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Comparative study (analysis) of mechanisms for case law harmonisation in selected member states of the Council of Europe

This analysis was prepared by Ms Milica Vesovic, Council of Europe consultant

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TABLE OF ABBREVIATIONS

BiH: Bosnia and Herzegovina

CoE: Council of Europe

CAPI: "Increasing judicial capacity to safeguard human rights and combat ill treatment and impunity "

IT: Information Technology

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

HJPC: High Judicial and Prosecutorial Council

Table of Contents

EXECUTIVE SUMMARY

The main goal of the comparative analysis is to help the project beneficiaries, namely courts and judges, but also end users of justice system, to define the best harmonisation mechanism and to provide information and recommendations about already existing mechanisms established in member states with similar legal background. Those mechanisms have been supported through the Council of Europe (CoE) co-operation on projects, in order to streamline the process of harmonisation process and improve the protection of human rights.

However, there is not a single mechanism that could be used and applied as a ready-made solution as it depending on the legal environment and independence of judiciary of each Council of Europe (CoE) member states. Nevertheless, conflicting court decisions at national level should not generate human rights violations. Each country has a responsibility to select the best mechanism and to adapt it to its own legal architecture. This report serves as a tool to present various available avenues for the CoE member states to organise their legal systems ensuring full protection of principle of legal certainty and consistency of national jurisprudence.

CONTEXT AND BACKGROUND OF THE COMPARATIVE ANALYSIS

This report has been prepared at the request of the "Increasing judicial capacity to safeguard human rights and combat ill treatment and impunity "CAPI" project; which is a part of the Horizontal Facility for the Western Balkans and Turkey - a co-operation framework of the Council of Europe and the European Union with the aim of supporting South East Europe and Turkey to comply with European standards.

The project's overall objective is to contribute to the efforts of the countries to strengthen the capacities of legal professionals to safeguard human rights and combat ill-treatment and impunity. One of the components within the framework of the project is related to case law harmonisation at national level, through the support of joint appellate court meetings. One constituent activity of this component is to develop a comparative study (analysis) of mechanisms for case law harmonisation at national level.

Furthermore, the report is expected to be one of the points for discussion during the Regional Conference on Harmonisation of court practice and alignment with ECtHR case law

with the main stakeholders responsible for case-law harmonisation at national level, to be held from 11-13 April 2018 in Skopje).

In preparation of the present analysis, the responses of selected member states to the questionnaires developed for the participation in the Conference on the identification of human rights issues by national courts: challenges and possible solutions (Athens 29 September 2017), were considered as key sources for mapping the issues; as well as research on relevant sources available within different Council of Europe projects and the HUDOC database on cases regarding breaches of Article 6 § 1 of the European Convention on Human Rights (ECHR) concerning the following countries: Bosnia and Herzegovina, Croatia, France, Montenegro, and Serbia.

HARMONISATION OF NATIONAL CASE LAW AS A NECESSITY

The issue of consistent case law as an indispensable part of the principle of legal certainty has become important for national courts, since serious consequences can arise if the practice of national courts leads to inconsistencies in the application of the law and unpredictability for citizens. In a state governed by the rule of law, individuals justifiably expect to be treated as equals. They should be able to rely on previous decisions in comparable cases so that they can predict the legal effects of their actions or omissions. Therefore, legal certainty and predictability are an essential part of the rule of law and protection of human rights. National courts have a duty to actively apply the case law of the European Court of Human Rights (ECtHR). Even where efforts are being made to ensure courts are aware of this duty, a lack of harmonised judicial practice has led to varying approaches to implementation, which in turn have reduced the impact of the ECHR and created insufficient protection of human rights. The harmonisation of judicial practice is a prerequisite condition for an effective human rights protection, particularly in relation to ensuring legal certainty. However, it cannot be pursued in isolation. Any efforts to pursue harmonisation must not jeopardize the independence of judges and must establish parameters within the other key requirements of the rule of law, the ECHR, and recognise the integral connection of harmonisation to legal certainty and the right to a fair trial[1].

Furthermore, it is important to consider that if lawyers and citizens, as parties to court proceedings, could infer through comparable case law the outcome of their claim, this might reduce the number of cases being brought to court. . It should be essential, to the greatest possible extent, for lawyers to know how to advise their clients and hence litigants to know their rights. The "litigation perspective" might be decisive for the parties and lawyers to initiate proceedings in first place. They might often decide not to go to the court proceedings if their case will not have success according to the information available about existing case law. Precedents/settled case law, and setting out clear, consistent and reliable rules, may reduce the need for judicial intervention in resolving disputes. Courts should rely on previous decisions reached in similar cases, in particular by higher courts,[2] which will enable them to deal more efficiently with their workload and ensure the principle of legal certainty.

The most effective protection of human rights is given at a national level by national judges. National courts are closer to individuals and situations they have to examine. They determine the facts of a case and interpret the provisions of national law at all levels of their jurisdiction as prescribed by domestic law. The ECtHR has a corrective role towards national judgments only when their flagrant inconsistency results in legal uncertainty for the citizens.

[1] The Venice Commission's Rule of Law check list provides a useful guide to the creation of a legal environment required for law to flourish.

[2] Item 7, Consultative Council of European Judges, OPINION N° 20 (2017), the role of the courts regarding the uniform application of the law.

The ECHR is therefore seen as a complementary tool that supplements existing harmonisation mechanisms and efforts established at national level. In practice, this should lead to a situation where the maximum numbers of cases possible are resolved through national procedures based on well-established predictability in the case law of national courts. Such a state of legal certainty and protection of human rights is appropriate and adaptable to the member state in question, using the national language. This is faster and more economical, and generally works to the mutual benefit of all parties involved and society as a whole.

The importance of consistent and coherent courts' practice is confirmed by the ECtHR case law,[3] which states that "coherence of judicial practice guarantees certain stability in legal situations and contributes to public confidence in the courts." The manner in which states implement harmonisation processes and apply different harmonisation mechanisms/models includes but is not limited to: a review of judicial practice by Supreme Court(s) or supreme judicial authorities, recommendations of high courts, summaries prepared by specialist court departments, meetings of different panels or departments (criminal, civil, administrative), etc. These models depend on the legal framework of specific countries, as well as the level of integration of the ECHR in national case law. This, of course, depends primarily on whether the ECHR can be applied directly, and on its status in the hierarchy of national legal norms. The ECtHR's role is complementary, to intervene only in cases where national courts are unwilling and unable to ensure effective protection of the rights guaranteed by the ECHR, including the right to a fair trial.

The main principles applicable in cases concerning the issue of conflicting court decisions,[4] according to the ECtHR, are as follows:

(i) It is not the ECtHR's job to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed on the rights and freedoms protected by the ECHR.[5] Likewise, it is not its job, except in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of these courts must be respected.[6]

(ii) The possibility of conflicting courts' decisions is an inherent trait of any judicial system that is based on a network of trial and appeals courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court.

(iii) The criteria that guides the ECtHR's assessment of conditions where conflicting decisions of different domestic courts rulings at the last instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the ECHR consist of establishing whether or

[3] *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII), which, *inter alia*, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 57, 20 October 2011.

[4] Nejdet Şahin and Perihan Şahin v. Turkey ([GC], no. 13279/05, 20 October 2011), (§§ 49-58).

[5] García Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I

[6] Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008);

not “profound and long-standing differences” exist in the case law of domestic courts; whether or not domestic law provides for machinery capable of overcoming these inconsistencies; and whether or not this machinery has been applied and, if appropriate, to what effect.

(iv) The ECHR’s assessment has also always been based on the principle of legal certainty, which is implicit in all articles of the ECHR and constitutes one of the fundamental aspects of the rule of law.

(v) The principle of legal certainty guarantees, *inter alia*, certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system; confidence that is clearly one of the essential components of a state based on the rule of law.

Additionally, it is important to consider situations in which a national court of the highest instance changes jurisprudence by claiming it as contrary to already established case law on the matter in question. The role of supreme judicial authorities, i.e. (Supreme and Constitutional) courts, is inherent to the process of establishing mechanisms that function to provide a state of legal certainty. A number of instances, the ECtHR has examined cases concerning conflicting national court decisions that were considered a violation of human rights. The ECtHR thus had the opportunity to pronounce judgment in which conflicting decisions of domestic supreme courts were in breach of the right to fair trial requirement enshrined in Article 6 § 1 of the ECHR.[7]

The analysis in the current report aims at demonstrating of the different practices and variety in the existing mechanisms of selected member states in the Balkan region (Bosnia and Herzegovina, Croatia, Montenegro, and Serbia) and France; all countries which have a continental legal system, where legal culture and the decision making process is not based on precedent but on a historically positivist approach. The legal system in the majority of Balkan countries is based on past commonalties derived from the legacies of the Socialist Federal Republic of Yugoslavia. The differences between common and continental law jurisdictions have traditionally been especially significant regarding the treatment of precedent and case law in general. Nevertheless, in the majority of continental law jurisdictions, although lower courts are not formally bound by the judgments of higher courts, they will usually follow the higher courts’ decisions on similar matters, since higher courts and the Supreme Court in particular are aware of their role in ensuring coherent application of law.[8] The present report shows several examples from the member states,

[7] *Paduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts) *inter alia*; *Beian; Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009; *Pérez Arias v. Spain*, no. 32978/03, 28 June 2007;
Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, 27 January 2009; *Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008; and *Tudor Tudor v. Romania*, no. 21911/03, 24 March 2009).

