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Identification of human rights issues by national courts, challenges and possible solutions

by Ms Milica Vesovic, consultant, former staff member of the Directorate General Human Rights and Rule of law (DGI), Council of Europe

on the basis of questionnaires submitted by the participating courts

Human Rights National Implementation Division

Human Rights Policy and Co-operation Department

Directorate of Human Rights

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EXECUTIVE SUMMARY

Rapid developments in the case law of the European Court of Human Rights (ECtHR) can create challenges for applicants, judges, and lawyers, and can have far reaching implications for the protection of rights, if not treated in a coherent and harmonised manner at national level. International and European legal instruments and standards, including first and foremost the European Convention on Human Rights (ECHR), and in light of the subsidiary principle guiding the jurisdictional reach of the ECtHR, recognise the importance of an early identification of human rights cases at national level as a key prerequisite for their protection and remedy. This report aims to respond to some of the related challenges.

The aim is twofold: firstly, to assess whether and, if so, to what extent the existing practice in national courts provides adequate identification of human rights issues at the beginning of the procedures before national courts, and second, to explore actions the Council of Europe could undertake to provide different solutions for identifying human rights cases; for instance what role can the Council of Europe play in empowering the Case Law Departments (CLDs) of national courts to take an active role in the process of harmonisation of the case law, including, harmonisation of national case law internally, and harmonisation of national case law with ECtHR case law. The report describes possible solutions that the Council of Europe could provide to national judiciaries in the long run.

The report argues that existing methodology of case-processing developed within the ECtHR or some of its elements could potentially be used within national jurisdictions. The report then proposes possible avenues for professional exchanges among national courts, which will together with the existing Superior Courts Network (SCN), support national judiciaries in finding the most effective ways of adjudicating human rights issues arising under the ECHR.

Additionally, the report gives specific attention to the role of CLDs in promoting the harmonisation of court practice at national level and discusses the possible creation of a body of cases forming the national well-established case law (NWECL). A specialised advisory body, a National Jurisconsult, is another tool that can reinforce harmonisation efforts. For instance, the body of NWECL can help judges and national court registries to identify the most appropriate case summaries and/or ECtHR references, when dealing with contentious or systemic or repetitive legal issues. The report argues that an early recognition of human rights issues within the national legal order would reduce the number of repetitive cases being brought before the ECtHR. This, in turn, would provide a healthy application of the principle of subsidiarity, which comprises two elements: an obligation for the States to implement the ECHR guarantees, this being an obligation of result rather than

means, and a duty for the ECtHR to allow the national authorities to have the fullest opportunity to address an ECHR complaint before it can examine the matter itself[1].

The conclusion of the report concentrates on three overarching themes. The first theme is to define the best methodology and approach, including IT solutions, and to identify what support would be most helpful to national courts; the second is to explore how the work of CLDs could be better supported. The third theme relates to the harmonisation and coherence of court practice, and the need to recognise it, including the work of CLD, more prominently, as an essential element of human rights identification and protection. In that context, the report examines how peer–to-peer exchanges could contribute to it.

The current report proposes to explore means for better communication between CLDs in the CoE member states in order to facilitate information exchanges and discussions among national judiciaries and courts. This kind of action will be complementary to the SCN. The report emphasises the need to further support national courts and judges in identifying human rights issues early on, and seeks to provide specific assistance to member states in this regard.

[1] ECtHR Background Paper, 30 January 2015, Prepared by the Organising Committee, chaired by Judge Laffranque and composed of Judges Raimondi, Bianku, Nuβberger and Sicilianos, assisted by R. Liddell of the Registry.

INTRODUCTION

1. Legal certainty and predictability of proceedings and court decisions in national legal orders contribute to the quality of justice[2]. The justice system, is unpredictable for the end users (victims cannot demand either the quality of judicial service, or its efficiency.) On the other hand, a justice system which does not provide adequate support to individual judges in carrying out research and find comparative examples, burdens the judges in the decision-making process and may result in huge discrepancies and heavily incoherent judicial practice. The problem was recognised by the Venice Commission as an obstacle to an efficient functioning of the judiciary**.**[3]

2. The issue is multifaceted as it may imply a variety of aspects, such as: the consistency in legislation or uniform practices by the executive branch/institutions and law enforcement bodies. These aspects are certainly very important for the proper functioning of a justice system whose predictability can be easily harmed if all of these aspects are not functioning properly. The main focus of the current report will be on the coherence, i.e. the harmonised approach in the case law of national courts.

3. A Judicial system which has a harmonised judicial practice signifies decisions by the courts/judges that are coherent in their approach to legal problems and predictable for applicants/victims, lawyers and all those who are involved in "the chain of judicial proceedings".

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[2] CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL); CEPEJ (2016)12 Measuring the quality of justice **"**In a more comprehensive sense, "quality of justice" can be understood as comprising not only the quality of judicial decisions and key aspects of judicial service delivery, but all aspects that are relevant for the good functioning of the justice system, typically assessed through the user perception. Measuring in this way means considering the quality aspects that go beyond the quality of the decisions and include a variety of elements such as the clarity of the procedure and judicial decisions, on-time individual procedural steps, the accessibility of the offices and the ease of use of available tools. "

[3] "On legal certainty and the independence of the judiciary in Bosnia and Herzegovina" (CDL-AD(2012)014) and Venice Commission's Opinion on Law on Courts and Judiciary in Serbia no.709/2012 CDL-AD (2013) 005; Opinion no. 751 / 2013 CDL-AD(2014)007 Armenia; General opinion regarding courts and judges: CDL-PI(2015)001 (3.2.1)

4. At the level of the Council of Europe, there is growing attention on the issue of incoherent judicial practice. There is an increasing number of ECtHR cases[4], which signal this existing problem at national judiciary level. Incoherent judicial practice could potentially create a large influx of cases arriving at the ECtHR. However, no mechanism or a special tool has so far been created to address it. The issue has also become a subject of discussion at several judicial conferences[5]. The core debate centres around the interrelation between the identification of human rights issues by national courts (as a supplementary means of harmonising the judicial practice), harmonisation of judicial practice at the horizontal level (among the courts of the same instance) and at the vertical level (harmonisation among the courts of superior instances at national level as well as with the case law of the ECtHR). The national courts and the case law departments can play an important role in serving as an indicator that there is a well-established practice on a given question.

SECTION I: National tools for identification of human rights cases - "early recognition is half way to protection"

5. The lack of legal certainty and unpredictability of the outcome of a dispute leads to a violation of the principle of legal certainty, an important element of Article 6.1 of the ECHR. The creation of a coherent body of national case law by national courts is the pre-requisite for a well-functioning legal system, in which legal certainty plays a fundamental role. The ECtHR reiterated on several occasions in its judgments and decisions: "that the possibility of conflicting court decisions was an inherent trait of any judicial system based on a network of trial and appeal courts with distinct territorial jurisdiction, with such divergences also possible within the same court. The ECtHR was clear that its function was not to compare different decisions of national courts, but to reinstate the relevant factors in its assessment of the circumstances in which contradictory decisions might entail a violation of Article 6 § 1:
   i. whether "profound and long-standing differences" exist in the case law of the domestic courts;
   ii. whether the domestic law provides for a mechanism for overcoming these inconsistencies;
   iii. whether that mechanism has been applied and, if appropriate, to what effect.

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[4] For example: *TUDOR TUDOR v ROMANIA (21911/03) – 24 March 2009; BALAŽOSKI V. 'THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA' (45117/08) – 25 April 2013; BRUMARESCU v. ROMANIA (GC) (28342/95) – 28 October 1999; VUČKOVIĆ and OTHERS v. SERBIA (17153/11 and others) – CHAMBER JUDGMENT – 28 August 2012; KRSTEV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (30278/06 and others) – 16h November 2010; SPASESKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (15905/07) – 27th September 2011; IVANOV and DIMITROV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (46881/06) – 21st October 2010; VINČIĆ and OTHERS v. SERBIA (44698/06 and others) – 1 December 2009; STOILKOVSKA V. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA – (29784/07) – 18t July 2013 ; GOROU v GREECE (No. 2) (12686/03) – 20 March 2009; NEJDET ŞAHİN AND PERİHAN ŞAHİN v. TURKEY (13279/05) – 20 October 2011;LUPENI GREEK CATHOLIC PARISH AND OTHERS v. ROMANIA (76943/11) – 29 November 2016* etc.

[5] Help Annual Conference 2016; VI Conference of Chief Justices of Central and Eastern Europe, 20-22 June 2016, Belgrade, Serbia; International forum "Dialogue of Courts - tool for the harmonisation of judicial practice".

