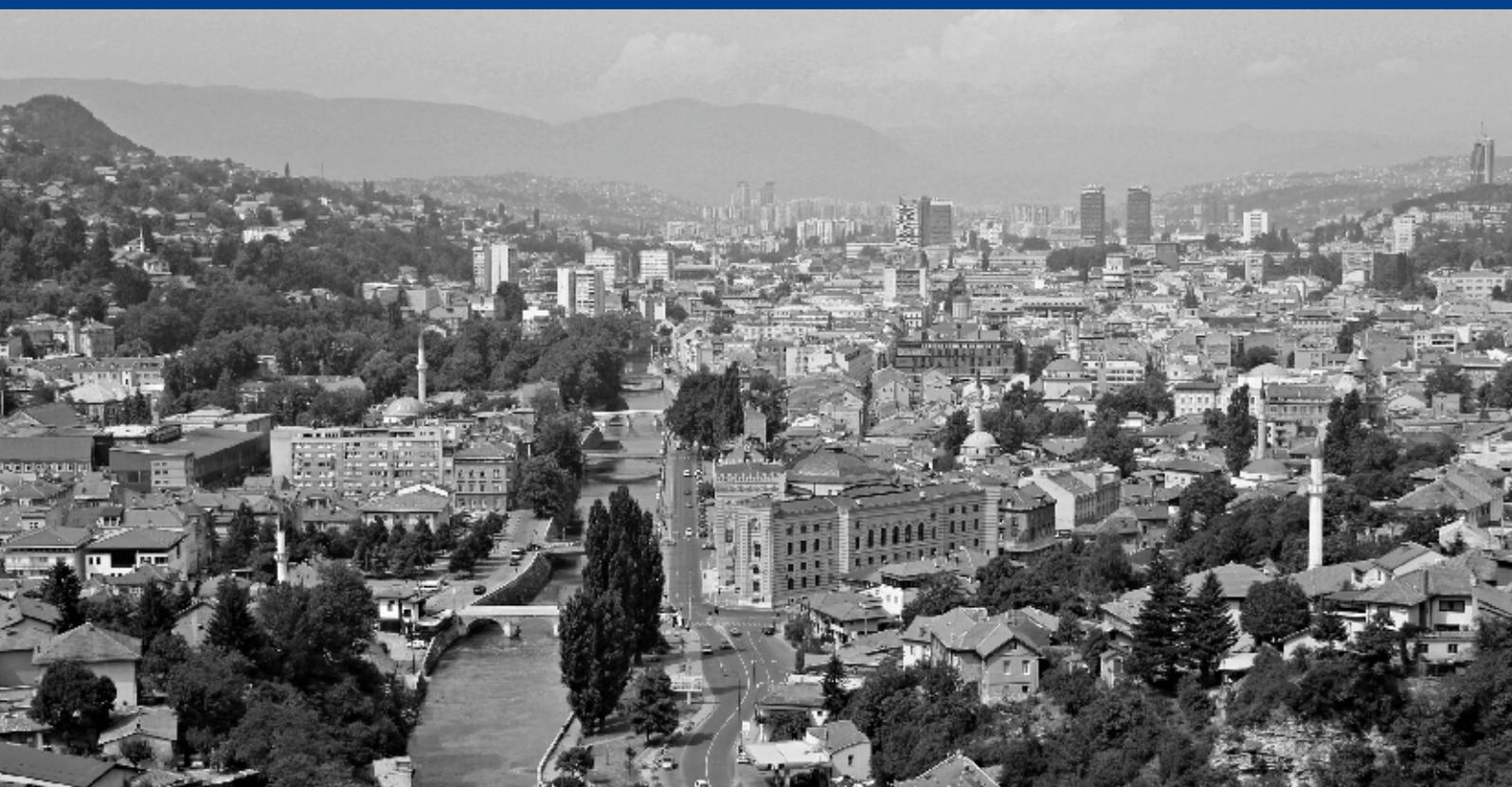


INTERNATIONAL FORUM

"Dialogue of courts - a tool for the harmonisation of judicial practice"

Report



Sarajevo
Bosnia and Herzegovina

21-22 June 2016



Visoko sudsko i tužilačko vijeće Bosne i Hercegovine
Visoko sudbeno i tužiteljsko vijeće Bosne i Hercegovine
Високи судски и тужилачки савјет Босне и Херцеговине
High Judicial and Prosecutorial Council of Bosnia and Herzegovina



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Introduction

The international forum “Dialogue of courts - a tool for the harmonisation of judicial practice”, organised by the Council of Europe (CoE) in co-operation with the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, brings together senior representatives from the European Court of Human Rights (ECtHR), CoE, courts of all instances in the region, non-governmental organisations and legal scholars.



