



ANALYSIS OF CASE LAW HARMONIZATION MECHANISMS WITH RECOMMENDATIONS FOR PROMOTION

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ANALYSIS OF CASE LAW HARMONIZATION MECHANISMS WITH RECOMMENDATIONS FOR PROMOTION

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*Analiza mehanizama za
harmonizaciju sudske prakse
sa preporukama za unapređenje*

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Introduction

The analysis of the mechanism for the harmonization of judicial practice was made within a common project of the European Union and the Council of Europe “Support for the Judicial Reform in Serbia”. The Component IV of this Project is aimed at contributing to achieving the interim measure 1.3.9 from Chapter 23 of the Action Plan: “Serbia ensures the qualitative improvement of the national judicial practice, making it more consistent and harmonized with the European Convention on Human Rights”. To that end, this Analysis aims to develop recommendations for the improvement of available or the development of new mechanisms regulating and ensuring the consistency of case law and its harmonization with the practice of the European Court of Human Rights (ECHR)¹.

This analysis provides an overview of the existing mechanism for the harmonization of case law, applied in the Supreme Court of Cassation (SCC), appellate and other courts of second instance, as well as an overview of the standards affecting the harmonization of case law, aimed at establishing possible shortcomings and providing recommendations for overcoming those shortcomings. For this purpose, the factual situation regarding the work of the case law department and the ways in which the courts keep and publish their decisions were considered.

Method of operation

For the purpose of this analysis, the relevant provisions of the Constitution of the Republic of Serbia, the Law on Judges, the Law on the Organization of Courts, the Court Rules of Procedure, the Rules of Procedure on the Organization and Work of the Supreme Court of Cassation, the Law on Civil Procedure, and the Law on Criminal Procedure were considered. The relevant case law of the European Court of Human Rights was also considered.

■ In addition to the above, the content of the Activity Plan of the Supreme Court of Cassation for the purpose of unifying court law, the Agreement of the presidents of the courts of appeal on the venue and time of the joint sessions of courts of appeal, the Work Instructions of the case law department of court of appeal, the Instructions on the method of entering judicial decisions of the SCC, SCC Anonymization Act, Open List of Descriptors were also reviewed. Previous analyses of mechanisms for the harmonization of case law and the work of the case law department were also reviewed.

Apart from the above, the current situation was also taken into account, in terms of publication of court decisions and the use of IT tools, and the Case Law Database was checked as well (<https://www.sudskapraksa.sud.rs/sudska-praksa>).

¹ The document was prepared by an engaged expert. The findings, conclusions and interpretations expressed in this document are the author's own views and cannot be considered to reflect policy or opinions of the Council of Europe and the European Union.

The importance of establishing mechanisms ensuring the consistency of case law

The Constitution of the Republic of Serbia in Article 21 para. 2 prescribes that everyone is entitled to equal legal protection, without discrimination. Article 36 of the Constitution also guarantees the protection of the rights before courts. ECHR took the position that one of the fundamental principles of the rule of law is the principle of legal certainty, which guarantees, inter alia, certain legal certainty and contributes to public confidence in the courts². On the other hand, the long-term existence of contradictory court decisions could create a state of legal uncertainty, reducing the public trust in the judicial system, whereas this trust is one of the basic postulates of a state based on the rule of law³.

Deciding on the violation of Article 6 of the Convention, ECHR recognized the existence of contradictory court decisions as a feature of court systems, which are based on a network of first and second instance courts, but that, in itself, cannot be considered a violation of the Convention⁴. On several occasions the ECHR has decided in cases related to contradictory court decisions⁵, and thus had the opportunity to take a position on the question under which conditions conflicting decisions of domestic courts violate the requirement related to a fair trial referred to in Article 6, paragraph 1. of the Convention⁶. In addition to the “profound and long-term” nature of the inconsistency of court decisions, the court also cites legal uncertainty, which is the result of the lack of mechanisms for resolving conflicting decisions, as a reason for determining the existence of a violation of the right to a fair trial⁷. The court explained the criteria it was guided by when assessing whether there are “profound and long-term differences” in case law⁸.

In the end, the Court repeatedly emphasized the importance of establishing mechanisms to ensure the consistency of case law and the uniformity of jurisprudence of the courts. The court also took the position that it is the responsibility of states to organize their legal systems in such a way as to avoid the adoption of contradictory judgments⁹.

Apart from the possibility of filing a constitutional appeal due to the violation of the right to equal legal protection referred to in Article 36 of the Constitution, there is no provision in civil or criminal proceedings for the procedural possibility of applying a legal remedy based on contradictory court decisions, which is why Serbia is in a large group of countries whose laws do not provide a special means for solving possible contradictory court decisions. This is why it is important to establish and implement clear and effective mechanisms for the harmonization of case law, in order to prevent the existence of such decisions.

No matter how necessary, the mechanisms for case law unification must not in any way endanger the freedom of decision-making of judges. It is a very delicate task to establish mechanisms for the harmonization of case law in legal systems based on a network of first and second instance courts, such as ours, which will successfully prevent the long-term existence of contradictory court decisions, and which will not endanger the freedom of decision-making of judges in any way.

Uniform case law, as an important prerequisite for the predictability of judicial decision-making, which creates legal certainty among citizens and strengthens confidence in the judiciary, is not an unchangeable constant, failing to follow the economic, social, technological and other changes to which society is constantly exposed. A lower court in another matter may decide differently from the legal understandings or legal position of the higher court, but is expected to provide a good rationale for its decision, in order to possibly pass the review of the legal remedy. Perhaps it is precisely the new legal position expressed in that decision that will lead to a change in practice and a review of previously adopted legal understandings and positions. That is why the harmonization of case law must not lead to thwarting the further development of case law. The way judges enforce law must follow social changes. Therefore, the mechanisms achieving legal certainty must leave room for case law to gradually develop and change interpretations of laws that have become obsolete.

2 Brumărescu v. Rumania, paragraph 61 ; mutatis mutandis, Ștefănică et al. v. Rumania, paragraph 38;

3 Paduraru v. Rumunija, stav 98; mutatis mutandis, Sovtransavto Holding v. Ukraine; Vinčić i ostali protiv Srbije, stav 56 ; mutatis mutandis, Tudor Tudor v. Romania; Ștefănică i ostali v. Rumunija, stav 38).

4 Santos Pinto v. Portugal, paragraph 41;

5 Zielinski and Pradal and Gonzalez et al. v. France; Paduraru v. Romania; Beian v. Romania and Iordan Iordanov et al. v. Bulgaria;

6 Perez Arias v. Spain; Ștefan and Ștef v. Romania; Iordan Iordanov et al. cited above, paras. 48–49; and Schwarzkopf and Taussik v. Czech Republic;

7 Tudor Tudor v. Romania, paras. 30–32; Ștefănică et al. v. Romania, paras. 37–38;

8 Iordan Iordanov et al. v. Bulgaria, paras. 49–50

9 Vrioni et al v. Albania; Mullai et al. v. Albania; and Brezovec v. Croatia;

Normative regulation of case law harmonization

In addition to the mentioned constitutional provisions guaranteeing the equality of the parties to the proceedings, the relevant provisions for the harmonization of case law are found in the Law on the Organization of Courts, the Court Rules of Procedure, as well as the Rules of Procedure on the Organization and Work of the Supreme Court of Cassation. As it will be explained, the provisions of the Rules of Procedure also foresee certain mechanisms for the harmonization of case law. Mechanisms for harmonization are also provided for in the Activity Plan for harmonization of case law of the SCC, the Agreement of the presidents of courts of appeal on the organization, venue and time of joint sessions of courts of appeal, as well as the Work Instructions of the case law department of the court of appeal.

Relevant provisions for the harmonization of case law from the new Law on the Organization of Courts

Article 26, governing the jurisdiction of the courts of appeal, in paragraph 3 stipulates that courts of appeal shall hold joint sessions and notify the Supreme Court about disputed matter of significance for the work of the courts in the Republic of Serbia, and the unification of case law. Article 26, governing the jurisdiction of the courts of appeal, in paragraph 3 stipulates that courts of appeal shall hold joint sessions and notify the Supreme Court about disputed matter of significance for the work of the courts in the Republic of Serbia, and the unification of case law.

■ Article 32, governing the jurisdiction of the Supreme Court, in paragraph 3 stipulates that the Supreme Court shall ensure a uniform judicial exercise of rights and equality of parties in court proceedings.

■ Article 34 stipulates that the decision of the Supreme Court on extraordinary legal remedies and other matters governed by law shall be published on the website of the Supreme Court.