> Thus it held: "while the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law, that it should not depart, without cogent reason, from precedents laid down in previous cases. … It reiterated that there was no acquired right to consistency of case law and that case law development was not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evaluative approach would risk hindering reform or improvement". [6]

Although, there is no formal doctrine of precedent at the European level, the ECtHR has recognized that the evolutionary or dynamic character of the ECHR must be tempered by other considerations, such as the predictability of the case law at national level. Otherwise, as earlier mentioned the lack of predictability and coherence in court decisions may create "an inherent trait of any judicial system"[7].

6. The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law.[8]

7. As interpreted by the ECtHR, the right to a fair trial enshrined in Article 6 of the ECHR is also linked to the requirements concerning coherent application of law. Certain divergences in interpretation can be accepted as an inherent trait of any judicial system which is based on a network of courts.[9] Different courts may thus arrive at divergent, but nevertheless rational and reasoned conclusions, regarding the same legal issue raised by similar factual circumstances.[10]

8. Given the differences in judicial systems, there cannot be a "one-size-fits all" methodology to identify a human rights case. Therefore, it is important that all parties use at least the same criteria and terminology in the process of identification of human rights cases or concepts related to the case. The complex and multifaceted character of their identification is also reflected in the variety of interpretations of human rights by national judiciaries. Indeed, it would make sense to consider the methodology already existing at the ECtHR, and the tools already available to the ECtHR Registry. The "human rights-based" judicial reasoning, applied at all levels of the judicial system, considerably increases the protection of human rights. This means that the party's rights may be addressed (and possibly remedied) much earlier on in the process. A timely

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[6] See: *LUPENI GREEK CATHOLIC PARISH AND OTHERS v. ROMANIA (76943/11) – 29 November 2016 , para.116*

[7] Ibid
[8] ECTHR, VINČIĆ AND OTHERS V. SERBIA, 44698/06, 1 DECEMBER 2009.
[9] ECTHR, TOMIĆ AND OTHERS V. MONTENEGRO, 18650/09 AND OTHERS, 17 APRIL 2012.
[10] ECTHR, ŞAHIN AND ŞAHIN V. TURKEY, 13279/05, 20 OCTOBER 2011.

tagging or identification of a human rights case by a court registry would thus be of crucial importance[11] .

9. One can look at the example of the ECtHR Registry. In its internal communications, the lawyers and judges use a human rights search engine called Case Management Information System (CMIS) and a classification methodology which it has been developing for the last twenty years. CMIS provides support to the Registry by identifying and grouping similar cases based on articles of the ECHR and offering the possibility that similar cases are referenced using different search possibilities, including legal concepts of the ECHR. The CMIS contains all the information pertaining to applications to the ECtHR. CMIS has an inbuilt workflow, which follows the stages a case goes through – from a new application, to being communicated to the respondent government, to getting a decision.

10. Adequate identification of human rights cases at the national level would potentially open a much broader judicial dialogue (in the same jurisdiction and between different jurisdictions) on ECHR related issues, enabling the identification and recognition of human rights at the beginning of judicial proceedings, possibly by using one of the available mechanisms such as a CMIS-like system. One can consider the question whether and to what extent the CMIS methodology could be transposed with some of its elements to the IT systems of national judiciaries and adjusted to their needs. In more concrete terms, by applying this method, the courts and judges who are faced with a human rights issue in their daily work, would be invited to recognize it at the very beginning of the court proceedings using similar tools to those that exist at the ECtHR.

11. Judiciaries of the following member States were looked into as regards their systems of harmonisation of judicial practice: Albania, Armenia, Bosnia and Herzegovina, Cyprus, the Czech Republic, Estonia, France, Georgia, Greece, Italy, Moldova, Montenegro, Norway, Russia, Serbia, Spain, “the former Yugoslav Republic of Macedonia”, Ukraine. The methodology included interviews with representatives of selected judiciaries and the analysis of replies to the questionnaires were sent to the high courts of the mentioned countries (the list of questions given in the Annex 1, and the list of replying member states in the Annex 2 to this report).

12. It is important to note that in 78 % of the replies to the questionnaire, the participating judiciaries confirmed that there are no human rights indicators collected from the decisions made by national courts. The transposition of the CMIS would thus allow the benchmarks and indicators to be identified, monitored, and remedied at national level. It

[11] It is to be noted that this report only considers the reasoning applied by judges. The proper reference to the ECHR by lawyers and prosecutors in their submissions is a subject of a separate study.

would signal to the national authorities the occurrence of human rights violations, indicating that a rapid remedy is needed.

13. It is of equal importance that lawyers and prosecutors apply the same method in their submissions; To date they often fail to make references to the ECHR and ECtHR case law because they do not find them relevant for the outcome of the dispute. The experiences vary, and they are mostly a reflection of the length of time the member state has reached this stage in the ECHR. For example, the system used by the French Court of Cassation shows extensive analyses of the harmonised court practice. Noteworthy is the fact that specific experimental chambers have been created recently, which is responsible for streamlining the harmonisation process. The example of France shows how giving direct effect to the ECHR has been priority for some national judicial systems. Judiciaries across Council of Europe member states are using different tools when it comes to the identification of human rights issues. See the chart number 1.

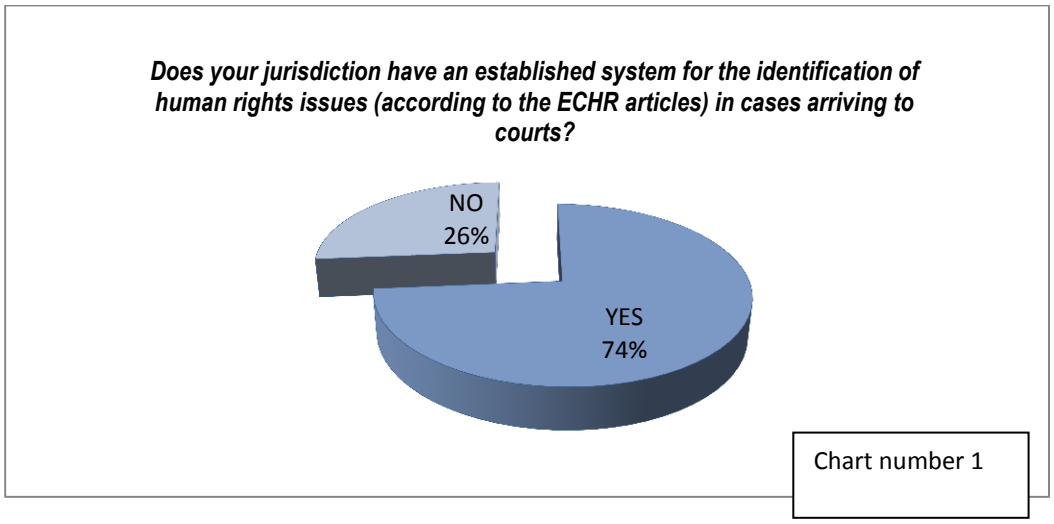
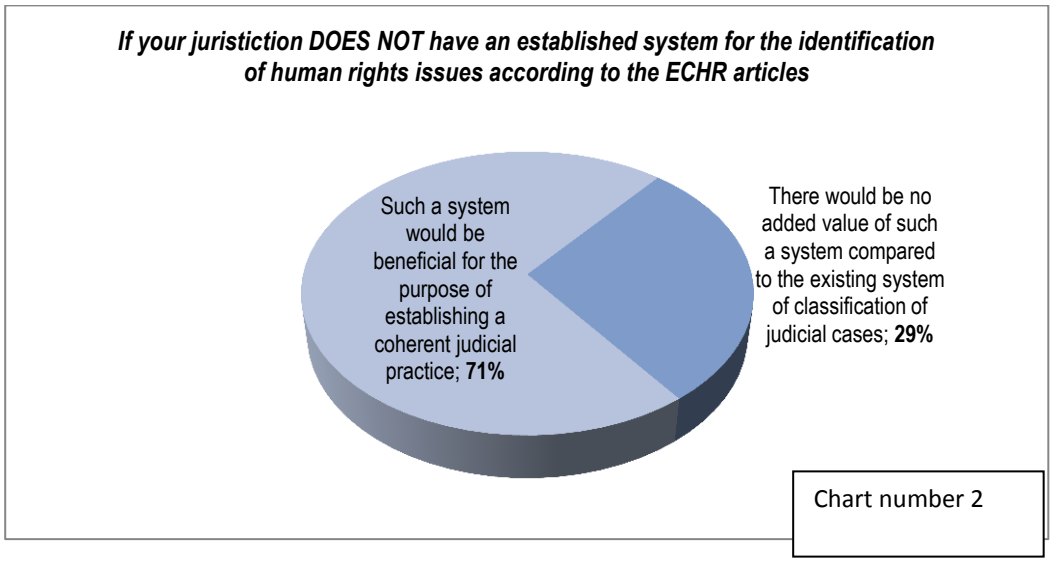


Chart number 1

For those national legal systems relying on the ECHR and ECtHR case law, their working methods differ in form from using only paper documents and researching only printed publications on the ECHR, to researching by way of very sophisticated case-management systems. Reliance on the Court's HUDOC website has been great. A vast majority of interviewed judges, or representatives of CLDs or registries, confirmed that they were well acquainted with the case law of the ECtHR and often benefited from the use of the HUDOC database. They also expressed their interest in getting support in order to better use the advantages already available at the ECtHR related to the identification, clustering, and classification of human rights issues (*see the chart number 2, above*).