The focus of the international Forum was to develop a regional dialogue and encourage cooperation between the judiciaries and to identify steps that can be taken to foster greater harmonisation of judicial practice and protection of human rights.

Over 50 participants attended the international forum from Albania, Bosnia and Herzegovina, Kosovo*, “the former Yugoslav Republic of Macedonia”, Montenegro, Serbia and Ukraine.

One and a half days of panel discussions, presentations and interactive working groups took place, giving all participants the opportunity raise and debate issues of incoherent application of judicial provisions by courts in the CoE member states with a greater focus on the Western Balkans.

Presentations

The Forum began with welcoming speeches delivered by Tatiana Termacic Head of Human Rights National Implementation Division, CoE, Jadranka Lokmić-Misirača, Vice-President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, and Mirsad Ćeman President of the Constitutional Court of Bosnia and Herzegovina.

The plenary session was then initiated by Stefano Piedimonte Bodini, Head of Research Division and Library, Registry of the ECtHR who presented the role of the Jurisconsult in ensuring the consistency of ECtHR case law.

Tatiana Termacic, spoke about the CoE’s co-operation programmes and the quality of the judiciary, highlighting the principle of legal certainty and equality before the law.

Maida Kovacevic, judge of the Appellate Court of Brcko District (Bosnia and Herzegovina) and Ljubica Milutinovic, judge, of the Higher Court of Cassation, Serbia, addressed national approaches to the harmonisation of judicial practice at the national level with a particular focus on the experience of Bosnia and Herzegovina and Serbia.

Johan Hirschfeldt, substitute member of the European Commission for Democracy through Law (the Venice Commission), explained the approach of the Venice Commission to the harmonisation of judicial practice.

Monika Mijic, Agent of the Council of Ministers of Bosnia and Herzegovina before the ECtHR, delivered a speech regarding the harmonisation of national case law and legislation in the process of execution of judgments of the ECtHR.

The presentations were then followed by a discussion and a questions session.

Participants spent the afternoon of the first day working in panels. The first panel focused on approaches to the harmonisation of judicial practice at the national level, with the aim of identifying effective models and their applicability in different legal orders. Discussions were also directed towards considering the availability and accessibility of national court’s case law. The key note speaker in this panel was Dusanka Radovic, judge of the Supreme Court of Montenegro. The panel moderator was Milica Vesovic, project coordinator DG1, CoE.

The second panel focused on effective application of the ECHR at the national level and the search for a harmonised approach to the implementation of the ECtHR standards. The key note speaker in this panel was Ljiljana Ivanovska, President of the Appellate Court of Skopje. The panel moderator was Andrey Esin, Project Manager, CoE Office in Pristina.

**All reference to Kosovo, whether to the territory, institutions, or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

The first day was concluded with a presentation from Valentina Boz, project manager, DG1, CoE, regarding the role of human rights education in the harmonisation of judicial practice. The day's conclusions were put together by Sergey Dikman, project co-ordinator, DG1, CoE.

Day two began with presentations of the panels' conclusions by Milica Vesovic and Andrey Esin. This was followed by an open floor discussion which highlighted significant support for the findings.

Ljiljana Mijovic, former judge of the ECtHR elected in respect of Bosnia and Herzegovina, then presented a speech regarding the main challenges facing harmonisation of judicial practice as a way to better implementation of the ECHR.