■ Article 38, governing the jurisdiction of the judicial department, stipulates that legal and other issues of importance to the department are discussed at the department session, among other things. Paragraph 2 stipulates that departments of courts of appeal, the Commercial Court of Appeal and the Misdemeanour Court of Appeal also review the matters relevant to the work of district courts.

■ Article 40, governing the Case Law Department operation, stipulates that the Case Law Department follows and studies case law of courts and international court authorities, and informs the judges, judicial assistants and judicial trainees on the interpretation of law by courts.

■ Article 42, governing the work of the Joint Session of Departments, stipulates that the Joint Session of Departments is convened when the consideration of a legal issue requires the cooperation of at least two departments.

■ Article 45, governing the SCC Sessions of Departments, stipulates that the session of departments shall also be convened due to incompatibilities between some chambers, arising in respect of the application of regulations, or if one chamber departs from a legal understanding adopted by its case law or a legal understanding accepted by

all chambers. Paragraph 3 stipulates that the legal understanding adopted at the session of departments is binding for all chambers comprising the departments.

■ This concludes the list of legal provisions governing matters of importance for the harmonization of case law. The new law took over the aforementioned provisions from the old law without amending their content. It shows that these matters are governed fragmentarily by the provisions of the law, which, apart from the provisions on the case law department, essentially govern other matters, such as the jurisdiction of court of appeal and the Supreme Court, the scope of work of the judicial department, the joint session of departments or the Supreme Court departments. The legal provisions do not foresee a mechanism for the harmonization of case law.

Case Law Department

The key role in ensuring the consistency of case law is played by the case law departments, in addition to the Session of the departments. As specified in Article 40 of the new Law on the Organization of Courts, and/or Article 27 paragraph 2 of the Court Rules of Procedure, the Case Law Department follows and studies case law of courts and international court authorities, and informs the judges, judicial assistants and judicial trainees on the interpretation of law by courts.

■ The case law department operation is governed by the Rules of Court Procedure in more details. The operation of the case law department of SCC is also governed by the Court Rules of Procedure on the Organization and Work of the SCC. Article 27 of the Court Rules of Procedure also stipulates that Case Law Departments must be established in courts of republic level and courts of appeal, and that they may exist in a court with a larger number of judges. Article 31 of the Rules of Procedure stipulates that, at the session of the case law department, proposals on case law matters will be established and prepared, to be presented at the session of all judges in order to take a certain position aimed at case law unification.

■ The especially important role of the case law department in initiating the initiative for the adoption or review of legal positions by the Session of the departments is governed by Article 199 of the Rules of Procedure, while the role of this department in harmonizing the practice of the council is also important, governed by Article 200 of the Rules of Procedure, as will be explained below.

Instructions on operation of the case law department of court of appeal

Considering the need to regulate the operation of the case law departments in more detail and adjust it with the role that this department should have in the harmonization of case law, in February 2017, the presidents of courts of appeal jointly adopted the Work Instructions of the case law department of the court of appeal. Among other things, this Instruction precisely defines the functions of the President and deputy president of the department, registrars of case law for certain legal areas and their deputies, as well as judicial assistants in that department. The publication of decisions on the court's website, the anonymization of decisions, and their classification in accordance with the Open List of Descriptors (keywords) are governed by this instruction more closely.

The role of the Supreme Court of Cassation in case law harmonization

In Serbia, as well as in many countries, the courts of the highest instance play a key role in unifying case law and defining guidelines for the correct interpretation of the law. Article 32 of the new Law on the Organization of Courts (LOC) stipulates that the Supreme Court of Cassation shall ensure uniform judicial exercise of rights and equality of parties in court proceedings.

Without a doubt, the SCC performs this through its specific decisions, which it makes in resolving disputed legal matters or through extraordinary legal remedies. Although court decisions do not represent a source of law, the SCC decisions act particularly through the power of the authority of the highest judicial instance. Judges know that they can expect their decision, if reviewed by a second-instance court or in accordance with the extraordinary legal remedy by the Supreme Court, to be repealed if it is not in accordance with the decision of the SCC. SCC ensures a uniform judicial implementation of law and through the adoption of legal understandings and determination of sentences from its decisions. SCC also exercises this authority by publishing its decisions. Article 34 of the Law on the Organization of Courts stipulates that the SCC decisions shall be published on the website of this court. The court publishes its decisions on the website, but transparency and the possibility of finding decisions resolving a specific legal matter is very limited.

■ SCC also organizes the Joint Sessions and meetings with courts of lower instance, and organizes Annual Conference of Judges of the Republic of Serbia – Judges’ Days. Judges of this court also participate in the Joint Meetings of the Courts of Appeal. These activities, among other things, serve to inform judges of lower courts about the current practice of the SCC, and published legal positions, but also for judges of the SCC to hear the disputed legal matters between lower courts, assess their importance for the work of judicial panels of the SCC and unification case law and if they meet the criteria, to launch an initiative so that the SCC department of the corresponding matter takes a legal understanding of that legal matter.

Mechanism for the harmonization of case law of the SCC in the adoption of legal understandings

For the decision made or the adopted legal concept of the SCC to be relevant for judges of lower courts, so that they could act with the power of the authority that made it, it is necessary to ensure compliance at the level of the SCC in relation to that decision or legal concept.

■ Article 35 of the Rules of Procedure on the Organization and Work of the SCC stipulates that the SCC department reviews legal matters and established legal understandings on the disputed legal matters. Article 45 of the new Law on the Organization of Courts stipulates that the session of SCC departments shall also be convened due to incompatibilities between some chambers, arising in respect of the application of regulations, or if one chamber departs from a legal understanding adopted by its case law or a legal understanding accepted by all chambers.

■ Article 36 of the Rules of Procedure on the Organization and Work of the SCC stipulates that the president of the department, the judicial panel and the judge may initiate a legal understanding of legal matters of interest for the work of the judicial panels in the department. If the panel finds that a legal understandings should be determined on the disputed legal matter it is deciding on in order to ensure the uniform implementation of the regulations, it informs the head of the department thereof. The panel prepares a report on the disputed matter, which is discussed at the department session (Article 32, paragraphs 2 and 3). The Case Law Department may also submit an initiative to review the adopted legal understanding (Art. 38 paragraph 3). The applicant explains in writing the need to adopt

a legal understanding, if it did not exist before, or the need to amend the adopted legal understanding. A legal understanding adopted at the session of departments is binding for all chambers comprising the departments.

■ If the department session cannot adopt a legal understanding, the General Session is convened. The General Session is also convened when there is a disagreement between councils from different departments or between departments in the implementation of regulations and in other cases stipulated by law and the Rules of Procedure (Article 12). The disputed legal matters are discussed on the general session, on the basis of reports and co-reports. Decisions at the General Session are made by the majority of the judges of the Supreme Court of Cassation present (Art. 18).

Mechanism for the harmonization of case law of the SCC in decision-making

The drawn up and signed decision is submitted together with the case to the records of case law (Art. 33 of the Rules of Procedure on the Work and Organization of the SCC). If the registrar of case law points out in a written reasoned objection that the adopted decision deviated from the adopted legal understandings and case law, the president of the panel again presents the case at the panel session.

■ In accordance with Article 41 of the Rules of Procedure on the Work and Organization of the SCC, if the panel does not change its decision, the case is submitted to the president of the Case Law Department for the presentation at the session of that department. At the session of the Case Law Department, the reasons and objections of the registrar of case law and the reasons of the panel for which the panel supported its decision are discussed, and a decision is made whether the case will be brought at the session of the department in which the panel that made the appropriate decision acts. The case is always presented at the department session, if no consensus was reached at the session of the Case Law Department. If the department session concludes that the decision deviated from the adopted legal understandings and case law, it will return the case to the panel that made the decision for the repeated decision-making. In accordance with Art. 32, until the decision is sent from the court, the same panel can decide on the same matter again. If the panel supports its decision, the case is submitted to the General Session.

■ As it may be seen, if the department session cannot adopt a legal understanding, and/or if the panel supports its decision, although the department session concluded that the decision deviated from the adopted legal understandings and case law, the case is submitted to the General Session for deciding. This established a clear decision-making sequence for the purpose of harmonizing case law.

■ However, the effect of the decision made by the General Session is not regulated, i.e. whether this decision binds all judges of the SCC or not. Unlike Article 45 para. 3 of the new Law on the Organization of Courts and Article 37 para. 8 of the Rules of Procedure on the Work and Organization of the SCC, stipulating that the legal understanding adopted at the department session is binding on all chambers within the department, there is no similar provision to govern the effect of the General Session decision, and/or whether the legal understanding adopted by the General Session is binding for all panels and/or judges of this court, as well as whether the panel is obliged to change its decision if the General Session finds that the decision deviates from the adopted legal understandings and case law.