[8] Compilation of replies to a questionnaire on the role of courts regarding the uniform application of law prepared by the Consultative Council of European Judges, http://www.coe.int/t/dghl/cooperation/ccje/Textes/Compilation_Avis%2020.asp.

including the comprehensive and long lasting experience of the Supreme Court of Cassation of France. The experience of the Supreme Court of France is selected with the aim of illustrating how an active approach to maintaining the coherence of case law could be encouraged. As of spring 2016, the Supreme Court of France introduced an experimental system concerning three (out of six) civil chambers of the Court of Cassation, which play a significant role in maintaining the consistency of case law. It includes the Department for Documentation, Research and Reporting, which is responsible for the allocation/assignment of cases to the competent chambers, and identifying and alerting the president of the relevant chamber and the first Advocate General each months about cases that deserve particular attention, where the ruling could have a strong "*charge normative"* (normative impact), meaning deviation from well-established case law. Consequently, in continental law countries, court rulings, especially of a Supreme Court, have greater importance beyond the specific case in which that ruling was given and, from this perspective, could be considered a *de facto* source of law.

The objective of this comparative analysis is to provide an illustration of how systematic and structured lines of communication between the courts at national level accompanied by a comprehensive case law database used by the courts, judges and the general public can be the key elements for the harmonisation of the case law. Harmonisation of judicial practice at the horizontal level (among courts of the same instance) and the vertical level (harmonisation among courts of superior instances at national level, as well as with the case law of the ECtHR) is the key pre-requisite to achieving a greater level of legal certainty and a larger degree of harmony in the approaches of national courts.

MODEL APPLIED BY SELECTED MEMBER STATES OF THE COUNCIL OF EUROPE

A. Bosnia and Herzegovina

BiH is a federal state with a plurality of legal orders. Four legal systems[9] have developed across largely autonomous lines over the past two decades. Due to the autonomous nature of legislative procedures in the two Entities and Brčko District, their legal orders vary in many areas of substantive and procedural law. In addition, since each entity, Brčko District and BiH has its own judicial system, differences may arise in the interpretation and application of similar or even identical legal provisions. Furthermore, BiH lacks a supreme judicial body to guarantee unity of legal order. The supreme judicial body is sometimes taken over by the Constitutional Court of BiH.

1. Legislative framework state level

The Court of Bosnia and Herzegovina acts according to Art. 7 (3) of the Law on Court of BiH,[10] and the jurisdiction of the Court is (also) to:

a) Take final and legally binding positions on the implementation of laws for BiH and international treaties upon request by any entity court or any court of Brčko District, entrusted to implement the law of BiH;

b) The Court also has the power to issue practical directions on the application of the substantive criminal law of BiH within the jurisdiction of the court, relating to crimes of genocide, crimes against humanity, war crimes, and violations of the laws or customs of war and individual criminal responsibility related to those crimes, ex officio or at the request of any entity court or the court of Brčko District.

Courts of Republika Srpska

According to Art. 6 of the Law on courts of Republika Srpska,[11] courts protect the rights and freedoms guaranteed by the Constitution of BiH, Constitution of Republika Srpska, and the laws, ensure constitutionality and legality, and ensure coherent application of the law, and the equality of all before the law.

It must be noted, though, that the Constitutional Court of Republika Srpska, in its decision U-101/14, has ruled that part of Article 6, which states to "ensure coherent application of the law," is not in line with the Constitution of Republika Srpska.[12]

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[9] For a more detailed description see e. g. the Venice Commission Opinion on legal certainty and independence of the judiciary and EBRD, Commercial laws of BiH, An assessment of the EBRD, August 2014, *www.ebrd.com/downloads/sector/legal/bosnia.pdf*.

[10] Official Gazette of BiH, Nos. 49/09, 74/09, and 97/09.

[11] Official Gazette of Republika Srpska, Nos. 37/12, 44/15.

[12] According to the Council of Europe's report DGI(2017)07Strasbourg, 28 August 2017, *Draft Recommendations* on the Introduction of Judicial Practice Departments within the Highest Judicial Instances of Bosnia and Herzegovina, the understanding of this decision is that the Supreme Court of Republika Srpska is responsible for harmonising court practice.

Courts of the Federation of BiH

According to Art. 8 of the Law on Courts in the Federation of BiH,[13] (…) court transparency is ensured through public hearings before the courts, the publication of the composition of the court, and providing information to the public on the progress of judicial proceedings, under the conditions provided for by law. Transparency can be achieved through publication of court decisions and other information of interest to the public.

As for the Supreme Court, Art. 35 of the above-mentioned Law on Courts in the Federation of BiH stipulate that the Court Plenum (General Session of the Court) consists of all judges to the court. It is convened and chaired by the President of the Court. The validity of the decision at the Plenum requires the presence of at least two-thirds of the judges, and decisions are made by majority vote of the judges present. The Federation Supreme Court has an extended Plenum, which takes general positions on issues of interest to the application of federal law. The extended Plenum is composed of the court president and judges of the Federation Supreme Court, and a number of judges as delegates of cantonal courts. The extended Plenum requires the presence of at least two-thirds of the judges who are part of the extended Plenum. Further provisions on the work and approach of the Plenum and extended Plenum shall be regulated by general act of the court.

Courts in Brčko District

According to Art. 9 of the Law on Courts of Brčko District of BiH,[14] the work of courts is transparent, unless otherwise specified by law. Transparency can be achieved through the publication of court decisions and other information of interest to the public.

2. Dissemination of case law and good practice

As outlined above, in Bosnia and Herzegovina, there is an evident lack of a supreme judicial body that would guarantee a unified approach and consistency in the decision making process of judges and courts. Lack of consistency creates confusion, as well as practical difficulties for the citizens of BiH. Dissemination and sharing of case law is therefore one of the key pre-requisites for the successful harmonisation of court practice and equality before the law.

If that is the case, this would be in line with Art. 35 of the above-mentioned Law on courts of Republika Srpska, according to which the Supreme Court is responsible for:

a) Taking general positions for the purpose of harmonising court practice on issues deemed to be of significance for the coherent application of law in Republika Srpska.

b) Considering the current issues of court practice, analysing the need for professional development of judges, expert associates, and senior associates, and performing other duties specified by law.

[13] Official Gazette of FBiH, Nos. 38/05, 22/06, and 63/10, 72/10 (correction), 7/13, 52/14.
[14] Official Gazette of Brčko District of BiH, Nos. 19/07, 20/07 (correction), 39/09 and 31/11.

The work of the Documentation Center of the High Judicial and Prosecutorial Council (HJPC), a state-level body, and its case law database is an important element and the key guardian of case law in Bosnia and Herzegovina. The Documentation Center posts only selected decisions of importance on its website. Although there is a general desire to post all decisions, this does not happen in practice. Since there is no clear or explicit obligation for the highest courts to send judgments to the Documentation Centre, only around 300 cases were entered as full texts in the database for 2017. The capability to carry out online searches of the decisions by various criteria also seems limited.[15]

The Supreme Courts of Republika Srpska and the Federation of BiH, as well as the Appellate Court of Brčko District, also publish selections of their case law online. However, this selection is limited and is not searchable. Most of the Court of BiH case law, at least in criminal cases, is available online.

The Court of BiH seems adequately equipped in terms of the means and knowledge for the harmonisation of case law. Although there is no case law department, there are experienced legal counsels, who, for example, search the HUDOC database when needed and monitor ECHR case law. The decisions of the Court of BiH are sent to the Documentation Centre, but not on a regular basis. In 2017, a total of 14 decisions were sent and an additional 28 decisions in 2016, only 3 of which were from the civil/administrative department.

An additional and very important element of the harmonisation of court practice is the case law department of the Supreme Court of the Federation of BiH that registers and monitors case law, which was established in 2017. The department consists of ten judges and was welcomed by judges of the court as a mechanism that acts in their own interest.

There is no case law department for the Supreme Court of Republika Srpska, although they are now in the process of discussing to establish one. President of the case law department in the Supreme Court of the FBiH, t, whose duty it is to monitor whether a decision departs from the established case law, plays a major role in this respect. The situation is different in Brčko District, where the role of the Supreme Court and the Constitutional Court is performed by the second instance court (the Appellate Court), with 20 judges altogether. The role of case law departments is to feed the judges with the summary of the court practice of the Entity. Once the case law department in Supreme court of Republika Srpska is established, there might be a need in establishing formal links and communication platform

[15] The following search criteria are available: name of the court, legal area, case number, case type, date when judgment is passed, type of decision, letter, free text search (including an option “entire phrase”, “all the words specified” or “at least one of specified words”), applied law and legal keyword.

between two case law departments.. After preparing an *index* of *judgments,* the department notifies the Documentation Centre.[16]

Sessions of court case law departments of BiH

The Rules of Internal Court Operations governing the organisation and internal procedures of courts in the two Entities and Brčko District[17] ensure that there are sessions of court departments; that they are held whenever issues of application of the law come up and/or if there is no agreement between judges or panels. While the interpretations of higher court departments are delivered to lower courts for reference only, they are of a binding nature for all higher court panels.
This instrument is not often used in practice.

