CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

OPINION No. 9 (2006)

OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

ON THE ROLE OF NATIONAL JUDGES IN ENSURING AN EFFECTIVE APPLICATION OF INTERNATIONAL AND EUROPEAN LAW

This Opinion has been adopted by the CCJE

at its 7th meeting (Strasbourg, 8-10 November 2006).

INTRODUCTION

1. The Committee of Ministers required the Consultative Council of European Judges (CCJE) to examine in particular some questions (which appear in the Framework global Action Plan for Judges in Europe[1]) such as the application by national judges of the European Convention on Human Rights and other international legal instruments, the dialogue between national and European judicial institutions and the availability of information on all relevant international texts.

2. The CCJE noted that national legal systems have, increasingly, to deal with legal issues of an international nature, as a result both of globalisation and of the increasing focus of international and European law**[2]** on relations between persons rather than states. This development necessitates changes in judicial training, practice and even culture, if national judges are to administer justice meeting the needs and aspirations of the modern world and respecting the legal principles recognised by democratic states.

3. Such an evolution should have, first of all, important consequences on the training of judges, on the nature of the relationships between international judicial institutions and on the hierarchy of norms to be respected by the judge in the context of increasing legal sources; secondly, this requests that state authorities use widely additional resources in ensuring the carrying out of the above mentioned activities.

4. Therefore, the CCJE deemed it useful to review the situation of the means made available to the judge so as to work efficiently in an international context and thus to address the application by the national judge of the European and international law. The aim of this Opinion is to achieve a sound application of international and European law, particularly human rights law. The training of judges, availability of relevant information and documentation as well as translation and interpretation are means to reach this goal.

5. In this regard, the CCJE underlines that national judges are the guarantors of the respect and proper implementation of international and European treaties to which the state they belong to is a party, including the European Convention of Human Rights.

6. This Opinion complements CCJE's Opinion N° 4 (2003) on appropriate initial and in-service training for judges at national and European levels**;** the considerations contained in that Opinion, in fact, are applicable, in their entirety, to the issues addressed by the present Opinion.

A. PROVIDING NATIONAL JUDGES WITH INFORMATION AND DOCUMENTATION ON ALL RELEVANT INTERNATIONAL AND EUROPEAN LEGAL INSTRUMENTS[3]

a. Good knowledge by judges of international and European Law

7. In a context of increasing internationalisation of societies, international and European legislation and case-law have a growing influence on national legislation and court practice; these areas of law must be properly understood by judges in order to perform their judicial functions according to the principle of the rule of law shared by democratic countries. Therefore, judges must be prepared to be acquainted with and participate in the international evolution of legal practice. They must know and be able to apply international and European law, in particular regarding human rights issues.

b. Providing judges with the means to access information on international and European law

8. International and European norms, as well as court practice, are rapidly growing both numerically and in complexity. If a country's judges are to be comfortable in the European and international context, the state, in order to remain consistent vis-à-vis its own international commitments, should take the appropriate measures to ensure that judges can gain a full understanding of the relevant European and international reference texts, in particular those related to the human rights protection, enabling them to better perform their activities.

c. Including international and European law in the curricula of universities and training courses for judges

9. In many countries courses in international law, European law, including human rights instruments, form parts of the legal curriculum in universities. However, only in some countries it is necessary for candidates to have an in-depth knowledge of these subjects to obtain a judicial post.

10. The CCJE considers that it is important that international and European legal issues be part of university curricula and also be considered in entry examinations to the judicial profession, where such examinations exist.

11. Appropriate initial and in-service training schemes on international subjects should be organised for judges, in both general and specialist areas of activity. Although differences exist among European countries with respect to the systems of initial and in-service training for judges, training in international and European law is equally important to all the judicial traditions in Europe.

12. In some countries special training initiatives in international and European law are organised specifically for judges, or for judges and prosecutors, by judicial training institutions (including judicial service commissions) or ministries of justice, as well as jointly by these agencies[4]. In other countries, no special training in international and European law is provided; in these countries judges usually may take part in general training courses organised by the judiciary itself or by other bodies (universities, bar associations, foreign judicial training schools).

