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Project "Support to the judicial reform – enhancing the independence and professionalism of the judiciary in Armenia"

HANDBOOK

On improving the quality of judicial decisions

March 2021

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CoE	Council of Europe
CM	Committee of Ministers of the CoE
Project	"Support to the judicial reform – enhancing the independence and professionalism of the judiciary in Armenia"
CCJE	Consultative Council of European Judges
Opinion No. 11	Opinion No. 11 of the CCJE to the attention of the CM of the CoE "On the quality of judicial decisions" of 18 December 2008
Convention	European Convention on Human Rights
ECtHR	European Court of Human Rights
CEPEJ	Council of Europe European Commission for the Efficiency of Justice

1. EXECUTIVE SUMMARY

1) The quality of judicial decisions is not an abstract goal. It is a result of the good knowledge of the domestic and international law, its correct interpretation and application to the facts of a particular case.

2) The CoE is, and always was, dedicated to assisting member states in improving the quality of judicial decisions which is a part of the quality of the judiciary in general. To this effect, the CoE developed, through its various bodies, several recommendations on how to ensure the quality of judicial decisions. The ECtHR also greatly contributes to achieving this goal by setting standards of legal reasoning and drafting in its judgments and decisions. In addition, the ECtHR conducts an important work on spreading knowledge about the Convention is an essential part of the commitment to this goal.

3) The assessment of the quality of judicial decisions is a complex process which may be conducted by different actors and on the basis of various methods. The statistical methods[1] alone do not reflect fully the quality of judicial decisions. They should be completed by more tailored methods aimed at assessing the internal structure of the judicial decisions, the quality of its reasoning and its compliance with the standards set out in the Convention.

4) The domestic courts enjoy important liberty in dealing with cases, including as regards the administration of evidence, the selection of the applicable legal framework, the interpretation of legal provision and the reasoning of their decisions. According to the so-called doctrine of "fourth instance", their judgments are not subject to the review by the ECtHR, unless the fundamental principles of fair trial are concerned. Therefore, the compliance with those principles is essential for ensuring the quality of judicial decisions.

5) The quality of judicial decisions does not concern only the parties to the proceedings. As judgments are delivered in the name of the state, they make part of the legal order of the country in general and, as such, are expected to be evaluated by any citizen. Moreover, as the majority of the judicial decisions are published nowadays, they are easily available to any interested person and might be relied on in the framework of another sets of proceedings. This makes the requirement of quality even more acute.

6) The reasoning is the central part of the judgment. Therefore, special attention should be paid to the drafting of this part of the judicial decisions. The rules of legal logic should be always respected in order to avoid mistakes in reasoning and, thereby, open the way for the challenging of the judgment. The reasoning is interdependent with the drafting.

7) Successful drafting of judicial decisions can only be achieved if all actors of the judicial process genuinely aim for that goal. Lawyers, public notaries, bailiffs and other legal professional are as responsible for the quality of judicial decisions as judges, albeit their responsibility is of a different nature.

[1] The statistical methods are based on the statistics at court level and include the number of cases pending as well as cases lodged and examined, the number of court hearing at each case, the length of proceedings, the number of cases remitted for fresh consideration, the percentage of appeals, etc.

2. INTRODUCTION

The present document has been prepared in the framework of one of the Project's component which is aimed at providing support to the Armenian judiciary in improving the quality of judicial decisions.

Bearing in mind that the quality of justice is a constant and long-standing concern of the CoE and that the quality of judicial decisions is major component of quality of justice[2], the Project team elaborated a two-fold training programme for the representatives of the Armenian judiciary.

The first part of the training programme was intended to provide the selected number (20) of the Armenian judges and assistant of judges with a two-day online training session dedicated to the overview of the most essential rules of legal drafting and reasoning based on the CoE standards with a particular emphasis on the CoE documents related to the quality of justice, as developed by various CoE bodies. This training was conducted on 23-24 February 2021.

The present handbook was elaborated with a view to providing a larger audience of judges and assistants of judges with a practical and easy-to-use manual summarising the most essential ideas and tools relating to the drafting of judicial decisions. It can be used in the process of professional trainings for judges and assistants of judges, or individually by a legal professional wishing to understand the international standards in the area of drafting of judicial decisions.

