

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. 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?

Yes, there is a concept of the uniform application of the law. The Constitution stipulates that all persons shall be deemed equal before the law, regardless of any particularity or personal feature and that everyone shall have the right to equal protection of the rights and liberties thereof. Further, according to the Constitution, the Supreme Court provides equal application of the laws by the courts.

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.

- *Consistent legislation is of the crucial importance for the uniform application of the law, as efficient and effective application of the law essentially depends on the quality of the law. Clarity and predictability of the law is condition for effective practicing of justice;*
- *Executive institutions and law enforcement bodies in the administrative proceedings are deciding on the rights and obligations of legal subjects, so they are expected to take a unique practice while applying the law. However, decision of the administrative bodies can be impugned with a claim in the administrative dispute in which the court has to take care if the administrative bodies have consistent practice at reaching decisions;*
- *Uniform case law is of the essential importance for executing legal certainty as the key aspect of the rule of law. So the principle of the unique protection of human rights and freedoms is imperative in the work of courts.*

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?

Rationale for the uniform application of the law is the same for all societies which base their grounds on democracy and rule of law. The uniform protection of human rights and freedoms means that everyone have equal opportunities before the state bodies when deciding on their rights and freedoms regarding both procedural status and application of the substantive law.

2. Role of the legislative and executive powers in ensuring the uniform application of the law

1. Are there in your country formal or informal requirements for ensuring the uniformity in the legislative process?

There are formal requirements for ensuring the uniformity in the legislative process. In proposing draft law drafting authority and Government body – Secretariat for Legislation are taking care about compliance of the law with the legal system, and in Parliament, while adopting the law, of great importance are attitudes of the working body constituted with the aim of taking care about mutual compliance of the laws and its compliance with the Constitution and accepted international Agreement.

2. Is there a hierarchy of laws?

The Constitution stipulates that the law has to be in compliance with the Constitution and accepted international Agreements, and the other regulation has to be in compliance with the Constitution and the law. Regarding the laws, they are of the same legal power.

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?

Conformity of the laws with accepted international Agreements is ensured during the process of their adoption. The Constitution provides that accepted international Agreements and generally accepted rules of the international law are integral part of domestic legal order and they have priority over domestic legislature. They are directly implemented when regulate relations different than domestic legislature. That way is verified legal effect of the international Agreements and determined that they have supremacy over domestic legislature, and at the same time, they remind the state bodies on the obligation of harmonization of national legislature with international law.

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

The Constitutional Court decides on compliance of the law with Constitution and accepted and published international Agreements, as well as about compliance of other regulations and general acts.

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?

Parliament of Montenegro enacts the laws. Right to propose the law have the Government and a Member of a Parliament. Right to propose the law have also 6,000 voters through a Member of Parliament. Regularly, the Government is proposer of the law in majority of cases, as conducting internal and foreign affairs are in their capacity. When enacting the law, legal entities are consulted through organized public hearings, and when it comes to the regulations in the area of judiciary it is predicted that Judicial Council, as independent body which takes care on independence and autonomy of the courts and judges, give its opinion on drafts of regulations.

6. Are acts of the executive power source of law in your country and in that respect are they legally binding for the courts?

It is in the Government's competence to enact decrees, decisions and other acts for enforcement of the law. When the Government enact by-law general act, it becomes an

integral part of the legal system and as such is source of law for all legal subjects, and therefore for courts. These acts have to be in compliance with the law and they can be the subject of evaluation of lawfulness and constitutionality before the Constitutional Court of Montenegro.

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

Transitional process which the state is going through has been marked with a numerous changes of laws in a good will to be accepted international standards and regulations of the European right. Anyway, it makes harder work of the state bodies as there is a need of frequent adjustment on the changes of the laws, which opens numerous challenges when it comes to the requests of the legal safety.

3. Role of courts in ensuring the uniform application of the law

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 been explicitly defined as formal source of law, considering the fact that the Constitution of Montenegro stipulates that the court shall rule in compliance with the Constitution, law and accepted international Agreements. But, the case law is the most important factor for providing uniform application of the law.