Joint extended panels

According to the Law on Courts in the Federation of BiH and the Law on Courts in Republika Srpska, the Supreme Courts of the Entities are responsible for taking general positions for the purpose of harmonising case law on issues considered to be of significance to the coherent application of law in an entity. General positions are taken at the Plenum, which consists of all judges of the respective Supreme Court and representatives of cantonal/district courts.

This instrument, although provided by law, is very seldom used in practice.

Harmonisation panels

In 2014, the Case Law Harmonisation Panels were established with the support of the Council of Europe.[18] In April 2014, the representatives of the Court of BiH, the Supreme Courts of the Entities, and the Appellate Court of Brčko District adopted the Rules of Procedure of the panels, which provide for a continuous dialogue between the highest judicial instances. When legal provisions are harmonised but their interpretation differs, the courts – members of the panels - may harmonise positions and provide legal opinions. Where legislative solutions are not harmonised, and result in the inequality of citizens before the law, the courts may initiate legislative amendments through the panels. The panels (on criminal, civil and administrative matters), coordinated by the HJPC, consist of judges of the

[16] It should be noted, however, that the department notifies the Documentation Centre only about selected cases, i.e. 21 judgments in 2017.
[17] Official Gazette of BiH, No 66/12; Official Gazette of Republika Srpska: Nos 57/08, 70/09, 13/10, 61/11.
[18] The support was provided in the framework of the project "Reinforcing the capacity of the judiciary to apply European human rights standards at the national level in Bosnia and Herzegovina" funded by Kingdom of Norway.

Appellate Division of the Court of BiH, the Supreme Courts of the Entities, and the Appellate Court of Brčko District. Once the panel courts have reached a decision in the form of a harmonised opinion, a panel member or a working group of the panel prepares reasoning for the decision. Legal opinions of the panels, once verified by the respective departments of the courts - members of the panels - are binding for these courts and instructive for lower instance courts.[19] Along with the accompanying reasoning, they are made available to the general public on the HJPC website.

The panels, based on exchange of opinions and expertise, hold quarterly meetings. As of now, several legal points, particularly in the field of civil justice, have been harmonised. The new mechanism has been generally well received by judges. However, given the fact that participation in panels is time-consuming, without simultaneously decreasing the monthly workload of those involved, judges are often reluctant to be nominated as court representatives.

It is important to note that inter-entity cooperation within the justice sector has been boosted by the implementation of the harmonisation panels.

Whereas judicial cooperation in the past suffered from the absence of an effective central body responsible for it,[20] the more active and central role played by HJPC in stimulating semi-formal cooperation, such as harmonisation panels, has clearly been a positive development. Harmonisation panels still operate under the auspices of the HJPC of BiH (state level). Case law department in the Supreme Court of the FBiH (and the eventual one in Supreme Court of Republika Srpska) is not meant to replace them but rather to complement. The harmonisation panels will be the only state level harmnonisation mechanism, while case law departments will act at the Entities' level.

3. Cases before ECtHR regarding Bosnia and Herzegovina in relation to inconstancy of court practice.

As of now, there are no cases regarding Bosnia and Herzegovina relating to the coherence and consistency of case law.

B. Croatia

1. Legislative framework (law, bylaws)

In the Republic of Croatia, judicial authority is performed by regular and specialised courts, and by the Supreme Court of the Republic of Croatia. Regular courts are municipal courts

[19] Although legal opinions are not binding to lower courts, departing from a legal opinion, without giving explicit reasons for doing so, might affect the evaluation of the judge's work.
[20] The Venice Commission Opinion on legal certainty and independence of the judiciary, p. 10.

and county courts. Specialised courts include commercial courts, administrative courts, misdemeanor courts, the High Commercial Court of the Republic of Croatia, the High Court of Justice of the Republic of Croatia and the High Misdemeanour Court of the Republic of Croatia. Municipal and misdemeanour courts are established for an area of one or more municipalities, or one or more cities or part of an urban area. County, commercial and administrative courts are established for a territory of one or more counties or part of a county. The High Commercial Court of the Republic of Croatia, the High Administrative Court of the Republic of Croatia and the High Misdemeanour Court of the Republic of Croatia is established for the territory of the Republic of Croatia, with its headquarters in Zagreb.[21]

The Supreme Court of the Republic of Croatia is the court of last instance. Issues of interest to the work of the departments, in particular harmonisation of court practice and issues relevant to the application of regulations in certain legal fields are discussed at sessions of the court departments of the Supreme Court of the Republic of Croatia. At sessions of the court departments of the County Court, the High Commercial Court of the Republic of Croatia, the High Administrative Court of the Republic of Croatia and the High Misdemeanour Court of the Republic of Croatia, issues of mutual interest for lower courts are also discussed.

At the session of the Department of the Supreme Court of the Republic of Croatia, issues of common interest for individual or all courts in the territory of the Republic of Croatia are considered and opinions on draft regulations from a particular legal field are discussed.[22]

The court sessions are organised when necessary, and at least once in a three-month period, and are chaired by the president of the department or the president of the court. When the president of the court participates in the work of a courtroom session, he chairs the session and takes part in the decision-making process. The session of all court judges is convened, when required, by the court department or one quarter of all judges. The decision at the session of the judges of the court or the judicial department is made by a majority of the judges, i.e. judges of the court department. The president of the court or department may invite all the judges or departments of the judiciary, i.e. the departments, as well as distinguished scholars and experts from a particular legal field.[23]

For the purposes of uniformity of court practice, the Supreme Court of the Republic of Croatia organise a joint meeting with the presidents of the court departments of all county courts every six months, or when necessary, for the consideration of contentious legal issues relating to second instance court proceedings. Conclusions from the meeting are published on the web site of the Supreme Court of the Republic of Croatia.

[21] Law on Courts, Republic of Croatia, NN 28/13, 33/15, 82/15, 82/16 01.09.2015, Article 14 and 15 (OG 33/15)

[22] Ibis, Article 38(3)

[23] Ibis, Article 39

It is important to note that sessions of the court departments regarding issues of interest to the work of the departments in relation to the harmonisation of court practice and the monitoring of the work and professional development of judges and, judicial practitioners deployed to work in the department, are not only considered as a legal possibility but take place as a normal part of judicial work. Decisions at a court session are taken by majority vote of all judges of that department. At sessions of the judicial divisions of appeals courts, issues of common interest for lower courts are also considered.

At the session of the Supreme Court of the Republic of Croatia, issues of mutual interest for particular courts or all courts in the territory of the Republic of Croatia are considered, and legal opinion/positions are given on draft regulations related to a particular legal field. [24]

When there are differences in understanding between court departments, councils or judges in applying the law, or when a council or a judge departs from a previously accepted legal understanding of a legal issue, a session of the department or a session of all judges is convened. A legal position accepted at a session of all judges, i.e. a court session of the Supreme Court of the Republic of Croatia and the Appeals Courts, shall be binding for all judges of that department or court.

The legal understanding adopted at the session of all judges or the judicial department of the Supreme Court of the Republic of Croatia, the High Commercial Court of the Republic of Croatia, the High Administrative Court of the Republic of Croatia, the High Misdemeanour Court of the Republic of Croatia and the session of the County Court Department is compulsory for all other municipal councils or judges of the department or court.

The organisational structure of monitoring and reviewing of case law at national level is also constructed so that there are, in addition to the Civil and Criminal Division, units for supervising, analysing and keeping records of judicial/court practice. The Department for Supervising and Judicial Practice also ensures that all decisions are made with consideration of both ECtHR and European Court of Justice case law. Judicial Practice Centres exist in the following County Courts - Osijek, Rijeka, Split, Varaždin, Zagreb - Heads are appointed by President of Supreme Court.

The Court Rules of Procedure[25] is the key legal framework that regulates the role of Supreme Court regarding the harmonsiation and dissemination of court practice. The internal organisation of the Centre for Judicial Practice is regulated in more detail in the Rules of Procedure of the Supreme Court of the Republic of Croatia.

[24] Ibis, Article 40, 41
[25] Court Rules of Procedures, Official Gazette Republic of Croatia N.N. 37/14, 49/14, 8/15 i 35/15 i 123/15

2. Dissemination of case law and good practice

Harmonisation and the disclosure/dissemination of judicial practice provide insight into the jurisprudence of the Supreme Court of the Republic of Croatia and other courts in the Republic of Croatia.

More than a decade ago, as of 2006, Croatia successfully implemented the project PHARE 2006: Harmonisation and Publication of Case Law, which supported a process of modernisation of the judiciary and the consolidation of case law in Croatia in accordance with EU requirements and standards. The project helped to increase the accessibility and dissemination of national case law from the 50 pre-selected courts (including county, municipal and commercial courts) for all interested parties (at national and international level). The main goal of the project was the harmonisation and dissemination of court practice, i.e. the availability of judicial decisions to all judges and court counsellors in all courts of the Republic of Croatia, as well as to the general and legal public.