■ Since there is no explicit provision governing the effect of the General Session decision, it may be assumed that the decision does not bind the judges in terms of the way in which they will decide in specific cases. The binding decisions of the General Session may represent a limitation of the judges' freedom of deciding, which is contrary to Article 2 of the new Law on Judges, stipulating that a judge is independent in the exercise of his/her judicial office, as well as that he/she is entitled to judge on the basis of the Constitution, ratified international treaties, laws, generally accepted rules of international law and other general acts, adopted in accordance with law. Article 144 of the Constitution has the same content. There is also a relevant Recommendation 2010 (12) of the Council of Europe stating: "judges must have the unfettered freedom to render judgments impartially, in accordance with law and their own interpretation of the factual situation."

Mechanism for the harmonization of case law from the Court Rules of Procedure

The Court Rules of Procedure govern the mechanisms for the harmonization of case law within the provisions pertaining to the joint sessions of courts of appeal (Articles 29 and 29a), as well as within the provisions pertaining to the work of the panel of second instance (Articles 194 to 201a).

Mechanism for the unification of case law of the courts of appeal

Article 29 of the Rules of Procedure stipulates that “For the purpose of harmonizing the work of courts of appeal, review of the disputed matters of importance for the functioning of courts in the Republic of Serbia and unifying case law, courts of appeal shall hold at least three joint sessions of the case law department, in January, April and December of the current year”. It is also stipulated that “Organization, venue and time of the joint sessions shall be governed in more details by the presidents of courts of appeal through a special agreement no later than 15 December of the current year for the next year”.

■ The Supreme Court of Cassation is informed about the joint sessions, as well as about the conclusions of the sessions, disputed matters and the need to unify case law.

■ Article 29a stipulates that “The need to unify case law is determined beforehand by the judicial departments of courts of appeal with the jurisdiction over the disputed legal matters, based on the report of the rapporteur judge appointed by the president of the department”. Other courts of appeal are sent a report informing them about the need for the unification of case law. The courts of appeal express their opinion on the disputed matter at the department session and submit the opinion in writing to the court of appeal that initiated the procedure within 30 days and submit the co-reports, if any. The Commercial Court of Appeal and the Supreme Court of Cassation are invited to a joint session with the submission of reports and co-reports. The disputed legal matters are considered at the joint sessions, based on the reports and co-reports of the rapporteur judges, and the adopted conclusions are submitted to the Supreme Court of Cassation together with the reports, co-reports and minutes of these meetings, for comments, within 15 days from the date of the joint session. The courts of appeal are also expected to publish the conclusions accepted by the Supreme Court of Cassation on their website.

Mechanism for the unification of case law of the court of second instance

Mechanism for the harmonization of case law in the adoption of legal understandings

■ The provisions pertaining to the activities of the second instance panel (Articles 194 to 201a) stipulate when the panel of the second instance court, as well as the case law department, may initiate the adoption of a legal understanding by the department session.

■ According to Article 196 paragraph 2, if the panel finds that the legal understanding should be determined on the legal matter being decided on in order to ensure the uniform implementation of the regulations, it informs the head of the department thereof, and stops working on the case until this matter is discussed in the session of the department and/or the session of all judges. Also, in accordance with Article 199 paragraph 2, “If the case law department considers that due to the discrepant case law of lower courts, uniform implementation of the regulations should be ensured, it shall submit a written notification to the president of the department competent for the implementation of the regulations in order to adopt the appropriate legal understanding.”

■ Article 23 governs the manner of adopting a legal position by the department session. In the absence of other provisions, by legal analogy it can be assumed that these provisions could also be applied to the adoption of legal positions. Article 23 paragraph 1 stipulates that the draft of the legal position is drawn up by the rapporteur judge, and if his/her proposal is not accepted, that the draft is drawn up by a judge appointed by the judicial department. Paragraph 3 stipulates that the final text of the legal position is signed by all members of the department (verification), whereas a judge who does not agree with the sentence or explanation of the adopted legal position will not sign the legal position, but will present his/her opinion separately and attach it to the original of the adopted legal position.

Mechanism for the harmonization of case law in decision-making

■ According to Article 199, para. 2 “If the case law department considers that the panel deviated from the court’s practice and that case law should be unified due to the existence of different decisions, it will return the case to the panel with a written reasoned objection and a contrary decision, within seven days from the date of receipt of the case in the case law department. According to Article 200, if the case law department points out in a written reasoned objection that the adopted decision deviated from the case law, the president of the panel again presents the case at the panel session. If the panel does not change the decision, the case is referred to the president of the department for the presentation at the session of that department and/or the session of all judges. If, by a majority vote of the judges of the department, that is, a session of all judges by a majority vote of the judges, the department session decides that the decision has deviated from the case law it will return the case to the chamber for reconsideration of the decision.

■ Unlike the Rules of Procedure on the Organization and Work of the SCC, the Court Rules of Procedure do not include the provision according to which the legal understanding adopted at the department session is binding for all chambers comprising the departments. The Rules of Procedure do not provide an answer to the question of how to proceed if the chamber persists in its decision despite the established disagreement with court law by the session of all judges.

Activity Plan of the Supreme Court of Cassation for the unification of case law

Obligations of the republic level courts regarding the harmonization of case law

■ In 2014, the SCC adopted the Activity Plan for the unification of case law. The Plan, among other things, foresees obligations for courts of the republic level (Commercial Court of Appeal, Misdemeanour Court of Appeal, and Administrative Court) regarding the harmonization of case law.

1. The Commercial Court of Appeal – as the court of republic level, which according to the Law on the Organization of Courts is entitled to determine legal positions for the purpose of uniform implementation of laws under the jurisdiction of commercial courts, is planned to:

- ▶ adopt an annual programme of activities aimed at unification of case law of commercial courts and inform the regional commercial courts and the Supreme Court of Cassation about that programme;
- ▶ organize annual consultations of commercial courts aimed at uniform implementation of the law, where the disputed issues are processed with reports and co-reports submitted to the Supreme Court of Cassation, with an invitation to participate in the consultation.
- ▶ inform the Supreme Court of Cassation about the defined positions
- ▶ publish its decisions at the website of the Court
- ▶ periodically publish a case law bulletin

2. The Administrative Court is planned to:

- ▶ through the case law department, harmonize the work of the panel of the Administrative Court and take care of the uniform implementation of the law by considering disputed matters based on reports and co-reports at the session of all judges,
- ▶ enable the horizontal exchange of decisions between the judges of this court in the head office and departments
- ▶ inform the Supreme Court of Cassation about the disputed matters
- ▶ publish its decisions at the website of the Court
- ▶ periodically publish a case law bulletin

3. The Misdemeanour Court of Appeal is planned to:

- ▶ through the case law department, harmonize the work of the panel of the Misdemeanour Court of Appeal and take care of the uniform implementation of the law by considering disputed matters based on reports and co-reports,
- ▶ enable the horizontal exchange of decisions between the judges of this court in the head office and departments, and between the Misdemeanour Court of Appeal and misdemeanour courts
- ▶ adopt an annual programme of activities aimed at unification of case law of misdemeanour courts and inform the regional misdemeanour courts and the Supreme Court of Cassation
- ▶ inform the Supreme Court of Cassation about the disputed matters
- ▶ publish its decisions at the website of the Court
- ▶ periodically publish a case law bulletin

Horizontal and vertical unification of case law

Point IV of the Activity Plan to horizontal and vertical unification of case law, to be implemented by publishing the decisions and exchanging them between courts. The exchange of court decisions should be made possible for all courts through the intranet, and the development of an interface for connecting to the automatic case management programme (AVP and SAPS). The establishment of special registers, digital (electronic) and analogue (hardcopy) is also planned for the following decisions of the:

1. European Court of Human Rights
2. International bodies for the protection of human rights
3. Constitutional Court
4. International bodies supervising the implementation of the Hague Conventions
5. Supreme Court of Cassation
6. Courts of Appeal
7. Higher courts
8. Decisions of any court that has been implemented by an international instrument. The decisions are planned to be classified by branch of law, and it is necessary to develop a unique nomenclature of legal institutes for horizontal and vertical exchange and search in that kind of database.

Agreement of the presidents of courts of appeal on the organization, venue and time of joint sessions of courts of appeal

For the purpose of unification of case law of courts of appeal, the SCC Activity Plan of the Supreme Court emphasizes the need to hold joint meetings of courts of appeal, based on the fact that the Courts of Appeal should hold joint sessions, in accordance with the Law on the Organization of Courts. It is noted that the Law neither determines the form nor regulates the organization and manner of decision-making at such sessions, creating the need to govern these matters in more detail by the Court Rules of Procedure. The Activity Plan also provides the instructions for acting of courts of appeal at these meetings. Article 29 of the Court Rules of Procedure (CRP) stipulates that the court of appeal shall hold joint sessions and notify the Supreme Court of Cassation about disputed matter of significance for the work of the courts in the Republic of Serbia, and the unification of case law, and that organization, venue and time of the joint sessions shall be governed in more details by the presidents of the courts of appeal through a special agreement.