13. In this respect, the CCJE therefore notes the *acquis* of the Council of Europe concerning the training of judges on the application of international treaties[5], affirming the needs (a) to develop the study of international law, treaties, European and other international institutions within the framework of university courses; (b) where appropriate, to introduce tests on the application of international norms in examinations and entrance competitions for judges; (c) to develop the international dimension in initial and further training of judges; (d) to organise, within the framework of the Council of Europe, and in collaboration with European institutions and other international organisations, training seminars for judges and prosecutors aimed at promoting a better knowledge of international instruments.

d. Ensuring good quality judicial training in the field of international and European law

14. With reference to international and European law training, the CCJE considers that members of the judiciary should be substantially represented among instructors. Such judicial training should include specific aspects relevant for court practice, and be accompanied by relevant study materials, possibly including distance learning materials provided over the internet. The CCJE encourages cooperation between national training institutions in this field and calls for the transparency of the information on such training programmes and the modalities to participate.

e. Continuous and accessible information on international and European law available to all judges

15. The CCJE notes that complete and up-to-date information on international and European legal texts and case-law is not regularly offered to judges. Even in those cases in which legal information is received by judges either electronically or on paper, official journals of the countries rarely include information on international and European law. Some countries, however, issue special legal circulars that include information on international law. Other institutions such as judicial academies, training centres or court administrations sometimes provide information on the recent case-law of international and European courts. Information may also be contained in the national legal periodicals.

16. The provision of internet access cannot, by itself, be regarded as a sufficient discharge of a state's duty to provide sufficient information, or means of obtaining information, on international and European legal subjects.

17. The CCJE recommends that all judges should have access to paper and electronic versions of legal instruments, so as to enable accurate research in international and European legal spheres. Such opportunities should be offered to judges through specialist support, if necessary by the way of a centralised service, which may ensure that judges are informed even beyond the contingent necessities of their work.

18. Only in a few countries ministries of justice or of foreign affairs provide judges with translations into their own language of relevant texts, including the judgments of the European Court of Human Rights concerning their own country. In the opinion of the CCJE, this situation should be rapidly changed by states; appropriate state support should also include the creation of efficient translation services for legal texts that could be of use to judicial practice (see also paragraph 23 below).

19. In order to facilitate the work of judges, complete and up to date digested, indexed and annotated information should be readily available, as the judge alone has to evaluate the relevance of information, if necessary with the help of court documentation services and judicial assistants[6]. Co-operation of centralised and local court documentation services and/or libraries with legal libraries and documentation centres outside the judiciary should also be encouraged.

f. Providing the judges with the means to access information in foreign languages

20. In taking account of what is set out above, the CCJE notes that knowledge of foreign languages is an important tool for the national judge to keep informed about developments in international and European law.

21. At present, foreign language courses for judges are only available free of charge in some countries; sometimes such courses are partly subsidised by the state; sometimes such incentives are offered to particular judges who are working in close contact with international and European institutions.

22. The CCJE encourages the taking of appropriate measures including the allocation of grants, aimed at teaching judges foreign languages as part of their basic or specialised training.

23. States should ensure that courts have available legal and international services for the translation of documents that judges may require to keep themselves informed in relevant areas of international and European law. The CCJE is aware of the importance of the costs needed for the functioning of these services and recommends that they are funded through a budget that is presented separately in the State budget so as to avoid that the funds allocated to the functioning of courts are not subsequently reduced.

24. These translations and interpretations must be performed by qualified professionals, whose competences must be susceptible to verification by judges, as they concern a judicial function.

B. DIALOGUE BETWEEN NATIONAL AND EUROPEAN JUDICIAL INSTITUTIONS[7]

a. A necessary dialogue, be it formal or informal

25. National courts have responsibility for administering European law. They are required in many cases to apply it directly. They are also required to interpret national law in conformity with European standards.

26. For all national judges, the case law of the European Court of Human Rights and, where appropriate the Court of Justice of the European Communities serves as a reference in the process of developing a body of European law.

27. The dialogue between national and European judicial institutions is necessary and already occurs in practice; the evolution of it must be supported through appropriate actions.

28. In order to encourage effective dialogue between national and European courts, there should be initiatives aimed at national judges to foster the exchange of information and also, wherever possible, direct contact between institutions.

29. This dialogue can take place at various levels. At a formal, procedural level, an institutional form of dialogue is exemplified by the preliminary ruling procedure used in order to gain access to the Court of Justice of the European Communities. National judges could also be given wider opportunities to participate in the functioning of the European Court of Human Rights. In a more informal way, forms of dialogue can occur during visits and/or stages of judges at the European Court of Human Rights, the Court of Justice of the European Communities and other international and European courts, as well as during seminars and colloquia, at a domestic and international level.

30. The CCJE notes that informal dialogue is considered to be part of the judicial training programmes. Participants in such actions are, at present and mostly judges of the higher courts (Supreme Courts, Constitutional Courts). The CCJE considers that, although it is necessary that judges of the highest courts have close relations with international jurisdictions, national training agencies should ensure that such occasions of dialogue are not only confined to judges of the higher courts, because in many cases it is the judges of first instance who are required immediately to evaluate, apply and interpret European norms or case-law. The experience of different countries shows that informal dialogue in small-scale meetings has proven to be most productive.

b. Direct interaction between national judges

31. Dialogue between national and European courts is but one aspect of interaction between judges at a European level: the relations of judges from different countries with each other are also of great importance. National judges often have to consider how the judges in other countries have applied and/or interpreted international and European law and they are keen to learn from each other's experiences. Such dialogue between judges from different countries is also important to reassert the principle of mutual confidence among European judicial systems, in order to facilitate the international circulation of national decisions and to simplify the proceedings for their enforcement in the various countries.