14. The entire process can be facilitated by a legal IT solution that would help national judiciaries to rapidly identify human rights cases and find adequate legal summaries that would help in the categorisation and motivation of the cases in question.

15. A timely identification of a human rights issue by a judge or a registry lawyer, and a subsequent linking of the case to an ECHR article serves several purposes:
    a. a better implementation of the ECHR at the national level, ensuring that the Convention's standards are directly applied by national courts;
    b. the prevention of another similar case reaching Strasbourg;
    c. a timely and systemic recognition of ECHR-related cases would increase the quality of justice (and judicial decisions);
    d. A coherent approach to dealing with Article 6 cases will increase the public trust in the judiciary and improve the image of the judiciary among national and foreign businesses;
    e. Provide better and quicker identification and reaction to inconsistencies in judicial practice in certain human rights areas, thus increasing the overall protection of individual rights.

16. The manner in which a state can implement the ECHR depends primarily on whether the ECHR can be applied directly, and on its status in the hierarchy of the national legal norms. The ECtHR's role is complementary, to intervene only in those instances where national courts are unwilling and unable to ensure effective protection of the rights guaranteed by the ECHR. As a former ECtHR judge pertinently noted, "[T]he case law of the ECtHR encourages domestic supreme courts to take into account (to a greater extent) the ECtHR case law. When doing so, the ECtHR will give them a broader margin of appreciation. It is a judicial policy to encourage the national courts to implement in full

the task conferred on them by the ECHR"[12]. The earlier human rights issues are recognised at the national level, the better the protection provided will be. It is to be noted that for example in the **Russian Federation,** if an ECtHR judgment is taken to be in favour of the applicant's case before a national court, this is a ground to restart the proceedings (i.e. the new circumstance); for this reason, national judges are invited to identify human rights violations early on in the proceedings, always keeping in mind that national courts at all levels must play the primary role in interpreting and giving effect to ECtHR case law.

17. Finally, the methodology that could be applied in the identification of human rights issues at the national level is an important element in the interpretation process, which may consequently result in a greater level of legal certainty and a larger degree of harmony in the approaches of national courts.

18. Replies to the questionnaires concerning the national practices reveal that the national courts, when faced with questions of protection of human rights, show a high degree of diversity. The questionnaire is structured in three parts: Identification of human rights issues, harmonisation tools, and statistics in human rights cases.

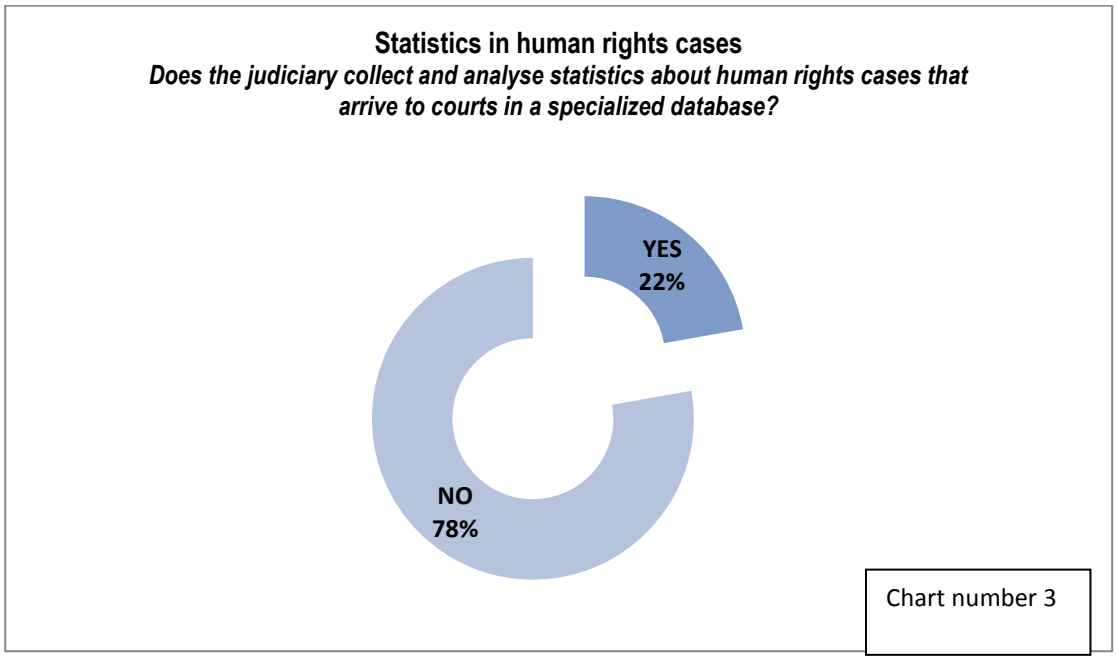
19. Although the methodology applied by national courts and judges to identify human rights violations is certainly different in each legal system, the roles of national courts in mapping human rights issue are comparable. The methodology related to the identification of human rights violations is complex and it seems that there are not many examples that could be transposed or followed by member States directly, because of differing time of their commitment to the ECHR. Although the ECHR is now mostly incorporated into the national legal systems of all member States, the manner in which its provisions have been transposed varies from member State to member State. The accessibility of the materials translated in national languages is also different (see chart number 3).

20. According to the summary of replies to the questionnaire, there is no specific identification of human rights cases at the level of the first instance courts, appeal courts, Supreme or Constitutional courts. There is no explicit identification as a human rights case "per se", even though the identification of cases as civil, criminal or administrative exists in almost all the jurisdictions of the member States that responded to the questionnaires. It is to be noted that although there is no formal, explicit identification of human rights cases by a national court registry, there is implicit recognition or identification of human rights cases by judges during the proceedings. 71% of the member States indicate that the possibility to identify, group and classify human rights cases would be beneficial (see chart number 2) in order to establish

[12] Françoise Tulkens – Dialogue between judges Proceedings of the Seminar 27 January 2012

"How can we ensure greater involvement of national courts in the Convention system?"

coherent judicial practices, to monitor the number of human rights violations at national level, and to alert judges and lawyers to characterise their cases as human rights cases as early as possible.



21. However, there are examples of replies, such as **Estonia,** where the early identification of human rights issues is *not* favoured. The argument goes that identifying human rights issues at an early stage, when they arrive at the court, would put an extra workload on the court staff or judges. Supposedly, for coherent judicial practice, it is sufficient to have a systematised case law of human rights cases *after* the cases have been solved. The argument is valid as long as the case gets the effective remedy "at home". The situation is likely to be different if the parties' rights need to be remedied at the level of the ECtHR.

