

Strasbourg, 10 November 2017

**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

**OPINION N° 20 (2017)**

**THE ROLE OF COURTS WITH RESPECT  
TO THE UNIFORM APPLICATION OF THE LAW**

**I. INTRODUCTION**

1. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty. On the other hand, the need to ensure uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law, nor should it call the principle of judicial independence into question.
2. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) resolved to reflect upon the role of courts with respect to the uniform application of the law and to set out applicable standards and recommendations.
3. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Charta of Judges (2010), and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter "Recommendation CM/Rec(2010)12").
4. This Opinion takes account of the replies of the CCJE members to the questionnaire on the role of courts with respect to the uniform application of the law prepared by the CCJE Bureau<sup>1</sup>, and of the report and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Professor Aleš GALIČ (University of Ljubljana, Slovenia), along with the analysis of the replies to the questionnaire.

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<sup>1</sup> Answers to the questionnaire (national reports) have been received from the following 34 countries: Albania, Andorra, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Switzerland, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

## II. WHY IS THE UNIFORM APPLICATION OF THE LAW IMPORTANT?

5. The uniform application of the law is essential for the principle of the equality before the law. Moreover, considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, citizens justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that they can predict the legal effects of their acts or omissions.
6. The persistence of conflicting<sup>2</sup> court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law.<sup>3</sup> Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice.
7. If parties can know in advance where they stand, they might often decide not to go to court in the first place. It should be, to the greatest extent possible, for the lawyers to know how to advise their clients and hence for litigants to know their rights. Precedents/settled case law (hereafter the case law), setting out clear, consistent and reliable rules, may reduce the need for judicial intervention in resolving disputes. By being able to rely on previous decisions, reached in similar cases, in particular by higher courts, cases can be resolved more efficiently.
8. As interpreted by the European Court of Human Rights (hereafter the ECtHR), the right to fair trial enshrined in Article 6 of the European Convention on Human Rights (hereafter the ECHR) is also linked to the requirements concerning the uniform application of the law. Certain divergences in interpretation can be accepted as an inherent trait of any judicial system which is based on a network of courts.<sup>4</sup> Different courts may thus arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances.<sup>5</sup>
9. However, under certain circumstances conflicting decisions of domestic courts, especially courts of the last instance, can constitute a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR. Thereby it has to be assessed whether (1) "profound and long-standing differences" exist in the case law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect.<sup>6</sup> The CCJE welcomes the development which emphasises the close link between the uniformity and consistency of case law and the individual's right to a fair trial.

## III. THE CASE LAW AS A SOURCE OF LAW

10. Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries. Nevertheless, the CCJE recognises that the difference between the common and civil law systems has traditionally been particularly significant in regard to treatment of precedent and case law in general.
11. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter.<sup>7</sup> Thus precedents are in principle binding *de jure* and thus considered to be a proper source of law. *Stare decisis*<sup>8</sup> - the legal principle of determining points in litigation according to precedent - is an important aspect of common law. In civil law countries, the guarantee of independence of judges has traditionally been construed as meaning, *inter alia*, that judges are independent and are, in their decision-making, bound (only) by the Constitution, international treaties, statutes and general principles of law, not by judicial decisions reached in similar cases. Therefore, in a number of civil law countries, case law has traditionally not been recognised as a binding source of law. Consequently, there have traditionally been important divergences between the common and civil law systems concerning the question of whether only a court of the same or a

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<sup>2</sup> Please note that in the French version of this Opinion, the term "conflicting" is translated as "contradictoire".

<sup>3</sup> The ECtHR, *Vinčić and others v. Serbia*, 44698/06, 1 December 2009.

<sup>4</sup> The ECtHR, *Tomić and others v. Montenegro*, 18650/09 and others, 17 April 2012.

<sup>5</sup> The ECtHR, *Şahin and Şahin v. Turkey*, 13279/05, 20 October 2011.

<sup>6</sup> *Ibid.*

<sup>7</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 45.