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?

On the formal level, it has been established obligation of the courts to adjust case law (see below 3.5). Judges are achieving quality work in the application of the law through consistent practice.

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 courts are obliged to take care about taking up the uniform case law. It is especially expressed on the vertical level, as higher courts hold the legal position when deciding on claims of lower courts. If there is a difference in the approach in application of the law between judges and panel of judges, the uniformity will be achieved on the sessions of the court departments or on the sessions of all judges.

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 only two specialized courts in Montenegro:

- *Commercial Court of Montenegro which is the court of the first instance in commercial-legal matters. On claims on its decisions decides Appellate Court of Montenegro, and on extraordinary remedies the Supreme Court of Montenegro;*
- *Administrative Court of Montenegro which decide in the administrative dispute on legality of the final legal acts. Versus its decisions can be appealed extraordinary remedy – request for extraordinary review of the court decision on which decides the Supreme Court of Montenegro.*

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 Supreme Court, according the Constitution, provides the uniform application of the law by the courts. This obligation of the Supreme Court has been performed through reaching decisions under its jurisdiction. But, the Supreme Court is, by the Law on Courts, authorized to hold principle legal positions on matters at issue from the case law with the purpose of the uniform application of the law. The principle legal position is not a rule, but interpretation of the law in the same or similar cases. It affects the case law of the lower courts through authoritative interpretation of the law taken on the session of all judges of the Supreme Court (general session) and not as mandatory rule. The Supreme Court holds its general legal position ex-officio on the request of the lower court. Anyway, it is a legal position inabstracto. All general legal positions are published on the web page and printed bulletins of the Supreme Court.

Also, lower courts have to take care about the uniform application of the law. The Law on Courts stipulates that on the session of judges are discussed issues of the application of the law if there is a difference between panel or judges of certain court. In courts are kept records of the case law.

In the Supreme Court is formed department for the case law, and in other courts such department can be formed and it is formed only in the courts with greater number of judges. The focus of this department, in compliance with the Court Rules of Procedure, is following the court practice and composition of proposals which will be presented on the session of judges, with the purpose of holding certain position with the aim of unification of the case law.

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?
- *Positions agreed on the sessions of the court apartments and on the sessions of the judges of certain court are obliged for judges and panels of that court.*
 - *Positions of the higher courts hold in decisions on remedies are obliged also for judges of the lower courts who are guided also with positions of the higher courts which they held on the sessions of the department and sessions of judges.*

- *Failure to act in compliance with positions of the higher courts is not regulated as disciplinary offence for responsibility of judges. But, at last, it can have effect on the quality of the work of the judge and on the evaluation of the work of the judge.*

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

The answer on this question has been contained in other answers.

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.)?

Acting of the high instance courts on appealed claims is of crucial importance for unification of the case law. Also, holding of the legal stands on the sessions of the court departments and sessions of the judges is important instrument for holding uniform case law. In the cases when a great number of complaints have been submitted to the court in which requests are based on the same or factual condition and the same legal ground, in civil matters, the court can resort reaching so called "Pilot judgments". With the aim of providing of the uniform application of the law in the civil matters, it has been introduced the institute of so called extraordinary revision (see below 3.10). Preliminary decisions in abstracto mean the only authorisation of the Supreme Court to hold general legal positions (see above 3.5).

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?

Failure to act in accordance with the case law is possible only in the case when there are changed facts and circumstances which are of importance for reaching the court decision.

