

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?

At the level of the state of Bosnia and Herzegovina (BiH) there is no concept of a uniform application of law. Bosnian legal domain is fragmented and divided in multiple layers, within which the concept of uniform application of law has been exercised in a particular manner, yet for all lower levels of authorities, including the state level, there is no such concept in the formal sense, either as a governing doctrine, or as the existence of multiple legal and political schools of thought. This issue is also poorly represented in the papers drafted by local lawyers, but there are three indicators that something is nonetheless being done in that regard. There used to be a broad scientific/professional initiative that discussed, within multiple sessions, the need and the possibility of establishing a supreme court, which would have the jurisdiction to unify the application of law. Further, to some extent this function has been performed by the BiH Constitutional Court through its appellate jurisdiction, but it has been limited to violations of constitutional and conventional rights, so the issue has been discussed only within that scope. And as the third indicator, the BiH Case Law Unification Panel has been established under the auspices of the High Judicial and Prosecutorial Council, so even the work of this Panel, through some dozen or so unified positions over the two years of its existence, shows a minimal progress in this largely neglected field.

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.

In BiH, there is no clearly established doctrine or position of the main schools of thought and relevant institutions on the concept of the uniform application of the law. However, according to the few positions that do exist, in BiH the concept is interpreted as a uniform practice within courts. There have been various efforts to have a consistent case law, but it has been a slow and long-lasting process, whose significant results cannot realistically be expected in the near future, mostly because of the fragmented legal system.

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 is necessary for the reasons of legal certainty, equality before the law, exercising other constitutional and conventional rights, and for the full acceptance of the rule of law principle, which characterizes developed and democratic societies. The public should be able to feel the absence of discrimination, equal treatment, equitability and social justice, as well as an ambiance in which there is a certain comfort in terms of living and fulfilling various business and personal plans and interests.

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?

In BiH there exists one state-level, two entity-level and Brčko District (BD BiH), as well as 10 cantonal legislative bodies. Those 14 legislative bodies (BiH Parliamentary Assembly, Parliament of the Federation of Bosnia and Herzegovina (FBiH), National Assembly of Republika Srpska (RS), BD BiH Assembly and 10 cantonal assemblies) have their own rules by which to regulate the legislative process, according to their specificities and responsibilities. There is no general rule on the uniformity in the legislative process that would unify the procedure of adopting laws in all foregoing legislative bodies, but it is worth mentioning that those processes are essentially correspondent.

2.2 Is there a hierarchy of laws?

Yes there is. The State Constitution is superior to all lower legal acts (state laws and by-laws of state institutions, entity constitutions and their laws and by-laws, BD BiH Statute and its laws and by-laws). Also, in BiH the European Convention for the Protection of Human Rights and Fundamental Freedoms enjoys a special status, so that all acts lower than the State Constitution must be in compliance with the Convention. In case an issue has been resolved in violation of the Convention or has not been dealt with at all, until a decision on non-constitutionality is made there is a constitutional ground for the direct application of the Convention.

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?

The conformity of national laws to international acts is ensured through the very legislative process, wherein various parliamentary commissions are tasked with providing for the conformity, but also through the review of constitutionality of laws before the Constitutional Court. International acts apply directly if a matter is not regulated by the national law, and there have been situations where the international treaty itself specifies its direct application, regardless of the existence of national laws.

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

International treaties have a obligatory significance for the country, so if a matter has been regulated differently by law it then must be brought into legislative conformity, while there is always a possibility for the review of constitutionality of such a law before the Constitutional Court.

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?

Draft laws are prepared by relevant ministries and, following or without public debate and consultations with interested groups, the government adopts the proposed law and submits it to the parliament, where it is first discussed within relevant committees (various committees provide their opinions and positions on the proposed law), after which the proposed law enters the legislative procedure before the houses of parliament. The sponsor has a dominant role allowing it not to accept public debate conclusions and positions of interested groups. Most common is a situation where public consultations are carried out only formally, after which regardless of the weight

of arguments the ministry or the government completely ignores them and submits to the parliamentary procedure the draft law that suits them.

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?

No, they are not a source of law and are as such not legally binding for the courts, except in case of general by-laws that must apply in the given case. In such a situation the by-law, if it is an act of executive power, is used in judicial proceedings, but the interpretation thereof is fully up to the court, and the court is not bound by the positions of executive powers concerning the interpretation of the specific norm that is to be applied.