<sup>8</sup> *Stare decisis* is Latin for "to stand by things decided".

higher level can overrule a precedent, or whether every, i.e. also a lower, court can depart from the case law provided that such departure is not arbitrary.

12. Nevertheless, the CCJE has already observed that in civil law countries judges are guided by case law, especially that of the highest courts, whose task includes ensuring the uniformity of case law<sup>9</sup>. It follows from the reports of the CCJE members that in the majority of civil law jurisdictions, although lower courts are not formally bound by judgments of higher courts, they usually will follow their decisions in similar matters, whereby higher courts and the supreme court or the court of cassation<sup>10</sup> in particular, are aware of their role in ensuring the uniform application of the law. In addition, in some countries of a civil law tradition, (certain) judgments of the supreme court, sitting as a grand chamber (*en banc*) or in extended chamber, are binding – either for all courts or for all panels of the supreme court (until another judgment of a grand chamber is taken).
13. Consequently, in civil law countries, court rulings, especially of a supreme court, have a wider importance than in the specific case in respect of which that ruling was given and, from this perspective, it can be considered a source of law. With regard to civil law countries, reports submitted by the CCJE members quote constitutional rules relating to the rule of law, equality before the law, principle of justice, the right to a fair trial and the position of supreme courts as forming the basis for the concept of the uniform application of the law. Therefore, on the legislative level, laws relating to the organisation of courts (in particular the powers of the supreme court), the laws on constitutional courts and laws determining filtering criteria for the access to the supreme courts, are relevant.
14. According to the *stare decisis* doctrine, one precedential decision has a relevance. A consolidated trend of decisions on a certain point all in accord (settled case law, *jurisprudence constante*, *ständige Rechtsprechung*) has traditionally been required in order to become relevant in civil law countries. This will certainly not prevent a decision from having a jurisprudential value when the supreme court rules for the first time on a question of law which is not yet settled. It is accepted that there can be no formula as to how to identify the moment at which the case law can be considered settled. Numerous supreme courts in civil law countries are now empowered to select cases with intention of setting standards that should be applicable in future cases. Therefore, in these cases, already one judgment of a supreme court, when it was reached with intention to set a precedent, can count as an authoritative case law.

#### IV. MEANS FOR ENSURING THE UNIFORM CASE LAW

##### a. Formal, semi-formal and informal mechanisms

15. There are formal, semi-formal and informal mechanisms with regard to the role of courts in achieving consistent case law.
16. Formal proceedings brought to appellate<sup>11</sup> and in particular to supreme courts or courts of cassation have the most direct impact on the uniform interpretation and application of the law. Such proceedings in the supreme courts are for example (1) deciding an individual litigant's appeal (a final appeal on points of law; revision, cassation), (2) special appeals brought by a public prosecutor (or a similar public body) bringing to the Supreme court (in civil cases) an important legal question with a goal of ensuring, the uniform application of the law or development of law through case law, whereby such a recourse in most systems results in a declaratory judgment, not affecting the rights of the litigants in the case at hand, (3) rendering interpretational statements (which are called e.g. "uniformity decision", opinions, principled legal opinions) in a purely abstract manner, not on appeal brought in an individual case and (4) preliminary rulings adopted in pending cases on narrowly defined points of law, upon the request of an inferior court.
17. Semi-formal mechanisms include e.g. regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court. Such meetings can have either a purely informal character or they might be institutionalised to a certain extent. Issuing "guidelines" (that generally leave room for individual assessments) in which attention is drawn to the applicable principles, in accordance with the established case law (such as scales for

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<sup>9</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 48.

<sup>10</sup> For the purposes of the present Opinion, the term "supreme courts" will be used for referring to the courts of highest instance.

<sup>11</sup> The term "appellate courts" also refers to the appellate panels.

damages regarding personal injury in civil cases, sentencing in criminal cases or reimbursable lawyers' fees – where there is no lawyers' tariff applicable can have similar effects.