The final topic for discussion was presented by Vera Bjelogrić, Head of Court Documentation Centre of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, who focused on the accessibility of data and the role of courts' documentation centres

The Forum

Disharmonised national judicial practice affects legal certainty and leads to the unpredictability of the application of legal norms by national courts. Of course there cannot be any universal "guidelines" for the national judiciaries as regards harmonisation tools. It all depends on the architecture of a given judicial system, legal traditions and the efficiency of the existing mechanisms. There is however a key basic criterion which such tool or mechanism should fulfill: it should be designed without undermining the independence of individual judges. This also means that any potential mechanism should be aimed at "harmonisation", rather than "unification" of judicial practice. The latter would mean that the judicial sector and individual judges do not fully enjoy independence and discretion which are the natural elements of the judicial power. One should remember, however, that the other side of the independence "coin" is the public trust in the judiciary. Trust by society is of vital importance for the establishment of the rule of law and a coherent judicial practice and legal certainty are the most convincing arguments in ensuring that trust. Ultimately, it is only a well-trained judge that will be able to fully contribute to a harmonised court practice at the national level.

Ms Tatiana Termacic,

Head of Human Rights National Implementation Division



I think that forums like the International Forum "Dialogue of courts - a tool for the harmonisation of judicial practice" are of great importance not only for B&H, but for all the countries, members of the Convention, especially when it comes to the harmonised implementation of the Convention standards developed by ECtHR before national courts. I also think that this kind of forums should be held annually, so that progress in the harmonisation of the court practices at national and regional level could be evaluated and further developed. Bearing in mind that in B&H there are many levels of authorities (state level, two entities, ten cantons and District Brčko) and that legislation and case law are rather different within different jurisdictions, this kind of events can effectively improve the dialogue between national courts with an aim of improving legal certainty in the whole territory of B&H. The Forum, especially if held regularly, can significantly contribute to the better and more harmonised implementation of the ECtHR case law by national courts.

Having said that, I strongly welcome events like this.

Ms Monika Mijic,

Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights



The Conference was very useful and far-reaching.

The harmonization of the court practice must fulfill the criteria from the Rule of law check list (Venice commission) which relate to legality, legal certainty, prevention of abuse of power, access to justice, respect of human rights and non-discrimination. Harmonization should not be achieved via adoption of the binding legal opinions, but rather by the strength of legal arguments in specific court judgments, in particular the highest instance court judgments. Judges should improve their professional knowledge and exchange experiences in the application of law at the professional gatherings and by taking part in programs for acquiring and enhancing their skills.

Forming a network of the highest courts of the member states of the Council of Europe is one of the key tools in reaching these goals. This will enable exchange of experiences between the members of the network and better understanding of the good practices of the European Court on Human Rights.

Ms Ljubica Milutinovic

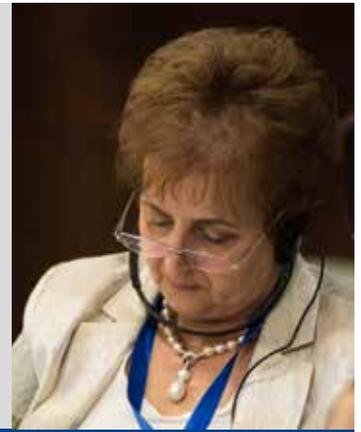
Judge of the Supreme Court of Cassation of the Republic of Serbia



The conference addressed the integral issue of harmonisation of judicial practice throughout the region. The presence of high level representatives from many different countries was particularly beneficial as it has enabled exchange of best practice and the initiation of regional dialogue channels.

Ms Dusanka Radovic

Judge of the Supreme Court of Montenegro



The independence of judges does not as such hinder different measures for harmonization of judicial practice, for example recommending guidelines. Such measures must however not be designed or used in such a way that they could effect in undue influence on the administration of justice of a single case assigned to the individual judge.

Mr Johan Hirschfeldt

Substitute Member of the Venice Commission, former President of the Svea Court of Appeal



Case law consistency and harmonisation of judicial practice are of paramount importance for the Court. Internally this is done through the work of the Jurisconsult. Externally, the Court continues to develop dialogue with domestic judges, in particular with the recent launching of the Network of Superior Courts.

Mr Stefano Piedimonte Bodini

Head of Research Division and Library, Registry of the European Court of Human Rights



HELP can play a crucial role in supporting (not substituting) National Training Institutions and Bar Association as it can be seen as a tool to ensure national case law harmonisation through tailor made training for legal professionals. The regional nature of the conference has led to conclusions which will allow HELP to assess harmonisation training needs for the future.

