

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?

In Poland there is a concept of the unification of application of the law by courts. It is both formal (established at the level of the ordinary legislation – some acts of law) and informal (applied in practice by common courts, the Supreme Court and the High Administrative Court).

- 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.

It is understood rather as the unification of application of the law by courts than others forms.

However, administrative courts (which deal with administrative cases, i.e. the appeals against administrative decisions given by different executive institutions) can create standards of understanding (interpretation) of administrative law, what can result unification of application of administrative law by executive institution.

- 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 unification of application of the law by courts is one of the conditions of legitimization of the judiciary (courts) and let achieve the trust of people to courts and 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?

Yes, there are.

- 2.2 Is there a hierarchy of laws?

Yes, there is: the Constitution,
the EU Treaty,
the international multilateral conventions (e.g. European Convention on Human Rights)
the ordinary internal legislation (the acts of law) + the EU regulations
the government orders

- 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?

Treaties and other international legislation instruments are both applied directly or through national implementing legislation (it depends on the particular international act – e.g. the EU Treaty, the European Convention on Human Rights are applied directly, the EU directives are implemented to national legislation – ordinary acts of law).

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

It depends on the kind of contradiction.

On the national level (what concerns national legislation) there are some rules:

lex posterior derogat legi priori,

lex superior derogat legi inferiori,

lex specialis derogat legi generali,

lex consumens derogat legi consumptae etc.

What means that there are special rules of interpretation of law on the case of contradiction.

On the European (EU) level – there are special instruments provided by the EU law.

- 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?

The government has the dominant role.

The government prepares the draft projects of acts of law.

The parliament in most cases accepts 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?

Yes, they (so called the government orders) are the source of law, binding for bodies and institutions from the governmental sector.

However, they are not binding for the courts - in this meaning, that when there is a contradiction between the government order and the act of law, court can refuse to apply the government order and can apply the act of law directly.

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

This is the real problem in my country.

Laws are amended too often and it affects the legal certainty in the country.

For example: the Code of civil procedure was amended 15 times only in 2016.

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?

The court case law has not general binding effect in Poland.
It is not a source of law.

But in some cases judgments (or resolutions) of the Supreme Court or the High Administrative Court are binding for the courts of lower instance.

For instance:

In civil cases:

If during the hearing of an appeal a legal issue arises which poses serious doubts, the court may refer that issue to be resolved by the Supreme Court, whereupon the hearing of the case shall be adjourned. The Supreme Court shall be competent either to hear the case itself or to refer the issue to be resolved by an extended panel of that Court. A resolution by the Supreme Court of a legal issue shall be binding in the case concerned.

In criminal cases:

If, in the course of examination of an appeal measure, a juridical question is disclosed requiring a substantial interpretation of the Act, the appellate court may adjourn the hearing of the case and refer the question to the Supreme Court. The Supreme Court may refer the resolution of such a juridical question to an enlarged panel of that court. The resolution of the Supreme Court shall be binding as to a given question.

Similar regulations concern the procedure inside the administrative courts (in administrative cases).

This is institution of so called legal questions or pre-judicial questions transmitted to the Supreme Court or to the High Administrative Court. (Both those highest courts are courts of cassation – the Supreme Court for civil, criminal and labour cases, the High Administrative Court for administrative cases. But they have also tasks concerning unification of interpretation and unification of application of the law by the courts.)

- 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?

At formal level – see the answer to the point 3.1.

There are another formal legal instruments. For example:

In civil cases:

If the hearing of an appeal in cassation reveals legal issues which pose major doubts, the Supreme Court may adjourn the adjudication of a case and refer the issue to be resolved by an extended panel of Supreme Court judges. The resolution of an extended panel of the Supreme Court judges shall be binding in the case concerned. An extended panel of Supreme Court judges may also decide to hear the case.

The court to which a case is referred shall be bound by the Supreme Court's interpretation of the law with respect to that case. An appeal in cassation from a ruling issued after the reconsideration of a case may not be founded on arguments which are contrary to the Supreme Court's interpretation of the law with respect to that case.