Through mutual Agreements of the presidents of courts of appeal on the organization, venue and time of joint sessions of courts of appeal, the presidents of courts of appeal governed numerous technical and other matters regarding the organization of the joint meetings. Based on these Agreements, joint meetings have been held since 2014 until today. The last such Agreement was concluded by the presidents of the courts of appeal for 2021–2025. As stated in the Agreement, it is an expression of the need for courts of appeal to define the causes that lead to different case law and propose a concrete plan of activities to be undertaken in order to enable the unification of case law and improve the quality of court decisions through a uniform interpretation of law.

Mechanism for the harmonization of case law from the Agreement of the presidents of courts of appeal

The Agreement of the presidents of courts of appeal 2021–2025 stipulates a special mechanism for the harmonization of case law at the court of appeal level, in accordance with Articles 29 and 29a of the Court Rules of Procedure.

1. Previous session of judicial departments of courts of appeal where the need for the unification of case law is identified – In order to organize and hold joint sessions, courts of appeal will hold sessions of judicial departments beforehand. During these sessions, judicial departments identify the need to unify case law for the disputed legal matters, from their jurisdiction, based on the report of the rapporteur judge appointed by the president of the department. The judicial department of the court of appeal with the jurisdiction over the disputed legal matter under consideration and which determines the need for the unification of case law, through the president of the court or the president of the judicial department, initiates a joint session, by notifying other courts of appeal of the need for the unification of case law, with the submission of a report of the judge rapporteur. The courts of appeal express their opinion on the disputed matter, depending on the judicial matter, at the department session and submit the opinion in writing to the court of appeal that initiated the procedure no later than 30 days from the date of submission of the disputed matter and the report of the rapporteur judge, and submit the co-reports, if any.
2. Convening a joint session of courts of appeal – The president of the court of appeal on whose territory the joint session is held or the president of the judicial department of the court of appeal on whose territory the joint session is held, with a jurisdiction over the disputed legal matter under consideration, issues a document on convening the session with the agenda, delivered to other courts of appeal no later than eight days before the date of the joint session. Integral parts of the document on convening the session are the reports of the rapporteur judges, written statements of other courts of appeal, as well as other reports on the same disputed matter, if any. The composition of the court of appeal delegation is determined so that each delegation includes up to five members (the president of the court, the president of the judicial department, the head of case law and two judges). The court of appeal on whose territory the joint session of the courts of appeal is held, informs the Supreme Court of Cassation about the joint session, disputed matters and the need for the unification of case law by submitting the document on convening the joint session of the courts of appeal with the agenda, no later than eight days before the joint session.
3. The joint session of courts of appeal – the disputed legal matters are discussed during the joint sessions, on the basis of reports and co-reports of the rapporteur judges. Minutes of the joint sessions of courts of appeal are kept, and all opinions expressed during the discussion, as well as the voting results, are entered into those minutes. Integral parts of the minutes are the reports of the rapporteur judges and co-reports discussed at the session, as well as the conclusions adopted. A judge who does not agree with the adopted conclusion will not sign the minutes, but will present and enclose his/her opinion separately.
4. Notification to the Supreme Court of Cassation – The conclusions adopted at the courts of appeal sessions are submitted to the Supreme Court of Cassation, together with the separate opinions, reports, co-reports and minutes of these meetings, for comments, within 15 days from the date of the joint session. The courts of appeal publish the conclusions accepted by the Supreme Court of Cassation on their website.

■ Courts of appeal also undertook to hold joint meetings with the representatives of regional higher and basic courts from their jurisdiction twice a year (in April and October), for the purpose of unifying case law in all matters, within each court of appeal, for the purpose of unifying case law at the level of all courts of appeal.

■ In order to enter the decisions of the courts of appeal in the case law base of the Supreme Court of Cassation, the presidents of the courts of appeal adopted regulations on the anonymization of decisions for publication. Before the beginning of implementation of the Agreement, the presidents of the courts of appeal courts will form editorial boards for the selection of the most important court decisions of the courts of appeal in order to enter them in the case law base of the Supreme Court of Cassation.

■ The Instructions of the courts of appeal governing the work of the case law departments, adopted by presidents of courts of appeal, should also be consistently followed, and within the framework of the Annual Work Schedule, the activity leads responsible for the work of the case law department in courts of appeal should be identified.

■ Courts of appeal undertook to apply the uniform nomenclature of legal institutes prescribed by law, as well as harmonizing the current instructions of the courts of appeal governing the work of the case law departments, so that the tasks performed in the Case Law Department, judicial assistants performing the tasks and the judges supervising their work would be established in a uniform manner in more details.

■ Courts of appeal also undertook to take special measures within the case law department in order to make a uniform application of procedural law and the actions of second-instance courts in cases that need to be returned to the first-instance court for supplementation.

■ Through the Agreement, the courts of appeal also undertook to maintain, in addition to the general register, special registers for: decisions of the Supreme Court of Cassation, decisions of the Constitutional Court, decisions of the European Court of Human Rights, decisions of international institutions that protect human rights, decisions of courts of appeal, decisions of higher courts, legal positions and conclusions, as well as registers of court decisions by branch of law.

Case law database

Presidents of courts undertake to enable the entry of decisions into the electronic case law database. They also undertook to take measures for the gradual anonymization of data in all court decisions entered into the database, so that they could be made available to the public, while protecting personal data and the right to privacy of participants in court proceedings. Every two years (even earlier if necessary), starting from the date the case law database of the Supreme Court of Cassation is commissioned, the presidents of courts of appeal will review the need to improve the work of this case law database.

Keeping and publishing court decisions and legal positions and understandings

Article 28 of the Court Rules of Procedure stipulates that the case law departments maintain a general register of legal understandings, in which legal positions expressed in court decisions in individual cases or received from a higher court, which are of importance for case law, are entered in a summarized form. Also, in addition to the general one, the court will keep a special register in which the legal understandings adopted at the meeting of all judges, department sessions, consultations and working meetings of judges are entered.

■ It is stipulated that the general and special register of legal understandings be kept separately for each branch of court work, in chronological order, and that they may be published in a separate collection or on the court's website.

■ According to the same Article 28 paragraph 4, in courts, there should also be special registers for: decisions of the Supreme Court of Cassation, decisions of the Constitutional Court, decisions of the European Court of Human Rights, decisions of international institutions that protect human rights, decisions of courts of appeal, decisions of higher courts, legal positions and conclusions, as well as registers of court decisions by branch of law.

■ According to paragraph 5 of that Article, the legal positions entered into registers by the court, are submitted to the Supreme Court of Cassation for the needs of the Serbian judicial information system. This provision is related to Article 30, stipulating that case law monitoring activities are performed using ICT, with the application of a single standard application (unified list of legal institutes) of methodologies and computer programmes established in the Judicial Information System of the Republic of Serbia. This provision is imprecise, as there is not a judicial but a legal-information system, established by Article 28 of the Law on publishing the laws and other regulations and acts, as a collection of data in electronic form.

Conclusions:

On the case law harmonization mechanisms

According to the aforementioned, the provisions of the Court Rules of Procedure and the Rules of Procedure on the Organization and Work of the SCC provide mechanisms for the harmonization of case law, concerning the adoption of new or consideration of existing legal understandings and positions by the session of the judicial department, the session of all judges and the General Session of the SCC, and for harmonizing court decisions with the existing practice of the judicial department.

■ The special mechanism for the harmonization of case law of four courts of appeal was also established. According to the aforementioned, the Agreement of the presidents of the courts of appeal elaborates in detail the mechanism that foresees the candidacy of disputed legal matters, their review by the sessions of the departments, as well as the adoption of conclusions about them by the joint session of courts of appeal, with the notification and statement of the SCC on the conclusions adopted.

■ The role of the case law department and the judicial department in the implementation of these mechanisms is key. The role of the case law department is particularly important in recognizing panel decisions that are inconsistent with the practice of the department, but also with the practice of the SCC, the Constitutional Court, the ECHR, and in courts of appeal with the case law of other courts of appeal.