Ms Valentina Boz

Project Manager "HELP in Western Balkans and Turkey"



The importance of judicial practice harmonisation

During the International Forum participants engaged in discussions and heard presentations that reflected on the integral role of harmonisation of judicial practice. The results of the discussion are summarised below.

The issue of harmonisation of judicial practice has been addressed by the ECtHR in numerous decisions and has also been the subject of Venice Commission opinions. One of the objectives of a court in any given society is to clarify or expand the meaning of a legal norm. The judicial exercise of in-





terpretation however, in the absence of proper procedures and infrastructure can lead to divergent decisions and ultimately unequal implementation of the law upon the end user. The ECtHR has stated that harmonisation and legal certainty are fundamental aspects of the rule of law. The law should be sufficiently precise to allow an individual to foresee to a reasonable level the legal outcome of an action. In conjunction with a growth in the quantity of law in member states of the CoE, significant importance is placed by the judiciaries upon harmonisation of national case law in order

to ensure reasonable certainty and, importantly, that public confidence is maintained.

National courts have a duty to actively apply the case law of the ECtHR. Even where efforts are being made to ensure courts are aware of this duty, lack of harmonised judicial practice has led to varying approaches to implementation which in turn have reduced the impact of the ECHR and created insufficient protection of human rights.

The harmonisation of judicial practice is central to effective human rights protection; however, it cannot be pursued in isolation. Any efforts to create harmonisation must not threaten the independence of judges and must establish parameters within the other key requirements of the rule of law, the ECHR and recognise the integral connection of harmonisation to legal certainty and the right to a fair trial. The Venice Commission's Rule of Law check list provides a useful guide to the creation of a legal environment required for law to flourish. Harmonisation and a sense of a member state's ownership to a favourable legal environment are important building blocks in this overall scheme.

How could internal methods that improve harmonisation be organised to not interfere with judicial independence? The Venice Commission Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina states that a judge must have independent decision making power in order to ensure that the judiciary is free to decide cases without external interference. Once this requirement is considered in conjunction with a citizen's legitimate expectation of the judiciary to nurture coherent and foreseeable justice, it is clear that judges also have duties and responsibilities to society which means that judicial independence is not a concept for the self-interest of judges but integral to wider effectiveness of justice.

A system of appeal is a core instrument of a harmonised judicial practice which strengthens implementation and increases legal accuracy while maintaining coherence with judicial independence. Other "soft methods" of judicial harmonisation have proven successful in some states by achieving harmonisation without compromising judicial independence. Some states have created sentencing guidelines (i.e., "the Former Yugoslav Republic of Macedonia", Sweden, UK) that have been used to guide judges on the sentences to be applied in criminal cases. The use of advisory guidelines and a transparent and consistent dialogue between courts of different levels are effective examples of soft methods which can be used to foster harmonisation efforts within a particular jurisdiction. Effective models often incorporate collegial open discussion which is not tightly directed by superior judges



and in which judges from first instance courts have the opportunity to openly express issues to supreme court judges and vice versa. Participants highlighted that these discussions prove most effective when carried out both vertically (between lower and higher courts) and horizontally (between courts of the same instance). By allowing decisions made by all courts to be available within the judiciary and, under the principle of free access, to the general public, a complete body of judgments can be compiled leading to a better harmonisation. High quality legislation is also integral to a well harmonised system. It may be possible for judges to play a role in taking initiatives and providing advice to legislators on reforming the law, but these judges should be highly aware of the boundaries established by the duty of independence and ethical requirements.

The Council of Europe, the European Court of Human Rights and questions of harmonisation of judicial practice

The attendance of senior CoE and ECtHR staff members meant participants were informed about the most recent and key programmes to support harmonisation efforts.