The Project invited Mr Oleksandr Ovchynnykov[3], an international consultant of the CoE, to prepare the training programme, to conduct the training session and to draft the requested handbook.

It should be noted at the outset that this handbook is not intended to provide judges and assistants of judges with a universal guide on drafting judicial decisions. Rather, it is aimed at making them aware of certain methodological rules of legal drafting and reasoning which had emerged from practice of various bodies of the CoE.

Also, this handbook attempts to install the idea according to which the good knowledge of the Convention and the correct application of the case-law of the ECtHR are the best "compass" for judges in their judicial practice.

Several doctrinal and practical books in English and French had been devoted to the issue of legal drafting and legal reasoning[4]. In comparison, the methodology of drafting judicial decisions had attracted much less attention of scholars.

There might be two main reasons for this. Firstly, the very idea of drafting manuals on improving the quality of judicial decisions might appear misconceived because it would imply that judicial decisions in any given country are of unsatisfactory quality. In turn, this could mean that there are problems with the quality of laws, of legal education of judges but also of lawyers,

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[2] Opinion No. 11 (§§ 1-2).

[3] Mr Ovchynnykov is attorney-at-law (Strasbourg Bar), former lawyer at the European Court of Human Rights and at the Department for the Execution of Judgments of the European Court of Human Rights.

[4] Among which: "Modern Legal Drafting: A Guide to Using Clearer Language", Third Edition, Peter Butt, Cambridge University Press, 2013; "Oxford Guide to Effective Argument & Critical Thinking", Colin Swatridge, Oxford University Press, 2014; "A Short Introduction to Judging and to Legal Reasoning", Geoffrey Samuel, Edward Elgar Publishing, 2017; "How Judges Think", Richard A. Posner, Harvard University Press, 2010; "Petit traité de l'écrit judiciaire" (*A short treaty of judicial writing*), Jean-Marie Denieul, Dalloz, 2017.

and with the independence and impartiality of judges. Secondly, the difficulty of such manuals relates to the fact that the international standards in the area of the quality of judicial decisions are rarely codified or assembled in one source.

Legal writing and reasoning are taught first at legal schools. Subsequently, this initial knowledge is typically adjusted to specific needs of a particular legal profession, which gives it unique and recognisable style. However, being a good legal writer requires undoubtedly much more than the knowledge of rules of logic, language or law.

Judges in the CoE member states can benefit from the unique opportunity to rely in their daily work on the Convention and the ECtHR. In this context, it is essential to recall that the ECtHR has always said that it is generally not its task to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors are manifest and infringed rights and freedoms protected by the Convention (*García Ruiz v. Spain* [GC], § 28; *Perez v. France* [GC], § 82).

According to this so-called doctrine of "fourth instance", the ECtHR would not review the assessment of facts and the application of law made by the domestic courts. In other words, this means that most often there will be no assessment of the quality of the national judicial decisions by the ECtHR. This, undoubtedly, puts additional pressure on the domestic judicial system which is expected to produce decisions of good quality in compliance with the CoE standards.

To ensure this, Article 6 of the Convention provides the basic principles of fair trial: equality of arms, adversarial process, independence and impartiality of judges. If these principles are followed, there should not be any error in interpreting and applying legal norms.

One aspect of that Article appears to be of particular concern for judges[5]: how to ensure the quality of judicial decisions with the equally important requirement to examine cases within reasonable time. It is recalled in this context that the CCJE indicated in its Opinion No. 11 that

> "to achieve quality decisions in a way which is proportionate to the interests at stake, judges need to operate within a legislative and procedural framework that permits them to decide freely on and to dispose effectively of (for example) the time resources needed to deal properly with the case. The CCJE refers to the discussion of "case management" in its Opinion No. 6 (2004)[6]." (§ 13 of the Opinion No. 11).

Reference can also be made to the practice of the CEPEJ, which has developed useful tools of case management, including as regards the dealing with cases within reasonable time.