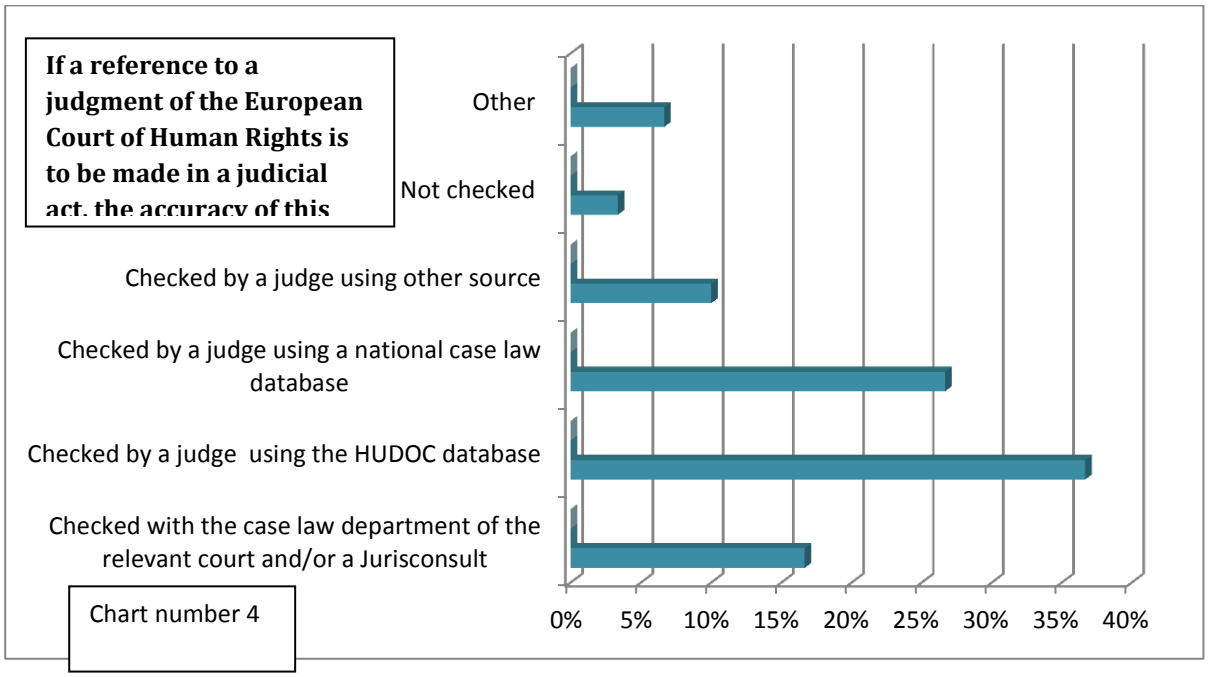
22. According to the replies, there is no systematic collection and/or analysis of the statistics of human rights cases at the level of national courts (see chart number 3). The analysis of types of violations per article of the ECtHR would contribute to the harmonisation process and would be of help to judges when searching for a reference case at national level. The majority of the replies provided by the member states indicate that the collection and analysis of statistical data would be beneficial for the courts (see chart number2).

23. The CoE might be the best placed partner to help national judiciaries collect these kind of statistics and also to help them establish an internal mechanism for statistical data collection. The indicators, such as number of violations, category of violations, number of repetitive cases, etc., would provide measurable indicators for human rights development trends at national level.

SECTION II: Harmonisation Tools- The role of Case Law Departments (CLDs) at national level

24. The court practice in this area, supported by CLDs, is currently gaining more importance. The judge is no longer expected to just formally apply the law, but to apply and interpret the law creatively; sometimes the judge is even acts as a quasi-interpretative body (such as where there is a legal conundrum or there are gaps in law), while searching for adequate references as direct or indirect application of the ECHR and the case law of the ECtHR. Therefore, the role of CLDs is becoming more obvious.

25. The accuracy of the references to the ECtHR case law is one of the biggest challenges that judges and their support staff face in their daily work. For the national courts to be able to protect human rights in the same way as the ECtHR does, and thus fulfil their duty to apply fundamental rights for the benefit of all citizens, it is necessary to harmonise national court practice and case law with that of the ECtHR. In order to accomplish this task, judges have to become familiar not only with the ECHR but with the ECtHR's case law (the latter without which the ECHR provisions remain a mere skeleton, just bones without meat, instead of a living instrument for the protection of human rights). If a reference to a judgment of the ECtHR is to be made in a judicial act, the accuracy of this reference is very important. The ECtHR case law is then included in the reasoning used by national judges. There are several examples of how the accuracy in referencing the ECtHR case law is checked at national level (see chart number 4). In particular, such practice might avoid quashing judgments based on ECtHR case law by making it clear to higher courts why and how changes in domestic practice are operated and showing which way they come about.



**multiple choice answers were mandatory*

26. Ensuring the overall consistency of national jurisprudence and its harmonisation with the standards set by the ECHR and the ECtHR has become a complex task. It requires enhancing the capacity of judges to take into consideration human rights standards and the ECtHR case law and to incorporate them into national judicial decisions. In that process, the national case law departments could become an engine for the creation of the body collecting and processing national case law, with a view to identifying repetitive cases – national well established case law - "NWECL". This body would keep a record of national decisions which will help individual judges in their decision-making process. The main objective is that the reasoning applied in national cases does not relate merely to factual and domestic-law aspects of a case, but also to the ECtHR dimensions in a coherent and harmonised approach. As mentioned above, there are several challenges that judges face at the national level regarding identification of human rights issues, which are indeed a pre-requisite for the creation of the NWECL. Challenges identified by member States participating in the questionnaires included the language of ECtHR documents. Most of the materials, information, and case summaries are written in English or in French, and a translation is not always available in each national language. Most judges encounter language barriers in understanding the substantial and procedural concepts of the ECHR. One positive example of a state overcoming such barriers is **Italy;** it has a well-organised database where the summaries of judgments are kept in such a way that they cover legal principles "*massima*" kept in *Massimario*. Summaries are prepared by specialised court departments (two departments of the

Court of Cassation), and are published in a national database, *Italgiureweb*, and on a website of Court of Cassation.

27. Access to documents has an impact as to the extent the Convention is applied at national level. If the NWECL were to be created, it would partially overcome this type of barrier as it would lessen the dependency of researching the ECtHR cases and encourage looking first at the NWECL. Moreover, it would provide predictability and clarity of all court decisions, available to all legal professionals, including the "end users" of the justice system.

28. Many countries use different mechanisms in order to bring coherence to judicial practice at the national level. These vary from region to region. The form and methods applied in order to ensure harmonisation often depend on local legal traditions, and may include advisory opinions issued by high courts, distribution of case law through modern databases or legal summaries available in the databases, or advisory roles given to senior judges or heads of the CLDs, or special roles given to court/legal departments of high courts to ensure the task of "the guardian of consistency in court practice". The effectiveness of those mechanisms is also different.

29. There are various responses to the question: Which tools for the harmonisation of the judicial practice are used in your jurisdiction to follow up on domestic case law and the case law of the ECtHR? (see chart number 5). The selected examples to be looked at: the Court of Cassation of **France** has had an advanced system in place since March 2016. As of the spring of 2016, there has been an experimental system concerning the three civil chambers of the Court of Cassation (out of six chambers). It includes the Department for Documentation, Research and Reporting, which is responsible for the allocation/assignment of the case to the competent chambers, identifying and alerting, every month, the president of the relevant chamber and the first Advocate General about the cases which deserve particular attention since the judgment could have a strong "*charge normative*" (normative impact).

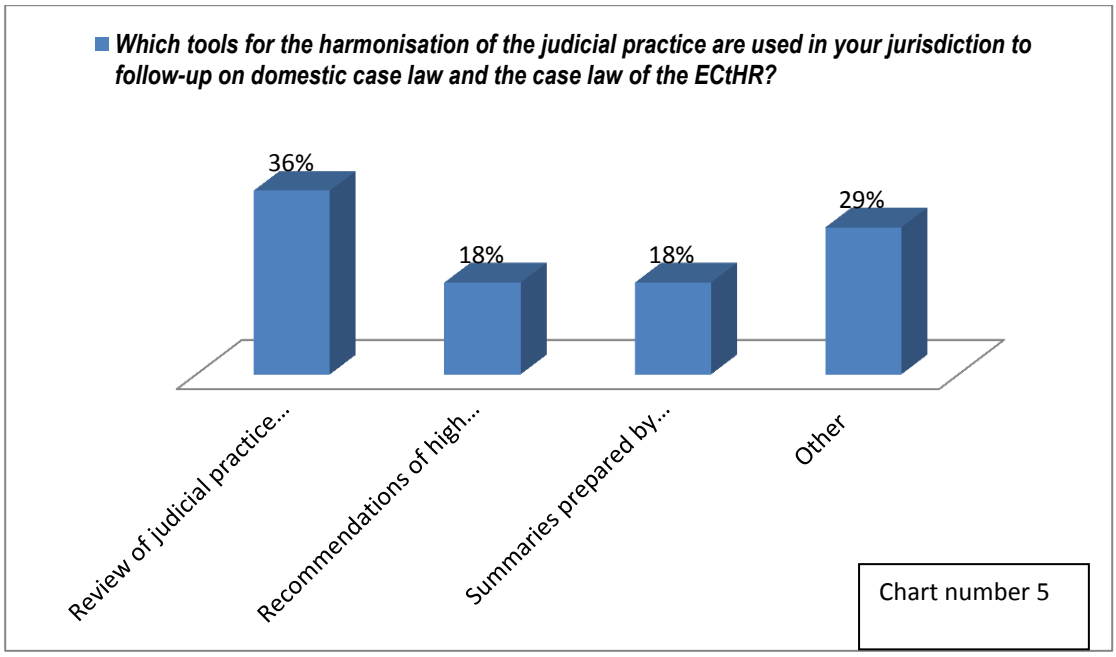
30. One of the criteria used for this is the "Questions relating to fundamental rights and human rights (appeals proportionality, in particular) ".