Building upon the importance ascribed to inter judicial dialogue in the Brussels Declaration, the enhancement of dialogue by protocol 16 of the ECHR and the three pillars, the CoE has become a key platform for discussion and exchange of best practices regarding the harmonisation of national judicial practice. The CoE develops standards, monitors application and supports implementation of the ECHR by member states through cooperation projects. Through development programmes, such as the European Programme for Human Rights Education for Legal Professionals (HELP), the CoE is raising awareness on various aspects of the ECHR and the ways the ECtHR standards are to be applied, offering expert support and using training as a tool to achieve a harmonised judicial practice. In Bosnia and Herzegovina, the HELP programme has launched country specific courses and will soon launch a course focusing



on the reasoning of judgments, all of which will provide the necessary skills for lawyers, prosecutors and judges to work towards a more harmonised approach to the application of the Convention and judgment of the ECtHR.

The work undertaken by the ECtHR to improve harmonisation in the application of the ECHR at the national level will now be significantly bolstered through the Network of Superior Courts. This Network was officially launched on 5 October 2015 in Strasbourg. Although the overall aim of the network is to enrich a dialogue and the implementation of the Convention, the immediate objective is to create a practical and useful means of exchanging relevant information on Convention case-law and related matters. The main priority is to develop a dedicated internet Network site (with access restricted to those superior courts who are members of the Network) and to take the necessary steps to ensure that those superior courts who wish to join in the Network can do so as soon as possible.

Regional harmonisation efforts



Through the exchange of best practice and identification of problems, participants of the International Forum highlighted steps that have already been taken in their countries to develop harmonisation of judicial practice and those that have had the greatest success.

Bosnia and Herzegovina have recognised the importance of judicial practice harmonisation and the process undertaken to achieve this has been fully owned by the state with the support of the CoE. ECtHR-judgments against Bosnia and Herzegovina have revealed structural issues which make the process of harmonisation more challenging. The CoE and Bosnia and Herzegovina have taken many initiatives to improve understanding of the ECHR within the judiciary. Without a well-informed judiciary the implementation of the ECHR, including the requirement of harmonising national law with ECHR and ECtHR case law, will be challenging.

Positive steps, however, are being taken to harmonise judicial practice. This is being gradually realised through a model of an inter-judicial dialogue and consensus-based decision making in the meetings of established panels for the harmonisation of national case law in civil, criminal and administrative matters. The panels consist of representatives from all the high courts which operate within a complex legal system of Bosnia and Herzegovina. Panel discuss issues related to the harmonisation of case law which have been highlighted as problematic by any of these high courts or the Constitutional Court of Bosnia and Herzegovina or constitutional courts of the Entities. The panel then prepares a report of its findings. These findings and a final conclusion are adopted once all panel members express unanimous agreement. Due to the need to reach unanimous agreement some past discussions have reached impasses. The Court Documentation Centre of the High Judicial and Prosecutorial Council publishes the non-binding decisions adopted by panels. The panel may also suggest an amendment to legislation in for the purpose of harmonisation.

An electronic case law system exists in Bosnia and Herzegovina. This system has not had a significant effect upon harmonisation as it is limited to cases that have been held in the court to which the system is registered. The system does not allow searches of case law developed in other same instance or higher courts. As a result, monitoring of decisions by judges is often reduced to informal discussions with

colleagues. The Court Documentation Centre of the High Judicial and Prosecutorial Council currently aids the process of judicial practice harmonisation by supporting the work of harmonisation panels. It also produces a paper based collection for legal professionals and the general public of decisions sent to them by the Supreme Court and summaries of Constitutional Court decisions. New developments are then published in a monthly paper based bulletin. The Documentation Centre aims to produce summaries of ECtHR judgments and decisions but recognises the need for an increased capacity in



this area for the future. The Documentation Centre has developed an online case law database which contains 11,000 published decisions, however the failure to accurately classify judgments under search parameters and key words has meant that the large amount of information is difficult to use efficiently. Problems emanating from the same issues of case law databases collecting large amounts of case law but failing to make provisions for this law to be accurately and efficiently searched have also been reported by “the former Yugoslav Republic of Macedonia” and Albania. Judges in Montenegro have access to a case law database which links all Supreme Court decisions with the lower instance decisions in the same case which has proved to be a useful tool for creating a degree of harmonised judicial practice.

