

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?

**A.** The issue of uniform interpretation or application is not expressly referred to in the Constitution or legislation. Really, this is not seen as a “really hot” issue in Ireland. I suspect this is because the judiciary is small, there are only about 150 judges in all, and the structure of the courts means that an authoritative interpretation is the preserve of a very small number of judges, so inconsistency of interpretation is rarely in issue. As will be referred to at a later section of this response an issue of greater significance arises where the law permits judges a wide discretion in how to apply the law and as a result significant divergences in how the law is applied can emerge.

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;

**A.** Subject to not enacting any legislation which is repugnant to the Constitution the legislature enjoys a very wide discretion as to what legislation to enact, or what the terms of legislation should be. Legislation will often be enacted designed to deal with what is perceived by the majority in the legislature to be a pressing political or social problem. In deciding whether to enact proposed legislation or to reject, legislators are likely to focus on the merits or otherwise of the specific proposal before them. Certainly this can lead to inconsistencies or approach between different pieces of legislation. However given that the priorities and the political/ideological make up of legislatures will vary from time to time, this is probably inevitable.

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

**A.** The obligation on executive institutions and law enforcement bodies is to apply and implement the law. As law enforcement is organised on a national basis, there are no local or regional or State police forces, the issue of inconsistent application does not really apply. Greater differences can emerge in the case of local authorities, there are some 30 in the State, undertaking tasks and responsibilities delegated to them by legislation.

- uniform case law developed by courts.

**A.** The courts are organised on a hierarchal basis:-

- District Court (Local Courts)
- Circuit Courts (Regional Courts)
- High Court
- Court of Appeal
- Supreme Court

Courts are bound by interpretation of courts that are higher in the hierarchy. There are a number of statutory provisions which enable a court to obtain the

opinion of a Superior Court if in doubt about the correct interpretation or the correct approach.

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?

**A.** There would a very broad consensus about the desirability of having a uniform or consistent application of the law. It is though recognised that on occasions there can be tensions between the desire for constancy and the need to respect the independence of individual judges.

## **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?

**A.** As will be apparent from responses to earlier questions because legislation is enacted by legislators, and because the make up of the legislature can vary from time to time, inconsistencies of approach can occur. However, if the fact of inconsistency with other measures on the statute book is identified during the legislative process, steps would normally be taken to bring the various measures in question into harmony.

2.2 Is there a hierarchy of laws?

**A.** Yes. The basic or fundamental law of the State is the Constitution of Ireland which can be amended only by the vote of the people in a referendum. At the next level come statutes enacted by both Houses of the Oireachtas (Parliament). The Oireachtas is specifically prohibited from enacting legislation that is repugnant to the Constitution. At a level below that comes the subordinate or delegated legislation eg. Ministerial orders and Statutory Instruments. The validity of such subordinate or delegated legislation is derived from an enabling Act of the Oireachtas. For the delegation to legislate to be valid, it is necessary that relevant "principles and policies" to be applied can be identified from the primary legislation.

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?

**A.** The Constitution states expressly that the State observes the generally recognised principles of public international law. So far as International Treaties and Conventions are concerned, these are not directly applicable, but it is necessary that legislation be enacted to incorporate the Treaty and give it effect in domestic law. Different considerations of course apply in the case of EU measures.

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

**A.** The courts will always seek the harmonious interpretation of the laws they are called on to interpret. In exceptional circumstances that may prove impossible, in which case it would be necessary for the Oireachtas/Parliament to act to resolve the situation. So far as international treaties are concerned, as already indicated, these are not directly applicable.

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?

**A.** I have already referred to the amendment of the Constitution, by vote of the people and to the enactment of a statute by the legislature and to the possibility of subordinate or delegated legislation. The power to make subordinate or delegated legislation is given to a wide range of bodies including the Government, individual Ministers, local authorities and a range of other public bodies.

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?

**A.** The Executive does not have any free standing or independent power to make laws. Statute passed by Parliament frequently authorise the Government or Ministers to make orders which are legally binding.

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

**A.** In general that would not be seen as a valid criticism. There are some very contentious political issues which tend to be addressed frequently and sometimes new legislation is introduced or enacted as a political majority for change emerges. That does not give rise to any uncertainty as such, but it can give rise to administrative difficulties if individual practices or structures are not allowed bed down.

### **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?

**A.** Under the common law system the precedent value of decisions of Superior Courts is very considerable indeed. A decision of the Supreme Court is binding on every court in the land. A final and authoritative court decision represents the law of the land and will continue to do so, unless and until that law as so laid down is altered by Parliament/Oireachtas. In some cases what is in issue is a matter of constitutional interpretation and the decision can only be set aside by vote of the people in a referendum.

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?

**A.** Case law can and does have binding effect.

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?