However, the quality of judicial decisions relates not only to its substantive aspects. It also concerns the accessibility and clearness of the language used by the judge and the internal structure of the decision. As it will be demonstrated below, these formal aspects are as important as the substance for two main reasons. Firstly, this allows better understanding – and, thus, acceptance – of judicial decisions by the parties. As a consequence, there should be less appeals against judicial decisions, which in turn reduces the pressure on the judicial

[5] This was also confirmed during the training of 23-24 February 2021.

[6] Opinion No. 6 (2004) of the CCJE to the attention of the CM of the CoE on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement as adopted by the CCJE at its 5th meeting (Strasbourg, 22-24 November 2004).

system as a whole. Additionally, clear and accessible reasoning enables any person other than the parties to better understand the case and, eventually, to use it in separate proceedings[7].

Secondly, there is a strong interdependence between legal writing and legal reasoning. As a particular form of human writing, legal writing operates within the system of specific rules and limits. This concerns the compliance with the rules of logic, the adherence to a certain style of legal documents existing in each county, the conformity with the legislative requirements set out in the domestic legislation and so on. If these rules are not followed, the legal drafter might reach wrong conclusions, and, thereby, affect the substantial quality of the document.

These considerations are even more indispensable for judges. By contrasts to the *predictive legal writing*[8], which is used, notably, by lawyers, their drafting is *objective*. This means that the judicial decision is supposed to reflect the assessment of facts and evidence in accordance with the applicable legal framework in absolutely neutral and objective manner. Where there lawyers would be permitted, within the rules set out in the legislation and their professional codes of conduct, to argue the case in a way the most beneficial to their clients, judges would have much less room for "creativity". Instead, they would be expected to assess the evidence presented to them in objective and impartial way with a view to finding the only just and lawful decision.

The above does not imply to suggest that all judges should adhere to any particular *style* of drafting. Some judges would tend to describe facts, complaints and reasons for their decisions at some length, while others would tend to be short. Some judges would quote extensively case-law of superior courts or international sources, while others would never or rarely do it.

The quality of judicial decisions should normally not be affected whether cases are examined by a *single judge* or a *panel of judges*. In the latter case, however, additional difficulties might arise in terms of finding the common ground between judges in relation to the legal reasoning and drafting style.

Although domestic law typically provides some guidance to this situation, it appears that appropriate arrangements between judges are necessary to improve the interaction between them. In those countries where the *separate opinions* of judges are accepted by legal tradition, dissenting judges have the floor to express their disagreement with the majorities' findings[9].

As it will be demonstrated in the subsequent chapters, the drafting of judicial decisions should be understood as a *process* each stage of which has certain peculiarities. As there is a great

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[7] This is especially important in the member states of the CoE where judicial decisions are systematically published and disseminated to a large audience. Also, reference can be made to § 7 of the Opinion No. 11: "A judicial decision must meet a number of requirements in relation to which some common principles can be identified, irrespective of the specific features of each judicial system and the practices of courts in different countries. The starting point is that the purpose of a judicial decision is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case-law which may prevent the emergence or other disputes and to ensure social harmony".

[8] This type of legal writing reflects the situations in which the author aims at suggesting to the reader his or her ideas. The typical example is the writings of lawyers. The lawyer is not bound by the obligation to be objective. Instead, the lawyer would generally present the facts of the case and the arguments in the manner the most favourable for his or her client.

[9] It is difficult it at all possible to assess whether this improves or not the quality of judicial decisions. One might argue that the dissenting opinions provide additional insights into the judges' reasoning. It can also be argued that the contrary is true as the dissenter somehow "undermines" the authority of the judicial decisions. That is why certain legal traditions do not accept dissenting opinions (for instance, France). It is also interesting to observe that the ECtHR itself admits dissenting opinions in its judgments, but not in the inadmissibility decisions.

variety of *types of judicial decisions*[10], the process of drafting them will have significant differences. Typically, only the judicial decisions settling the case warrant specific attention in terms of the compliance with the international standards.

The present handbook is specifically devoted to the drafting of civil and administrative cases. The criminal justice has specific features inherent to its purpose and the issues at stake. Nevertheless, it can be argued that criminal judges would find useful tools for their work in this handbook.