Serbia, which has also undertaken a large number of co-operation projects with the CoE, has also recognised the important role played by appellate courts in the harmonisation process. The Serbian law on courts allows the appellate courts to notify the Supreme Court about issues that are considered important for the correct functioning of courts in Serbia. In order to determine legal positions on certain disputed matters the appellate courts maintain a programme of regular meetings. If at their regular meetings the four appeal courts discover divergence in their practice, they can on their own initiative submit a request to the Supreme Court to choose the most suitable approach. This model provides a mechanism by which issues may be formally raised and outlined. It should be seen as an authoritative initiating mechanism which contributes to the harmonisation of judicial practice at a national level.

“**The former Yugoslav Republic of Macedonia**” has begun to address harmonisation of judicial practice through the establishment of sentencing guidelines which work in conjunction with mitigating or aggravating formulas. The aim is to create harmonisation by eliminating any abuse on the part of judges, prosecutors and lawyers, particularly in regard to plea bargaining. These guidelines go beyond soft measures and draw closer to the system of sentencing guidelines applied in the United Kingdom. The Appeal Court have also met twice a year to take a common position in regard to matters considered to be issues. National and ECtHR judgments have been considered in these meetings in order to implement harmonised practice.



Montenegro has initiated a harmonisation model in which the Judicial Practice Department plays a significant role within the Supreme Court. This department monitors decisions of the Supreme Court and highlights harmonisation issues which should then be remedied by the Supreme Court. It is also possible for the Supreme Court to com-

municate with lower instance courts regarding the harmonisation of decisions. This is done through monthly meetings between the President of the Supreme Court and lower courts at which harmonisation issues can be raised.

Kosovo* has also established a system of dialogue with the Constitutional Court which has taken on the primary harmonisation role in the country. Projects have also been implemented to improve the training of judges, in particular young judges, in order to enhance their knowledge of the ECHR, ECtHR and HUDOC and increase harmonised implementation of the ECHR at the local level.

Albania have ensured that all judicial decisions are published and freely accessible online and have placed the primary responsibility for judicial practice harmonisation within the ambit of the Supreme Court. The Courts seniority and experience of dealing with complex legal matters means it is well placed to carry out the harmonisation role.

Conclusions and recommendations of the International Forum

The following conclusions and recommendations are based on discussions that took place throughout the International Forum.

Progress towards harmonisation of judicial practice in Bosnia and Herzegovina and throughout the Western Balkans has been initiated but must now be intensified in order to ensure that the rule of law is upheld at the national level and the ECHR is effectively applied. The models and systems that should now be developed must focus on achieving two interrelated requirements, firstly the need to ensure harmonisation of national judicial practice, and secondly the creation of a harmonised approach to the application of the ECHR at the national level.

Court practice departments

Court practice departments must be established or strengthened in order to create an authoritative body within the court system empowered to highlight the importance of harmonisation, monitor the state of harmonisation within the bodies of case law, systematise the practice of a particular court and look into the practice of other courts of the country. In some countries of the region, notably Serbia, bodies similar to court practice departments already exist but undertake the evaluation of judicial harmonisation on a semi voluntary basis and receive little recognition for a role that is accorded a lower level of importance than it requires. Strengthened departments must become professional bodies with a formal structure and powers which reflect the significant importance of harmonisation in maintaining effective rule of law. Many of the departments that already exist in the region are made up of judges, in many cases it is the head of department within the court who takes on the role alone. Judges have brought experience and knowledge to the role but have struggled to dedicate sufficient time to the departments due to being expected to deal with a full rota of cases at the same time. This burden is excessive, it must be reduced for those appointed to new and strengthened court practice departments and the role should also be assisted by dedicated members of staff. Court practice departments should be established in courts of all instance not dependent upon the courts size. Courts of first instance and high courts should be equally included in the work of the departments; harmonisation is as integral at the first instance as this is the level closest to the citizen.