The main results of the project included strengthened administrative capacities of the Supreme Court Department for Judicial Practice (Case Law Centre) and of the administrative units responsible for case law in selected courts. An additional and very important outcome to highlight is the availability of IT systems for managing active and archived documents at national level (i.e. Electronic Document and Record Management System),which were fully implemented and used by the 50 pre-selected courts. Finally, the project significantly contributed to increased administrative and operational capacities of personnel at the court level. The project provided sustainable results, considering that on the web portal of Supreme Court of Cassation, there are 189.395 published decisions and the system is now, twelve years later, showing ongoing signs of stability/sustainability. The well-established method of anonymising courts' decisions could be viewed as a good of example balancing the involved parties' rights to protection of personal data with the need to publishing all court decisions. The Rules on the Anonymisation of Judicial Decisions and the Guidelines on the Method of Anonymising Judicial Decisions are the key documents that support this process. Each decision in the database has a complete text that differs from the original in sections protecting the privacy of the parties involved in the proceedings, as well as the associated metadata (for example: court name, court department, date of decision, type of decision, etc.) available to a wider general and legal public.

The Supreme Court of the Republic of Croatia publishes all of its decisions (non-selectively) and the database contains all the decisions of that court from 1990 to today, whilst the other courts only publish the most significant court decisions. Legal positions (so-called sentences-legal summaries) are published in addition to decisions of particular interest or importance. Since July 1st 2012, Supreme Court decisions relating to requests for trial within a reasonable time are no longer published due to a large number of identical (typical) decisions, except for those where a significant legal position/opinion was taken.

The system also provides insight into court practice published in printed editions of the Supreme Court of the Republic of Croatia, entitled "Decision Making".

In view of the above, the treatment of case law has an important role in the reform of the Croatian justice system. It should be well laid out that court practice is accessible first to judges, but also to all citizens, and as such contributes to the more coherent and uniform resolution of court cases in same or similar factual and legal situations, thus strengthening legal certainty and the equality of all citizens before the law. It also prepares judges for the application of European Union Law and the ECtHR case law. The Supreme Court of Croatia plays the leading role and holds responsibility for the harmonisation of case law.

3. Identified issues from the ECtHR regarding Croatia

CASE OF TARBUK v. CROATIA 31360/10 as of 11/12/2012 Judgment (Merits and Just Satisfaction) Remainder inadmissible No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing
CASE OF VUSIĆ v. CROATIA 48101/07 as of 01/07/2010 Judgment (Merits and Just Satisfaction) Violation of Art. 6-1
LUKEŽIĆ v. CROATIA
24660/07 as of 10/09/2013 Decision, Court (First Section)

C. France

1. Legislative framework (law, bylaws)

France has a legal system stemming from Roman law and based upon codified laws. The Civil Code was drafted in 1804 under Napoleon I. Nevertheless, judges have a duty to interpret the law and the decisions of the higher courts have a certain influence on the lower courts, even if they are not bound by any higher court's decision. There are several categories of courts, divided into two major branches - Judicial and Administrative.

Judicial Organisation[26]

The civil courts settle private disputes between individuals such as divorce, inheritance, property and so on, but do not impose penalties. The criminal courts judge individuals who have committed offences.

[26] Laurent Cohen-Tanugi, Founder and Managing Partner, Laurent Cohen-Tanugi Avocats, Paris; Visiting Lecturer, Stanford Law School; Case Law in a Legal System Without Binding Precedent: The French Example, 2016/02/29 https://cgc.law.stanford.edu/commentaries/17-laurent-cohen-tanugi/

First Instance jurisdiction. The District courts (Tribunaux d'instance) have jurisdiction for civil matters. They hear personal property claims under €10,000, as well as claims for which they have exclusive jurisdiction. They have a criminal division, the Police Court (Tribunal de Police) that handles misdemeanours in five classes, exclusively with fines. For petty offences (classes one to four) and some civil issues under €4,000, it may be a "lay" judge (juge de proximité) or a professional judge who hears the case. For both civil and criminal issues, cases are tried by a judge sitting alone.

Appellate courts (cour d'appel)

Composed solely of professional judges, the cour d'appel re-examines judgments rendered in civil, commercial, employment or criminal matters. It re-examines the legal bases of judgments, checking that no errors have been made in the law, and re-examines the facts of the case. It may either confirm the judgment of the lower court or set it aside (i.e. cancel or revise it) in whole or in part. In the latter case, it reaches a new decision on the substance of the case. Decisions of the cours d'appel may be appealed to the cour de cassation.

Court of cassation (cour de cassation)

Cases are referred to the "cour de cassation" (court of cassation) on appeal. This process is known as a "pourvoi en cassation" (appeal on points of law). This type of appeal may be brought before the court by any person who has been the subject of a court judgment or by the prosecuting authority (procureur général près la cour d'appel – Principal public prosecutor at the cour d'appel). When the cour de cassation considers that the decision challenged is not consistent with the law, the decision is overturned ("cassée"). The case is then sent back to a lower court to be reconsidered. Otherwise, if the cour de cassation finds that the decision challenged is consistent with the law, the appeal is rejected, which amounts to confirming the decision. The prosecuting authority is represented by the procureur général and avocats généraux (principal public prosecutor and prosecuting attorneys).

The role of the Court of Cassation[27] is unique and it is essential to unifying case law. This function explains the specialised nature of the court, which never rules on the facts. Its task is thus solely to interpret the law, regarding either the merits or procedure of a case, old or new, all of which enhances the importance of its decisions accordingly. Its interpretation is based on the replies it gives in its judgments to the arguments set out before it, more specifically to the arguments alleging a breach of the law. How the ensuing case law is

[27] See available data in Pdf doc. https://www.courdecassation.fr/IMG/File/About%20the%20court_mars09.pdf

formed, developed and disseminated invites for some comment and dialogue. Owing to the very nature of the technique of quashing (cassation), which consists of checking each case for the proper application of the law to the impugned decision, case law develops gradually on the basis of arising appeals and arguments.

The practice known as arrêts de règlement ('regulatory judgments') is prohibited at the Court of Cassation, as it is in all other French courts, by Article 5 of the Civil Code, according to which "courts are prohibited from making a ruling by way of general regulatory provisions on cases submitted to them." Hence it is by being attuned to French - and now European - society that the court states the law, adapting it to developments in that society, be they political, social, economic, international, technical or technological.

The very diversity of the issues put to the Court of Cassation means that it has to give a balanced, logical response to most of the potential problems raised by interpretation of the law. The resulting flexibility leaves ample scope for new readings, over time and when required, of how to interpret the law, in light of changes to society and the way they are perceived.

This aspect of court practice and case law in France therefore has a particularity and significance, and should be explored further as a potential and very prominent example when it comes to the mechanisms used to ensure consistency and legal certainty for the end user of the justice system.

The development of case law undergoes gradual shifts but may also take the form of actual reversals of precedent, which by their very nature are exceptional. The justices of the Court of Cassation are compelled to lay down a case law that is stable, and can thus serve as a yardstick for trial courts, litigants and their counsel. Building the law is necessarily a gradual, ongoing process. Moreover, the court's authority is at stake. Yet this does not mean that case law should be cast in stone, as judgments have repeatedly shown. The logic of development can therefore result in a sudden reversal of precedent, usually the fruit of a long internal maturing process, and additional elements such as the reactions of scholarly opinion or resistance from the trial courts. However, it is only after mature reflection that such a reversal of case law is decided upon, for it has repercussions not only for the particular case directly concerned, but also, through a chain reaction, on all pending cases on the same issue.. It is therefore understandable that there is a constant concern to strike a delicate balance between the need to adapt the law to changes in society and the need for sustainable/long-lasting laws. The greatest reversals of precedent often originate in the full court, though it has no monopoly over them.

Examples of good practices of harmonised law

The case law of the Court of Cassation has a particular significance for all actors in the justice system. This is why such importance is attached to the task of publicising it, which is the responsibility of the Legal Research Department, which it does so in a variety of ways to reflect the varied sections of the public concerned.

The traditional vehicle for this, dating back to the age of the Revolution, is the publication of two monthly bulletins, one for the civil chambers, the other for the Criminal Chamber, featuring judgments whose publication is proposed by the president of each chamber. There is now also a quarterly "labour law" bulletin and a fortnightly information bulletin. The latter, addressed to all courts and courts of appeal, provides summaries of the most important decisions or those that are of particular interest to the trial courts, and which have been delivered not only by the Court of Cassation, but by other courts too. It also reproduces the opinions of advocates general and reports by justices (conseillers), together with a selection of scholarly writings and transcripts of meetings organised by the Court of Cassation, such as those of the presidents of the courts of appeal.

Another instrument that has been in use since the nineteenth century is the publication of judgments in legal journals, accompanied by commentaries by legal scholars and often, in the case of the most significant decisions, of the opinions and reports referred to above.

Through computing and the development of the Internet, the public now has free access to the Legifrance[28] website, an online database featuring all the decisions published in the Civil Bulletin since 1960 and decisions published in the Criminal Bulletin since 1963, as well as all decisions since 1987 (published as well as unpublished). This database is set to develop further with the inclusion of new headings. The Court of Cassation's website[29] also offers a selection of judgments and opinions and publishes all the periodic information bulletins. Finally, special mention should be made of the Court of Cassation's Annual Report. Under the Judicature Act, the Garde des Sceaux (Minister of Justice) receives an annual report on the progress of proceedings and the time limits laid down for them, for which purpose a Reports and Studies Committee was set up. This Committee, under the authority of the First President and of the Procureur Général of the court, consists of one of the justices of the court as chairman, and of representatives from each chamber of the court, of the Parquet Général and the director of the Legal Research Department. Among other things, the annual report contains suggestions for legislative or regulatory amendments, commentaries on the most significant judgments delivered during the year, as well as legal studies prepared by justices of the Court of Cassation. It can be found online on the court's website.