In criminal cases:

A court to which a case has been referred for re-examination shall adjudicate as to the limits within which the case has been referred. Reversing a ruling only in the part regarding the ruling on a penalty or other measure does not prevent the acquittal of the accused or the discontinuance of proceedings. If a case is referred for re-examination, the court which has adjudicated in the first instance, in conducting proceedings with respect to evidence which was irrelevant to the reversal of the ruling, may restrict itself to a disclosure thereof. The legal opinions and directions of the appellate court with respect to the further course of proceedings shall be binding upon the court to which the case has been referred for re-examination.

At informal level – judgments of the Supreme Court and the High Administrative Court (although do not have formally binding effect) are recognised as very important for judges of common courts. Common courts judges mostly accept the interpretation of law presented in judgments of this highest courts.

- 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?

The unification of interpretation of the law is the fundamental task and duty of the Supreme Court and the High Administrative Court.

There are special arrangements within both highest courts (the Supreme Court and the High Administrative Court) to ensure uniformity of interpretation and application of the law.

See the answer to the point 3.2.

If the President of the Supreme Court or the President of the High Administrative Court find the divergence in case law, can refer the issue to be resolved by an extended panel of the Supreme Court or the Highest Administrative Court judges.

The resolutions of an extended panel of the Supreme Court judges (i.e. seven judges, all judges of a chamber, two joined chambers or all chambers) may or shall be binding for all judges of the Supreme Court in other cases.

There are not such formal arrangements within each court (particularly common 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.

There are two different jurisdictions.

First - for civil, criminal, family, company, labour, land register, company register etc. cases (common courts).

Second - for administrative cases (administrative courts).

Each pillar of jurisdiction has its own "highest court" - the Supreme Court and the High Administrative Court. The role of them is very similar.

There are not specialised courts outside the common and administrative courts.

So, there is not regulation concerning the challenge of final judgments of specialised courts before the Supreme Court.

- 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?

By laws: the Code of civil procedure, the Code of criminal procedure, the act on the Supreme Court, the act on the court administrative procedure and the act on administrative courts.

- 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?

The judgments of the Supreme Court are never obligatory for all judges in the country.

The resolutions of an extended panel of the Supreme Court judges may or shall be binding for all judges of the Supreme Court in other cases. Are not binding for other judges (judges of common courts).

The court to which a case is referred shall be bound by the Supreme Court's interpretation of the law with respect to that case. An appeal in cassation from a ruling issued after the reconsideration of a case may not be founded on arguments which are contrary to the Supreme Court's interpretation of the law with respect to that case.

There are some consequences for judges if they do not follow case law of higher court (but not disciplinary).

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

Judges of the common courts respect the judgements of the Supreme Court voluntary as this Court has considerable standing.

Judges of the administrative courts respect the judgements of the Highest Administrative Court for the same reason.

- 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 president of each common court can refer to the First President of the Supreme Court issue of contradictions or deviations in the case law between different courts, asking for the intervention (what means presentation by the President of the Supreme Court the legal issue to the extended panel of the Supreme Court judges).

- 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?

In situation of new legislation (national or within the EU), amendments of legislation, judgments of the Constitutional Tribunal, judgements of Court of Justice of European Union.

- 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)?

The role of the Supreme Court in establishing uniformity of application of law is fundamental.

See the answers to points 3.1, 3.2, 3.3, 3.6, 3.7, 3.8.

Access to the Supreme Court in civil cases:

A. An appeal in cassation is not possible in cases for property rights where the value of the subject of the appeal is less than fifty thousand Polish zlotys or, in cases falling within the scope of the labour and social insurance law, less than ten thousand Polish zlotys. However, in cases falling within the scope of social insurance, an appeal in cassation is possible notwithstanding the value of the subject of the appeal in cases for the awarding or suspending of retirement and disability pensions and for mandatory social insurance. An appeal in cassation is also possible notwithstanding the value of the subject of appeal in cases for redress of damage caused by the issuance of a final and non-appealable judgment against the law.