■ With the introduction a unique case law electronic database and connecting it with the database of the Judicial Academy, which contains the selected decisions from the case law of the European Court of Human Rights (ECHR), relevant for Serbia (<https://e-case.eakademija.com/>), the holders of judicial functions and citizens can read the relevant decisions of the ECHR, also to investigate the decisions of domestic courts related to the practice of the ECHR. This linking was made between the ECHR judgments and the SCC decisions and Courts of Appeal, which preceded and contributed to the adoption of that decision of the ECHR, or applied the legal position expressed in that decision. Considering that more than 60 translated decisions from the database of the Judicial Academy are included in the linking, the visibility of these decisions has been significantly increased, thus indicating their relevance. As part of this activity, more than 180 decisions of the Supreme Court of Cassation (80 decisions) and courts of appeal (103 decisions) were linked to the translated decisions of the European Court of Human Rights from the Judicial Academy's e-CASE database.

On shortcomings in the normative framework

In the normative framework, particularly the Court Rules of Procedure and less in the Rules of Procedure on the Organization and Work of the SCC, there are certain shortcomings, which, in the author's opinion, should be considered by the future working group that will work on the new Court Rules of Procedure, the drafting of which is stipulated in the new by the Law on the Organization of Courts.

■ It can be said that the Court Rules of Procedure clearly stipulate how and under what conditions the panel of the second-instance court and the case law department may launch an initiative to adopt a legal understanding or consider the existing understanding by the session of the department of the second-instance court (Article 196 paragraph 2 and Article 199 paragraph 2). However, it remains unclear whether this initiative can be initiated by every judge of that department or if a request of one third of the judges of that department is required, as with the initiative to schedule a session of the department (Article 18 paragraph 1). Although the president of the department can schedule a session on their own initiative, it is not stipulated whether they could independently initiate taking a legal position or understanding. This matter is clearly stipulated by Article 36 (4) of the Rules of Procedure on the Organization and Work of the SCC stipulating that "the president of the department, the judicial panel and the judge may initiate taking a legal understanding of legal matters of interest for the work of the judicial panels in the department". Unfortunately, the Court Rules of Procedure do not include such an explicit provision.

■ The Court Rules of Procedure does not stipulate the manner in which the Session of departments reviews and adopts a legal understanding. Article 23 governs the manner of adopting a legal position by the department

session. Through legal analogy it can be assumed that these provisions could also be applied to the adoption of legal understandings, although that is not the best solution.

■ The Court Rules of Procedure provisions governing the work of the case law departments are neither complete, nor well systematized. Article 27 of the Court Rules of Procedure also stipulates that a case law department must be established in courts of republic level and courts of appeal, and that it may exist in a court with a larger number of judges. It is up to the voluntarism and initiative of the president of the court and judges to establish these departments in higher courts.

■ Article 31, governing the operation of the case law department Session, stipulates that it only prepares proposals on case law matters to be presented at the session of all judges in order to take a certain position aimed at case law unification. This provision is incomplete, considering that other tasks are performed and/or other decisions are made at the case law department session. In accordance with Article 199 paragraph, a case law department may return the case to the panel if it finds that the panel deviated from the case law, and also if it finds that due to the discrepant case law of lower courts, uniform implementation of the regulations should be ensured, and it submits a written notification to the president of the department competent for implementation of the regulations in order to adopt the appropriate legal understanding. Decisions to return the case to the panel or launch an initiative to adopt the appropriate legal understanding should be made at a session of the case law department, and should be governed accordingly. This would ensure that the making of these decisions is carried out in accordance with the provisions governing the way of working and making decisions at the department session.

■ As stated, the making of decisions to return the case to the panel or launch the initiative for the adoption of the appropriate legal understanding and the actions of the case law department in relation to those are governed by the provisions of Article 199, para. 2 and Article 200, located in the part governing the work of the panel of the second instance court. The basic provisions governing the case law department are located at the beginning of the Rules of Procedure (Articles 27 and 28). Such a fragmented arrangement of the work of the case law department in different parts of the Rules of Procedure makes it difficult to see and understand the role of this department as a whole. The operation of the case law department governed the Court Rules of Procedure on the Organization and Work of the SCC in a more comprehensive and systematized manner. The provisions of these Rules of Procedure, from Article 38 to Article 41, govern the work of the case law department, including acting of this department in launching the initiative for taking a legal understanding and harmonizing the panel decisions with the department case law.

■ One of the indicators that the Court Rules of Procedure have shortcomings in terms of governing the work of the case law department is the need to adopt the Instructions on the work of the case law department of the courts of appeal, which the presidents of the courts of appeal jointly adopted in February 2017. Among other things, this Instruction precisely defines the operations for which the president and deputy president of the case law department, registrars of case law for certain legal areas and their deputies, as well as judicial assistants in that department are competent. All the tasks that should be performed by this department are regulated for the first time by listing the specific tasks for each member of this department. Also, in accordance with the provisions of the Rules of Procedure on the Organization and Work of the SCC, the instruction specifies acting of case law department in case the panel deviated from the adopted legal understandings and case law in the decision adopted.

■ This Instruction, among other things, specifies the tasks of the case law department in connection with the publication of court decisions. It is stipulated that the department should separate decisions of importance for case law, mark them and classify them in accordance with the Open List of Descriptors, the so-called keywords, adopted by the SCC, anonymizes separated decisions in accordance with the Rulebook on the replacement and omission (pseudonymization/anonymization) of data in judicial decisions of the SCC of 20 December 2016, and publish them on the court's website. As the Rules of Procedure do not include similar provisions, it was necessary to additionally govern numerous important tasks regarding the publication of the decisions the case law department is competent for.

■ As already stated in relation to keeping and publication of court decisions, Article 28 of the Court Rules of Procedure stipulates that the general and special register of legal understandings should be kept separately for each branch of court work, and that they may be published in a separate collection or on the court's website. The biggest problem with these provisions is that they are outdated. In the case law departments of most courts of appeal, all the decisions made by the panels of those courts were filed in binders that make up the general register of case law. Given that not only legal positions expressed in decisions of importance for case law were filed in the register, the register was losing part of its practical value because it was very difficult to search due to the volume of its content. With the introduction of the electronic case law database containing decisions, legal positions and understandings

of the courts of the republic level and courts of appeal, the need to keep these registers in these courts has ended. On the other hand, there was a need to additionally organize new operating processes and obligations of panels and technical services entering data related to the entry of decisions into the case law database.

On the needs of case law departments

All courts face the issue of an insufficient number of expert judicial assistants to work in the case law department only. Courts are permanently faced with the departure of expert judicial assistants with many years of practical training. It is generally known that the salaries of judicial assistants are too low to be a motivation for long-term engagement, and due to being appointed as judges, going to the bar or other legal professions, the best trained and capable personnel leave the courts every year. In this way, the training of personnel in the courts through practical work permanently goes through periodic cycles in which, after the practical training, the personnel leave while new ones begin to acquire the necessary knowledge again. This includes the passage of a certain period until the new assistants are trained to carry out their tasks with high quality. This constant outflow of trained personnel is a chronic issue in the work of the courts, in particular the case law departments.

On electronic case law database of the SCC

The electronic case law database was created in 2017, as a part of the IPA 2012 Judicial Efficiency Project (JEP). This database has two main versions, depending on the level of access. The internal case law database was developed to enable judges and judicial assistants to view the case law of their own court as well as other courts of the same or higher level. In addition to the internal database that contains integral (non-anonymized) decisions, the database also contains a public instance available to the general public and that contains selected anonymized judgments. Both instances include court decisions, legal positions/opinions, summaries of decisions – verdicts, as well as case law bulletins of the Supreme Court of Cassation (that is, the Supreme Court of Serbia (before the judicial reform in 2014), courts of appeal of general jurisdiction, the Administrative Court, the Commercial Court of Appeal and the Misdemeanour Court of Appeal. The database is linked to the database of the Judicial Academy, which contains the decisions of the European Court of Human Rights. The number of decisions in the case law database has been constantly increasing since 2017, and at the end of 2022, it contained hundreds of thousands of integral decisions and tens of thousands of anonymized decisions of these courts, as well as 112 legal understandings and positions of the SCC. One of the biggest advantages of this database is the easy search of its content, given that all decisions in it are classified and distributed in accordance with the Open List of Descriptors, adopted by the SCC. This enables the search of decisions according to specific legal institutes, i.e. keywords, describing the material or procedural essence of the decision. Unfortunately, the database does not contain decisions of higher courts. That is why the case law of 25 higher courts, through whose second-instance case law the case law of 66 basic courts is also directed, remains outside the centralized and unified electronic database of case law, which in many ways makes it impossible for the courts and the public to become familiar with it, which consequently makes it impossible to harmonize it.