[28] (http://www.legifrance.gouv.fr)

[29] (www.courdecassation.fr)

Early Warning experimental system for cases that deserve particular attention, as the judgment could have a strong "charge normative" (normative impact).

The Court of Cassation of France has an advanced system, in place since March 2016. As of Spring 2016, there has been an experimental system concerning three (out of six) civil chambers of the Court of Cassation. It includes the Department for Documentation, Research and Reporting, which is responsible for the allocation/assignment of a case to the competent chambers, identifying and alerting the president of the relevant chamber and the first Advocate General each month to cases that deserve particular attention, as the judgment could have a strong "charge normative" (normative impact).

One criteria to note is used for this is: "Questions relating to fundamental rights and human rights (appeals proportionality, in particular)."

The same systematic identification takes place at various stages of the case. The criteria applied are, in particular, taken into account to decide on the choice of the panel (restricted or extended) for a particular case.

Second, the Court of Cassation has a systematic tracking and follow-up system of possible differences of case law, if legal gaps exist (between chambers). These operations are led by the first Presidency, with the support of the Department for Documentation, Research and Reporting and the close involvement of the presidents of each of the chambers of the court. If the inconsistency is not resolved by aligning the position of one chamber with that of another, then a plenary session is called (the court's largest body, presided over by the President and in which all the chambers are represented) or an audience of mixed chambers (chaired by the first president, in which the chambers concerned by the inconsistency in question are represented).

Third, the opinion procedure, which allows judges to pose questions to the Court of Cassation on a specific case or a new legal issue presenting a serious difficulty and arising in numerous disputes, helps prevent differences or inconsistencies in jurisprudence between courts of appeal. These opinions are not binding for the courts but they represent strong guidance on the subject matter.

The Court of Cassation's Legal Research

Placed under the authority of the First President, the Legal Research Department is directed by a justice (conseiller) at the Court of Cassation and consists of the court judges (auditeurs) and senior registrars. First, this helps to streamline the processing of cases. When the appeals are referred to the various chambers, it groups together proceedings raising

identical or related issues and helps to reduce any conflicts in the case law of the Court of Cassation itself, or between it and the trial courts. It also assists justices and advocates general in their research if they so require. The creation of a database of European law in the department provides a useful tool for analysing the problems arising from the implementation of European law by national courts. Secondly, the Legal Research Department is instrumental in developing the court's case law policy by publishing its judgments and publicising them in the courts, via electronic and other means.

Advisory opinions of the Court of Cassation

The advisory opinion procedure has the advantage of making it known very quickly where the Court of Cassation stands on the interpretation of new texts, thus making it easier to predict what the court's position will be regarding a particular rule whose implementation is causing problems. This procedure, which is strictly regulated, is subject to a number of conditions:

• A request for an opinion must be made by a court in the national judiciary that decides to ask the Court of Cassation's opinion in connection to a question raised in pending proceedings. Direct requests from the parties are therefore excluded.

• The question must be of legal nature and new (not previously adjusted).

• It must present a serious difficulty and result in many disputes. A law of 15th May 1991 granted the Court of Cassation the power to deliver advisory opinions.

• The Court of Cassation has created another condition in addition to those imposed by law: the question raised must not already be the subject of a previous pending appeals, the intention here being not to deprive the chamber dealing with the case of its power to rule on it.

In criminal cases, the law of 25th June 2001 imposed other restrictions relating to the nature of disputes and addressed the concern of preventing delays in the adoption of a decision when an accused is being held in custody on remand or is subject to judicial review.

The Court of Cassation, which rules as a specific, separate bench depending on whether an opinion has been requested in a civil or criminal case, with the First President presiding, must deliver its opinion within three months of the filing of the request. The court that

requested the opinion is not formally bound to comply with it. There are some ten advisory opinions per year.

Publication and "Motivation": The Two Pillars of the Integrity of Case Law

Although, as shown above, the importance of case law takes a different shape depending on the area of law, case law serves multiple functions within the French legal system, including:

- Interpretation: Judges interpret abstract rules of law, and their decisions create a jurisprudence that adapts the law to specific cases. In this context, judges tailor general rules of law to fit a given situation.
- Substitution: Judges have a duty to issue decisions under all circumstances, even in situations where the law is silent, obscure, or insufficient to address the circumstances of a specific case. To refuse to do so would amount to a denial of justice. Judges can therefore create specific rules to resolve an individual case.
- Adaptation: When the law is unclear or obsolete, judges can adapt the law to the "needs of society". Fixed rules of law can be too rigid or strict to fit the needs of an evolving society. The main challenge of jurisprudence is to ensure the evolution of applicable law, allowing the law flexibility to fit the needs of society.
- Harmonisation: To ensure that different jurisdictions interpret the law in a uniform manner, a court (generally, the Court of Cassation) can create a true rule of jurisprudence, referred to as a decision of principle. Such a decision is recognised as a guiding principle by other courts facing similar cases. However, the Court of Cassation, which is the guardian of such harmonisation efforts, can always reverse its earlier decisions.

However, public trials and the publication of decisions form the primary guarantee of the integrity of *jurisprudence* in France, allowing case law to serve its many functions. This principle is based on both the European Convention on Human Rights and French procedural code provisions.[30]

The publication of decisions ensures accountability, which in turn accords legitimacy to judges and gives weight to their decisions. A decision can be well reasoned, efficient, fair, and just, but it will not be legitimate unless it can be challenged by the parties and criticised by any interested party. The publication of decisions provides this legitimacy, as well as the possibility of referring to the logic and the ruling of such decisions in future cases. As a result, *jurisprudence* is considered a source of law within the French legal system's "hierarchy of norms".[31]

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[30] European Convention on Human Rights, Article 6, open for signature Nov. 4, 1950, came into force 1953, http://www.echr.coe.int/Pages/home.aspx?p=basictexts. This article outlines the right to a fair trial, providing:

[31] Pursuant to the principle of legality, each legal norm must comply with the set of rules superior to that norm within the hierarchy of norms. Failure to respect this principle leads to legal imbalance and may engage the State's responsibility

While court decisions can be accessed by the public, France does not have a comprehensive official case reporting system for all judicial decisions. The majority of the decisions of the Court of Cassation are published in two publications, one for civil cases and one for criminal cases (*Bulletin des Arrêts de la Cour de Cassation rendus en matiere civile* and *Bulletin des Arrêts de la Cour de Cassation rendus en matiere criminelle*, respectively). The presiding justice of the relevant chamber decides whether or not to publish the decisions.

A second important safeguard of the integrity of French *jurisprudence* is the obligation for judicial decisions to have a legal basis: the "duty of *motivation*" or the duty to state the legal reasons supporting the judgment.[32] Ethically, the obligation to state the reasoning supporting a judgment prevents arbitrary and partial decisions. On an intellectual level, providing the rationale behind a decision requires rigor, factual evidence, reasoning and consistency. This duty to state the supporting reasoning is essential, as it delivers to the public the underlying rationale for a particular legal decision and provides the basis for any eventual contestation of it.[33]

In practice, French judges never expressly base their decisions upon previous judgments, but instead follow prior interpretations and arguments from such judgments and any resulting legal principles. When a French judge issues a decision, legal specialists (i.e., lawyers and legal scholars) issue commentaries analysing the decision. In later trials, lawyers can refer to the ideas developed in earlier decisions and make use of these commentaries.

Although French court decisions are not formally binding, case law has been essential in the development of the French legal system, both in producing decisions of principle that are referenced by later courts adjudicating similar issues, and in establishing the fundamental principles of administrative and constitutional law. Furthermore, the publication of decisions and the obligation to state reasons (discussed above) play a critical role in promoting the rule of law[34].

3. Cases before ECtHR regarding France concerning inconstancy of court practice

CASE OF UNEDIC v. FRANCE 20153/04 as of 18/12/2008 | Judgment (Merits)
No violation of Art. 6-1

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before national, European or international courts. In France the hierarchy of norms places the Constitution and international laws on the top, followed by ordinary law, ordinances, regulations and *jurisprudence*.

[32] This "*devoir de motivation*" is based on French civil, criminal and administrative procedural codes.

[33] Though *devoir de motivation* is paramount in France, it is important to note that contrary to opinions issued by American courts, French court decisions are very brief and concise and do not include an exhaustive discussion of the relevant facts and legal analysis. The French courts emphasize the abstract interpretation of general law, rather than the concrete facts of the specific case. Further, there is no publication of dissenting opinions, nor any trace of internal discussion or doubt. *See* Laurent Cohen-Tanugi, Le droit sans l'Etat (Law Without the State) (1985) 79–82 (1985).

- [34] Laurent Cohen-Tanugi, Founder and Managing Partner, Laurent Cohen-Tanugi Avocats, Paris; Visiting Lecturer, Stanford Law School; Case Law in a Legal System Without Binding Precedent: The French Example, 2016/02/29

BOUMARAF V. FRANCE , application no. 32820/08, decision of Aug. 30, 2011

D. Montengro

1. Legislative framework

According to the Constitution of Montenegro[35], the Supreme Court is the highest court in the country. The Supreme Court ensures uniform and harmonised enforcement of laws by the courts. Furthermore, according to the Law on Courts[36], the Supreme Court adjudicates against decisions of the courts in Montenegro in the third instance and on extraordinary legal remedies. In addition, the Supreme Court adjudicates on the transfer of territorial jurisdiction when it is obvious that it will be easier for another court that has subject-matter jurisdiction to conduct the proceedings, or for other important reasons. Another of its roles is to resolve conflict of jurisdiction between different types of courts in the territory of Montenegro. When the Supreme Court decides on matters relating to the transfer of territorial jurisdiction, it determines the relevant court as having territorial jurisdiction and conflict of jurisdiction in a panel of three judges, without conducting a hearing.