31. The same systematic identification takes place at the 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 the particular case.

32. 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).

33. Third, the opinion procedure, which allows judges to formulate questions to the Court of Cassation, in a specific case, on a question of 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.



34. Likewise, in the **Russian Federation,** the Supreme Court is responsible for ensuring the coherence in judicial practice.

35. Another noteworthy example is **Spain,** whose Organic Law on the Judiciary provides for a new of implementation of ECtHR's decisions since 2015. The purpose of this legal reform is not to establish a procedural mechanism for the harmonisation of judicial practices but to introduce a way of effective reparation for violations of human rights under the ECHR. This is not a preventive remedy but a way of repairing incurred damages. As for the preventive aspect of harmonisation, the Organic Law 6/2007, of 24 May, reformed the Organic Law on the Constitutional Court and introduced a requisite for the admission of Appeals for Constitutional Protection of Fundamental rights ("Amparo appeals"): the special constitutional relevance of the individual plea. This new requisite has been analysed by the Court in the Judgment 155/2009, of 25 June. In this Judgment, the Constitutional Court of Spain identifies some categories of Amparo

appeals enjoying special constitutional relevance. Among them, the Court outlines those appeals that give an opportunity to the Court of:

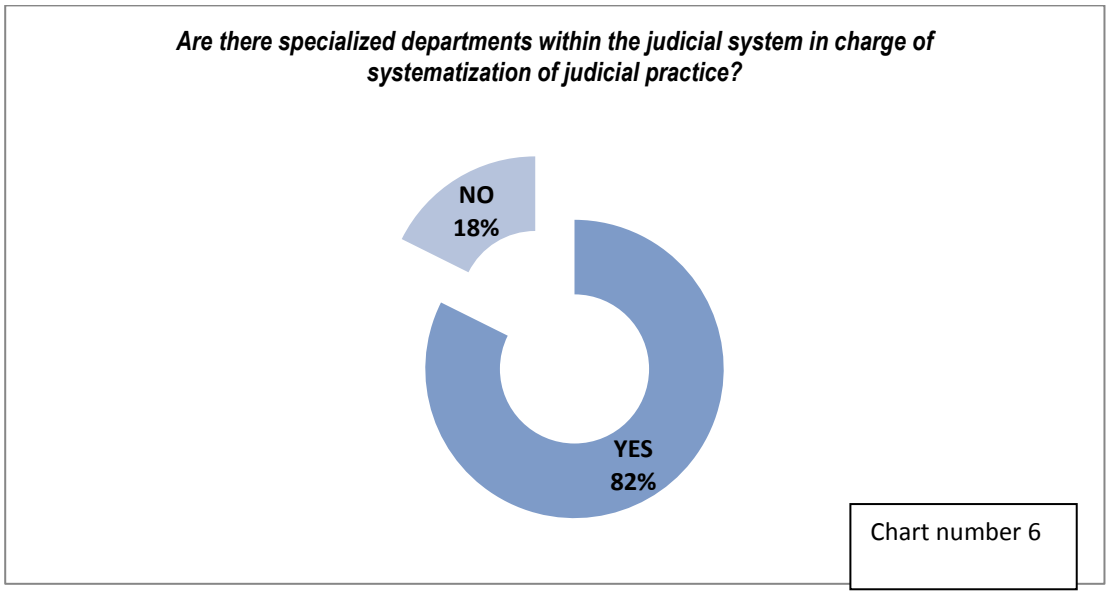
> clarifying or changing its doctrine, as a consequence of a process of internal reflection, as occurs in the case in question, or due to the new social realities which have arisen, or regulatory changes relevant for the configuration of the content of the fundamental right, or a change in the doctrine and theory of the guarantee bodies entrusted with the interpretation of the international treaties and agreements referred to in Article 10.2 (of the Spanish Constitution).

Therefore, as a matter of fact, overcoming decisions of the ECHR "provides" special constitutional relevance to Spanish cases. So, Amparo appeals citing decisions of the ECHR, and not just those based on the case law of the ECHR, deserve a specific analysis by the admission panels of the Constitutional Court of Spain.

36. **Armenia:** According to Article 92 of the Constitution of the Republic of Armenia, the Court of Cassation is the court of highest instance, except for matters of constitutional justice. It is responsible for ensuring the uniform implementation of the law and facilitating the development of the law. The Court of Cassation is divided into two Chambers, the Civil and Administrative Chamber and the Criminal Chamber. A ground for lodging a cassation complaint is a judicial error, i.e. a violation of substantive or procedural law that could influence the outcome of the case, as well as newly emerged circumstances. The Court of Cassation is the court of highest instance in Armenia, except for matters of constitutional justice. It is responsible for ensuring the uniform implementation of the law and facilitating the development of the law.

37. Replies to the questionnaire show that the majority of courts in respective jurisdictions have a separate CLD (see chart number 6). It needs to be clarified though whether courts of all instances have a CLD and whether their communication is facilitated by higher courts or through peer-to-peer exchanges of CLD of courts of the same instance.

38. The modalities of CLDs' work are different. CLDs often imply support provided by an advisor or a senior judge who is responsible for consistency of research carried out by judges or judicial assistants. Some of the responding judiciaries explicitly welcomed and confirmed that similar working methods of CLDs exist in their country (**Estonia, Serbia, Montenegro, Bosnia and Herzegovina**). Moreover, there is an evident desire to have CLDs established in the courts of all instances, including the courts of first instance and high courts, which should be equally engaged in the work and exchange of information with the CLDs of the higher courts.



39. In most cases, the CLD meetings or meetings of the panels, are the occasion where the judges discuss how "precedents" and appeal decisions should be interpreted and applied in a way that ensures consistency. These kinds of meetings are very useful and often contribute immensely to the coherence of the body of national case law. Otherwise, there are no general formal arrangements between courts to ensure consistency apart from a few examples existing in some member States, such as **Bosnia and Herzegovina, Estonia, Georgia, Montenegro, Serbia.**

40. Systematisation of court practice would provide a reference point to other courts at national level. Thus, further strengthening of the CLDs is important in order to streamline this process.

41. According to the majority of the replies to the questionnaire, the position set out in a judgment of a higher court concerning the interpretation and application of a provision of law gives guidance to the lower court conducting a new hearing on the same matter. This is understood as an important element of consistency in judicial decisions. Contradictions or deviations in case law are usually resolved by the Supreme Court or Constitutional Court.

42. The interpretation and application of legal provisions by higher courts is important because they are especially cautious about changing established court practice, and change it only on serious grounds and on the basis of a detailed argumentation and reasoning. The coherence of judicial practice needs to be balanced between judicial independence and the requirement of legal certainty. Moreover, it is to be noted that the internal independence of judges is a key element of the independence of the judiciary and that "superior courts should not address instructions to judges about the way in

which they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law."[13]

43. Nevertheless, "precedents"[14] handed down by the supreme courts are *de facto* treated as a source of law; although without binding effect, they represent the influential opinion of the lower courts. As indicated above, precedent is not formally binding in all members States, but judges in the lower courts should and do accept guidance in order to develop a coherent body of judicial practice which can be observed by all courts and which creates foreseeability of the outcome. Thus, this element represents a very important aspect of legal certainty in any well-functioning judicial system.

44. Contradictions or deviations in decisions of national judges and national case law are usually resolved by the Supreme Court or similarly positioned judicial institutions. Harmonisation approaches vary among member States between special arrangements within each court, or specifically signed protocols between different courts at horizontal or vertical level ensuring in a more general sense a harmonised approach to applying the law in similar cases.