**A.** As indicated the court structure is hierarchal, so the decisions of higher courts as regards interpretation bind lower courts. Within a particular court, consistency of interpretation is regarded as desirable. If at a particular court level, differences of interpretation are emerging, the matter is very likely to be brought before a higher court for guidance. This could be done by way of the parties appealing a particular decision or by way of a trial court “stating a case” for the opinion of the higher court. There would probably also be discussions within the court where the divergence of approach was emerging designed to achieve a greater consensus. The Court President might well also play a role.

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.

**A.** In general there are no specialised courts as such. There is a specialised commercial division within the High Court. There are also a number of specialised Tribunals operating in areas such as employment matters, landlord and tenant matters and asylum. Decisions of these bodies are usually subject to an appeal to the courts and indeed sometimes then to a further appeal to a higher court. The exact arrangement varies from body to body. Sometimes there is a full appeal and sometimes and increasingly so, the appeal is on a point of law only. Such bodies are also subject to judicial review. In general the focus in a

judicial review will be on the procedure followed rather than the merits of the decision.

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?

**A.** The Superior Courts would by long standing practice, indeed from the foundation of the State and even before that have seen the role in promoting consistency of application and approach as being a central part of their function.

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

- judges/panels of that court;

**A.** Judges are not obliged to follow decisions of other judges of the same court. However, the long established jurisprudence is that ordinarily they should do so and can depart from earlier decisions only if there is good and clear reason for doing so.

- all judges in the country;

**A.** All judges are obliged to follow decisions of all higher courts.

- are there any consequences for judges if they do not follow case law of higher court?

**A.** There are no direct consequences in that they will not be disciplined or removed from office. However, while it has never happened, if a judge consciously and deliberately and persistently decline to follow binding precedent, it is not inconceivable that this could amount to stated misbehaviour providing grounds for impeachment. A refusal to implement the law and apply it as laid down by higher courts would not be consistent with the oath every judge takes on assuming office.

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

**A.** It is obligatory for lower courts to follow decisions of higher courts

- 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.)?
- A.** As already stated, if differences of interpretation or approach emerge, it is very probable that the matter will, by one route or another, be brought before a higher court.
- 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?
- A.** It is hard to imagine a case where it would be acceptable not to follow a binding precedent. However, that it is not to say that the lower court has no element of flexibility. It may be possible to argue that the case before the court can be distinguished i.e. by identifying factors present in the case at hearing or factors not present in the case at hearing, which have the effect of taking it out of the category of cases covered by the earlier decision so that on a detailed analysis the earlier decision is not in fact a binding precedent.
- 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)?
- A.** This is an area where there has been major change in recent times. Until 2014 when a Court of Appeal was established as a result of an amendment of the Constitution, an appeal lay from all decisions, subject to limited exceptions, of the High Court to the Supreme Court. The position now is that there is no automatic right of appeal. In the great majority of cases the decision of the Court of Appeal is final. A dissatisfied party can ask the Supreme Court to permit a further appeal. However, that would be allowed only if the case involves a point of law of exceptional public importance and it is desirable in the public interest that the view of the Supreme Court be obtained. There is also provision for the Supreme Court on application to it to permit so called "leap frog" appeals.
- 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?
- A.** By statute all courts are required to take account of decisions of the European Court of Human Rights. There is no comparable statutory provision in relation to other bodies, but it would not be unusual for decisions and rulings of international bodies to be referred to and they would be course be treated with great respect.

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.

**A.** Decisions of national courts of precedent value are published on the Courts' website. There are also a number of reports published either in hard copy and/or on line, such as the Irish Reports and the Irish Law Reports Monthly as well as reports focusing on specific areas of law eg. Employment Law. At this stage, though this was certainly not always the case in the past, relevant decisions are readily available to practitioners, students, academics, judges and indeed the wider public.

3.13 Is the access to such database free of charge?

**A.** The public databases are free of charge. There are also a number of private sites which in some cases charge, typically this would be by way of a subscription or membership 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?

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?

**A.** As indicated at the outset the issue which from time to time causes concern is the way in which judges exercise discretion vested in them by law. So, by way of example the maximum penalty for most criminal offences is prescribed by statute. However, that is a maximum and is rarely imposed in practice. The view is taken that the maximum should be reserved for the worst possible cases. It will therefore be for the judge dealing with the individual case to select a penalty. There can be significant differences of approach. There are judges who will be inclined towards leniency and judges inclined towards severe sentences. Similar situations can arise in other areas, another example might be the assessment of compensation for personal injuries suffered. Here there are judges who would be inclined to be generous and others whose instincts would be to be conservative.

In cases of this nature if appeals are brought, then the appeal court may seek the middle ground between leniency and severity or between generosity and meanness. Appeal courts will by that means offer a degree of guidance, in the hope of encouraging greater consistency, but it is very much a work in progress. Divergences persist and the extent of those divergences can give rise to public disquiet. On the other hand judges would tend to respond by saying that every case is different and every case has to be dealt with on its own facts.



3.16 Any other point you wish to raise.

I would draw attention to paragraph 3.15. I would be glad elaborate or clarify any aspect required.