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

Laws are being amended continually, which shows that efforts have actually been made to improve legal solutions, which is to a certain extent acceptable in a country undergoing transition, such as BiH. However, there has been a series of poor amendments made, creating some unsurmountable difficulties in practice, which ultimately has negative implications for the legal certainty. Naturally, it is necessary to pay special attention to the legislative process, especially with the aim of involving broader interest and professional groups in the law drafting process. In BiH there has been a general tendency of political parties to “trade in laws”, thus politicizing technical and legal issues. All this is a product of our early stage of democratic development, poor reception of the rule of law, low legal culture and the absence of political accountability.

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?

In our national legal system case law does not have a binding legal effect and represents a subsidiary source of 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?

Case law plays a rather important role in making court decisions, and despite the fact that legal positions taken in decisions issued by higher (appellate) courts are not formally binding, lower courts still tend to comply with those decisions. The effect of decisions issued by higher courts on lower courts is reflected in the sheer power of arguments.

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?

Since the organization of the judicial system in Bosnia and Herzegovina reflects the complexity of the country’s constitutional structure, the judiciary has been organized on four levels. Both Entities – FBiH and RS, as well as the BD BiH, practically have separate judicial systems. Besides, BiH also has a state court – the Court of BiH.

However, the Court of BiH does not have a cassation jurisdiction, and in that context there is no hierarchy between the Court of BiH and the entity courts. Given such an organization of the judiciary, unification of the jurisprudence has been carried out primarily at the level of each individual judicial system. Both entities have their own supreme courts which through legal positions they take in their decisions or at sessions of court divisions contribute to the uniformity of interpretation and application of law at the entity level. In the Brčko District, the unification of interpretation and application of law is performed by the Appellate Court through its decisions, while at the Court of BiH that role is played by the Appellate Division. Unfortunately, BiH does not have a supreme court that would provide for the uniformity of case law at the level of the entire country.

In accordance with the recommendations given within the Structured Dialogue on the Judiciary, between the EU and BiH, the Case Law Unification Panel was established in 2014 under the auspices of the HJPC BiH. The Panel provides a platform for establishing a continued dialogue between the highest judicial instances, for unifying the case law, and for the discussion about other issues of common interest. Panel members include judges of the Appellate Division of the Court of BiH, the RS Supreme Court, the FBiH Supreme Court and the BD BiH Appellate Court. The Panel has been set up to cover the fields of criminal, civil and administrative law.

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.

The only specialised courts existing in BiH are commercial courts in the RS. Pursuant to the Law on Courts of the RS, the courts with special jurisdiction are the District Commercial Courts (five Courts in total) and the High Commercial Court. The provision of the above referenced Law regulating the jurisdiction of the RS Supreme Court as a supreme judicial instance within the referenced Entity does not explicitly provide for the Supreme Court's jurisdiction concretely over the decisions of the High Commercial Court. The referenced Law, however, provides that the Supreme Court shall decide on extraordinary legal remedies against the final decisions delivered by the courts in the RS (also including the High Commercial Court), where stipulated by the law.

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 obligation of case law unification has been determined by neither the applicable Constitutions in BiH nor the currently effective laws on courts, except implicitly by the Law on Courts of the Republika Srpska within the definition of the jurisdiction of the Supreme Court of the Republika Srpska. Pursuant to the referenced definition, the Supreme Court shall, *inter alia*, have jurisdiction over „taking principled stances for the reason of adjustment of the case law on issues deemed to be important for unified application of laws in Republika Srpska.”

With regard to by-laws, the Book of Rules on Internal Court Performance adopted by the High Judicial and Prosecutorial Council of BiH provides for the obligation of the Presidents of the Entities' Supreme Courts, the Court of BiH and the Appellate Court of the Brčko District BiH to organize meetings of courts' divisions with the aim of case law unification, to be held at least twice a year.

The way of performance of the Case Law Unification Panel, also including the procedure to harmonize legal positions, has been defined by the Rules adopted by the representatives of the Courts participating in the activities of the Panel.

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?**

Legal positions of the Entities' Supreme Courts, as well as the legal positions generally taken in the decisions of the high (appellate) courts are mostly instructive by their character, that is, they are not binding in formal and legal terms. However, the Panel's Case Law Unification Rules have provided that the Panel's positions shall have instructive character for the lower instance courts, but a binding one for the courts the representatives of which are members of the Panel (see the response under 3.3.).