45. According to examples provided in the questionnaire, it transpires that peer to-peer exchanges are one of the most useful tools used to maintain judicial dialogue. It is to be noted that, for example, in the **Russian Federation,** different bodies play the role of a peer-to-peer platform: the All-Russian Convention of Judges (meeting every 4 years, participants are representatives of judges of courts of all levels from all the regions; Councils of Judges -formed by the Convention of Judges to act in between the Convention meetings – this is a platform for a regular judicial dialogue, as well as a dialogue between judges and other branches of power); another dialogue space is provided by regular meetings between the Supreme Court and presidents of lower courts and their deputies; seminars are organised with the participation of judges of all levels; national and international conferences. In addition to the Supreme Court, a database is being maintained by the Judicial Department under the Supreme Court (NB: in Russia, judicial department is an administrative support entity).

46. A similar situation is observed in **Greece**, where the Supreme Special Court (*Anotato Eidiko Dikastirio*) provides a peer-to-peer platform, according to Article 100 of the Hellenic Constitution. Members of the Superior Courts (*Areios Pagos*, the Hellenic Council of State and the Court of Audits) participate in the composition of this platform. Another example is from **Estonia,** where the peer to peer exchange is seen as useful to remedy situations of inconsistent court practice. The Supreme Court's Judicial Training Department organises training, which includes not only lectures and seminars, but also roundtables for judges, which could be seen as a forum for a regular peer-to-peer

[13] Recommendation *CM/Rec(2010)12 and explanatory memorandum* of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.
[14] For the purpose of this report a "precedent" means a new decision, a new practice by the highest courts. It signifies the new decisions, including those in the continental law systems.

dialogue between judges. The aim of roundtables is to give judges a chance to discuss current topics on equal footing - judges from all instances are participating.

47. Opinions of higher courts are not mandatory in general, but they are considered to be very useful tools. Familiarising with the positions set out in a judgment of a higher court on the interpretation and applications of a provision of law are mandatory for the court conducting a new hearing of the same matter. For judges, there are no consequences if they do not follow case law of a higher court. This represents a very important aspect of judges' independence. The independence of individual judges, on the one hand, and the objective of legal certainty, on the other, needs to be balanced as two fundamental legal principles.

48. Finally, from the questionnaire it transpires that assistance could be provided by the CLD to individual judges in order to identify the best sources and references for the reasoning of their decisions. The replies indicate that this would indeed be highly welcomed by a majority of member States. Methodology that could be applied in the identification of human rights issues at the national level could be an important element in the interpretation process.

SECTION III: Steps to strengthen the national harmonisation mechanisms

The role of Jurisconsult at the ECtHR

49. The ECtHR has worked meticulously on the harmonisation of its own judicial practice and has created the position of Jurisconsult as a mechanism to contribute towards harmonisation. "The Jurisconsult is an individual person and occupies the third most senior position in the ECtHR registry. He or she is assisted by experienced lawyers of the Registry and a Deputy Jurisconsult. The Jurisconsult's role involves advising the Grand Chamber in all matters of case law, assisting the development of case law, monitoring draft judgments and decisions, and carrying out research on international, comparative and ECtHR case law. The Jurisconsult's role is particularly focused on harmonisation through weekly meetings with representatives of each of the sections within the ECtHR. The Jurisconsult receives relevant files and draft judgments a week before the meetings and carries out research to identify any potential divergence from a precedent. The Jurisconsult then drafts a report on any issues identified which is sent to the heads of sections and can be discussed in the weekly meeting. Judges remain wholly independent and the Jurisconsult's report and advice only amount to an opinion from which a judge is free to depart. In practice, the opinions of the Jurisconsult are generally followed and in any case always trigger constructive discussion which aids the judge's deliberations.[15]

[15] *The ECtHR – Court (Rule 18); since 1 July 2014, the Rules of Court include a Rule 18B, entitled "Jurisconsult"*

50. The role of ECtHR Jurisconsult cannot be directly transposed from the ECtHR to national courts. However, to ensure that CLDs have updated information on the case law of other courts, and of the ECtHR, a national channel of communication between CLDs should be established, in a similar or different form. One of the possibilities could be a national jurisconsult who will act as a focal point for CLDs of the national courts.

51. While a CLD could be established in every court, the jurisconsult could be placed in higher courts only and supported by a secretariat of legal advisors who will work on harmonisation issues at the level of supreme or constitutional courts. It is up to the national judiciary to decide to what extent the role of jurisconsult will be formalised, considering differences in the judicial systems. The national jurisconsult could provide judges with updates on case law developments, highlight possible deviations from precedent, monitor draft judgments and carry out research on national and comparative law issues. The jurisconsult will also be expected to look into the case law practice of courts in other countries and maintain a dialogue with peers from the courts of his/her region. These tasks will significantly advance the harmonisation of judicial practice. This national jurisconsult could be an integral part of the vertical national court structure, but should also be in touch with developments relating to the ECHR. It is important that those who take on this role have sufficient experience, the ability to carry out legal research and extensive knowledge of international and national systems. This individual or body may also be a key focal point between national courts and the ECtHR within those states which are members of the Network of Superior Courts and potential/future collaborative space of CLDs.

52. Jurisconsults at national level could potentially act as main focal points whose role will be to collect and systematise the national case law and to update courts on the case law of the ECtHR and other relevant international tribunals. Strong CLDs together with jurisconsults at national level may become a tool for ensuring a coherent application of national legislation and the standards set out by the ECtHR.

Communication tool for the Collaborative space of European CLDs

53. A collaborative space or forum for exchanges among the CLDs and jurisconsults of national courts, the CoE Secretariat, and the ECtHR Registry could be created and facilitated by the CoE.

54. The national courts in the member states may be interested in delegating the topical issues, discussing them during the semi-annual meetings. The summaries of discussions on the topical issues of concern for national judiciaries could help the searches for better solutions at national level, but will not be reduced (only used) to examining individual cases. These information exchanges could be potentially shared among the representatives of the legal community, lawyers or National Human Rights Institutions.

55. The CLD could potentially work on the methodology and best approaches to harmonisation of judicial practice by articulating contentious legal issues and seeking for possible solutions based not only on national but also regional practices and approaches. It will create (and will be constantly updating) a framework methodology for the harmonisation of national judicial practice that will serve as a guidance for national judiciaries. The methodology will concern general matters as well as thematic areas that are of a priority for a certain jurisdiction (i.e. harmonisation of practice in the area of prevention of terrorism, cybercrime, human trafficking, migration, etc.). The recommendations arising out of the CLD collaborative space could then be tailored to the needs of each of the member states. The potential exchange could contribute to the existing application of the principle of subsidiarity and the human rights protection at national level.

56. The current report takes into consideration the SCN. While the SCN explicitly targets communication between supreme/superior courts on a bilateral basis in order to examine concrete cases in question, the collaborative space of CLDs would be available to almost the majority of the CoE member states. The collaborative space envisages, unlike the SCN, an "informal" way of exchanges on a multilateral basis, irrespective of concrete cases pending. These kinds of exchanges would be available to all courts at national level, and would possibly support the establishment of the CLDs in a cascade order throughout national judiciaries. The communication on the CLD collaborative space would focus on thematic dilemmas, rather than individual cases in question. This co-operation modality enables co-operation and dialogue among the CLDs, with a view to help national judges and courts to find solutions that are tailor-made for each judiciary, while at the same time respecting the legal architecture of each member state.

57. Each national court has already appointed Focal Points of the SCN whose commitment is already highly estimated. The added value of the collaborative space would be that all questions that are not falling in the scope of "advisory opinion by the ECtHR, and in view of Supreme Court Network facility" would be open for the discussion among the members of the CLD collaborative space. The ECtHR could potentially be interested in receiving contributions from the work arising out of these exchanges.

58. Unlike the relationship between the ECtHR and national courts, which is focused rather on bilateral exchanges based on the legal issues deriving from particular cases pending, the CLD collaborative space or forum for exchanges of ideas will be oriented towards general aspects of harmonisation of the case law at national level.

59. The functioning of the CLD collaborative space could be supported by the CoE Secretariat, which will be responsible for the overall co-ordination regarding the preparation of terms of reference for case law departments and jurisconsults, needs assessment studies, and dissemination of all relevant information between members of the CLDs. The CLD collaborative space will facilitate the exchange of information on significant developments in the legal approaches to the harmonisation of judicial

practice, policies, and methodology and IT technology relevant to the day-to-day functioning of courts.