B. Moreover, an appeal in cassation shall not be admissible in cases:

- 1) for divorce, legal separation, maintenance claims, rent for leased or rented property, or infringement of possession,
- 2) concerning penalties for breach of order, certificates of employment and related claims as well as benefits in kind or their equivalents,
- 3) adjudicated according to the simplified procedure.

§ 3. An appeal in cassation against a judgment declaring marriage non-existent or annulling a marriage shall not be possible if at least one of the parties entered into the marriage after the judgment became valid.

C. An appeal in cassation may be founded by a party on the following grounds:

- 1) misinterpretation or misapplication of substantive law,
- 2) infringement of the rules of procedure, where such infringement could significantly affect the outcome of a case.

Allegations against the establishment of facts or evaluation of evidence may not serve as a basis for an appeal in cassation.

D. The Supreme Court shall accept an appeal in cassation for hearing if:

- 1) a major legal issue is involved,
- 2) it is necessary to interpret legal provisions which cause major doubts or cause discrepancies in case law,
- 3) the proceedings were invalid, or
- 4) an appeal in cassation is evidently justified.

The Supreme Court shall decide in camera whether to dismiss or accept an appeal in cassation for hearing. Such decision need not be justified in writing.

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?

Government and Parliament:

On 19 July 2007 the Prime Minister set up the Interministerial Committee for Matters of the European Court of Human Rights, an advisory body aimed at ensuring that Poland implements, to the fullest extent possible, recommendations arising from the judgments of the European Court of Human Rights. The Committee is tasked with developing the Government's positions on communicated applications and the ECHR judgments, analysing the compliance of major bills with the European Convention and presenting relevant proposals. It monitors the execution of judgments and decisions of the Court against Poland on the basis of action plans and reports submitted by competent ministers.

The Committee analyses problems arising from communicated applications and the ECHR judgments and drafts proposals for relevant measures. It also serves as a forum for discussion on major issues relating to compliance with drafted amendments with the Convention which could lead to significant consequences for Polish law or its application.

On 5 February 2014 the Parliamentary Subcommittee on Execution of Judgments of the ECHR was established. Its terms of reference include examination in detail of information submitted by the Council of Ministers on the state of execution of judgments of the European Court of Human Rights by Poland; monitoring of judgments of the European Court of Human Rights adopted in respect of Poland; and preparation of draft desiderata or opinions for the Justice and Human Rights Committee and the Foreign Affairs Committee concerning fulfillment by the Council of Ministers of the obligations of Poland to execute judgments of the European Court of Human Rights.

Judiciary:

The case law of the European Court of Human Rights (judgments, agreements, standards) is the subject of training in the National School for Judiciary and Prosecution.

The judgments of the ECHR are accessible on the website of the Ministry of Justice.

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.

All judgements of administrative courts (courts of first instance and the High Administrative Court) are accessible in the Internet, and at the same time selected judgments are published in the official journal (in traditional paper form).

Selected judgments of the Supreme Court (not all, but most of them) are accessible in the Internet, and at the same time selected judgments are published in the official journal (in traditional paper form). Each Chamber has its own collection of the most important judgments published in traditional form.

Selected judgements of common courts are published in the Internet. The Ministry of Justice works on the programme for publishing all judgments of common courts in the Internet.

All judgements of ECHR against Poland are accessible on the website of the Ministry of Justice or Ministry of Foreign Affairs (in translation to Polish language).

All judges and prosecutors have access to commercial collection of judgements of all courts – also judgements of both European Courts (the Ministry of Justice buys such commercial databases for all courts and public prosecutors offices).

3.13 Is the access to such database free of charge?

Access to databases published by courts and ministries are free of charge.
Commercial databases are not free.

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 providers of judgment through free access.

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?

1. Number of cases and judgments.

Courts in Poland decide every year about 15 million cases and produce more than 15 million courts decisions. It difficult to uniform such big among of case law.

2. No comments.

3.16 Any other point you wish to raise.

No comments.