Non-compliance with the case law of the higher court may result in the revocation of the lower-instance court's decision which is based on a different legal position, which is certainly one of the reasons for which lower-instance courts indeed comply with the higher courts' case law, despite its non-binding (non-obligatory) character.

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

Please, see the response provided above for the previous question.

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.)?

Since there is no supreme court at the state-level in BiH, the case law unification at the state level has been presently effectuated through the activities of the Case Law Unification Panel. The Panel adopts its conclusions by taking unified positions on certain legal matters. The conclusions are adopted by a consensus of all members of the Panel, and the members vote on the referenced conclusions following the principle „one court, one vote“. The conclusions adopted by the Panel are thereupon being submitted for verification by appropriate divisions of the courts the representatives of which participate in the Panel's activities. Once the verification has been completed, the unified legal position of the division will become the Panel's legal position. As stated in the response to one of the previous questions, legal positions of the Panel are of the obligatory/binding character for the courts the representatives of which sit on the Panel, or of an instructive character for lower-instance courts.

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?

No derogation from the established case law is prohibited since it has no binding character. However, it may result in the revocation of the court's decision in the appellate proceedings if the high(er) court has noted that the derogation is unjustified, taking into account the circumstances and specific characteristics pertaining to the concrete case.

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)?

As already stated in the responses to the previous questions, there is no concept of a unified application of the laws in BiH, within the genuine meaning of the term, nor is there any supreme court at the BiH state-level.

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?

Starting from the status the ECHR enjoys in the BiH legal system (see the response to question 2.2.), the courts in BiH are under obligation, in rendering decisions falling under their jurisdiction, to take account of the protection of human rights and freedoms guaranteed under the Convention. Along this line, in interpreting the Convention, the courts comply with the legal positions taken in the decisions/judgments of the European Court of Human Rights.

In addition, in war crimes cases, the courts in BiH, particularly the Court of BiH, have relied on the legal positions taken by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda with regard to the application and interpretation of both international criminal and humanitarian 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.**

The case law collection, systematization and publishing in BiH are primarily under the competence of the Judicial Documentation Centre of the High Judicial and Prosecutorial Council of BiH. The core function of the Centre is to provide the holders of judicial functions and the wider legal community with a simple access to a wide spectrum of reliable legal information including, *inter alia*, a review of the case law of international judicial institutions, as well as the judicial institutions in the neighbouring region. In addition, the follow-up of the case law of the Entities' Supreme Courts and the Court of BiH has been ensured by way of the case law bulletins periodically published by the referenced Courts and posted on their respective web-sites, and thereby making them accessible to not only the legal community but to the general public too. Ultimately, decisions and judgments of certain courts are being published on their web sites. Concretely, all decisions of the Constitutional Court of BiH are available on its web site, while the Court of BiH publishes its decisions of particular interest for the public and/or legal professionals.

3.13 Is the access to such database free of charge?

The access to the database of the Judicial Documentation Centre is free of charge for judicial office holders and professional staff employed with the courts and prosecutor's offices, while other individuals may access the database under payable monetary fees.

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?

See the responses provided for questions no. 3.12. and 3.13.

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?

As stated above, the key problem when it comes to the case law unification in BiH is the absence of a state-level supreme court.

In addition to the four different judicial jurisdictions in a relatively small territory, different legislative standards also constitute a large problem. For example, pro-European, modern, short and implicit laws which suit their purpose are characteristic for the state level, while the socialistic-statist legal dogma inherited from the past still maintains a dominant role at the entity level. Therefore, the quality of laws in the four different legal sub-systems coexisting under the Constitutional Court of BiH is quite discrepant, which is an additional problem in the unification of positions and taking a unified legal position concerning the application of laws. In this regard, we have a larger problem with the use of narrow terms and rather questionable norms, which is being made more complex to a further extent by almost regular annual amendments, which frequently result in the emergence of antinomies. Legal particularism generated by the complex constitutional and legal organization of the state of Bosnia and Herzegovina has perhaps showed the largest deficiencies exactly in terms of the justice concept, which requires taking same actions in the same situations, while taking different actions in different situations. While the European states have been approximating the unification of the most complex legal positions and diametrically different legal traditions, the situation in BiH is such that we have ongoing debates concerning the commencement and completion of deadlines, which is but a consequence of an ungainly constitutional and legal organization of the state and a fragmented legal system, which in no way suits the needs of the BiH citizens.

3.16 Any other point you wish to raise.