60. The methods for consultations among court practice departments, and their collaborative space should be developed, monitored and implemented with the support of the CoE. The consultations should cover methodologies and different possibilities for the identification of human rights issues, and facilitate exchanges on a bilateral and multilateral level, including on different topical issues. Online case law databases with national case law selection could be established or improved to increase the harmonisation of judicial practice and support the work of judges. While it would be ideal that judges in search of ECtHR's case law, consult HUDOC directly, the majority of judges and, reportedly, judicial assistants, consider the language of ECtHR judgments to a barrier to access.. However, there is a large selection of case- law circulating in various bulletins, on various web sites and in various other forms in local languages. When it comes to national case law, the majority of court decisions are published online. However, in the majority of courts/ judiciaries, there is an obligation to remove all personal data from the decisions before the publication, which calls for additional resources which are usually not readily available. Thus, courts are required to be very selective when making their decisions public.

The CLD web portal for a peer to peer exchange

61. The functionality of the Web portal for the CLD Collaborative space should be considered with the aim to serve courts and their CLDs. The CLD collaborative space may be facilitated with an interactive online space maintained by the CoE, which will serve case law departments at European level as a tool of exchange of information on approaches to solving contentious legal issues and exchanging on on other topical issues. The CLD collaborative space could, in the long term, operate as jurisprudence-analysing working groups which have the duty to analyse the best practices on topical issues and to prepare non-binding summary opinions on the result of their collaboration. The topics to be explored and discussed could be determined annually by delegation of topical priorities of the CoE member states.

62. In the long run, the CLD collaborative space may to a certain extent facilitate exchanges on selected topics and can support their classification and further dissemination. The communication on the Web portal could possibly be disseminated in a cascade order throughout national judiciaries.

CONCLUSIONS

1. Early identification of human rights issues by national courts is instrumental in making the domestic remedies more effective. The ECtHR case-management methodology could be taken into account by national judiciaries, in particular a system of human rights “tagging”.

2. The role of Case Law Departments (CLDs) would become more significant and would need more specialisation with a structure and competencies that reflect the need for case law harmonisation. Additional training for staff members of Case Law Departments on the ECHR and the ECtHR legal reasoning and methodology would improve the domestic implementation of the ECHR. Regular discussions among CLDs would be welcome to exchange good practices and methodologies regarding their composition and activities.

3. Stronger Case Law Departments can become a vehicle for the creation of the body of the well-established case law at a national level (National Well Established Case Law). A space for the dialogue between Case Law Departments at national level and between Case Law Departments from different jurisdictions can create an opportunity to discuss the methodology of identification of human rights issues.

4. Online case law databases with a selection of national case law should be created or reinforced in national judiciaries in order to facilitate the harmonisation of judicial practice and to support the work of the judges. Case Law Departments could be responsible for maintaining the database.

5. Full texts or at least summaries of national judgments should be made available to all judges at national level. The capability to carry out an on-line selection of the decisions by various criteria should be improved. Indexing of judgments that may take into account the ECtHR's Case Management Information System methodology could be put in place.

PROPOSED ROADMAP FOR 2018-2022

1. To consider a regular exchange of good practices among CLDs of interested countries and to create an appropriate forum to that effect.

2. Regular meetings of the CLDs and judiciaries on harmonisation issues to be supported by the CoE.

3. The need for jurisconsults within national judiciaries to be considered.

4. An international dialogue on harmonisation of judicial practice should ultimately include lawyers, prosecutors and possibly National Human Rights Institutions.

5. The exchange started during the conference should be expanded to larger number of member States and eventually should include all 47 member States.

6. The work on supporting the harmonisation tools should be continued through bilateral and multilateral co-operation projects in volunteering member States.

ANNEX I – LIST OF RESPONDENT COUNTRIES

Armenia

Bosnia and Herzegovina

Cyprus

Czech Republic

Estonia

France

Georgia

Greece

Italy

Republic of Moldova

Montenegro

Norway

Russian Federation

Serbia

Spain

“The former Yugoslav Republic of Macedonia”

Ukraine

ΣΥΜΒΟΥΛΙΟ ΤΗΣ ΕΠΙΚΡΑΤΕΙΑΣ

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

High-level Conference on the harmonisation of case law and judicial practice

organised by the Council of Europe in cooperation with the Council of State of Greece

Athens, 29 September 2017

Venue: Ministry of Foreign Affairs, Akadimias 1

List of participants

NATIONAL DELEGATIONS

Albania

1. Mr Xhezair Zaganjori, Chief Justice of the Supreme Court

2. Mrs Bernina Kondi, Judge, Appeal Administrative Court

Armenia

3. Mr Arman Mkrtumyan, Chairman of the Court of Cassation

4. Ms Anna Vardapetyan, First Deputy Head of the Judicial Department, Secretary of the Council of Court Chairmen

Bosnia and Herzegovina

5. Mr Obren Buzanin, Judge at the Supreme Court

6. Ms Ljiljana Filipović, Judge at the Supreme Court

7. Ms Šeila Imamović-Brković, Legal Adviser, Judicial Documentation Centre, High Judicial and prosecutorial Council

Cyprus

8. Mrs Anastasia Psara-Miltiadou, Judge at the Supreme Court

Czech Republic

9. Ms Katarína Deáková, Adviser, Department of Analytics and Comparative Law, Supreme Court

10. Ms Andrea Pokorná, Adviser, Department of Analytics and Comparative Law, Supreme Court

Denmark

11. Dr. Jens Hartig Danielsen, Judge at the High Court of Western

12. Ms Maria Aviaja Sander Holm, Special Adviser, Ministry of Justice, Constitutional Law and Human Rights Division

Estonia

13. Mr Ivo Pilving, Chairman of the Administrative Chamber of the Supreme Court

France

14. Mr Bruno Pireyre, President of Chamber, Director of the Documentation, Research and Reporting Department, Court of Cassation

15. Mr Eloi Buat-Ménard, Deputy Judge at the Court of Cassation

16. Mr Jean-Luc Sauron, Councillor of State, Professor at Paris Dauphine University, HELP certified tutor

Georgia

17. Ms Nino Bakakuri, Judge at the Supreme Court, member of Consultative Council of European Judges (CCJE)

18. Mr Aleqsandre Iashvili, Judge at the Tbilisi City Court

Greece

19. Mr Nikolaos Sakellariou, President of the Council of State

20. Mr Michail N. Pikramenos, Councillor of State

21. Mr Ilias Mazos, Councillor of State

22. Ms Aikaterini Christoforidou, Councillor of State

23. Mr Efthimios Antonopoulos, Councillor of State
24. Mr Georgios Tsimekas, Councillor of State
25. Mr Spyridon Markatis, Councillor of State
26. Mr Aristovoulos-Georgios Voros, Councillor of State
27. Mr Georgios Potamias, Councillor of State
28. Ms Margarita Gkortzolidou, Councillor of State
29. Ms Evangelia Nika, Councillor of State
30. Ms Agoritsa Sdraka, *Maître des Requêtes*, Council of State
31. Mr Christos Liakouras, *Maître des Requêtes*, Council of State
32. Mr Vasileios Androulakis, *Maître des Requêtes*, Council of State
33. Ms Stavroula Ktistaki, *Maitre des Requêtes*, Council of State
34. Ms Frantzeska Giannakou, *Maître des Requêtes,* Council of State
35. Ms Efstathia Skoura, *Maître des Requêtes*, Council of State
36. Ms Konstantina Lazaraki, *Maître des Requêtes*, Council of State
37. Mr Dimitrios Vasileiadis, *Maître des Requêtes*, Council of State
38. Ms Theoni Kanellopoulou, Rapporteur to the Council of State
39. Mr Antonios Fovakis, Rapporteur to the Council of State
40. Ms Eleni Koulentianou, Rapporteur to the Council of State
41. Ms Antonia Papaioannou, Rapporteur to the Council of State
42. Ms Maria Gkana, Rapporteur to the Council of State
43. Mr Ioannis Rokas, Rapporteur to the Council of State
44. Ms Maria Driva, Rapporteur to the Council of State
45. Ms Angeliki Chaida, Rapporteur to the Council of State

46. Mr Petros Alikakos, Ph.D., Judge of the Court of General Jurisdiction of Thessaloniki, Member of HELP Consultative Board

47. Mr Georgios Stavropoulos, President of the National Commission of Human Rights

48. Professor Maria Gavouneli, National Commission of Human Rights

Italy

49. Mr Antonio Corbo, Counsellor of the Court of Cassation, Electronic Department of Documentation

Republic of Moldova

50. Mr Teodor Papuc; Deputy Chief of the Secretariat from the Supreme Court of Justice

51. Ms Galina Stratulat, Judge from the Civil, commercial and administrative review college

52. Ms Luiza Gafton, Judge from the Civil, commercial and administrative review college

Montenegro

53. Ms Dušanka Radović, Judge at the Supreme Court

54. Mr Miraš Radović, Judge at the Supreme Court

55. Ms Tijana Badnjar, Advisor at the Supreme Court

Norway

56. Mr Nils Engstad, President of the Consultative Council of European Judges (CCJE)

57. Mrs Wenche Elizabeth Arntzen, Judge at the Supreme Court

58. Mr Arnfinn Bårdsen, Judge at the Supreme Court

Russian Federation

59. Mr Viktor Momotov, Judge, Secretary of the Plenum of the Supreme Court, Member of the Consultative Council of European Judges (CCJE)