On the Instruction on the manner of entering court decisions into the case law database of the SCC

The need for the adoption of this Instruction is a clear indication that the provisions of the Rules of Procedure on the Organization and Work of the SCC, governing the work of the case law department in connection with the keeping and the publication of decisions, are not adequate to the needs. Considering the advantages of the case law database in relation to the existing way of keeping and publishing decisions, as well as the shortcomings in the normative framework related to it, in October 2022, the president of the SCC issued the Instruction on the way of entering court decisions into the case law database. The instruction stipulates that the Decisions of the Supreme Court of Cassation are entered into the case law database in an integral form and anonymized, with the provision that the anonymized decisions are also published on the website of the Supreme Court of Cassation, in accordance with the legal obligation of the Supreme Court of Cassation. This Instruction governs the process of entering decisions into the case law database. The obligations of the panel that made the decision to adequately mark the decision with appropriate descriptors, as well as filling out the appropriate form with the data needed

to enter the decision into the database, are specified. The Case Law Department is also required to check whether the decision is marked with appropriate descriptors and whether the completed form contains all the necessary data, as well as the possibility to return the case to the panel in case of need for supplementation. The Case Law Department is also responsible for determining decisions of importance for the development and uniformity of case law and marking them in accordance with the Form. The Case Law Department also submits a properly marked decision with a completed form to the Information Services (hereinafter: ICT Office) which performs the technical entry of the decision and data from the form into the case law database. The Case Law Department also submits the adopted legal understandings, sentences and bulletins to ICT Office for entry into the case law database. In this way, a new work process was introduced into the court operation, to enable easier recording, keeping and availability of court decisions to other courts and the public. This exceeds the non-implementation of the provisions of the Rules of Procedure governing the maintenance of the general and special register due to their obsolescence, and governs a new work process regarding the publication of decisions in the case law database.

On the Agreement on the organization, venue and time of joint sessions of courts of appeal

Considering the need of the four courts of appeal to define the causes that lead to different case law, and the need to develop and implement a concrete plan of activities to be undertaken in order to enable the unification of case law and improve the quality of court decisions through a uniform interpretation of law, pursuant with Article 24 of the Law on the Organization of Courts and the Plan of the SCC for the Unification of case law I Su-7 24/2014 of 1 April, 2014, through mutual Agreements on the organization, venue and time of joint sessions of courts of appeal, the presidents of courts of appeal stipulated numerous technical and other matters regarding the organization of the joint meetings, along with a special mechanism for the harmonization of case law at the level of courts of appeal, in accordance with Articles 29 and 29a of the Court Rules of Procedure. Joint sessions have been held since 2014, and have significantly contributed to the unification of case law. In particular the civil matters and labour dispute matter. This is particularly important considering an increasing number of cases in which applications were filed before the European Court of Human Rights, pertaining to different case law in labour disputes.

On Activity Plan of the Supreme Court of Cassation for the unification of case law

This Activity Plan is a very important document sublimating the activities of the SCC regarding the harmonization of case law. The Plan also stipulates obligations for courts of the republic level (Commercial Court of Appeal, Misdemeanour Court of Appeal, and Administrative Court) regarding the harmonization of case law. Special obligations are stipulated for each of these courts, such as the adoption of an annual programme of activities aimed at unification of case law, the organization of annual consultations where disputed matters are addressed, the publication of decisions and the issuing of bulletins and informing the SCC of the implemented activities, disputed legal matters and established legal positions. It could be said that this Plan established the “foundations” for the norms and activities that were later adopted, and/or undertaken with the aim of harmonizing case law. Thus, the Plan envisages the organization of joint meetings of courts of appeal, governed later by the provisions 29 and 29a of the Law on the Organization of Courts and more closely regulated by the Agreement of presidents of courts of appeal. The Plan also stipulates a very important vertical and horizontal connection between courts for the harmonization of case law, in terms of mutual insight into decisions, published using IT technologies, on the basis of which a unique electronic case law database was established.

Recommendations

Based on the analysis of the mechanisms for the harmonization of case law applied in our judiciary, the normative framework that governs these mechanisms, the work of the case law department and other matters of importance for the harmonization of case law, as well as the way in which court decisions are kept, published and harmonized with the case law of the ECHR, in order to contribute to the achievement of Interim Benchmark 1.3.9 from Chapter 23 of the Action Plan, the following recommendations could be made:

Case law harmonization mechanisms

It can be stated that the existing mechanisms for the harmonization of case law, stipulated by the provisions of both Rules of Procedure, have been confirmed in practice. They are well normatively regulated, so it is difficult to provide remarks and possible recommendations for improvement. This particularly refers to the mechanism governed by the provisions of the Rules of Procedure on the organization and operation of the SCC. Confirmation of the effectiveness of the mechanism for the harmonization of the panel decisions with the case law department is the fact that on very rare occasions the panel persists in its decision, even though it deviated from the case law of the court according to the position of the case law department, department session and the joint session. The mechanism for resolving disputed legal matters, governed by the Agreement of presidents of courts of appeal on joint meetings, has been confirmed as efficient and effective in practice.

■ The effective application of these mechanisms primarily depends on how well the work of the court department and the case law department is organized in each court, for which it is particularly important to have enough personnel to perform these and other tasks related to the harmonization of case law.

Improvement of the normative framework

The Conclusions emphasize certain shortcomings in the normative framework, primarily the Court Rules of Procedure and the Rules of Procedure on the Organization and Work of the SCC, governing matters of importance for the harmonization of case law. In connection with these shortcomings, the following recommendations can be made for overcoming those shortcomings:

1. For the purpose of clear stipulating on who may launch an initiative to adopt a legal understanding or consider the existing understanding by the session of the department of the second-instance court, the provision should be entered referred to in Article 36 (4) of the Rules of Procedure on the Organization and Work of the SCC stipulating that “the president of the department, the judicial panel and the judge may initiate taking a legal understanding of legal matters of interest for the work of the judicial panels in the department”.
2. As it has been emphasized, the Court Rules of Procedure does not stipulate the manner in which the Session of departments reviews and adopts a legal understanding. Article 23 governs the manner of adopting a legal position by the department session. Although through legal analogy it can be assumed that these provisions could also apply to the adoption of legal understandings, the recommendation is to clearly regulate the proposal, deliberation and decision-making of the session of the second-instance court department on the disputed legal matter and adoption of legal understanding. A model can be found in Art. 36 para. 3 of the Rules of Procedure on the Organization and Work of the SCC, in the part governing that:
 - ▶ “At the department session the disputed legal matters are discussed on the basis of reports, co-reports, accounts and proposals for regulations and acts, submitted with the invitation to the department session.
 - ▶ The president of the department, the judicial panel and the judge may initiate a legal understanding of legal matters of interest for the work of the judicial panels in the department.

- ▶ The applicant explains in writing the need to adopt a legal understanding, if it did not exist before, or the need to amend the adopted legal understanding.
- ▶ The same procedure is followed when the judicial department proposes to the General Session launching of the initiative for the legal regulation of certain matters, for amending existing regulations and making proposals for evaluating the constitutionality and legality of laws and other general acts.”

3. It was stated in the Conclusions that the provisions of the Court Rules of Procedure, governing the work of the case law department, are not properly systematized, that they are incomplete, and that some of the provisions are outdated, and as such they are overcome in practice. In this regard, it can be recommended:

- ▶ That all provisions governing the work of the case law department be grouped under “Case Law Department” and “Session of the Case Law Department”.
- ▶ Article 27 of the should also stipulates that case law departments must be established in higher courts as well. These are 25 higher courts, through whose second-instance practice and legal positions, the case law of 66 basic courts is guided as well. Considering that the majority of citizens meet the judicial authorities due to proceedings before these courts, due to greater transparency that raises public confidence in their work, it would be necessary for the case law of these courts to be harmonized and accessible to the general and professional public, as well as other courts. Given that case law departments have a very important role in the unification of case law, in informing judges about the case law and positions of the SCC, the Constitutional Court, the ECHR, etc., as well as in the publication of decisions, it is necessary that they be established in these courts as well.
- ▶ Article 31, governing the operation of the case law department Session, should include all decisions adopted at this Session, as the applicable provisions stipulates that it only prepares proposals on case law matters to be presented at the session of all judges in order to take a certain position, which certainly does not complete the list of tasks performed by the session of the case law department. It was previously stated that at the session it is decided to return the case to the panel, if the decision deviated from the case law of the court, as well as launching an initiative to take a legal position. The session of the department should also decide which decisions, as significant for case law, should be made available to the public, through publication in the electronic case law database. Stating all decisions made by this department would ensure that the making of these decisions is carried out in accordance with the provisions governing the way of working and making decisions at the department session. A model can be found in Art. 41 of the Rules of Procedure on the Organization and Work of the SCC. Through a review of the method of operation of the case law department of the courts of appeal and the SCC, it could be established that these departments should also perform other tasks, especially those related to the marking, anonymization and publication of decisions.
- ▶ With the introduction of the electronic case law database containing decisions, legal positions and understandings of the courts of the republic level and courts of appeal, the need to keep general and special registers in these courts has ended. On the other hand, there is a need to additionally govern new operating processes and obligations of panels related to the entry of decisions into the case law database. It is recommended that, in accordance with the Instruction on the way of entering court decisions into the case law database of the SCC, the acting of the judicial panel, case law practice, as well as the technical service entering data into the case law database should also be governed.