3. CHAPTER 1. QUALITY OF JUDICIAL DECISIONS

Section 3.1 Definition and international standards

The quality of judicial decisions can be defined as a number of its internal and external characteristics which make it a part of legal order in any given country.

As regards the internal characteristics, the main indicators of quality will relate to the lawfulness of the decision and the correctness of the legal analysis conducted by the judge in the process of resolving the case.

As regards the external characteristics, the quality will be assessed against the clearness of the language used by the judge; the appropriate formatting style of the judgment and the use of headings, paragraphs and subparagraphs; the appropriate length of the judgement; the use of correct proper, geographical and other names, etc.

The quality of judicial decisions should be understood as the quality of the decision as a *whole*. Thus, it would not be conceivable to assess the qualities of certain parts of the judicial decisions (the clear language, the sound legal reasoning, the presentation of facts or the assessment of evidence). All the parts of the judgment are interdependent and cannot be artificially separated for the purposes of the assessment of their quality.

In measuring the quality of judicial decisions, one should bear in mind that they do not "belong" to the parties. In most countries, judgments are delivered in the name of the state[11] and, therefore, are an integral part of the domestic legal order. The consequence of this is that the quality of judicial decision should be understood *objectively* and not *subjectively*[12].

By contrast, it is relatively easy to define the judicial decision of bad quality. Typically, this would refer to the wrong assessment of evidence and interpretation of the applicable legal rules (or the application of the wrong legal rules altogether), the failure to respect the grammatical or spelling rules, the failure to address the most essential and decisive arguments of the parties, etc.

The judgment of bad quality might also be difficult to enforce, for instance because of the confusing statements in its operative part. The judgment of bad quality might contain technical errors which, without affecting its internal quality, would require parties to apply for rectification of such errors, causing thereby a loss of time and the additional resources.

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[10] Ordering provisional measures or settling the case; decisions of first instance, on appeal or on appeal in cassation; initial decisions or decisions reviewing the case after the remittal for a fresh consideration; procedural decisions and decisions on substance, and so on.

[11] Or the people, or the Republic, etc.

[12] For instance, one can imagine a situation in which the judgment, although fully unlawful and poorly drafted, is in favour of one of the parties who is completely satisfied by it.

As regards the *international standards* in the area of the quality of judicial decisions, it should be observed that there is no one single binding document which would set the rules for drafting judicial decisions. Legal orders are different, and judges in different countries resolve cases on the basis of different rules and in accordance with different legal traditions.

Within the CoE, various sources of the standards for drafting judicial decisions do exist. As mentioned above, Opinion No. 11 of the CCJE provides a summary of the most essential indicators to assess the quality of judicial decisions and the tools to ensure it. Being elaborated on the basis of judicial experiences of different member states and various legal instruments of the CoE, this document can be relied on by any judge or assistant of judge[13].

The ECtHR is a unique source of standards for drafting judicial decisions. Judgments and decisions of the ECtHR, which are easily accessible and translated into several languages of the member states of the CoE, can be regarded as the "standards-settler" for the quality of judicial decisions in Europe and beyond. Irrespective of the member state against which the application is lodged, the ECtHR applies similar formatting and drafting style in its decisions. Furthermore, the case-law of the ECtHR defines the scope of each right enshrined in the Convention, helping national judges to apply the Convention properly.

Section 3.2 Factors and indicators of quality of judicial decisions

Difference should be made between the factors and indicators of quality of judicial decisions.

The ***factors*** relate to the external and internal circumstances surrounding the work of judges and having certain impact on it.

The external environment includes the legislation, the economic and the social context.

As Opinion No. 11 of the CCJE points out, the quality of a judicial decision "depends not only on the individual judge involved, but also on a number of variables external to the process of administering justice such as the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training" (§ 10).

The quality of legislation has special importance for the quality of judicial decisions because it affects them in the most direct way. Inadequate quality of legislation warrants judges to spend additional time on dealing with cases and might lead to the wrong decisions.

The quality of law is, however, not easy to be assessed itself. The legislative drafting methods are the subject of an ample doctrinal research[14]. In some countries, these methods and rules for drafting any legislative enactments are addressed at the state level[15].