Serbia

60. Ms Vesna Popović, Judge at the Supreme Court of Cassation

61. Mr Vesko Krstajic, Judge at the Supreme Court of Cassation

62. Ms Dragana Marinkovic, Judge at the Appellate Court in Belgrade

Spain

63. Mr Joaquin Huelin Martínez de Velasco, Magistrate of the Administrative Chamber of the Supreme Court

64. Mr Luis Pomed, Head of 'Legal Doctrine' Service, Constitutional Court

« The former Yugoslav Republic of Macedonia »

65. Mr Jovo Vangelovski, President of the Supreme Court

Ukraine

66. Mr Oleh Kryvenda, Judge at the Judicial Chamber on Administrative cases

67. Mrs Maryna Chervynska, Deputy President of the High Specialized Court for Civil and Criminal Cases (HSCU)

COUNCIL OF EUROPE

Registry of the European Court of Human Rights

68. Mr Lawrence Early, Jurisconsult

69. Mr Hasan Bakirci, Deputy Section Registrar

Directorate General Human Rights and Rule of Law (DGI)

70. Mr Christos Giakoumopoulos, Director General

71. Mr Mikhail Lobov, Head of the Human Rights Policy and Co-operation Department

72. Ms Tatiana Termacic, Head of Division, Human Rights National Implementation, Human Rights Policy and Co-operation Department

73. Mr Sergey Dikman, Project Coordinator, Human Rights National Implementation Division, Human Rights Policy and Co-operation Department

74. Ms Alessandra Ricci Ascoli, Project Coordinator, Human Rights National Implementation Division, Human Rights Policy and Co-operation Department

75. Ms Cindy Ferreira, Assistant, Human Rights Policy and Co-operation Department

76. Mr Arcadio Diaz-Tejera, Judge, Senior Legal Adviser, Justice and Legal Co-operation Department

77. Ms Milica Vesovic, Consultant for the Council of Europe.

Directorate of Communications

78. Mr Panos Kakaviatos, Media Officer

Interpreters from the Council of Europe

79. Ms Natasha Ward

80. Ms Eva Zissimides

81. Ms Fanny Croiset

82. Ms Melpomeni Konstantinidi

83. Mr Haris Ghinos

84. Mr Alexander Zaphiriou

85. Mr Vladislav Feygin

86. Mr Pavel Palazhchenko

87. Ms Dusica Lisjak

88. Ms Biljana Obradovic.

* *
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ANNEX III - QUESTIONNAIRE

Harmonisation of judicial practice
Questionnaire for national judiciaries

Dear respondent,

Harmonisation of case-law is an emerging topic which translates the pressing need to provide effective and qualitative justice in all European States. Coherent implementation of domestic legislation and enhanced application of the Council of Europe legal instruments at the national level is primarily contingent on a coherent judicial action. The uneven application of the relevant legal requirements adversely affects their implementation, thus resulting in numerous complaints being brought to the European Court of Human Rights (ECtHR) and other monitoring mechanisms. The main bulk of problems do not arise from the quality of law, being rather attributed to disharmonised judicial practice.

To address these issues, the Council of Europe is organising a conference on the harmonisation of judicial practice, in cooperation with the Council of State of Greece to be held in Athens, Greece on 29 September 2017. The objective of the conference is to enhance a dialogue between the Council and its member states as regards the harmonised implementation of the standards set out by the ECtHR, and to facilitate a peer-to-peer exchange between the judiciaries of the member states on the best practices to be applied for a more coherent application by national courts of the ECHR and domestic legislation.
Member States' judicial authorities have developed a wealth of different practices in response to that challenge. The Council of Europe is increasingly supporting such good practices and stimulates its member States to resolve systemic human rights problems which have been identified through the Court's case-law or otherwise. Some mechanisms and tools have been tested to that effect by different member States: advisory opinions issued by high courts, special functions conferred to case law/human rights departments of higher courts, enhancing access to the case law through modern databases, creation of harmonisation panels, modern judicial training techniques on the ECHR and ECtHR case law, etc.

This questionnaire below will help the Council of Europe to better understand the current state of play as regards the existing tools; the analysis of answers will allow us to shape the topics for discussion during the conference and to present the participants with the successful models.

When answering the questions, please mark one or several answers. You may as well add any relevant information, even if it is not explicitly referred to in a question.
Thank you for your co-operation.

SECTION I. Identification of a human rights case

1. Does your jurisdiction have an established system for the identification of human rights issues (according to the ECHR articles) in cases arriving to courts?

- ☐ Yes
- ☐ No

2. If yes:

- what criteria are used?
- what methodology is applied (specified coding, tagging, classification, etc.)?
- at which stage of judicial proceedings a case is identified as having an ECHR-related issue (first instance court, appeal court, Supreme Court, Constitutional Court)?

3. If no:

- ☐ such a system would be beneficial for the purpose of establishing a coherent judicial practice;
- ☐ there would be no added value of such a system compared to the existing system of classification of judicial cases.

4. Translated judgments of the European Court of Human Rights taken in respect of your country or other countries are:

- ☐ published in full at a specialised website
- ☐ published in full at a case law database
- ☐ published in full in a specialized publication
- ☐ only summaries are published (please, indicate, where)
- ☐ not published
- ☐ other (please, specify)

5. If a reference to a judgment of the European Court of Human Rights is to be made in a judicial act, the accuracy of this reference is:

- ☐ checked with the case law department of the relevant court and/or a Jurisconsult;
- ☐ checked by a judge using the HUDOC database;
- ☐ checked by a judge using a national case law database;
- ☐ checked by a judge using other source (please, specify);
- ☐ not checked
- ☐ other (please specify)_____

SECTION II. Harmonisation tools

6. Is the case law of the European Court of Human Rights in respect other countries available to judges in their mother tongue or another language commonly understood by judges?

7. Which tools for the harmonisation of the judicial practice are used in your jurisdiction to follow-up on domestic case law and the case law of the ECtHR?

- ☐ Review of judicial practice by Supreme Court
- ☐ Recommendations of high courts
- ☐ Summaries prepared by specialised court departments
- ☐ Other (please specify) _____

8. Is the issue of incoherent judicial practice as regards the implementation of the standards set out by the ECtHR being formally discussed/raised within the judiciary?

9. If yes, by whom?

- ☐ Government Agent before the European Court of Human Rights
- ☐ Supreme Court
- ☐ Constitutional Court
- ☐ Ministry of Justice
- ☐ Other

10. Which (judicial) body is responsible for harmonisation of domestic case law in your jurisdiction?

11. Are there specialized departments within the judicial system in charge of systematization of judicial practice?

- ☐ Yes
- ☐ No

12. If yes, where are such departments placed?

- ☐ Within the Supreme Court
- ☐ Within appellate courts
- ☐ Within the self-governing judicial body (Judicial council).

13. Who is working in such departments:

- ☐ judges
- ☐ legal associates (with law degree)
- ☐ associates (without law degree)

14. Do you have an electronic database with:

- ☐ all court decisions
- ☐ appellate and Supreme Court decisions
- ☐ there is no such database

15. The decisions in the database referred to in Question 6 are:

- ☐ accessible to general public
- ☐ accessible to judges and lawyers free of charge
- ☐ accessible to judges and lawyers for a fee
- ☐ accessible to judges free of charge, to others – for a fee

☐ other (please, specify)
_____

16. Is there a tool/ platform for a regular peer-to-peer dialogue between judges? (if yes, please, specify)

SECTION III. Statistics in human rights cases

17. Does the judiciary collect and analyse statistics about human rights cases that arrive to courts in a specialized database?

☐ Yes
☐ No

18. If yes, it is collected by:

☐ Supreme court;
☐ Appellate courts;
☐ Case-law departments of relevant courts/Jurisconsults;
☐ Self-governing judicial body;
☐ Ministry of Justice;
☐ Other

19. If the answer to question 17 is NO, what would be the most appropriate authority in your jurisdiction to collect and analyse data on human rights cases dealt with by courts?

Thank you!