Improving the use of the electronic case law database of the SCC

The case law database has become an extremely important instrument for preserving institutional memory in the courts whose decisions are found in it. The database also enables horizontal and vertical connection between courts in terms of mutual insight into court decisions. This achieves the basic prerequisite for the harmonization of the case law of these courts, in accordance with Point IV of the Activity Plan of the SCC for the harmonization of case law. Given that through the public part of the database, the general and professional public can see the case law of the courts, it enables greater predictability of court decision-making, which increases legal certainty and public trust in the work of the courts.

■ The case law database also allows all users to point out the possible existence of different decisions, in the same factual and legal circumstances, which, with regular monitoring of objections by the case law department, can enable the courts to react in a timely manner and prevent the long-term existence of such decisions, which is one of the requirements of the ECHR.

■ To that end, it can be recommended that in the case law departments of courts whose decisions are included in the case law database, special court assistants or trainees should be tasked for each particular matter to regularly monitor the content of the decisions of other courts entered in the database, as well as any objections expressed by users of the database on non-compliance of the decisions entered. This is especially true for the case law departments of the courts of appeal, which should take care of the mutual compliance of the case law between these courts. That is why it could also be recommended that, through the mechanism for the harmonization of case law from the Agreement of the presidents of courts of appeal on joint meetings, the inconsistent decisions that have been noticed by the case law department and which the users of the database have pointed to, should be considered as the department sessions and joint meetings.

Inclusion of decisions of higher courts in the case law database

Because of same reasons as a result of which it was proposed to establish case law departments in higher courts, it is recommended that the decisions of these courts be entered and published in the electronic case law database. Higher courts remain the only second-instance courts in Serbia whose decisions are not available and visible in the case law database. At the same time, the number of these courts, their geographical distribution and the complexity and variety of cases in which these courts judge, lead to inconsistent practice that directly affects citizens, creating legal uncertainty. The ability of judges of higher courts and legal aid to see each other's decisions would significantly accelerate the process of unification of case law in Serbia.

■ It is of particular importance to make the decisions of special interest for the formation of the public's perception of the fight of the state and the judiciary against corruption and organized crime available to the public, in a way that makes it easy to find these decisions. By including the decisions of higher courts in the case law database, it would be possible to regularly publish the decisions of the Special Departments for the fight against corruption of four higher courts, as well as the decisions of the Special Departments for organized crime and war crimes of the Higher Court in Belgrade. For now, the decisions of these courts are not published in a unified and systematized way, which makes it difficult for experts and the general public to access these decisions.

Improving the work of case law departments

As a possible solution to the problem of the chronic lack of judicial assistants with significant professional knowledge and the necessary experience in case law, the introduction of a special title (e.g. Case Law Advisor) for an assistant in case law was proposed. This position would be permanent, with a corresponding salary higher than the salary of other assistants, to enable and motivate the career advancement of assistants who have the affinity and expertise to work in these jobs.

■ In accordance with the needs of the case law department of courts of appeal, expressed in the Instructions on the work of the case law departments of courts of appeal, it is recommended to add a new paragraph to Art. 27, to stipulate that the case law department consists of the president of the case law department and his/her deputy, registrar of case law records for certain legal areas and their deputies, as well as judicial assistants and judicial trainees, determined by the court's annual schedule.

■ It is also recommended that the courts, taking into account all the work and tasks that the case law department should perform, adopt a precise schedule of tasks for judges, associates and trainees in these departments, to determine, on the basis of that, the possible need for hiring new assistants and interns to work in these departments, and to propose a corresponding draft of the amended personnel plan.

■ In accordance with the needs of the case law departments, it could be recommended to amend the Rulebook on special functional competences for employees in courts, public prosecutor's offices and the State Attorney's Office "Official Gazette of the RS", No 18 of 15 March 2019, to add in Article 3, governing areas of work – narrower internal units in which special functional competences are established for employees in courts, the tasks of harmonization of case law, as well as prescribing special functional competences for employees in these departments in accordance with that.

Update of the Open List of Descriptors/keywords of the case law database

As previously explained, the open list of descriptors of the case law database is the basis for searching the contents of the database based on the legal institute that is decided on in the decision. As such, it enables a very efficient sorting and search of decisions in the database. The term "Open" in the title of the document refers to the nature of the document to be continuously developed. It is designed to be a living document that should be periodically improved and expanded in order to better fulfil its role as a tool that facilitates the search of decisions in the case law database.

■ The current version of the Open List of Descriptors of the Supreme Court of Cassation, which is also used by courts of appeal, is ready for supplementation, after several years of practical testing. Periodic updates of the list are necessary to adapt it to the needs of the database user. Based on the decisions entered into the database so far, the descriptors under which a greater number of decisions have been entered could be established. Entering a large number of decisions under the same descriptor makes it more difficult to search for those decisions. This may indicate that the descriptor is too general. In such cases, the descriptor should be further broken down into more specific terms, in order to enable further classification of decisions based on them.

■ In connection with the above, it can be recommended to SCC to launch the initiative to supplement the Open List of Descriptors. In this regard, it is necessary to send a memo to courts of appeal to invite the judges of these courts to submit their proposals for supplementing the list within a certain deadline. It is also possible to organize a special joint meeting of the judges of the SCC and courts of appeal, where the received proposals for supplementing the List and possibly considering other issues of importance for improving the use of the case law database features would be considered. In the end of this process, the Editorial Board of case law of the SCC should consider all the received proposals, and based on the accepted proposals, supplement the existing List. The updated List of Descriptors would then be incorporated into the case law database by the developer.

Amendment of the Rulebook on the replacement and omission (pseudonymization and anonymization) of data in court decisions

The SCC adopted the new Rulebook on the replacement and omission (pseudonymization and anonymization) of data in court decisions on 23 June 2020, that replaced the Rulebook of 2016. Although it can be said that the new Rulebook has corrected many shortcomings from the previous document, for it to be used, apart from the SCC, by other courts whose decisions are published in the case law database, as well as accelerating and facilitating anonymization procedure, it is necessary to make certain amendments to the Rulebook.

■ It is necessary to amend Article 2, governing the court decisions the rulebook applies to, in order to extend its application to all court decisions published in the case law database.

■ It is also necessary to amend Article 10, governing the pseudonymization and anonymization of data in court decisions existing in electronic format. This article stipulates that the first name and surname are anonymized by replacement with two identical capital letters, while retaining the basis of the identity of that person in the procedure. The first name and surname of the person mentioned in the court decision is replaced with letters (AA), while each subsequent name and surname of the person is replaced with two other capital letters, according to alphabet (BB, CC, etc.)

■ This way of anonymization prevents semi-automatic anonymization with the help of available IT tools. An available computer programme, which could be easily installed in all courts, facilitates and accelerates anonymization, by marking all capital letters and numbers in the text of the decision. The person performing the anonymization

needs only to choose, with one “click”, whether to replace the word with an initial capital letter, as with the first name and surname, or to leave the word in the text in its unchanged form, if, for example, it is the name of a city. There is a similar option for replacing the numbers that appear in the text of the decision. This very simple programme significantly accelerates the procedure, and perhaps more importantly, reduces the possibility of an error due to a possible omission to replace certain personal data in the text of the decision being published.

Training for tasks in case law department

Rad u odeljenju sudske prakse zahteva posebnu stručnost, odlično poznavanje materijalnog i procesnog prava kao i sudske prakse najviših sudova u zemlji, prakse Ustavnog suda, Evropskog suda za ljudska prava itd. Takođe je neophodno posebno znanje potrebno za pravilno obeležavanje sudskih odluka u skladu sa Otvorenom listom deskriptora, kao i za odabir odluka od značaja za sudsku praksu, radi njihovog objavljivanja. S tim u vezi može se predložiti izrada početnog programa obuke za sudije i stručne saradnike za rad na poslovima sudske prakse, kao i uvođenje ove obuke u program obuke Pravosudne Akademije.