18. In the third place, there are purely informal mechanisms, such as informal consultations among judges seeking to establish consensus on several points of procedural and material law when practice shows divergent case law. Continued legal education and judicial training is extremely important for uniformity and predictability of the case law.
19. These semi-formal and informal mechanisms are intended to promote the uniform application of the law, but conclusions drawn in these contexts cannot infringe the independence of the individual judge.

#### **b. The role of supreme courts**

20. It is primarily a role of a supreme court to resolve contradictions in the case law. The supreme court must ensure uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system.<sup>12</sup> There is an inherent link between considerations concerning the uniformity of the case law, on the one hand, and mechanisms for access to the supreme court, on the other.
21. The CCJE recognises that, on account of differences in legal traditions and organisation of judiciaries, access to supreme courts is framed differently across Europe. The same applies to the concepts as to whether supreme courts should predominantly serve the private function or the public function. The former consists of striving for just and correct resolution of every individual case for the benefit of the parties to this case. The latter is concerned with safeguarding and promoting the public interest in ensuring the uniformity of the case law and the development of law. As this would go beyond the scope of this Opinion, the CCJE does not attempt to prescribe how to organise supreme courts and access to them<sup>13</sup>. Nevertheless, the supreme court's responsibility to ensure uniform case law is likely to require the establishment of adequate selection criteria for admitting cases to the supreme court. Those countries which permit unfettered right to appeal may consider introducing a requirement for seeking leave or other appropriate filtering mechanism. The criteria for granting leave should facilitate the supreme court in fulfilling its role in promoting the uniform interpretation of the law. In that context, the CCJE recalls what was said in Recommendation No. R (95) 5<sup>14</sup>.
22. The introduction of such criteria for granting leave to appeal namely implies that a supreme court's resolution of the matter bears significance beyond the scope of the individual case. It will generally be expected to be followed in future cases and therefore offers a valuable guidance for lower courts and all future litigants and their lawyers. Only such selection criteria ensure that only cases of precedential value are adjudicated by a supreme court. At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes.
23. The CCJE takes the view that the responsibility of supreme courts to ensure and maintain the uniformity of the case law thus should not be understood as if the supreme court is required to intervene as often as possible. In addition to causing delays in the supreme court's handling of cases and diminishing the quality of its adjudication, such an approach would inevitably cause contradictions within the case law of the supreme court itself, whereby it is also inevitable that if the number of cases decided by a supreme court is excessively high, its case law will frequently remain overlooked. Therefore, existence of conflicting judgments of lower courts cannot simply be cured by providing for an unrestricted access to the supreme court.
24. The existence of instruments for ensuring uniformity within the same court is particularly relevant for supreme courts. It is especially problematic if the supreme court itself becomes a source of uncertainty

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<sup>12</sup> The ECtHR, *Albu and others v. Romania*, 34796/09, 12 May 2012.

<sup>13</sup> See CCJE Opinion No. 11 (2008) on the quality of judicial decisions.

<sup>14</sup> See Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Article 7 (c)): "Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims".

and of conflicting case law, instead of ensuring its uniformity. It is thus of paramount importance that within the supreme court, mechanisms exist which can remedy inconsistencies within this court. Such instruments may include e.g. referrals to grand chambers or convening larger panels where the case law of the supreme court is divergent or where reconsidering and possibly overruling of an established precedent is considered. At least an “exchange of opinions” with the chamber, from which case law another chamber intends to depart, might be necessary. Informal mechanisms, as mentioned above in para 19, are also valuable.

25. The CCJE is of the opinion that a divergent case law in appellate level of jurisdiction (either within the same appellate court or between different appellate courts) is best addressed by a possibility to file a further appeal on points of law to the supreme court.

#### **c. The role of appellate courts**

26. It should be recalled that if access to the supreme courts is shifting from a matter of a right to a matter of exception, it is the courts of appeal that are becoming the highest instance for most cases. They should therefore be in a position to accomplish their role in ensuring the quality of justice which includes the need to secure the uniform application of the law. Achieving consistency of the case law may take time, and periods of conflicting case law may therefore be tolerated without undermining the principle of legal certainty.<sup>15</sup> Consequently, in the CCJE’s view, it cannot be automatically imposed on a supreme court to intervene as soon as there are divergent decisions on the level of appellate courts. It can be expected in numerous cases that the uniform application of laws should in due time be achieved on the level of appellate courts. Therefore, appellate courts have an important role in ensuring uniform application of laws.