An important area of work for the Supreme Court relates to its general session, which constitutes a major tool towards more harmonised approaches of court practice by national courts. This important tool is the key to insuring of legal certainty to for end users of the justice system in Montenegro. The Supreme Court sets out the positions of principle on laws related to disputable legal matters arising from case law, with the aim of ensuring uniformity in the application of law by the courts[37].

Adopting the legal position of principle may be taken *ex officio* or at the request of a court. The manner of keeping records and publishing legal positions of principle shall be determined by the Rules of Procedure of the General Session of the Supreme Court. It is important, according to the findings of the ECtHR decision, that the Rules of Procedure are tailored to provide sufficient "machinery in place"[38].

[35] Official Gazette of Montenegro 01/07 of 25 October 2007, Article 124, and Amendment replaces Article 124 paragraphs 2, 3 and 4 and supplements Article 124 of the Constitution of Montenegro.

[36] Official Gazette of Montenegro No 11/15 of 20 March 2015

[37] According to Article 26 and 27 of the Law on Courts Republic of Montenegro.

[38] ECtHR case of Cupara V. Serbia, 34683/08, 12 July 2016. The Court notes that domestic law provides for machinery capable of overcoming these inconsistencies (see paragraphs 20-23 above). The Court also notes that in a number of cases that were factually and legally identical to that of the applicant, the Constitutional Court found violation of the right to a fair trial, quashed the impugned civil judgements and ordered the reopening of civil proceedings (see paragraphs 16-17 above). In view of the above, even though the applicant was not required to have exhausted that avenue of redress in terms of admissibility of the application (see paragraphs 27-30), the mechanism provided by the Constitutional Court, and which was available to the applicant, is nevertheless an important consideration when looking at the system as a whole. Given that the Constitutional Court was, at the relevant time, a part of the mechanism capable of remedying case law inconsistencies. As illustrated in its case law (see paragraphs 16-17 above), the Court finds that in the specific circumstances of this case, and

It is therefore important to note in the context of the practices described above that in the case of *Tomić et al vs. Montenegro,* the European Court of Human Rights considered that the Supreme Court ensured the consistency of the case law in question; and that there were no "profound and long-standing differences" in this particular case law and thus no violation of Article 6 § 1 of the Convention.

Supreme Court

The Supreme Court of Montenegro fulfills the obligation to harmonise the case law within the case law department of the Supreme Court. The legal opinions given by the Supreme Court are taken in the form of guidelines for the application of the law, when judges consider the legal issues to be of significance for the harmonised application of the law, or when there is a difference in the approaches between the judicial councils in the interpretation of legal provisions. However, the Supreme Court is authorised by law to take principle legal opinions on controversial issues arising in court practice to ensure uniform application of the law. The principle legal position is not a rule, but an interpretation of the law in order to provide legal certainty and equal application of the law in the same or similar cases. The principal legal position is influenced by the argumentation of the rights occupied by the judges of the Supreme Court (General Session) in the practice of lower court courts, and not as a binding rule. The principal legal position is taken by the Supreme Court *ex officio* or at the request of a lower court. Otherwise, this is a legal position *in abstracto*. All principle legal opinions and positions are published on the webpage and in the printed bulletins of the Supreme Court.

Both lower courts must take into account the need for a harmonised application of the law. The Law on Courts prescribes that a session of judges will consider the issue of interpretation and application of lawsif there is a difference in the perceptions of individual councils or judges of a particular court. Records of decisions are kept in the case law departments.

In the Supreme Court, the existence of case law departments is compulsory and of essential importance. In other courts such a department can be formed and it is indeed advised that the case law departments be formed in the Court of Appeal and higher and first instance courts with a larger number of judges. The focus of the work of the case law departments, according to the Court Rules of Procedure, is to monitor the consistency of case law and the drafting of proposals to be brought to the session of the court departments or at a session of the judges, in order to take a certain position to unify case law.

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given the nature of the applicant's complaint, the Serbian legal system provided the applicant with a mechanism capable of overcoming the reported inconsistencies.

Since the beginning of 2010, the Supreme Court has also established a Department for monitoring the case law of the European Court of Human Rights and European Union law[39], in order to assist judges in applying relevant legal positions in international practice and with the intention to help all courts in Montenegro.

Judges are expected to “adhere” to positions that have been agreed upon at the sessions of the court departments and at the sessions of judges of a particular court. The lower courts shall be guided in their work by the views of the higher courts, which are occupied at the sessions of the department or at the sessions of the judges. Non-compliance with the views of the higher courts is not prescribed as a disciplinary offense for the responsibility of judges, which establishes a balance between harmonising court practice and preserving the independence of a judge. However, it can ultimately reflect on the quality of the judge's work as a criterion for the evaluation of his/her performance.

More recently, the legislature has made a contribution to the removal of contradictions or deviations in jurisprudence in civil litigation by imposing the possibility of adopting the so-called "Pilot Decision" in cases where a number of lawsuits have claims that are based on the same or similar facts, i.e. the legal basis; as well as the introduction of the so-called “Extraordinary revisions". The 2015 amendments to the Law on Civil Proceedings prescribe the potential of the Supreme Court to accept the proposal of the party to allow revisions and, if necessary, overturn a final verdict rendered in a second instance procedure that otherwise could not be challenged by revision, in accordance with procedural rules. A legal issue of relevance to the provision of legal certainty or the uniform application of the law shall be considered. The ultimate objective is the need to provide consistent and harmonised practice in the same or similar cases and equality before the law.

The process of harmonisation often begins with an inconsistency; as such, departures from the established case law might indeed be made in an attempt to bring an already consistent practice in line with ECHR standards. It is therefore especially important in such instances that the ECtHR’s case law is duly referred to, adding value to any argument based on domestic law.
Harmonisation of case law in the Supreme Court is carried out through the following activities:

a) Decisions on legal remedies
b) The work of the Judicial Practice Section and the Department for Monitoring the Practice of the European Court of Human Rights and European Union Law
c) Issuing legal opinion within court departments
d) Adopting the principle legal positions

[39] http://sudovi.me/vrhs/vrhovni-sud/odjeljenja-i-vijeca/

e) Court Dialogues
f) Judges training
g) Issue of a printed publication - Bulletin of the Supreme Court

Deciding on legal remedies is essential for equating court practice, since the reasoning of a court decision must necessarily contain a view on legal issues, which is the interpretation of the relevant law for the disputed legal relationship.

Observation and monitoring and analysis the study of case law is carried out through the continuous cooperation of the a case law departments and the department for monitoring the case law of the European Court of Human Rights and European Union law; which strengthens continued contribution to the constitutional and legal role of the Supreme Court in ensuring the uniform application of the law. At the sessions of the court departments in certain matters, legal opinions are taken in case the draft decision contains a position that is different from those taken in the same or similar court case, or when the judges state that a certain legal issue takes an position/opinion because of their different understanding of the legal norms, for the purpose of uniform application of the law. This form of judicial practice is important and there are numerous examples in taking legal opinions/positions based on the views and standards of the European Court of Human Rights.

Court of Appeal

1. Decides on appeals against first-instance decisions of High Courts, as well as on appeals against decisions of the Commercial Court
2. Resolves the conflict of jurisdiction between:
   - Basic Courts from the territories of different High Courts,
   - Basic and High Courts,
   - High Courts
3. Performs other duties prescribed by law

The Court of Appeal is divided into divisions: civil law, criminal law, labour law and juvenile justice. In addition, the Court of Appeal also has a case law division, responsible for the consistency of that court's case law. Without having an insight into the IT system of classification and clustering, the authors of the present report,, believe that the proper use of a database could potentially help identify inconsistencies in the case law.

Administrative Court

The Administrative Court is a unique, single instance court that deals with all the administrative disputes in Montenegro, with its seat in Podgorica. While there is a case law

section – small case law department - it seems to be only at the early stage of development and it is difficult to ensure not only that every decision is in line with the existing jurisprudence of the ECtHR, but also that there are no discrepancies between decisions within the court itself, thus allowing for inconsistencies. Furthermore, harmonisation with the ECtHR and its case law is something that is still a challenge to be taken into consideration as a necessary requirement in the process of decision-making.

2. Examples of good practices of harmonised law

Availability *of court practice*

As explained above, in order to achieve the aim of harmonisation of court practice in a comprehensive way, two departments are established at the Supreme Court: the Judicial and Legal Informatics Department and the Department (for monitoring) the case-law of the ECtHR and EU law. In co-operation and coordination, these departments harmonize court practice related to cases under the jurisdiction of the Supreme Court, thereby directing the practice of lower-instance courts.

