



ANALYSIS

of national legislation as to the uniformity of judicial practice and ways to improve it (Summary)

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The Analysis has been prepared by the national expert of the Council of Europe Mr Andrii Nyzhnyi at the request of the Council of Europe project “Support to Ukraine in implementation of the Council of Europe standards on the judiciary” following the discussion that took place on 13–14 December 2024 “Dialogue platform “Uniformity of case-law: an attempt to rethink”.

The main conclusions and recommendations are as follows:

1) Move to the most common criteria in civil jurisdiction for admitting a case to cassation review, including the significance of the case for law enforcement practice or its exceptional significance for a party to the case or society. The proposed wording of amendments to the procedural codes in this part is similar, for example, to the provisions of paragraph 2 of part 3 of Article 287 of the Civil Procedure Code of Ukraine, which establish exceptional grounds for cassation review of decisions in minor cases. At the same time, it is possible to retain the established approaches to comparing the conclusions of the Supreme Court regarding the application of the rule of law within the framework of such a criterion as “significant importance for ensuring the formation or development of a uniform law enforcement practice.”

2) Introduce another ground for cassation appeal, namely the existence of conflicting decisions of the Supreme Court in similar legal relations. A similar rule existed as a ground for reviewing decisions of the higher specialized courts of the Supreme Court in cases of “inconsistent application by the court (courts) of cassation of the same substantive law provisions, resulting in different court decisions in similar legal relations.”

3) Since it is proposed to introduce new cassation filters (the existence of inconsistent conclusions of the Supreme Court and significant public interest in the resolution of the case, or the case is of exceptional importance to the complainant), it is proposed to more clearly regulate the procedural action of the court if the cassation appeal does not pass the cassation filter. It is proposed that in such cases the court should refuse to open cassation proceedings.

4) To unify approaches and establish that if a cassation appeal has passed one of the cassation filters and cassation proceedings have been opened, the Supreme Court must consider such an appeal on its merits and adopt a resolution in which it may formulate a new conclusion or confirm or depart from the previous one. This was the approach that existed before the introduction of the current cassation filters in 2020. To do this, it is necessary to exclude the provisions under which the SC closes cassation proceedings if, after opening cassation proceedings, the court finds that the grounds for cassation appeal set out in the cassation appeal are unfounded (the appellate court decided the case taking into account the conclusion of the SC or the dissimilarity of the disputed relations to those referred to in the SC's conclusion by the complainant).

5) Extend the time limit for deciding whether to accept a cassation appeal to a reasonable period, especially in view of the above proposal to abolish the grounds for closing

cassation proceedings as a result of the court's conclusion that the cassation appeal is unfounded, made after the opening of cassation proceedings.

6) It is proposed to establish that the generalized conclusions of the Supreme Court regarding the application of law, which must be formulated explicitly and separated from the conclusions of the Supreme Court based on the results of the cassation appeal, are mandatory for consideration. A similar mechanism existed in the practice of the Supreme Court of Ukraine, which published such generalized “legal positions” in a file with the text of the court decision, but after its content (below the signatures of the judges), thus separating it from the decision on a specific dispute¹[1]. In this case, other conclusions of the SC regarding the application of the rule of law, not highlighted as “generalized,” will not be formally binding, but will mainly be taken into account by the courts as “soft law.”

7) There are quite a few deviations from the SC's previously formulated conclusions on the application of legal norms. In particular, during 2017-2024, the SC's Civil Chamber alone adopted 267 resolutions in which it deviated from the legal conclusions of the Supreme Court of Ukraine, the cassation courts within the Supreme Court, and the SC's Civil Chamber².

8) In cases where a judicial chamber, joint chamber, or Grand Chamber of the Supreme Court deviates from the conclusions of, for example, a panel of judges or a judicial chamber, this is understandable, as this is how a common approach to the application of a particular legal norm is formed and agreed upon by the entire Supreme Court.

9) However, each conclusion of the Grand Chamber of the Supreme Court regarding the application of a legal norm finalizes the process of harmonizing approaches within the Supreme Court, taking into account that the conclusions reflected in the resolutions of the Grand Chamber of the Supreme Court are perceived as final not only by the entire justice system, but also by all participants in legal relations regulated by the relevant legal norm, taking into account the conclusion of the Grand Chamber of the Supreme Court. Therefore, any departure by the SC from its conclusions, especially within a relatively short period of time, should be an extraordinary and rare event. At the same time, since its inception in 2017 until the end of 2024, the SC has already departed from its own conclusions 55 times³.

10) In order to eliminate the dependence of the outcome of the cassation appeal on the merits and the formation of the SC's conclusion on which of the SC judges is present during the consideration of the cassation appeal (primarily regarding the SC), it is proposed to establish that the decision of the panel, chamber, joint chamber, or SCJ be adopted by a majority of the judges of the panel of judges, chamber, joint chamber, or SCJ, respectively. Also, to compensate for the negative impact on the stability of judicial practice of the regular change in the composition of joint chambers and the SCJ, it can be provided that decisions of the chamber, a joint chamber or the Supreme Court deviating from a previously formulated conclusion on the application of a legal norm of the same chamber, joint chamber or Supreme Court be adopted by a qualified majority (two-thirds of the votes) of the chamber, joint chamber or Supreme Court. At the same time, a departure from a conclusion regarding the application of

¹ For example, Resolution of the Supreme Court of Ukraine of 21 March 2011 in case No. 3-7rc11 // <https://reyestr.court.gov.ua/Review/14758922>

² Khotynska-Nor O., Nyzhny A. Summary of the discussion of the Dialogue Platform “Unity of Judicial Practice: An Attempt at Reinterpretation” (Lviv, December 13-14, 2024) (With the support of the Council of Europe project “Supporting the Judiciary of Ukraine in Wartime and the Post-War Period”)// <https://rm.coe.int/-2024-/1680b5a665>

³ Ibid

a rule of law “vertically” (for example, by a joint chamber from a conclusion of a panel) is carried out in accordance with general rules.