#### **d. Specialised courts**

27. The existence of specialised courts on the lower level does not necessarily have significant adverse effects on the uniformity of the case law if in the top of the structure of judiciary there exists a single supreme court with general jurisdiction. If, however, there exist multiple “supreme courts” or courts with final jurisdiction and when they may deal with the same legal issues, this could cause problems concerning the uniform application of law. In accordance with the case law of the ECtHR, it is essential in such cases that the domestic law provides for formal or informal mechanisms for overcoming the inconsistencies between these unrelated and independent supreme courts and that such mechanisms produce consolidating effects<sup>16</sup>.

#### **e. Binding interpretative statements *in abstracto***

28. In the CCJE’s view, the public role of a supreme court, which consists of providing guidance *pro futuro* thus ensuring the uniformity of the case law and the development of law, should be achieved through a proper filtering system of appeals. This should be preferred over making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court. Such instruments, as (still) existing in several countries<sup>17</sup>, are (unlike the instrument of preliminary rulings) adopted irrespective of any real-life or pending cases and without the parties to such cases and their lawyers being able to argue their positions. While admitting that such instruments can have a positive impact on uniformity of the case law and legal certainty, the CCJE is of the opinion that they raise concerns from the viewpoint of the proper role of judiciary in the system of separation of state powers.

#### **f. Preliminary rulings**

29. In some countries, there is a possibility for courts of lower instance to refer, in the framework of pending cases, a question of interpretation of a point of law to the supreme court. This may contribute to the uniformity in application of the law since future divergences may be avoided. On the other hand, such preliminary rulings may provide a premature authoritative answer to the question and thus hinder the successive development of the law.

### **V. DEPARTURE FROM THE CASE LAW**

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<sup>15</sup> The ECtHR, *Albu and others v. Romania*, 34796/09, 12 May 2012.

<sup>16</sup> The ECtHR, *Sahin and Sahin v Turkey*, 13279/05, 20 October 2011.

<sup>17</sup> These instruments, referred to under no. 3 of para 16 above, are different (as they are binding, and issued with no reference to a pending case) from those referred to under no. 2 of the same para, for which no objections arise.

**a. The need to prevent rigidity and obstacles for the development of law**

30. The CCJE is of the view that seeking to ensure equality, uniform interpretation and application of the law should not lead to rigidity and to obstacles for the development of law. Therefore, the requirement that “like cases should be treated alike” must not be framed in absolute terms. The case law development is not, in itself, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement<sup>18</sup>. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice of the EU or the ECtHR) often result in the need to adjust the domestic case law as well.
31. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a well-established case law, shall not be reopened. Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons.

**b. The requirement to provide explicit reasons for departure from established case law**

32. The CCJE has already adopted the position that while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision<sup>19</sup>. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual’s right to a fair trial would be violated<sup>20</sup>.

**c. The principle of judicial independence and the binding force of the case law**

33. According to the *stare decisis* doctrine in common law countries, only superior courts and, under some conditions, courts of the same level may depart from a previous precedent, whereas lower courts are generally bound by precedents of higher courts. Therefore, the latter is not considered to be incompatible with the requirements of judicial independence<sup>21</sup>.
34. On the contrary, in many civil law countries, the (constitutional) guarantee of independence of judges is construed as meaning, *inter alia*, that judges are, in their decision-making, bound (only) by the Constitution, international treaties and statutes, not by judicial decisions of hierarchically superior courts, reached in previous similar cases. It is thus accepted that also inferior courts may depart from settled case law of hierarchically superior courts. The CCJE agrees that different legal traditions may lead to different perceptions as to the interface between precedents of higher courts and judicial independence of judges in lower courts and that these different approaches may continue to coexist.
35. It is however essential that, firstly, when the lower court may depart from the case law established on the superior level, the requirements concerning reasons, as elaborated in the sub-chapter b above, fully apply. Secondly, in case when a lower court departs from the case law of a higher court, a possibility of appeal should in general be open to such higher court. The latter should have the last word concerning the disputed issue and should be in a position to determine whether it will insist on its previous case law, or whether it will agree with the arguments of the lower court that the case law should be changed.
36. If the parties justifiably rely on the existing case law, the court that considers departing from it should, in the CCJE’s view, so far as possible avoid causing undue surprise. It should enable the parties to realise that such a change is indeed considered and thus give them opportunity to prepare and

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<sup>18</sup> The ECtHR, *Sahin and Sahin v Turkey*, 13279/05, 20 October 2011, para 58.

<sup>19</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 49.

<sup>20</sup> See the case *Brezovic v. Croatia*, ECtHR.

<sup>21</sup> Strictly speaking, a precedent set by lower courts in common law countries is never binding on a higher court.

possibly adjust their arguments. In exceptional circumstances, even a prospective overruling could be an acceptable tool to prevent undue harshness to parties which have justifiably relied on existing case law.

#### **d. Distinguishing cases**

37. Adjudication implies the assessment of all the specific circumstances of the case at hand. In this perspective too, there are limits to uniformity. The relevance of the case law presupposes that the previous case was indeed based on essentially similar facts. When relying on case law, due consideration should be given to the context and circumstance of the case wherein they were adopted.
38. Adequate focus should be devoted to analysing relevant case law including developing proper techniques for distinguishing cases. These can have the effect that the case is taken out of the category of cases apparently covered by the earlier decision so that on a close and critical analysis, the earlier decision is not in fact a relevant precedent. Giving two disputes different treatment cannot be considered to give rise to conflicting case law when this is justified by differences in the factual situation in question.

#### **e. The consequences for judges for not following the established case law**

39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary.

### **VI. PUBLICATION AND REPORTING OF THE CASE LAW**

40. 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 not just to the parties to the individual case but, so as to enable them to rely on these judgments in future cases, to other courts, lawyers, prosecutors, academics and general public<sup>22</sup>.
41. Official, semi-official and private kinds of reports can be in place, in a traditional paper form or in a form of electronic data-bases privately or publicly. Judges should have access, and be trained to use free of charge at least one electronic data base with the case law of the supreme court and of appellate courts.
42. The CCJE acknowledges that different legal traditions influence different styles of judicial decisions and also different concepts as to which decisions should be published and in what form. The CCJE however wishes to stress that due regard must also be given to the factual circumstances and the context of the case, so that the possible use of the reported decision in future cases will not unduly be extended to cases, based on insufficiently similar circumstances. The CCJE welcomes the practice to publish summaries of decisions (indexes or maxims), including factual background, so as to make the search for precedents easier.
43. Where supreme courts or appellate courts produce a huge amount of the case law, its mere publication does not yet enable judges, lawyers and academics to keep a proper track of it. For such circumstances, the CCJE sees a value in a system that a selection of judgments, which set important standards to be followed in future cases, is published in a form (for example "a collection of landmark decisions") with a purpose to ensure to a greater extent that they will be taken into account.

### **VII. OTHER RELEVANT ASPECTS**

#### **a. Responsibilities of all three state powers**

44. The concept of the uniform application of the law is relevant to all organs of state: the legislature, the executive and the judiciary. In this respect too, the organs of state are interconnected and interdependent as they all have an obligation to foster coherent legal rules and coherent application of

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<sup>22</sup> See CCJE Opinion No. 14(2011) on justice and information technologies (IT).

these rules. The law must as far as possible be clear, foreseeable and consistent and when amending laws, the legislature should have due regard to the case law that has developed in the areas, where the change is attempted. The courts can better ensure uniform application of laws if laws are logically consistent, well drafted, clearly worded, avoiding unnecessary ambiguity and without internal contradictions.

45. The CCJE, while admitting that legislative reforms are inevitable in a highly regulated modern society, wishes to warn that frequent, sometimes incoherent and hasty, changes of laws affect the quality of legislation and legal certainty. Piecemeal nature of amendment and the complexity of laws (as amended) compromise the principle of legal certainty.
46. Contradictions in the case law are sometimes a consequence of ambiguously drafted laws which prevent courts from being able to arrive at a uniform and generally acceptable interpretation. The CCJE considers it in such circumstances to be ultimately the responsibility of the legislature to change the law. This is not to suggest that casuistic and detailed regulation is a desired goal. Broad definitions and open norms are often indispensable as they allow courts much needed flexibility and may be useful when the need arises to fill gaps in law. As the ECtHR reiterates, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances<sup>23</sup>.

#### **b. The role of lawyers and prosecutors**

47. The role of lawyers and public prosecutors in ensuring uniform application of laws is very important. For ensuring the best quality of justice for the parties, adequate contribution should be made by the lawyers and public prosecutors. They should engage in a proper research of the case law and submit arguments for the applicability or, respectively, the inapplicability of previous decisions.

#### **c. Ensuring uniform application of international and supra-national law**

48. Internationalisation of law creates a challenge as to how to ensure uniformity in application among different countries. Concerning international treaties, due regard should be given to the need to achieve their uniform application in all contracting states. Contradictions between national laws and international treaties should be avoided. These goals should be pursued regardless of whether a state adheres to the “dualist system” (meaning that international law is not directly applicable, an implementing domestic legislation is necessary) or to the “monist system” (meaning that international law does not need to be translated into national law and can, once the international treaty is ratified, be directly applied by the courts). 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<sup>24</sup>.

### **VIII. MAIN CONCLUSIONS AND RECOMMENDATIONS**

- a. Regardless of whether precedents are considered to be a source of law or not or whether they are binding or not, reasoning with previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.
- b. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty in a state governed by a rule of law. Uniform application of laws enhances the public perception of fairness and justice, and the confidence in the administration of justice.
- c. A persistence of conflicting decisions of courts, especially courts of the last instance, can trigger a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR.
- d. The need to ensure uniform application of the law should not lead to rigidity and unduly restrict the proper development of law and neither should it jeopardise the principle of judicial independence.
- e. It is primarily a role of a supreme court to resolve conflicts in the case law and to ensure consistent and uniform application of laws as well as to pursue development of law through the case law.

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<sup>23</sup> The ECtHR, *Borisenko and Yerevanyan Bazalt Ltd. v. Armenia*, 18297/08, 14 April 2009.

<sup>24</sup> On this issue, the CCJE refers to its Opinion No. 9(2006) on the role of national judges in ensuring an effective application of international and European law.



- f. From the perspective of ensuring uniformity and consistency of the case law, it is most appropriate if the supreme court is empowered to grant leave to appeal or use another appropriate filtering mechanism. The selection criteria should pursue the public function of the supreme court to safeguard and promote the uniformity of the case law and the development of law.
- g. Making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court, while admitting that this can have a positive impact on the uniformity of the case law and legal certainty, raises concerns from the viewpoint of the proper role of the judiciary in the system of separation of state powers.
- h. Appellate courts also have an important role in ensuring uniform application of laws.
- i. It is of paramount importance that within the highest court, mechanisms exist which can remedy inconsistencies within this court.
- j. If there exist multiple courts with final jurisdiction for specific areas of law, it is essential that the domestic law provides for formal or informal mechanisms for overcoming the inconsistencies between these unrelated and independent supreme courts and that such mechanisms produce consolidating effects.
- k. When a court decides to depart from previous case law, this should clearly be stated in its decision. It should follow from the reasoning that the judge knew that the settled case law on the point was different, and it should thoroughly be explained why the previously adopted position should not stand.
- l. The applicability of previous decisions should not be extended to the factual and legal situations of another case, if a close and critical analysis would lead to the finding that the circumstances and the context of the cases do not match.
- m. An adequate system of reporting the case law of supreme courts and appellate courts is essential for ensuring uniform application of law.