

Consistency of the case law as a prerequisite to legal certainty: European and national perspectives

Nils Engstad, President of the Council of Europe's Consultative Council of European Judges (CCJE), introduction at the High-Level Conference on the Harmonisation of Case Law and Judicial Practice, Athens, 29 September 2017

1. The title of this part of the conference is *Consistency of the case law as a prerequisite to legal certainty*. The title leads us quickly to the concept of the rule of law. As stated by the European Court of Human Rights, the principle of legal certainty is implicit in all the Articles of the European Convention on Human Rights and constitutes one of the basic elements of the rule of law.¹ Legal certainty contributes to public confidence in the courts. Domestic legal systems must be able to maintain consistency in court decisions. The Strasbourg Court has developed a close link between the consistency of domestic case law and the individual's right to a fair trial as enshrined in the Convention Article 6 § 1. Conflicting decisions of domestic courts, especially of supreme courts, can trigger a breach of the fair trial requirement. *Justice must not degenerate into a lottery*, to quote the dissenting judges in the case *Şahin and Şahin v. Turkey*.²
2. Turning to the reports of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, we will find that legal certainty is not satisfactorily ensured in a number of Member States of the Council of Europe. Furthermore, there are no trends towards significant improvements. Consequently, there is a need to pay increased attention to this important requirement of the rule of law and to foster improvements in this respect at a national level.
3. The CCJE will make its contributions. At its plenary meeting in November this year, the CCJE will adopt an Opinion on *the role of the courts with respect to*

¹ *Beian v. Romania* (No. 1), 30658/05, judgment of 6 December 2007, para. 39

² *Şahin and Şahin v. Turkey*, 13279/05, judgment of 20 October 2011, Joint dissenting opinion para.

uniform application of law. A draft has been prepared by a working group composed of members of the CCJE, assisted by Professor Aleš Galič as our scientific expert, and I will of course rely on this work.

4. Although the courts have a crucial role to play in this respect, we must not forget the broader perspective. Upholding the rule of law is a common responsibility for the three powers of state. Consequently, all powers of state have an obligation to foster coherent legal rules and coherent application of these rules, at the same time respecting each other's domains.
5. The point of departure for the judge when interpreting and applying the law is to help the law achieving its purpose. The role of the other powers of state in this respect is to provide clear, foreseeable and consistent legislation. This is indeed one of the most important contributions to the rule of law. The judge, on the other hand, can better interpret the law, can better apply the law and can better ensure uniform application of laws if laws are logically consistent, if they are well drafted and clearly worded, avoiding unnecessary ambiguity and without inner contradictions.
6. It is also for the national level and the powers of state to organise a court system that will foster legal certainty and coherent case law. Sometimes the issue of conflicting court decisions is a result of the very organisational structure of a state's court system. Conflicts of jurisdiction, for example, may give rise to parallel systems deciding on the same legal issues, causing disparities in the case law between the parallel systems, as was alleged in the aforementioned case *Şahin and Şahin v. Turkey*.
7. One important aspect in this respect is the role of the supreme courts. Precedents and case law has been and still is an important aspect of common law. However, also in a majority of civil law jurisdictions judges are guided by case law, especially that of the highest courts. Consequently, case law of the supreme courts has the most direct impact on the uniform interpretation and application of the law.

8. One important observation is the link between the consistency of case law and mechanisms for access to a supreme court. These access-mechanisms differ across Europe. The preferred solution depends on whether the predominant role of the Supreme Court is to strive for just and correct resolution of every individual case for the benefit of the parties, or whether the predominant role of the Supreme Court is to promote the public interest in ensuring uniform case law and the development of the law.
9. The European Court of Human Rights has made it quite clear that it is the role of a supreme court to ensure consistency of case law. In its judgment of 6 December 2007 in the case of *Beian v. Romania* (no. 1) (30658/05) the Court states that it is precisely the role of a supreme court to resolve divergences in case-law. To my mind, in order to facilitate the fulfilment of this important role, there should be adequate selection criteria for admitting cases to the Supreme Court. Furthermore, the Supreme Court itself should be empowered to grant leave to appeal.
10. Size may also be of significance. My point of departure is that a small supreme court deciding first and foremost on cases of precedential value is preferable. Both the size and the limited number of cases admitted will promote the role of the Supreme Court in ensuring consistency of case law and the development of the law. I believe that when a supreme court decides on an excessively high number of cases, its case law can be ignored and the court itself could become a source of legal uncertainty.
11. Limited access to supreme courts entails that the courts of appeal will be the courts of last resort for the vast majority of cases. Hence, the courts of appeal will have a crucial role to play in order to ensure consistent case law, and they should have the necessary means at hand to do so, including filtering mechanisms.
12. Case-law development is not, in itself, contrary to the proper administration of justice. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. That is what Aharon Barak describes

as bridging the gap between law and society.³ The law of society is a living organism based on realities that are constantly changing.

13. However, and this addresses the role of the judge, departing from settled case law should not be an easy thing to do. It should happen only when there are pressing needs to do so. A judge who departs from settled case law should provide persuasive reasons and explicit reasoning for doing so.⁴ This is the only way to establish whether the judge consciously departed from case law in an effort to change it or whether the court neglected or was simply unaware of the previous case law. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.⁵

14. Finally, and this is of importance, an adequate system of reporting case law is essential for ensuring uniform application of law. At least judgments of the supreme courts and appellate courts should be published in order to make them known.

15. I have come to the end of this presentation. I am looking much forward to listening to the other presentations as well as to the following discussions, and I thank you all for your attention.

³ Barak, A. *The Judge in a Democracy*, Princeton, New Jersey, 2006, p. 3

⁴ The Opinion No. 11 (2008) of the CCJE, para 49.

⁵ *Brezovec v. Croatia*, 13488/07, Judgment of 29 March 2011, para. 65