National Jurisconsult

The ECtHR has grappled with the issue of its own judicial practice harmonisation in the past and established the position of Jurisconsult as one mechanism to contribute towards harmonisation. A cursory overview of the role identifies the key effect that the Jurisconsult has on a harmonised judicial practice. The Jurisconsult is an individual person and occupies the third most senior position in the ECtHR registry. He or she is assisted by experienced lawyers of the registry and a Deputy Jurisconsult. Their role involves advising the Grand Chamber in all matters of case law, assisting the development of case law, monitoring draft judgments and decisions and carrying out research on international, comparative and ECtHR case law. The Jurisconsult's role is particularly focused on harmonisation through weekly meetings with representatives of each of the sections within the ECtHR. The Jurisconsult will receive relevant files and draft judgments a week before the meeting and will carry out research to identify any potential divergence from precedent. The Jurisconsult then drafts a report of any issues identified which is sent to the heads of section and can be discussed in the weekly meeting. Judges remain wholly independent and the Jurisconsult's report and advice only amounts to an opinion from which a judge is free to depart. In practice the opinions of the Jurisconsult are generally followed and in any case always trigger constructive discussion which aids the judge's deliberations.

The role of Jurisconsult cannot be directly transposed from the ECtHR to national courts. However, to ensure that court practice departments have updated information on the case law of other courts, and of the ECtHR, a national channel of communication between court practice departments should be established. This channel can be a Jurisconsult who will act as a focal point for court practice. While court practice departments will be established in every court, the Jurisconsult will be placed in higher courts only and supported by a secretariat of legal advisors who will work on harmonisation issues. The Jurisconsult will provide judges with updates on case law developments, highlight possible deviations from precedent, monitor draft judgments and carry out research on national, comparative and ECtHR case law contentious issues. The Jurisconsult will also be expected to look into the judicial practice of courts in other countries and maintain a dialogue with peers from the courts of his or her region. These tasks will significantly advance harmonisation of judicial practice. This National Jurisconsult will be an integral part of the vertical national court structure, but should also be in touch with developments relating to the ECHR. It is important that those who take on this role have sufficient experience, the ability to carry out legal research and extensive knowledge of international and national systems. This individual or body may also be a key focal point between national courts and the ECtHR within those states which are members of the Network of Superior Courts.

Online case law database

The availability of past judgments to the public and within all courts is essential to foster harmonisation at the national level. However, simply ensuring availability overlooks the need to ensure efficient and easy access to relevant judgments. To increase the harmonisation of judicial practice and support the work of judges and the Jurisconsult, a searchable database of national cases must now be established or improved. Cases must be entered under relevant search parameters in order to make the database accessible and effective. It may be considered advantageous for searches to be carried out via numerous parameters, such as by key words, dates, courts, party names and subject. Cases may also include direct links to lower instance decisions on the same matters. In addition, highlighting judgments which are of particular interest because they settle or depart from precedent will have a considerable positive effect upon harmonisation efforts. The structure of these databases may take two possible overarching forms. The first option is a database which only contains well-reasoned judgments that could serve as a good example to other judges. The second option is a database that contains all judgments. In the first option it will be the case law departments role, with assistance from the Jurisconsult if required, to decide which judgments contain a high enough level of reasoning to be placed on the database.

These newly created databases may also serve as a tool to increase judicial networking across the region. By establishing a unique nomenclature of search parameters which would be applied equally to all case law search parameters throughout the region each individual country may make best use of others developments.

Horizontal and vertical dialogue

Harmonisation is dependent upon communication. As outlined earlier, some of the best means of judicial practice harmonisation which have already exist in the majority of the Western Balkan's national systems revolve around horizontal and vertical meetings of courts. These meetings must now either be established or intensified and be formally arranged to deal directly with issues of harmonisation. The meetings must establish a system of permanent dialogue and take place both vertically and horizontally in order to include courts of all instances at national and international (regional) levels. The developed meeting models should value open and inclusive discussion between all ranks of judges. The decision making process and those involved will vary dependent upon national requirements but particular emphasis should always be placed on the independence of judges to interpret case law. Exercise of judicial independence should not be allowed to become a ground for discipline or enforced practice. The aim should be to reach agreement through constructive discussions, reasoning and further meetings if required. This process will help a culture of addressing harmonisation to grow throughout the system.

Currently both constitutional and supreme courts are better trained on ECHR issues than lower instance courts. Dialogue between these higher and lower courts through consultative meetings on the application of the ECHR in their national legal orders will improve harmonisation throughout the system. Moreover, constitutional and supreme courts can assist the lower courts in the application of the ECHR, for example, by using more references to the ECHR and the ECtHR case law in their acts when resolving divergences in lower courts' practice.