The indicators of quality of law are: its clarity; its normative nature; lack of complexity but also the lack of over-simplifying; the foreseeability and the accessibility.

The legislative process should also be subject to certain rules with a view to ensuring the quality of legislation. It relates primarily to the assessment of the impact of the draft legislation.

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[13] Opinion No. 11 of the CCJE deals with several aspects relating to the quality of judicial decisions, such as the quality factors, including the internal and the external environments, and the evaluation of the quality with references to specific evaluation methods.

[14] See, for instance, "La crise de la loi" (*the crisis of the law*), Pierre Albertini, Paris, LexisNexis, 2015.

[15] See, for example, for France, the 721-pages guide on the methods to drafts legal enactments enacted by the Prime Minister and the Council of State (the higher administrative court): https://www.legifrance.gouv.fr/contenu/Media/Files/autour-de-la-loi/guide-de-legistique/guide-de-legistique-edition-2017-format-pdf.pdf.

Although individual judges are typically not involved in this process, Opinion No. 11 of the CCJE specifically recommends that "[any] draft legislation concerning the administration of justice and procedural law should be the subject of an opinion of the Council for the Judiciary or equivalent body before its deliberation by Parliament" (§ 12).

It should also be mentioned that the judge should always be aware that the law or legal provision, although being in force at the domestic level, might not be compliant with the provisions of the Convention. In such situations, the judge should use all the available tools at his or her disposal with a view to avoiding the application of the domestic law and to applying instead the international law.

The resources allocated to the judiciary are undoubtedly also the precondition for the quality of judicial decisions. Inadequate funding, limited human and material resources, insufficient judicial remuneration, low number of assistants and judicial clerks can only negatively affect the quality of judgments produced within any judicial system.

Another important factor affecting the quality of judicial decisions relates to the other actors of justice, among which the lawyers, bailiffs, public notaries, judicial administrators (liquidators) and so on. Inappropriate or insufficient training of these actors might result in judicial decisions of inadequate quality. This is particularly true in civil proceedings in which judges typically have only limited powers to act *ex officio*, relying rather on the partis' submissions. They have also usually limited powers to prevent manifestly ill-founded claims from being lodged with the courts[16].

The internal environment which affects the quality of judicial decisions concerns the professionalism of the judge and the management of the case. As regards the professionalism, reference can be made to the judicial independence, compliance with the judicial ethics and deontology, and the adequate legal training[17].

As regards the procedure and management of the case, the quality of a final decision will be ensured only if the procedure is compliant with the requirement of fair trial as enshrined in Article 6 of the Convention.

The ***indicators*** of the quality of the judicial decision are inherent to its substantive and formal aspects which ensure that it was adopted in accordance with law[18]; it is legally reasoned; it is based on the correct assessment of evidence; it is complaint with the rules of legal logic; it is

[16] In certain countries there are mechanisms for this. In France, judges can fine the applicants for up to 3 000 euros if they lodge dilatory or abusive claims.

[17] These issues are summarised in the following opinions of the CCJE: Opinion No. 1 (2001) for the attention of the CM of the CoE "On standards concerning the independence of the judiciary and the removability of judges" of 23 November 2001; Opinion No. 3 (2002) "On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality" of 19 November 2002; Opinion No. 4 (2003) "On appropriate initial and in-service training for judges at national and European levels" of 27 November 2003, and Opinion No. 9 (2006) "On the role of national judges in ensuring an effective application of international and European law" of 10 November 2006.

[18] This indicator contains several separate elements. The "lawful" judicial decision will need to contain a certain number of references which are typically established in the procedural legislation (for example, the name of the court, its address, its contact details; the composition of the court; the date of hearing (hearings) and the date of the delivery; the name of the parties and/or their representatives, including the confirmation of their standing (power of attorney or other documents); the date of its entry into force; the appeals available and the time-frames and other details to lodge them; the signature of the judge (judges) and of the registrar; the stamp, etc. In substance, the "lawfulness" means that the judicial decision was adopted as a result of the correct application of material and procedural law.

drafted in correct language and it can be readily enforced without recourse to any additional clarification or rectification proceedings.