After validation, all judgments of the national courts in Montenegro are published in anonymised form on the website www.sudovi.me

The views of the case law departments of Supreme Court and legal principles are also published electronically, as well as court case reports prepared and regulated by the Judicial Department and issued by the Supreme Court.
The Court's website has published all the judgments of the European Court of Human Rights in cases against Montenegro, as well as some leading judgments of the The European Court of Justice (ECJ).

At the regional level, an electronic database of decisions of the European Court of Human Rights has been established. This project was implemented with the cooperation of state representatives before the European Court of Human Rights and the AIRE Centre, London. The database contains judgments against Montenegro, the Republic of Serbia, Bosnia and Herzegovina, “The Former Yugoslav Republic of Macedonia”, the Republic of Albania, the Republic of Croatia, and a number of leading judgments against other states. (www.ehrdatabase.org). Access to these databases is free and available to the general public.

The printed publication (Bulletin of the Supreme Court) is prepared and edited by the case law department of Supreme Court. The Bulletin publishes the opinions/standing points of the Supreme Court's CLD and principles of law, as well as opinions/standing points from important court decisions, with arguments contained in their explanations.

The Supreme Court is currently undertaking the following measures with aim to harmonise court practice:

a) Intensifying work and responsible relations in the field of harmonisation of court practice with its case law department
b) Organising bi-monthly meetings with the presidents of the case law department of lower-level courts in order to exchange experiences and recognise the need for dialogue in this important area
c) Analysing the implications of the decisions of the European Court of Human Rights and the Constitutional Court of Montenegro to give quality guidance to lower courts for proper implementation
d) The Supreme Court is already planning several seminars under the title: "The right to a reasoned court decision"

It is to be noted that Montenegrin judiciary is taking very active steps toward harmonisation process and dialogue of courts, in vertical and horizontal lines of Montenegrin judiciary. The good practices are shared with support of several Council of Europe's co-operation projects[40].

3. Cases before ECtHR as regards to Montenegro concerning inconstancy of court practice

CASE OF TOMIC AND OTHERS v. MONTENEGRO

18650/09 18676/09 18679/09... 7 more... 17/04/2012
Judgment (Merits and Just Satisfaction) | Court (Fourth Section) | No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing)

E. Serbia

1. Legislative framework (law, bylaws)

The Supreme Court of Cassation, as the highest court in the Republic, decides on extraordinary legal remedies against the decisions of the courts of the Republic of Serbia and

[40] Support to the Ombudsperson's office and the Constitutional Court of Montenegro in applying European Human Rights Standards (SOCCER) and Support to the National Institutions in preventing discrimination in (PREDIM), and "Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level (FILL)"

other matters specified by law. [41] As the highest court in the judicial authority system, the Supreme Court of Cassation provides judicial application of law and equality of parties in court proceedings - it considers the application of laws and other regulations, as well as the work of the courts, thus securing its jurisdiction beyond the trial context.[42] Both the decisions of the Supreme Court of Cassation relevant to the practice of the courts and the legal opinions at sessions of the Supreme Court of Cassation are published on the court's website. Although court decisions do not represent the source of the law formally, the decision of the Supreme Court of Cassation plays a major role in harmonising court practice. The General Session of the Supreme Court of Cassation considers the application of laws and other regulations, plus the work of the courts; appoints judges of the Constitutional Court; gives an opinion on candidates for President of the Supreme Court of Cassation; passes the Rules of Procedure and the work of the Supreme Court of Cassation; and performs other duties determined by law and the Rules of Procedure of the Supreme Court of Cassation. The General Session also considers other issues from the session of all judges.[43]

There are also case law departments that follow and analyse the practice of courts and international jurisprudence, including ECtHR case law. They also take care to inform judges, judicial assistants and judicial trainees on the legal concepts of courts. This is another procedure or tool to unify court practice, especially in courts with a large number of judges, and is led by a judge appointed by the president of the court.

The work of the court practice department is compulsory and must be established in all Republic level courts (the four Appellate courts).[44] Under these provisions, the task of the case law department is to monitor and study the practices of courts and international judicial authorities and to inform judges, judicial assistants and trainees about the legal perceptions of the courts. However, the courts of general jurisdiction of the Republic of Serbia often decide differently or even contradictorily on same or similar issues. This is due to the divided first-instance real jurisdiction and the divided second-instance jurisdiction between the 25 higher courts and the four appellate courts, often unaware of the existence of a divergent court decision or a substantially different decision of the second court. It is important to note that, the Supreme Court of Cassation has a very limited scope of cases on the harmonisation of court practice, since it decides in a very limited number of cases, especially in criminal matters, therefore the role of the court practice department is actually

[41] Law on Courts Republic of Serbia, Article 31, ("Official Gazette of the Republic of Serbia", No. 116/2008, 104/2009, 101/2010, 31/2011 - other law, 78/2011 - other law, 101/2011, 101/2013, 106/2015, 40/2015 - other law, 13/2016, 108/2016 and 113/2017)

[42] Article 31 of the Law on the Organisation of Courts

[43] Article 44 paragraph 1 of the Law on the Organization of Courts

[44] Article 38 of the Law on the Organization of Court

wider and substantially more important than monitoring and studying court practices and informing judges.

In the broadest sense, these departments monitor and study court practice and perform other set tasks. This ensures that citizens have the same legal protection before a court (Article 36 of the Constitution) and prevents violation of the right to a fair trial within the meaning of Article 6 of ECHR, which is essential due to the lack of legal certainty that arises, inter alia, due to different and contradictory final court decisions made in the same factual and legal situations.

Following the cases listed below (Rakic v. Serbia, and Vincic v. Serbia), the activity of case law departments increased and became very important in process of harmonising of national jurisprudence.

In view of the above, the Case Law Department is composed of the President of the Department and his/her deputy, Heads of Case Law Registries for particular legal matters and their deputies, who are appointed in accordance with the annual schedule of the court. In addition to the general register, in the Case Law Department, there is a special register in which the legal opinions that are adopted at sessions of the department, and conclusions from consultations and working meetings of judges are entered.

The general and special registry of legal opinions /positions is conducted separately for each branch in a chronological order, and can be published in a special collection or on the Supreme Court of Cassation's website. When the decision of the Supreme Court of Cassation has appeal by case the parties/litigants, the case is dispatch from case law department and transferred to copy services for the purpose of reconciliation and multiplication.

If necessary, the presidents of the court's departments and their deputies can be engaged in the work of the Case Law Department. The Case Law Registries for Particular Legal Matters follow specific legal matters: criminal, civil, labour matters, the protection of the right to trial within a reasonable timeframe. The Case Law Registries for other legal matters, such as organised crime, war crimes, seizure of assets acquired from crime, family law, detention cases etc., can be established as optional.

For the purpose of uniform judicial application of law, the rules of jurisprudence of the courts of general and special jurisdiction may organise joint consultations and consultative meetings, independently or in cooperation with the Supreme Court of Cassation.[45] Contentious legal issues are considered on the basis of the reports of the Judge Rapporteur and the conclusions adopted can be published in a special collection or on the court website.

[45] in the sense of Article 29 of the Rules of Procedure, ("Official Gazette of the Republic of Serbia" No. 110/2009, 70/2011, 19/2012 and 89/2013)

2. Examples of good practice of harmonised case law

Joint Sessions of Appellate Courts

According to amendments to the Law on the Organisation of Courts, which apply from the beginning of 2014,[46] the a new feature is that appellate courts hold joint sessions and notify the Supreme Court of Cassation on issues of relevance to the functioning of the courts and the harmonisation of court practice. The law therefore envisages another special mechanism that would prevent, at least to a considerable extent, the possibility of different decision-making on the same issues, primarily in the appellate courts.

In joint sessions, disputed legal issues are examined on the basis of reports of the judges rapporteurs and adopted conclusions are submitted to the Supreme Court of Cassation, together with the reports, correspondents and minutes of these meetings for the purpose of making a statement within 15 days from the date of the joint session. The Appellate Courts publish the conclusions accepted by the Supreme Court of Cassation on its website.

Agreement of the President of the Appellate Courts on the organisation, place and time of holding joint sessions of appellate courts

It is interesting to note that further steps have been taken to harmonise court practice. The presidents of the Appellate Courts concluded a mutual agreement that regulates a number of technical and other issues related to the organisation of joint meetings. As stated in the agreement, it is the expression of the need of the appellate courts to define the causes that lead to different case law, and propose a concrete plan of action to be taken in order to harmonise court practice and improve the quality of judicial decisions through a uniform interpretation of the law. The presidents of the Appellate Courts find that the harmonisation of court practice is necessary, since in 2013 and 2014, the Constitutional Court passed a number of decisions that adopted constitutional appeals based on violation of the right to equal protection of rights, or because of unequal treatment of courts in the same factual and legal situations. There is therefore a need for the Supreme Court of Cassation, as the highest court in the Republic of Serbia, along with the Appellate courts, as the last instance in a large number of cases, to be more engaged in monitoring case law and its jurisprudence.

[46] Ibis; amendments (Article 24, paragraph 3)

Availability of court practice

General and Particular Registries of Legal Opinions

The Case Law Registry for a particular legal matter shall maintain the General Registry of legal opinions for that legal matter, where summarised legal views/opinions expressed in court decisions in individual cases or received by the Supreme Court of Cassation, which are of importance to court practice**,** are recorded. [47]

In addition to the General Registry, the court shall maintain the Particular Registry of legal opinions adopted at the session of all judges, departmental sessions, conferences and working meetings of judges.