32. Direct contacts between judges from different countries, including those organised by national judicial training institutions, in the context of seminars, exchanges of judges, study visits, etc, are particularly relevant. In this area, useful partners may be found in co-operation schemes active at a European level.

33. Judges must be provided with practical information about the specific exchanges organised in this framework and be granted an equal access to these exchanges when they wish to take part in it.

C. THE APPLICATION BY NATIONAL COURTS OF INTERNATIONAL AND EUROPEAN LAW[8]

a. The role of the judge and the hierarchy of norms

34. Each country's application of the international and European standards depends to a large extent on the status of such standards in national law, including under the Constitution.

35. It was observed that obstacles exist in achieving this objective. These obstacles were considered to be the result of problems in accessing information, problems of a 'psychological' nature and specific legal problems[9].

36. The first two obstacles can be tackled through the actions described above, aimed at achieving better access to European legal documentation and improved dialogue between institutions.

37. As regards obstacles of a legal nature, the CCJE notes that, generally, countries recognise the primacy of international treaties over national law when ratified and/or, when necessary, incorporated into national law. In most cases this primacy is stipulated in the constitution of individual states, while also according primacy to

the constitution itself. In a few countries, the primacy of international law stems from the decisions of the national Supreme Court. Usually, the rank of the European Convention of Human Rights is below the national constitution, but the Convention normally has a special position *vis-à-vis* ordinary acts of parliament; the practical implementation of this principle, however, shows a number of variants.

38. In most cases, national laws and legal traditions allow courts, when faced with a conflict between a supranational provision and a provision of domestic law, to decide in favour of the international convention or treaty. There is an alternative, which requires national courts to stay the proceedings and refer the case to their Constitutional Court. But there are countries where courts are obliged to apply the provisions of domestic law, even if they conflict with, for example, the European Convention of Human Rights.

39. Each state has its own system for interpreting these instruments and incorporating them into domestic law, depending on the status accorded to them. To avoid uncertainty, courts should interpret and give effect to all domestic legislation and develop domestic case-law as far as possible so as to be consistent with European law and international and European principles and concepts.

40. Judges, together with the legislative and executive branches of government, are bound by the Rule of law. The CCJE considers that it is important for judges in different countries to ensure the respect for international and European law, which promote the principle of rule law, by having due regard to such law, regardless of the national legal systems.

b. National and international/European case-law and instruments, in particular the Council of Europe recommendations

41. Case-law influences the application of international and European standards because the judiciary must interpret national law in the light of supranational law, while upholding national constitutional standards.

42. As to the role played by the case-law of the European Court of Human rights and, where appropriate, the Court of Justice of the European Communities, there appears to be two tendencies: the first, and most common, is where national courts take the decisions of these courts into account even in cases where they are not binding. The second tendency is for this case-law to be accorded the status of a precedent, which national courts must follow.

43. Although national judges take into account and apply international and European law, this does not ensure that national legislation conforms to the recommendations of the Council of Europe, which are considered as "soft law".

44. The Committee of Ministers of the Council of Europe may make recommendations to member states on matters for which it has agreed ‘a common policy’. Recommendations are not binding on Member states, although the Statute of the Council of Europe empowers the Committee of Ministers to ask member governments ‘to inform it of the action taken by them’ on recommendations (see articles 15.b of the Statute of the Council of Europe).

45. The CCJE stresses that it is advisable that, during the preparation of new legislation, law makers refer to Council of Europe recommendations. Similarly, judges, in applying the law, should as far as possible interpret it in a manner which conforms to international standards even if set by "soft law".

c. Observance of the judgments of European Court of Human Rights

46. In some states, even prior to the lodging of an application with the European Court of Human rights, it is possible to apply for judicial review of a final decision that appears in conflict with the decisions of the European Convention of Human Rights. However, the CCJE notes that, in a large number of countries, a decision of the European Court of Human rights against the state concerned is required before it is possible to apply for review of a final decision.

47. A claim for compensation for violations of the European Convention on Human Rights may usually be lodged only after the Court has found a violation. In most countries, it is not possible to seek a finding of such violations and compensation before the Court has found a violation.

48. The CCJE is aware that in most of the countries the implementation of the judgements of the Court is not prescribed by national law; in some countries implementation measures may be granted by the Constitutional Court.