The indicators of quality are primarily detailed in the domestic and international legislation. They can also derive from practice or legal doctrine.

Section 3.3 Evaluation of the quality of judicial decisions

The evaluation of the quality of judicial decisions presents certain theoretical and practical difficulties related to the judicial process. As indicated above, one of the difficulties is attributable to the issue of judicial independence. If judges are independent and bound only by law, who can evaluate their decisions?

The most obvious answer is that superior courts or judges have typically powers to review, fully or to some extent only, the decisions adopted by the inferior courts. Thus, in practice, any judge will most likely draft its judgment in such a way as to prevent its quashing or modification by the superior court.

However, the proportion of judgments of any judge (or court) overturned on appeal or on appeal in cassation can be a misleading tool to evaluate their quality. Firstly, because not every party, even if dissatisfied with the outcome of proceedings, would challenge the decisions adopted in his or her case. Secondly, because the superior judge can also adopt a wrong decision.

There are several methods for the evaluation of the quality of judicial decisions[19]. However, for individual judges the most effective evaluation method is probably the self-evaluation[20]. In this context, it is essential that such evaluation be on the basis of the fundamental principles of the ECtHR[21].

4. CHAPTER 2. THE DRAFTING PROCESS

Section 4.1 Preparatory stage

It should be noted at the outset that the drafting of judicial decisions, like any other legal drafting, is a *process*.

The elaboration of judgments includes two major phases:

1) The phase of *judicial investigation* (or preparation).

The purpose of this phase is to ensure that the case is ready to be decided on the merits.

Typically, this phase would include: the examination of the initial claim of the applicant (or of the joint claim in certain types of proceedings); the determination of legal facts and/or legal issues which will need to be established, and the corresponding determination of the procedural tools to achieve this; the gathering of evidence and ensuring that it is sufficient; the review of the partis' submissions and/or of their requests for provisional measures,

[19] See, in particular, Part II of the Opinion No. 11 of the CCJE.

[20] Also, the CCJE encourages the evaluation by other actors within the justice system, in full respect of the judicial independence (see § 70 of the Opinion No. 11 of the CCJE).

[21] See § 60 of the Opinion No. 11 of the CCJE.

investigative steps (expertise, hearing of witnesses or review of their statements, on-site examinations, and so on).

During this phase, the judge might have preliminary or final opinion of the case and of the way to resolve it. However, owing to the principles of fair trial, he or she would normally avoid expressing his or her ideas before the phase is completed.

In the course of this phase, the judge might need to draft some provisional or procedural documents (for instance, on the issue of the provisional measures; the suspension of the proceedings; on appointing experts; on scheduling hearing; on setting various deadlines to the parties to submit their observations, etc).

This phase can be short or lengthy, depending on the peculiarities of each case. When it is concluded, the judge would normally be able to start actually drafting the judicial decision.

2) The phase of *drafting of judicial decision.*

This phase is essential in the drafting process because at its end the case will be decided.

Depending on the type of proceedings, each stage might have different duration and require uneven intellectual efforts from the judge. For instance, in certain cases the legal issue might be quite easy while the evidence to reach the right conclusion might be controversial, partial or otherwise difficult to assess. In certain other cases, the facts and evidence might be of a relative simplicity. However, the legal issue might warrant extensive research and balancing of arguments.

In any case, the *preparatory stage* is of particular significance for the drafting of reasoned and lawful judgment. If properly conducted, it will then facilitate the drafting process and save the drafter's time.

It is essential to ensure during this stage that any preconception about the case file is tested against all the evidence available and the arguments of the parties presented in support of their claims or counterclaims. Even though in most of the jurisdictions the same judge will be in charge of the investigative and the drafting phases of the drafting of judicial decisions, it can be recommended to disregard the influence of the ideas that might had appeared during the initial phase[22].

The knowledge of the case is closely related to the knowledge of the applicable legal framework on the basis of which the case will be decided. Thus, it is important to make sure that the drafter has in his or her possession all the legal provisions applicable to the dispute at issue, and that this legal framework is still in force and is updated[23].