11) In certain cases, the SC applies different approaches to the application of procedural law rules in its rulings, since these rules regulate the procedure for initiating cassation proceedings and are not assessed in the SC's decisions on the outcome of cassation appeals. In such cases, different judicial practices of the SC arise, which are not covered by the existing mechanism for reconciling conflicting conclusions of the SC, since only cases concerning conclusions set out in SC rulings can be referred to a judicial chamber, a joint chamber, or the SC's Grand Chamber for consideration. A possible way to reconcile conflicting conclusions of the SC on the application of such rules of procedural law may be to specify in the procedural codes that the conclusions of the SC on the application of rules of law may also be set out in the rulings of the SC. However, first, this could lead to a significant increase in the workload of the Supreme Court, since in the absence of a clear distinction of the conclusion in the text of the Supreme Court's decisions, even the court's assessment of the validity of a request to adjourn the court session could be considered as such. Second, it is precisely by adopting a resolution on the outcome of the cassation appeal that the SC performs the function of a court of law and ensures uniform application of the law by lower courts through the formation of a SC conclusion that is binding for future consideration.

12) Therefore, the uniform interpretation and application of the rules of procedural law governing the activities of the Supreme Court itself should be achieved through internal organizational measures within this court, for example, through the coordination of approaches at the Plenum of the Supreme Court or at meetings of judges of the relevant cassation courts. Given the restrictions on access to cassation review, there are certain categories of court decisions that cannot be considered by the Supreme Court. Therefore, as noted by the Chairman of the Supreme Court, S. Kravchenko, the issue of ensuring the uniformity of judicial practice in cases where court decisions are not subject to cassation appeal, in particular in cases of administrative offenses, remains relevant⁴.

13) The following are possible ways to ensure consistency in practice in cases of administrative offenses.

First, granting the general assembly of the CAS of the SC or the CCS of the SC the power to issue advisory explanations on the application of legal norms in cases of administrative offenses, by analogy with the powers of the Plenum of the SC, provided for in paragraphs 10-1 and 10-2 of Part 1 of Article 46 of the Law of Ukraine “On the Judicial System and Status of Judges,” based on a generalization of the judicial practice of lower courts, but without consideration of specific cases by the relevant cassation courts. At the same time, despite the possibility for the Plenum of the Supreme Court to provide such clarifications, this is not currently being implemented in practice. Another risk is the emergence of contradictions between the clarifications of the CAS of the Supreme Court and the CCS of the Supreme Court and the lack of a formalized method for their elimination.

Second, cases are admitted to cassation review based on the criterion of inconsistent application of the law in similar legal relationships, which has led to the adoption of different court decisions by appellate courts in similar legal relationships. However, this has led to an increased workload for the CAS of the SC and the SCC of the SC, as each cassation appeal will need to be analyzed for compliance with this criterion for admission to cassation review. To

⁴ The Supreme Court discussed the results of the analysis of the practice of the Supreme Court regarding deviations from previously established legal positions // <https://supreme.court.gov.ua/supreme/pres-centr/news/1399652/>

reduce the workload on the SC, it is possible to establish a restriction for such cassation review in the form of the existence, at the time of filing the cassation appeal, of a conclusion of the SC that has already eliminated the contradiction referred to by the appellant. At the same time, in such a case, there will be situations where the appeal decision will contradict a certain conclusion of the SC, but there will be no possibility of cassation appeal, unlike in a case where the SC formulated the relevant conclusion.

Thirdly, the introduction of the power of the court of first or appellate instance to refer to the Supreme Court for an advisory opinion on the application of a rule of law on which there are different practices of appellate courts, by analogy with the mechanism provided for in Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms and already applied by the Grand Chamber of the Supreme Court⁵. At the same time, unlike the European Court of Human Rights, which is an international organization, there is no such mechanism in the practice of national courts of cassation, since judicial practice is usually formed by concluding decisions based on the results of consideration of cases that contain positions on the correct application of legal norms.

Fourth, it is possible to introduce an institution similar to the model case provided for in Article 290 of the Code of Administrative Procedure of Ukraine, when the court of appeal, which is hearing the relevant case of an administrative offense or an administrative case appealing a decision on bringing to administrative responsibility, could apply to the Supreme Court with a request to consider such a case by the Supreme Court as a court of appeal if there is inconsistent application of the law by courts of appeal in similar legal relations, which has led to the adoption of different court decisions by courts of appeal in similar legal relations. Since the unity of judicial practice within a single jurisdiction is ensured by the joint chamber of the relevant cassation court, it is this chamber that could consider the relevant cassation appeals in order to harmonize the approaches of different courts of appeal.

⁵ Decision of the Grand Chamber of the Supreme Court of 25 June 2025 in case No. 607/15144/20 // <https://reyestr.court.gov.ua/Review/128876517>