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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 Italy scholars and case law usually refer to a "nomophylactic" function – i.e. the task of ensuring compliance with the law and its uniform interpretation – as being attributed to the Supreme Court of Cassation. This adjective derives from the Greek noun νόμος (the "norm", the law) and the verb φυλάσσω (indicating the action of "protecting").

This function attributed to the Supreme Court is formal, as it is provided for in art. 65 of the Italian Law on the Judiciary (Royal Decree 30 January 1941 no. 12):

*"*The Supreme Court of Cassation, being the supreme organ of justice, ensures the exact observance and uniform interpretation of the law, the unity of the national law, respect for the competences of the different jurisdictions; it settles conflicts of competence and fulfills other duties assigned to it by law."

Having said this, one should however clarify that, although the Supreme Court issues persuasive precedents, they are not binding, as Italy does not have a stare decisis *rule.*

Nonetheless in 2005 the Italian Parliament conferred on the executive the power to issue secondary legislation to ensure uniformity of application of the law, at least within the civil sector of the Supreme Court, with the aim of discouraging litigation. Consequently in 2006 a legislative decree introduced a minimal stare decisis *concept: if a panel of the Supreme Court wished to overrule precedents of the joint chambers, the panel itself could not do so, but would have to refer the case to the same joint chambers (article 374 of the Italian Code of Civil Procedure, as amended by article 8 of Legislative Decree of 2 February 2006, No. 40). It is worth mentioning here that, along this pathway, article 1 of Legisl. Decree of 2011, No. 195, has introduced a similar rule in article 99 of the Code of Administrative Procedure; so the several panels of the Council of State are in a weak stare decisis relationship with the Plenary Chamber of the same Council, from the precedents of which they cannot depart except by further referral.*

Although judges of the first and second instances are not, strictly speaking, obliged, in subsequent civil cases, to follow the new stare decisis *rule, the fact that the Supreme Court (or Council of State) are (partially) bound by (some of) their precedents introduced an incentive for uniformity both on panels (forced to either follow the previous decisions of the joint chambers or issue well reasoned new referrals to the joint chambers to persuade them to overrule their precedent) and lower judges.*

An important role in uniformity is played by the Supreme Court's documentation service – that is, the sector of the Court composed of judges who select decisions to be indexed and who alert when inconsistent interpretations arise. The data base of decisions prepared by this service is widely used by judges and practitioners. The service also issues yearly publications.[1]

A further step has been represented by Decree-Law no. 168 of 2016, converted with amendments into Law no. 197 of 2016: from now on appeals before the Supreme Court (that are very numerous compared to other countries) will be dealt with in the ordinary way in a public hearing only in a limited number, when uniformity is at stake; in other cases, they will be treated in camera, without the participation of the private parties and the public

[1] For a wider perspective, see Müller A. (ed.), Judicial Dialogue and Human Rights, CUP, 2017, with a chapter concerning Italy: http://admin.cambridge.org/academic/subjects/law/human-rights/judicial-dialogue-and-human-rights?format=HB&isbn=9781107173583

prosecutor. This will reinforce the value of those judgements that solve conflicts, which will progressively be the only ones to be cited.

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 most common understanding concerns uniform case law developed by courts.
However, also executive institutions are bound by their precedents, but they can depart from them adopting a motivation. Citizen can challenge administrative acts departing from precedents in administrative tribunals.
As for Parliament, there exist a service in the Presidency of the Council of Ministers which provide legislators an evaluation of the impact of new legislation on preexisting legislation (article 5 of Law no. 50 of 1999 – "analisi tecnico normativa" (ATN)); the service also provides follow up time after the new regulation has been enacted ("analisi di impatto della regolamentazione" (AIR)); thus complying with OECD principles.[2]

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 control of interpretation is viewed as a tool to ensure legal certainty.
Given the great complexity of legislation and social change, it is not uncommon to observe frequent changes in interpretation, which fuel public debate on the so-called crisis of the nomophylactic function. As has been mentioned, recent legislation has tried to address this issue at the same time leaving unchanged the traditional lack of a stare decisis *rule.*

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?

Please see answer above concerning services warning legislators of impact of new legislation.

2.2 Is there a hierarchy of laws?

Yes. A relationship between the sources of law is provided by an article of the Civil Code of 1942, as complemented by the Italian Constitution. In short, the Constitution and constitutional laws are at the top, then EU law is privileged over domestic legislative sources (laws, decree laws, legislative decrees); then regulatory sources, also known as secondary sources follow (regulations of the executive power, local authorities); at the bottom, customary unwritten sources.

