

Strasbourg, 12 January 2017

## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

### RESPONSE FROM NORWAY

**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?

Article 2, second sentence of the Norwegian Constitution, states that its purpose is to safeguard democracy, human rights and the rule of law. The concept of the uniform application of the law may thus be seen as a consequence of the principles of the rule of law, separation of powers and legality; equal and uniform application of the law ensures the generality of the law and equality before the law.

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.

The term "application of the law" refers first and foremost to the appliers of the law, including the courts and the executive branch. The makers of the law – the legislature – has an important role to play in this respect as the laws must as far as possible be clear, foreseeable and consistent. The Supreme Court is a court of precedence, clarifying and developing the law. The Supreme Court rulings are formally binding only upon the parties to the case, but the interpretation of the law in question will have a more general application. Thus, the Supreme Court rulings will have decisive effects on the uniform application of the law.

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 rationale is the rule of law. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty.

## **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?

No formal requirements, but consistency in legislation is considered carefully as a part of the process of preparing and adopting legislation.

2.2 Is there a hierarchy of laws?

Yes, the highest level is the Constitution. Statutes made under the Constitution are subordinate to it. Regulations made under such a statute are subordinate to such law.

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 special act of implementation is in principle required in order for the treaty to apply as part of internal law. Normative harmony is ascertained during the preparation of the implementation, making sure that the national law is in accordance with the treaty or the convention.

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

The national statute will be interpreted in accordance with the treaty, or the statute will be amended and harmonized in accordance with the treaty. The courts exercise control to ensure that no legislation violates the incorporated conventions that take precedence over other Norwegian law. The fundamental human rights conventions are incorporated through the Human Rights Act of 1999.

- 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 bill is introduced to parliament by a member of government, normally following the publishing of a white paper prepared by an expert committee. The executive and the parliament have the dominant roles in the process. The parliament is the legislative body, but the initiative for the adoption of legislation is mostly taken by the government. The government also carries out the preparatory work. From time to time, judges are members of expert committees preparing the law. A bill may also be introduced to parliament as a private member's bill, by an individual representative.

- 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?

Regulations made by the executive under a statute are subordinate to such law, still binding, but subject to review by the courts as any other legislation.

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

A lot of laws and regulations are amended during one year, but that is how it is in a highly regulated welfare society.

### **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 Supreme Court is a court of precedence, clarifying and developing the law. The Supreme Court rulings are formally binding only upon the parties to the case, but the interpretation of the law in question will have a more general application as it will be followed both by the courts and by the executive in their application of the law, cf. 1.2. In that respect, the Supreme Court's case law may be seen as a source of law. Due to the precedent effect, Supreme Court decisions have to some extent the same effect as the laws enacted by the parliament.

The Norwegian courts have the right and the duty to review the constitutionality of laws when constitutional review is invoked or otherwise relevant. Although the binding force of the decision of the Supreme Court in such a case is limited to the case in question, the decision will be applied to other cases that raise the same issues of constitutional conflict.

- 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?
- 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?

As mentioned, the Supreme Court is a court of precedence, clarifying and developing the law. The Supreme Court is provided with filtering mechanisms enabling the court by its appeal section committee to grant leave for appeal for cases suited for clarification and uniform application of the law. Although the Supreme Court according to the Constitution is the court of last resort, in practice, due to heavy filtering of appeals by the Supreme Court's appeal section committee, the six courts of appeal are the courts of last resort for the vast majority of cases. Thus, the courts of appeal have a crucial role to play in order to ensure in practice the uniform application of the law in the case-law of the courts. There are no special arrangements within the courts or between the courts to ensure uniformity.

- 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 Norwegian court structure is quite simple. It is a three-tier system including 66 district courts, six courts of appeal and the Supreme Court, all of which are courts with general jurisdiction and composed of generalist judges. Apart from the land consolidation courts, special courts play a minor role in the administration of justice. The ordinary courts of appeal are the appellate courts for judgments and decisions made by the land consolidation courts. The ordinary courts undertake constitutional review as well as judicial review of administrative actions. There is no separate jurisdiction for administrative courts.

- 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 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 Supreme Court rulings are formally binding only upon the parties to the case, but the interpretation of the law in question will have a more general application as it will be followed both by the courts and by the executive in their application of the law, cf. 1.2 and 3.1. No disciplinary sanctions have been imposed on judges who in their decisions have deviated from Supreme Court's 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.)?

There are no specific procedures besides what is described above.

- 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?

One quite obvious reason for the Supreme Court to depart from its previous case-law, is the need to "bridge the gap" between law and society. Changes in society might imply the need for a new interpretation of the law. The need for consistency in the case-law, or the need for improving a previous interpretation of the law, might be other reasons for deviation from previous precedents. Also decisions from supranational courts might influence the interpretation of national law in such a way that departing from previous national case-law is necessary.

- 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 to the role of the Supreme Court, see above. Leave to appeal can only be granted if the appeal raises issues of significance beyond the scope of the case, or if it is of importance for other reasons that the case is decided by the Supreme Court. Leave may be limited to specific claims and to specific grounds of appeal, including invoked errors in the application of the law, in the procedure or the factual basis for the ruling.

- 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?

No specific measures are implemented. Also in this respect, the Supreme Court plays a crucial role. The lower courts will follow the Supreme Court's interpretation and application at national level of the case-law of supranational courts. Access to databases containing legal information, is one of the most important tools for judges in order to maintain coherency within the law, see below.

- 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.

Currently, Norwegian judges are provided with access to databases containing:

- all Norwegian statutes since 1687 now in force and all historical versions since 1998
- legal commentary to all statutes in force
- all regulations in force, national and local
- the circulars of the tax and social security authorities
- the *Norwegian Legal Gazette* from 1986
- travaux préparatoires – preparatory works
- treaties signed by Norway since 1992
- Supreme court decisions from 1836
- all appellate court decisions from 1993
- selected decisions on a regular basis from other courts
- Norwegian summaries of the ECtHR’s category 1 cases
- Nordic court decisions concerning maritime law from 1952
- opinions by the Civil Ombudsman (from 1963)
- opinions by special boards dealing with complaints from private customers of banks and insurance companies
- opinions of the Market Council
- the opinions of about 40 different governmental and other appeal boards
- digital publishing platform for academic journals and books, containing more than 26,000 articles within a range of disciplines
- publications highlighting legal developments within the European Union

This information is accessible to all, but charges apply.

### 3.13 Is the access to such database free of charge?

The website Lovdata.no provides access to a collection of online legal resources. Some of the legal documents are available free of charge to all non-subscribers; and such documents may be used on a personal basis as long as such use is for a non-profit and/or non-commercial purpose.

### 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?

The providers of the services mentioned above, are private entities. One of them, Lovdata, providing the most comprehensive services, was established on 1 July 1981, as a private foundation by the Ministry of Justice and the Faculty of Law at the University of Oslo. The purpose of Lovdata is to establish and operate legal information systems on a non-profit 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 quotation from the Norwegian Supreme Court Justice dr. juris. Arnfinn Bårdsen, may sum up the challenges and judicial duties:

*"Faced with the dynamic forces of legal fragmentation and of overlapping jurisdictions, maintaining coherency within the law is of the very essence of judicial duty. This includes clarifying the proper interaction of legal rules on different levels, in order to secure that co-existent and partly integrated systems of law are functioning as a whole."*

*(Supreme Court Justice dr. juris Arnfinn Bårdsen, The Norwegian Supreme Court: Supreme Courts and the Challenges posed by the Transnationalisation of Law, Faculty of Law, University of Bergen, 21st September 2015.)*

3.16 Any other point you wish to raise.