts case law. Third challenge is overburden of cases so judges cannot devote appropriate time to study the case.

3.16 Any other point you wish to raise.

*Duro Sessa
Croatia*