[2] Recommendation of the Council of the OECD on improving the Quality of Government Regulation, adopted on 9 March 1995 and further texts.

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?

At present, the Constitutional Court has construed different legal frameworks, depending on whether the case in question concerns European Union (EU) law or international law (which includes the European Convention of Human Rights.

In the area of EU law, the Constitutional Court recognised article 11 of the Italian Constitution as the legal basis for allowing Italy's participation. In 1984 the Court recognised that EC law has primacy over Italian law within the so- called doctrine of competence, establishing that European law is not hierarchically above national law, but has a sphere of competence into which national law cannot enter. However, the Constitutional Court reserved the final word for itself: should European law breach the basic principles of the Constitution or the fundamental rights of individuals, then the Court itself could declare European law inapplicable (there is a preliminary ruling request in front of the CJEU concerning this topic).

Concerning international law and the ECHR (which has been treated as any other piece of conventional international law), under article 10 of the Italian Constitution, as interpreted by the Constitutional Court, national judges could not refuse to apply domestic law, even if this law conflicted with the Convention rules as construed by the ECtHR. National courts could only refer such cases to the Constitutional Court and Constitutional Court judges could only have domestic law struck down because of its incompatibility with principles of the Italian Constitution. The ECHR is placed in an intermediate position between the Constitution and ordinary domestic law (art. 117 of the Constitution).
The domestic judge can also directly use the Convention as a guideline for the interpretation of domestic law. This is possible when no direct and clear conflict exists.

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

See answer to 2.3.

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?

Ordinary laws are approved by Parliament or by regional Assemblies, upon initiative of the members of the assemblies, the government or the people.
The Italian Constitution also provides for two normative acts having force of ordinary law, enacted by the executive power: the decree-law and the legislative decree.
The Decree-Law (Decree Law) is governed by Article 77 of the Constitution. It is approved by the Council of Ministers and issued by the President of the Republic. It may be adopted in extraordinary cases of necessity and urgency and loses effectiveness if it is not converted into law by Parliament within sixty days following its publication.
Legislative Decrees are governed by article 76 of the Constitution. They are also approved by the Council of Ministers and issued by the President of the Republic, but can be adopted only after the delegation of the Parliament, given by way of a law specifying the subject matter of the discipline, the principles and criteria to be followed and the deadline within which it must be issued.
In present days the executive power, either as initiator of an ordinary law or as a delegated or urgency legislator, under the control of Parliament, is the dominant actor.

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?

The acts having force of law are binding (see 2.5).
Other acts (regulations, administrative acts) can be disregarded by the judge in the individual cases if they conflict with a law.

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

Yes.

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 no binding legal effect except for the parties to the lawsuit. Decisions of the Constitutional Court declaring laws unconstitutional are binding.

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?

See answer to 1.1.

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?

See answer to 1.1. As for lower courts, the Law on the organization of the Judiciary – at least for civil courts – provide that judges regularly meet in order 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.

Yes. Please see answers to CCJE's questionnaire in preparation of the Opinion on specialisation of courts. It is possible to challenge 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?

See answer to 1.1.

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?

See answer to 1.1.

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

They are persuasive. See answer to 1.1.

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.)?

See answer to 1.1. The appeals system is the regular way to obtain uniformity. Before the Supreme Court, both the Prosecutor General and the Court ex officio *(when declaring a case inadmissible) can obtain that the Court renders a judgment* in abstracto.

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?

It is in general permissible, providing an adequate reasoning based on the law (except for panels in the Supreme Court, which have to refer the case before the Joint Chambers – see 1.1.).

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)?

See answer to 1.1. In Italy the Supreme Court is not given any discretion in selecting its cases, under the Italian Constitution which provides for an unlimited access of cases to the Court. The new article 360 bis of the Italian Code of Civil Procedure, introduced by article 47 of the Law of 18 June 2009, No. 69, was introduced to 'filter' the numerous civil cases that are traditionally brought before the Supreme Court. The reform of 2016 made the filter even stronger, since only relevant cases will be treated in a public hearing, other being dealt with in camera *with a written procedure.*

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?

See answers above.

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.

The decisions are accessible through the website www.cortedicassazione.it free of charge. Some cases are anonymized, according to privacy laws.

3.13 Is the access to such database free of charge?

Yes. A database with restricted access provides past decisions and indexes/links.

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 many commercial providers, which so far have been the only way to access lower court decisions. In a few months, also lower court decisions will be publicly retrieved and accessible.

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?

It definitely poses a challenge.

3.16 Any other point you wish to raise.