49. Stressing the significance of enforcing the common important rights as they are enshrined in the European Convention of Human Rights and emphasising that national judges are also European judges, the CCJE encourages judges, wherever possible, to use all resources available to them in interpreting the law or within existing procedural law: a) to re-open cases if a breach of the convention occurred, even before a judgement of the European Court of Human rights is issued and b) to grant compensation for violations as soon as possible. Legislators should consider amending the procedural law to facilitate this European task of the national judiciary[10].

SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. In the fields of training of judges in international and European law, access of judges to relevant information, foreign language courses and translation facilities, the CCJE recommends that:

(a) States should, while preserving the independence of judiciary through the appropriate independent bodies responsible for the training of judiciary, provide adequate means to ensure training of judges in international and European law;

(b) Prior knowledge of international and European law and case-law should be ensured by the inclusion of these topics in the curricula of the law faculties;

(c) Appropriate knowledge of international and European law should be one of the conditions that appointees to judicial posts should meet, before they take up their duties;

(d) Training in international and European law should play a relevant role in the initial and in-service training of judges; judicial training in this area would benefit from international cooperation between national judicial training institutions;

(e) Information on international and European law, including the decisions of the international and European Courts should be made available; with the co-operation of court documentation services, libraries and judicial assistants, the judge should be guaranteed an access to information suitably indexed and annotated; the information provided should be comprehensive and available promptly;

(f) Appropriate measures – including the allocation of grants – should assure that judges gain full proficiency in foreign languages; additionally, courts should have translation and interpretation services of quality available apart from the ordinary cost of the functioning of courts.

B. In view of the importance attaching to relations and cooperation of national judicial institutions both with each other and with international, particularly European, judicial institutions, the CCJE encourages:

(a) the development of direct contacts and dialogue between them, e.g. in conferences, seminars and bilateral meetings, with small scale meetings having especial value;

(b) visits and study programmes, such as those organised by national judicial training institutions and national judicial institutions, as well as some international courts for individual judges in relation to other judicial institutions, national and international;

(c) the inclusion in such contacts, dialogue, visits and programmes of judges of all instances, and not just of the higher judicial levels;

(d) the provision of information and taking of steps to facilitate access by national judges to websites and data bases available to other national and international judiciaries.

C. Despite differences in the legal systems in Europe, the CCJE welcomes the efforts that national judiciaries can make, in their role as interpreters and guardians of the rule of law, if necessary through appropriate exchanges of ideas between the several national judiciaries, in:

(a) ensuring, while respecting national legislation, that national law including the national case-law conforms to international and European law as applicable in the relevant states;

(b) reducing, as far as possible, different applications of this principle in the systems bound by the same international standard;

(c) assuring, specifically, that national law, including national case-law, respects the case-law of the European Court of Human Rights; in particular, by granting, wherever possible, that a case be re-opened after the European Court of Human Rights has found a violation of the ECHR or its protocols in the proceeding, and the violation cannot be reasonably eliminated or compensated in any other way than through a new hearing of the matter;

(d) taking duly into account recommendations of the Council of Europe.

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[1] Adopted by the Committee of Ministers at its 740th meeting, Document CCJE (2001) 24.

[2] The notion of European law is herein used in a broader sense, so as to include the instruments of the Council of Europe, especially the European Convention on Human Rights, as well as European Community Law and other instruments of the European Union, where appropriate and as far as applicable to the member States.

[3] See point IV (d) of the Framework Global Action Plan for Judges in Europe.

[4] Member States of the Council of Europe participate in the so-called “Lisbon Network” (the network for the exchange of information on the training of judges and prosecutors), composed of national agencies responsible for training of judges and prosecutors.

[5] See in particular the conclusions of the second meeting of the Lisbon Network (Bordeaux, 2-4 July 1997).

[6] See also paragraph 65 of the CCJE’s Opinion No. 6 (2004) on fair trial within a reasonable time and judge’s role in trials taking into account alternative means of dispute settlement.

[7] See point IV c of the Framework Global Action Plan for Judges in Europe.

[8] See point IV (b) of the Framework Global Action Plan for Judges in Europe.

[9] See in particular the conclusions of the second meeting of the Lisbon Network (Bordeaux, 2-4 July 1997).

[10] The CCJE finds it relevant to recall that under Protocol no14 to the European Court of Human Rights, opened for signature in May 2006, the Committee of Ministers will be empowered, if it decides by a two-thirds majority to do so, to bring proceedings before the Court where the State refuses to comply with a judgment. The Committee of Ministers will also have a new power to ask the Court for an interpretation of a judgment. This is to assist the Committee of Ministers in its task of supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment.