

CCJE-BU(2017)1

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?

**The concept of uniform application of the law is to be seen in correlation to the equality principle. As well as the legal norm itself, that is meant to impose the same duties on every person and confer the same rights to every one in the same position, the uniform application serves the equality of treatment by the**

**law. The Federal Constitution of the Swiss Confederation states in art. 8 as a fundamental right, that every person is equal before the law. The concept of uniform application of the law is applied in practice through common understanding.**

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.

**There is a difference in theory between legislation – that should be consistent – and application of the law – that should be uniform. Legislation should be consistent and respect the hierarchy of norms, which roughly means: Constitution on top level (majority of people and Cantons) – then statutes (Federal Parliament, possibly referendum) – and then edicts (Government).**

**Administrative authorities have to apply the law equally. They have to develop uniform practices and there is in general a possibility for persons concerned to appeal.**

**Uniform application of the law and the development of case law is a core mission of the judiciary.**

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?

**As above-mentioned, the uniform application of the law serves the equality of treatment before the law. As every person in the same situation is treated in the same way, the citizens should feel confident to respect the law.**

**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?

**The legislative process as such is in general statutory. If the intended norm is in conflict with higher legislation (e.g. Federal legislation is higher than cantonal and cantonal higher than communal) there is in general a legal remedy for citizens concerned to appeal to authorities (Government or Court).**

2.2 Is there a hierarchy of laws?

**Yes (s. 1.2).**

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 Federal Parliament is made aware of international law in the legislative process by the Government, that has to deliver a report about international obligations when submitting the proposals for new legislation in the ordinary**

**legislative process. International treaties that confer rights to citizens are directly applied.**

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

**Art. 190 of the Federal Constitution states that the Federal Supreme Court and the other judicial authorities apply the federal acts and international law. Traditionally treaties have been applied at the same level as national federal statutes and the international human rights acts at the same level as the Federal Constitution. There is a political controversy about the hierarchy at the moment.**

- 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 Parliament has in practice the dominant role. The Government is involved in the preparation and the people can often vote in a referendum (on request of a certain amount of citizens, less often mandatory).**

- 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?

**They are source of law but not binding for the courts.**

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

**Every body complains about this.**

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

- 3.1 Has the court case law in your country binding legal effect and is it a source of law? If yes, to what extent? To the same extent as the national legislation?

**Case law has no formal binding legal effect. Formal source of law is (federal and cantonal) legislation. Case law may become a source of law when it is generally accepted by every body (consuetudinary law, droit coutumier).**

- 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?

**It is generally accepted, that case law has to be complied with or else there has to be a convincing reasoning for not applying it.**

- 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?

**There are in principle different state levels (Federation, Cantons) and accordingly different bodies of law. So cantonal Courts – Cantonal Supreme Courts – are in charge to issue leading cases for their field of law, the Federal Supreme Court is in charge to ensure the uniform application of the Federal Law by issuing leading cases in application of the Federal Law.**

**Every Court or Panel has to ensure its responsibility for the decision of the case submitted to it. If it is not competent, it has to dismiss the case. There are exceptions, so that in doubtful situations the courts potentially responsible exchange opinions.**

**Within the Federal Supreme Court there exists a procedure of exchange opinions. If a section intends to change the case law established by another section, then an exchange opinions is mandatory. If there is a fundamental legal question to be answered that may concern other sections as well, an exchange opinion is possible. In any case the section responsible for the case that rises the controversial question of law submits this question and the answer to it by the majority of the judges is mandatory for the decision of the case.**

- 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 is a general structuring in administrative courts, correctional courts and private law courts. The federal Supreme Court is responsible for hearing cases of each branch, but has formed sections to deal with the cases of the respective fields.**

**Each Canton has its own court system. In principle appeals can be lodged with the Federal Supreme Court against decisions of the Supreme Cantonal Courts. Some Cantons have specialised (supreme cantonal) courts for instance in labour or tenant law. Judgements issued by such specialised courts can be challenged before the Federal Supreme Court in the same way as decisions issued by other Cantonal Supreme Courts.**

**On federal level there are an administrative, a correctional and a patent Court of first instance. Their judgements can in general be appealed before the Federal 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?

**The unification of case law is indirectly determined by the respect of the equality before the law (Constitution) and the possibility to challenge decisions of administrative bodies and courts before the Federal Supreme Court. The responsibility of the Federal Supreme Court in the unification of case law is recognised by long lasting practice.**

- 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 judgement of the court when issued is binding for the court itself and the parties concerned cannot bring up the same issue again (res judicata). If the judgement cannot be appealed, it is binding for all courts and judges. If it is appealed, the appeal admitted and the case sent back, then the rationale of the court of appeals decision is binding for the new decision of the lower**

court.

**Judges are not held responsible personally, if they do not follow the case law of higher courts. If they give a good reasoning for not following, they may even contribute to the further development of case law.**

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

**Appeals to higher court are in general admitted, when established case law is disregarded.**

**Contradictions in the case law between different sections of the Federal Supreme Court can lead to a procedure of exchange opinions (s. 3.3).**

- 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?

**If the facts have changed in a relevant way, exceptionally also, when strong reasons require a reconsideration.**

- 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)?

**Establishing uniformity in the application of law is the mission of the Supreme Court.**

**Appeals can be lodged in potentially every branch of law against decisions of the Supreme Courts of the Cantons and of Federal Courts of first instance. As a rule there is no appeal against the establishment of the relevant facts, but the incorrect application of the law to the case can be censured.**

- 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?

**There are statutory norms in the statutes of procedures that allow a particular appeal so that the decision brought before the European court of Human Rights can in case of admission be decided anew.**

**There is widespread disappointment about the quality of decisions of the European Court of Human Rights, so that they are rather looked upon as decisions on a by-case basis and treated accordingly.**

- 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 the judgements rendered by the Federal Supreme Court are published on internet and accessible via home page of the Court. They are accessible for the general public, including legal professionals.**

**For judges and law clerks there is an in-house database accessible through norms, key words etc.**

3.13 Is the access to such database free of charge?

**The access to the judgements of the Federal Supreme Court is free of charge. There is a charge for an access per thesaurus (more limited than the in-house database).**

3.14 Are courts the only source of information or there are more providers (on a commercial basis or through free access)? If the latter is the case, are such providers independent entities, and are they operating on commercial or not commercial basis?

**There are periodicals and other providers on a commercial basis. They are independent.**

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?

**The large amount of information and heavy workload leads to time-consuming research. Sometimes decisions that should have taken into account as precedents are ignored.**

3.16 Any other point you wish to raise.