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 subject matter jurisdiction of the Supreme Court of Montenegro has been regulated by the Law on Courts („Official Gazette MN“, no. 11/2015). Regarding the institutional court jurisdiction, for the Supreme Court has been established:

- 1) *decide in third instance as provided by law;*
- 2) *decide on extraordinary legal remedies versus decisions of the courts in Montenegro;*
- 3) *decide versus decisions of its panel of judges, as provided by law*

The Supreme Court has the jurisdiction to act in criminal, civil and administrative matters, and remedies on which decide the Supreme Court have been regulated by process laws for mentioned types of cases.

a) *Criminal cases*

In criminal matters the Supreme Court has the jurisdiction to decide on the claim on the judgment of the court of the second instance court (claim to the third instance court). Admissibility of the claim to the third instance court has been limited in three cases, if:

- *The second instance court reached the longest prison sentence or upheld the judgment of the first instance court by which such sentence has been reached (regarding the case when the sentence is 40 years of prison);*
- *The second instance court reversed the judgment of the first instance court by which the accused has been acquitted and reached the judgment by which the accused has been found guilty as charged.*

On the complaint will be decided according to the provisions applicable to the second instance proceeding.

As it is a word about the complaint, it is a regular remedy whose timely submitting postpones the execution of the judgment.

In deciding of the complaint the Supreme Court examines regularity and lawfulness of the second degree judgment, or examines if it is based on the important violations of the provisions of the criminal procedure, wrongly and incompletely established facts or on the violations of the Criminal Code, which are stipulated in the complaint.

The Supreme Court has the jurisdiction to decide on the legal remedy – request for protection of lawfulness. This request can be submitted by the Supreme Prosecutor’s Office versus final court decisions and proceeding followed by those decisions, if it considers that there has been a violation of the law.

When the Supreme Court find that the request for protection of lawfulness is admissible, which has been submitted in the benefit of the accused, it can reverse or set aside the judgment of the first instance and second instance court.

When the request for protection of lawfulness is appealed on the damage of the accused, and the Supreme Court find that it is well-founded, it will be found only that there is a violation of the law without examining of the final judgment.

Accused who is sentenced on unconditional prison sentence of one year or more can suggest to the Supreme Prosecutor’s Office to submit request for protection of lawfulness. If the Supreme Prosecutor’s Office reject the proposal, accused can submit complaint to the Supreme Court. In the case when the Supreme Court accept the proposal of the accused or his attorney, it will be considered as request for protection of lawfulness and the Supreme Court will decide on merits in further procedure on the panel session.

When deciding on the request for protection of lawfulness, it is examined lawfulness of the judgments of the lower courts. If during deciding on the request for protection of lawfulness for the benefit of the accused the court find considerable doubts on the exactness of the decisive facts established in decision versus which, and that is the reason why is not possible to decide on the request for protection of lawfulness, the Supreme Court will reach a judgment by which will quash the previous decision and back the case on the new trial.

B) Civil cases

In the civil cases the claim to the Supreme Court cannot be appealed as regular remedy.

Law on Civil Procedure recognizes two extraordinary remedies on which the Supreme Court will decide – revision and request for protection of lawfulness.

Revision is not allowed in property proceedings in which the value of the impugned part of the final judgment is under EUR 20,000.00 (or EUR 40,000.00 in commercial disputes). But, there are three cases in which the revision is allowed regardless the value:

1) in disputes on maintenance support when the maintenance support has been determined for the first time or reversed;

2) in disputes regarding the compensation of damage for the lost maintenance support due to the death of supporter of the maintenance and due to the loss of earning or other income from work when those compensations have been determined for the first time or reversed;

3) in property disputes arising from unconstitutional and illegal individual acts and actions by which legal or natural persons are placed in an unfair position in the market due to their seat or place of permanent residence or the market is violated in some other manner, involving disputes on the compensation of damage caused by it.

Revision can be appealed for essential violations of the provisions of the civil proceeding and wrong implementation of the substantial law, but not for wrongly and incompletely found facts. But, if the Supreme Court find that there was wrong application of the substantive law and, as a consequence wrongly found facts and so there are no conditions for reverse of judgment, it will quash completely or partially both judgments of the lower courts or just a second instance judgment and back the case on the new trial.

On revision will be decided without discussion.

The newest changes and additions of the law on Civil Procedure stipulates possibility that revision can be allowed versus second instance judgment, which, in accordance with mentioned conditions could not be quashed by revision, if it is necessary to reconsider legal issue of importance for providing legal certainty or uniform application of the law (Article 397 – Law on Criminal Procedure). Ratio legis of this law position is the need to be provided consistent and unique practice in the same or similar cases.

Proposal for allowing of revision in this case is submitted by the party, and the Supreme Court will decide in the panel composed of five judges.

If the Supreme Court allows to the party to appeal the revision in the case mentioned above, in its decision will cite in which part, or regarding which concrete questions the revision is allowed.

Versus the decision by which has been accepted proposal for revision, the complaint is not allowed.

The party has the time-limit to appeal the revision within 30 days from the day of delivering decision on allowing revision.

The request for protection of lawfulness can be submitted versus the first instance judgment and only in the case when impugned judgment is based on the illegal disposals of the parties. Such situation is when the party has on his/her disposal requests which are in collision with compulsory regulations, as it is the case with illegal disposal with the state property, avoiding financial obligations etc.

For submitting the request the Supreme Prosecutor's Office is in charged.

On the request will decide the Supreme Court on the panel session.

When deciding on the request for protection of lawfulness, the court is limited only on the examining violations alleged in the request.

On the procedure on the request for protection of lawfulness are applied provisions of the procedure on revision.

C) Administrative – court cases

In the administrative cases, the complaint has not been provided as regular remedy but as an extraordinary remedy – request for extraordinary examination of the court decision, or decision of the Administrative Court of Montenegro.

Above mentioned legal remedy can be appealed versus the judgment of the Administrative Court by which has been rejected the complaint in the administrative dispute.

On the above mentioned request the Supreme Court will decide, as a rule, on the first next session.

The request can be submitted because of violation of the substantive law and violation of the regulations of the proceeding in the administrative dispute which could influence on the solving the matter.

The Supreme Court will in its judgment accept or reject the request. The decision cannot be changed on the damage of the party if the party is the only who submitted the request.

The Law on Administrative Dispute stipulates applying of the Law on Civil Procedure regarding issues which are not defined by that law.

Accordingly, the Supreme Court is the third instance court when deciding in the criminal and civil cases. In the administrative matters the Supreme Court decides on the request for extraordinary examination of the decision of the Administrative Court, which means that acts as the second instance court.

In the process laws has been regulated that in examination of merits will not be taken the remedy which is time-barred or inadmissible, as it is the case with the remedy submitted by unauthorized person or when the remedy is submitted out of conditions regulated by the law for its admissibility. In such cases, the remedy will be rejected.

Beside above mentioned law authorizations, there are no any other forms of selection of cases in which the Supreme Court is supposed to decide.

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?

Case law of the European Court of Human Rights is taken into account while reaching decisions on the national level, which contributes to the unification of the case law. Positions from decisions and judgments of the European Court are more and more incorporated in reasoning of the decisions of the courts of Montenegro.

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.

Judgments of the European Court of Human Rights in the cases versus Montenegro are published on the web page of the Supreme Court. On the same way have been published also some leading judgments of the European Court. On the regional level has been established electronic decision base of the European Court of Human Rights. That base has been established and updated with the cooperation of the Representatives of the states before the European Court of Human Rights and AIRE Center from London. In the data base are judgments versus Montenegro, Serbia, Bosnia and Herzegovina, FYR Macedonia, Albania and Croatia. Approach to the data base is at www.ehrdatabase.org.

The courts can approach to the data base of the state bodies from the region where can be found judgments of the European Court of Human Rights for that states, which is of great importance because there is no language barriers.

13. Is the access to such database free of charge?

Approach to the data base is free of charge.

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 providers which on commercial or non-commercial ground in certain measure publish extracts from decisions of the European Court of Human Rights as printed publications or on the internet pages.

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?

Unification of the case law is permanent challenge of the national legislature.

16. Any other point you wish to raise.