General and Particular Registries shall be kept separately for each particular legal matter, in chronological order, and may be published in a special collection or on the court's website. The legal views/opinions entered in the registries shall be sent to the Supreme Court of Cassation.

The Classification of Court Decisions in the Registry

The Case Law Registry for a particular legal matter shall keep the General Registry of legal opinions that contains selected court decisions of importance to court practice, which are classified in accordance with adopted nomenclature of legal institutes.

The classification of decisions within the Registry shall be performed by judicial assistants, specially appointed to maintain the General Registry of legal opinions related to a particular legal matter.

Before placing a decision in the Registry, relevant keywords, in accordance with the adopted nomenclature, shall be written at the top right corner of the selected decisions. The selected decisions can be simultaneously classified into different areas, groups and subgroups.

[47] Auxiliary definition - Court decision is important for jurisprudence if it has one of the following characteristics:
- the decision solves a controversial legal issue for the first time,
- the decision first applies a new provision of law or a new way of interpreting the existing provisions of the law,
- the decision resolves legal issues that arise or may arise in a number of cases,
- there are other reasons why the decision may be of importance for jurisprudence.

Prior to placing the decision in the Registry, a judicial assistant shall note on a description sheet, at the first page of the Registry, the case number, date and the relevant keywords. All decisions found in the existing binders shall be classified according to the adopted nomenclature.

Decisions contained in the Registry that have already been published in a Bulletin, shall be marked as such in the upper left corner with the word "BULLETIN".

Publication of Decisions on the Court's Website

The Case Law Registry for a particular legal matter shall make the list of all selected decisions of significance to court practice for the respective legal matter at least once per month. Selected decisions shall be electronically submitted to a judicial assistant in charge of anonymisation of court decisions.

Anonymised decisions shall be submitted to the judge's assistant in charge of updating the jurisprudence section on the court's website, who will, with the help of IT technicians, upload decisions on the Court's website. All decisions will be classified in accordance with the adopted list of keywords before publishing on the website.

The Anonymisation of Court Decisions

The anonymisation of decisions for publication shall be done in accordance with the uniform Anonymisation Act, which will be adopted by the presidents of the appellate courts as part of this Instruction.

Duty to Inform on New Legal Opinions

The Head of the Registry, under the proposal of the court panel, will inform all judges from the respective legal area on the new legal position/opinion expressed in the panel's decision.

Monitoring of International Jurisprudence

In order to monitor the decisions of the ECHR and the practice of international institutions that protect human rights, appellate courts will provide information regarding all relevant decisions to all judges.

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3. Cases before ECtHR regarding Serbia concerning inconstancy of court practice.

CASE OF VINCIC AND OTHERS v. SERBIA 44698/06 44700/06 44722/06... 28 more... 01/12/2009 Judgment (Merits and Just Satisfaction) | Court (Second Section) | Preliminary objection dismissed (non-exhaustion of domestic remedies) Violation of Art. 6-1

CASE OF STANKOVIĆ AND TRAJKOVIĆ v. SERBIA 37194/08 37260/08 37194/08 37260/08 22/12/2015

No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing) No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing)

CASE OF VUČKOVIĆ AND OTHERS v. SERBIA 17153/11 17157/11 17160/11 17163/11 17168/11 17173/11 17178/11 17181/11 17182/11 17186/11 17343/11 17344/11 17362/11 17364/11 17367/11 17370/11 17372/11 17377/11 17380/11 17382/11 17386/11 17421/11 17424/11 17428/11 17431/11 17435/11 17438/11 17439/11 17440/11 17443/11 as of 28/08/2012 ; | Judgment (Merits and Just Satisfaction)

Remainder inadmissible Violation of Article 14+P1-1 - Prohibition of discrimination (Article 14 - Discrimination) (Article 1 of Protocol No. 1 - Protection of property Article 1 para. 1 of Protocol No. 1 - Peaceful enjoyment of possessions) Respondent State to take measures of a general character (Article 46-2 - Measures of a general character);Pecuniary damage - claim dismissed;Non-pecuniary damage - claim dismissed

CASE OF CUPARA v. SERBIA 34683/08 34683/08 as of 12/07/2016 Judgment (Merits and Just Satisfaction) | Court (Third Section)

No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing) No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings Article 6-1 - Fair hearing)

CONCLUDING REMARKS

- The organisation of regular meetings between courts of all instances should be institutionalised through a permanent dialogue at both national and international levels

- Even with a functioning harmonisation mechanism, there should be safeguards guaranteeing the independence of individual judges if he/she makes a decision that contradicts well-established case law in a well-reasoned judgment. No sanctions should be imposed in this case.

- An important element of harmonisation is for the courts to recognise national case law as a source of law.

- The Council of Europe could serve as a facilitator of dialogue between the courts at national and international levels (regional dialogue), providing them with an update on the most recent approaches of the ECtHR. Sustainability, however, can only be ensured when the ownership of any harmonisation mechanism is held by with the member states.

SUMMARY OF RECOMMENDATIONS

Creation of case law departments in large and medium-sized courts

Notwithstanding the importance of coherent application of the law, the creation of case law departments should not lead to rigidity or unduly restrict the proper development of law; nor should it jeopardise the principle of judicial independence.

Regarding composition, it is suggested that the case law department be headed by a judge and assisted by a team of highly qualified, experienced and well-paid legal counsels.

It is equally important that key decisions are sent regularly and in a timely manner to the case law departments of supreme or superior courts. Furthermore, judges are invited to employ to the already available semi-formal to formal instruments for ensuring the coherence of case law to the maximum extent. That means, *inter alia*, they should take a more active part in the process of adopting general opinions (i.e. participating at the Plenum of joint extended panels).

Case law departments

The case law departments are the cornerstones of the entire harmonisation process at the national level. The role of the Supreme Court is also central but is not always available for cases that reach the level of, for example, Appellate or Higher. The court and judges could potentially work on the best approaches to harmonisation of judicial practice by addressing contentious legal issues and seeking possible solutions based not only on national, but also regional practices and approaches. This would create (and constantly update) a framework methodology for the harmonisation of national judicial practice that would serve as guidance for national judiciaries

Case law database

Various case-management systems are available as communication channels in the judiciaries of the member states analysed within this overview. However, there is no uniform project management methodology within the judiciary that would provide communication at the level of vertical and horizontal exchanges.

While building a comprehensive IT support system is a work in progress and it appears that significant resources still need to be put in place, uniform (up-to-date) software should be made available to all courts. The main means of communication in the courts should increasingly become electronic. If necessary, additional training should be provided. The model used at the level of the European Court of Human Rights as an internal database for

selection and classification could be considered and discussed, with some practices spread over to the Council of Europe's members states.

Strengthening of publication of judgments

Strengthening of publication of judgments in full text or maxims including factual background is desirable and might be optimal for harmonization process. The capability to carry out online selection of decisions by various criteria should be improved. Indexing of judgments should be prepared by judicial assistants or legal counsels (guided and supervised by judges), so the judges can focus on the adjudication of cases. The anonymisation process should not be performed by judges themselves but by judicial assistants or court staff.

Secondment or Placement Program in Order to Establish or Strengthen the Role of National Human Rights Officers

For several years already, the ECtHR has been searching for funding to provide secondment of national judges and court staff to the members states across different projects. Secondment or placement for of six months in the Registry of the ECtHR has proven to be useful, as staff are trained in the procedures and case law of the ECtHR and can then spread the knowledge gained to their colleagues upon their return.

It would be advisable for the national courts and judiciary to consider the possibility of introducing standing placement arrangements with the ECtHR, thus providing additional training to their staff, and ensuring broader knowledge of the ECHR in particular to those judges and judicial assistants working in the case law departments.

Establishing a the role of national jurisconsult position or office

The position of a focal point in charge of monitoring case law and consistency with the ECtHR case law could easily be translated to fit the circumstances of the judiciaries of the selected member states. This person should be recruited from within the court, from the judges or judge's assistants, and should be selected based on his/her linguistic and analytical skills and willingness to take on the responsibility. This person should then become the human rights reference person for the entire court or even wider.

The national juristconsult, i.e national human rights reference officers, would be in charge of advising judges on human rights issues arising in a particular case, conducting research into the case law of the ECtHR and making sure that the jurisprudence of national courts is harmonised with this. To this end, he/she may initiate regular meetings in the court for the judges and their assistants, giving updates on the human rights issues both at the domestic and international level.

ANNEX I

Opinion No. 20 on the role of courts with respect to uniform application of the law

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

CCJE(2017)4

Strasbourg, 10 November 2017

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

OPINION N° 20 (2017)

THE ROLE OF COURTS WITH RESPECT

TO THE UNIFORM APPLICATION OF THE LAW

I. INTRODUCTION

1. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty. On the other hand, the need to ensure uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law, nor should it call the principle of judicial independence into question.

2. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) resolved to reflect upon the role of courts with respect to the uniform application of the law and to set out applicable standards and recommendations.

3. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Charta of Judges (2010), and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter "Recommendation CM/Rec(2010)12").

4. This Opinion takes account of the replies of the CCJE members to the questionnaire on the role of courts with respect to the uniform application of the law prepared by the CCJE Bureau[1], and of the report and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Professor Aleš GALIČ (University of Ljubljana, Slovenia), along with the analysis of the replies to the questionnaire.

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