The intensification of regional dialogue can also ensure the exchange of good practices of application and interpretation of ECtHR judgments. It is recognised that the majority of Western Balkan countries come from the same legal tradition and share the same basic concepts, language and many procedural rules. Increased frequency of regional events organised by the CoE may lead to the formation of regional best practice guidance and in turn lead to improved harmonisation of judicial practice throughout the region.

Maintaining judicial independence and reasoning of judgments

With a functioning harmonisation mechanism, there must be safeguards guaranteeing the independence of individual judges if he or she takes a decision that contradicts well-established case law in a well-reasoned judgment. No sanctions should be imposed in that case. Any model must accept that if each individual judge has different arguments they should adjudicate in the way they see appropriate and fully justify any deviation from precedent.

Member states within the Western Balkans have grown out of a shared civil law tradition. Due to the comprehensive codification process of a civil law system the judges individual reasoning is not attributed the same central importance as in a common law scheme. The overall civil nature of the legal systems in the member states does not require modification, however steps should be taken to establish a mechanism which allows individual judges to accurately articulate and record detailed reasons when they decide to deviate from established case law. When departing from established case law a judge has undergone a process of reasoning based upon their learned experience and knowledge of the law. For this process to be legitimised the judge must explain in detail why they have decided that the facts of the case require a different judicial approach. This mechanism maintains judicial independence, while recognising that judges are surrounded by the whole legal order both vertically and horizontally. The

clear and extensive reasoning will empower the appeals process to provide an effective check on lower court's deviation from established case law and ensure that departure from harmonisation is only carried out when absolutely necessary. In addition to academic commentary and legal arguments based upon the reasoning, the mechanism will also allow the appeals process or the individual decision to affirm necessary developments to the overarching bodies of law.

Translation of judgments and decisions of the European Court of Human Rights

Translation of the ECtHR judgments into regional languages must be a priority in order to ensure a harmonised approach to the application of the ECHR at the national level. A proportion of the judiciary do not possess sufficient French or English to properly understand the complex matters dealt with in judgments and hence harmonisation efforts are hindered. The ECtHR does not officially translate into all languages. Many, but not all, of the most important judgments are actively translated by governments, universities and nongovernmental organisations but access to judgments in national languages remains limited. Increasing the language capabilities of judges and encouraging the translation of judgments by other bodies are among ways to overcome this issue. The CoE has also produced ECHR glossaries which should be used as a tool by lawyers, prosecutors and judges to help understand a ECtHR judgment.

Training

More training for judges is required. The seminars organised by the CoE through several projects in the region have been particularly successful, owing to the high quality of CoE-network trainers. The organisation of more face-to-face seminars by the CoE would also lead to increased knowledge in the region. Judges who have already undergone training would benefit from more training, especially if seminars include a deeper exploration of issues and are aimed at concrete practical problems (such as proper examination of witnesses in criminal proceedings, right to correspondence in prisons, etc.). It should also be recognised that the level of civil servants' knowledge regarding the ECHR has to be high in order to support harmonisation through legislation.

The implementation of the HELP in the Western Balkans and Turkey project, funded by the Human Rights Trust Fund, started in April 2016. The most recent the HELP Network Conference focused on the importance of harmonisation of national case law in CoE member states. HELP identified training as a key tool to overcome lack of knowledge about the ECHR and in turn increase harmonisation of judicial practice. Regular training should be ensured not only for legal professionals (and not only judges and prosecutors, but also lawyers) both in the framework of initial and continuous training. Training should also be anticipated as early as possible in legal education in order to create a ECHR culture. Information about inconsistencies which are obstacles to harmonisation should be collected by National Training Institutions to assess training needs. The approach of the National Training Institutions in the selection of the target group to be trained as well as the topic to be covered is key to ensuring the effectiveness of the training. HELP can support National Training Institutions by providing a common harmonised training methodology. Such a tool would also facilitate the harmonisation of training for different categories of legal professionals to ensure that judges, lawyers and prosecutors within the same legal order understand each other. Difficulty accessing case law can also be tackled with the support of the HELP Programme as it contributes to better access to information on the Convention and recent Strasbourg case law. Finally, the HELP network also facilitates the exchange of good practice and dialogue.