■ Work in the case law department requires special expertise, excellent knowledge of substantive and procedural law, as well as the case law of the highest courts in the country, the case law of the Constitutional Court, the European Court of Human Rights, etc. It is also necessary to have special knowledge required for the correct marking of court decisions in accordance with the Open List of Descriptors, as well as for the selection of decisions of importance for case law, for the purpose of their publication. In this regard, it can be proposed to create an initial training programme for judges and expert associates to work on the tasks related to case law, as well as introducing this training into the training programme of the Judicial Academy.

■ Having in mind the interim measure 1.3.9 from Chapter 23 of the Action Plan, “Serbia ensures the qualitative improvement of the national judicial practice, making it more consistent and harmonized with the European Convention on Human Rights”, special attention should be devoted to identifying and solving the most common legal matters leading to violations of ECHR norms and improving the capacity of domestic courts to resolve such matters in accordance with ECHR practice. The capacity of the courts could be increased by organizing appropriate training for judges and assistants from the case law department that would enable them to provide appropriate assistance to the judges in the panel in terms of obtaining ECHR decisions the legal matter to be resolved by the judicial panel.

■ Regarding the ask of the case law departments to follow and study case law of the SCC, the Constitutional Court, and international court authorities, and international institutions monitoring the protection of human and minority rights, as well as informing the judges, judicial assistants and judicial trainees on the interpretation of law by courts, the members of departments should be trained to use the available electronic case law databases of these courts and bodies, starting with the use of the database of the Judicial Academy, which contains selected decisions from the case law of the European Court of Human Rights, relevant for Serbia.

■ In addition, considering the links made between the judgments of the ECHR and the decisions of the SCC and courts of appeal through the case law database, it is necessary that the members of the case law department of the courts whose decisions are entered into the database be trained to use all the features of this database, even those that enable the further linking of newly made decisions of domestic courts with the decisions of the ECHR that preceded them, or that contain the legal position that the national court was guided by when making the decision.

■ Along with the initial training programme, it is important to create conditions for the implementation of practical training through which assistants and judges with experience in the work of the case law department would transfer their knowledge to new colleagues. Practical training would be delivered through the gradual inclusion of new assistants in case law and direct supervision of their work. The training would definitely be significantly easier, faster and more successful if the judge and assistant who have experience in case law could, before moving on to other jobs, transfer the acquired knowledge and skills to the judge and assistant who will replace him in those jobs. In addition to the institutionalized training within the Judicial Academy, new personnel working on the tasks related to case law, should also go through a form of mentoring training, which implies the transfer of knowledge through daily work in practice. Mentoring as a specific educational solution enables the highest degree of individualization of the training process and provides the opportunity to adapt it to the current needs of the mentored person.

■ Mentoring is a complex, interactive process of communication and mutual relations between individuals of different levels of expertise, aimed at transferring relevant knowledge, skills, experience and psychosocial support for professional development. For this method of training to be successful, the mentor should be a good communicator, motivator, and be able to transfer his/her practical knowledge to another person. These skills could be acquired through a specific training programme adapted to the concept – training for trainers, which should also be delivered within the Judicial Academy.

■ It was suggested that this type of practical training be provided for in the Rulebook on the internal organization and systematization of workplaces in courts, where the job description for judges and assistants in the case law department would include the obligation to deliver practical mentoring training for new colleagues. In order to avoid a situation where there is no one to transfer the acquired knowledge and skills to a new judge or assistant in the case law department, it is necessary to take into account the need to deliver this practical training during HR planning, in order to provide enough time for an experienced judge and judicial assistant leaving to new positions to transfer the necessary knowledge to new colleagues replacing them.

Support for the organization of joint meetings of courts of appeal

For the purpose of unifying case law, the four courts of appeal, in accordance with Articles 29 and 29a of the Court Rules of Procedure, have been holding Joint Sessions since 2014, and the presidents of courts of appeal have stipulated numerous technical and other matters regarding the organization of the joint meetings, along with a special mechanism for the harmonization of case law at the level of courts of appeal through mutual Agreements on the organization, venue and place of joint sessions of courts of appeal. These meetings significantly contribute to the uniformity of the case law, in particular the civil matters and labour dispute matter. The support for these meetings should continue. In the previous period, this support was provided through various projects of the European Union, the Council of Europe, as well as by the OSCE Mission.

■ The manner of publishing the conclusions of these meetings should also be improved. For the time being, they are difficult to access for the public and judges of other courts, given that they are not published in a uniform and systematic manner. At one of the following meetings, the representatives of the courts of appeal should consider and adopt a new manner of publishing the conclusions adopted at the joint meetings, as well as the statements of the SCC regarding the conclusions. Although the adopted conclusions do not have a binding force, as guidelines for the work of lower courts they should be published in a way that enables their availability to all interested judges and assistants. It is possible to publish the conclusions through the case law database, on the website of one or all courts of appeal or on the website of the SCC. In this regard, he can recommend the publication of conclusions through the case law database, given that it enables the publication of legal positions and understandings, sentences and bulletins. Considering the constant increase in the number of users of the database, this would enable the largest number of people to become familiar with the content of these conclusions.

Instruction on the manner of entering court decisions into the case law database of the SCC

As it has already been pointed out, this Instruction overcomes the lack of implementation of the provisions of the rules of procedure governing the maintenance of the general and special register due to their obsolescence and governs a new work process regarding the publication of decisions in the case law database. The only recommendation in connection with this Instruction refers to the need to clearly define who is in charge of anonymizing the decision and at what moment before their publication in the public part of the case law database. In the current practice of the case law department of courts of appeal, the anonymization represents the “bottleneck” in the procedure of publishing decisions. This is particularly obvious in courts of appeal in which it is not specified who performs the anonymization of decisions. In order to improve promptness, the court act should determine a sufficient number of employees for these tasks.

Instructions on operation of the case law department of court of appeal

It has already been explained that in February 2017, the presidents of the courts of appeal adopted a joint instruction on the operation of case law departments of courts of appeal, which, in the absence of appropriate provisions of the rules of procedure, govern the work of this department more closely. With regards to the content of these Instructions, it can be recommended that instead of the outdated provisions governing the maintenance of the general and special register of legal understandings, taken from the Court Rules of Procedure, they should be replaced by the appropriate provisions of the Instructions on the method of entering court decisions into the case law base of the SCC, governing the work process for entering and publishing decisions in the electronic case law database. It was explained earlier that instead of keeping these registers, all courts of appeal enter their decisions into the case law database. It would therefore be more expedient for this Instruction to provide the uniform rules governing this work process.

Obligations of the republic level courts regarding the harmonization of case law

As it was stated above, the Activity Plan of the Supreme Court of Cassation for the unification of case law stipulates obligations for courts of the republic level (Commercial Court of Appeal, Misdemeanour Court of Appeal, and Administrative Court) regarding the harmonization of case law. Special obligations are stipulated for each of these courts. However, apart from publishing decisions in the case law database and issuing bulletins, it was not possible to examine how these courts fulfil their obligations, since there are no publicly available data thereof. That is why the SCC is advised to take a more proactive approach and insist on regular notification by these courts about the implementation of the foreseen obligations. Also, through annual meetings with these courts regarding the subject matter of harmonization of case law, the SCC could examine the effectiveness of the implemented activities and discuss the observed issues, in order to undertake further activities in accordance with the findings.

Raising awareness on the importance of harmonization of case law and the use of tools for searching the case law of domestic and foreign courts

Although they have access to various electronic case law databases (within the Legal Information System, INTERMEX case law database, the Case Law Database of the SCC, the Case Law Database of the Constitutional Court, as well as databases of court decisions on the portals of certain courts), many judges and assistants say that they use electronic case law databases in practice very rarely. The situation is similar when it comes to using the available electronic case law database of the European Court of Human Rights. Most of the interviewed judges and assistants are not directly familiar with the content of the case law database of the Judicial Academy, which contains the selected decisions of the ECHR, as well as with the content of other case law databases of that court. One of them is available in Serbian free of charge to all users, through the web portal of AIRE Centre.

■ The reasons for not using the case law database differ, starting from established habits of using only paper hardcopies in work, through insufficient time to search the case law of other courts due to the workload, to insufficient knowledge of the opportunities offered by the (not so) new technologies in operation. Regardless of the reason, judges and assistants do not have an established habit of consulting the case law of the highest courts in the country, particularly the SCC and the Constitutional Court, as well as the ECHR.

■ Considering the above, a recommendation could be made to raise the awareness of judges and assistants at all levels through the organization of targeted training sessions and counselling, as well as through the creation and distribution of informative pamphlets and brochures about the importance of the harmonization of case law for preserving legal certainty among citizens and strengthening confidence in the judiciary. Apart from raising awareness, it is necessary for judges and assistants to be introduced to and be trained to use the various electronic case law databases, both of the highest courts in the country, as well as the ECHR and other international courts, which are at their disposal.

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