As trivial as it may appear, the organisation of the material conditions of the work during this stage might have significant influence on its results. The work will certainly be better performed in the adequate conditions of silence, lighting and space[24].

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[22] In France, when the case is allocated to a panel of judges, a special judge is appointed as the preparatory judge ("*juge de la mise en état*"). He or she is specifically tasked with overseeing the progress of the investigative phase.

[23] Consider the ECtHR's judgment in the case of *Barać and Others v. Montenegro* (application No. 47974/06, judgment of 13 December 2011). When examining the applicants' cases relating to employment disputes, the domestic courts have relied on a law which had previously been declared *unconstitutional* and a relevant decision to that effect already published in the official gazette.

[24] One French author recommends to dispose of at least "one square meter of well-lighted space" ("Petit traité de l'écrit judiciaire" (*A short treaty of judicial writing*), cited above, p. 27.

Section 4.2 Drafting

This is a central stage of the drafting process during which the judge or the assistant of judge will put on paper (or, most likely, immediately on the screen of the computer) the text of the judicial decision.

For routine, not complex cases, this stage will not represent any particular difficulty. It could also be efficiently supported by various models or prefabricated templates.

By contrast, for cases raising certain difficulties in terms of facts or law this stage might require several "returns" to the previous stage. This will be the case, for instance, when the drafter will need to apply the legal provisions other than initially envisaged; when the problem of the competence will arise; when it appears that the evidence cannot be used owing to the violation of the rules governing its admissibility; when applicable law is amended in the course of the case's examination; when the procedural or other capacity of one of the party changes, etc.

Section 4.3 Control and double control

Once the drafting stage is finished, it can be advised to perform a control of the final draft.

This control is different from the one consciously or unconsciously conducted by any drafter of legal text, including of judicial decisions, in the course of the drafting. The idea of the final control is based on the presumption that any legal text, even the most successful one, can be improved if reviewed by another person, or from another perspective.

As regards the review by other persons, the limits for this method of control are inherent to the functions of judges who are independent and, as such, cannot be subject to control outside the established procedural forms (appeals, appeals in cassation, etc.). Unlike certain law offices, courts of the same level of jurisdiction are not supposed to have *junior* judges whose work might be supervised by *senior* judges. As regards the superior courts, their judges are typically more experienced. However, it is also unconceivable that the draft judgement of the court of first instance be reviewed prior to its adoption by, for instance, the court of appeal. It is equally unconceivable that any external actor within the justice system reviews the draft judgment before it is delivered[25].

In view of the above considerations, the only viable solution is to have recourse to the review of the draft judgment from *another perspective*.

The first option is to review the draft judgement from the point of view of the superior court. In doing so, the drafter might first wish to imagine which grounds of appeal the losing party might most likely rely on. This, in turn, would require to review once again the submissions of this party with a view to identifying the arguments that might had been overlooked or insufficiently addressed. In most jurisdictions the new arguments cannot be raised in appeal, even less in cassation. Therefore, the judge should ascertain that the most relevant and decisive

[25] In this context, it is observed that the CCJE "(…) encourages peer review and self-evaluation by judges. The CCJE also encourages the participation of "external" persons (e.g., lawyers, prosecutors, law faculties professors, citizens, national or international non-governmental organisations) in the evaluation, provided that the independence of the judiciary is fully respected (…)". This means that such evaluation is possible only *after* the judgment is delivered, not *prior* to that.

arguments, as required by Article 6 of the Convention, are addressed. Special explanation can be added to explain why certain other arguments are not relevant for the outcome of the proceedings.

Where possible, the judge might wish to check the relevant case-law of the superior court with which the appeal or the appeal in cassation might be lodged. In order to reinforce the authority of the judgement and to avoid the risk of its quashing, the judge might wish to specifically quote the case-law of the superior court applicable to the dispute at issue.

The second option is to review the draft judgment from the point of view of the losing party. This method is similar to the previous one. The difference relates mostly to the fact that the losing party would most likely rely on much larger set of grounds of appeal than the superior court will be able, or willing, to examine. The main task during this exercise is to identify what was at stake for the losing party, and which complaints it is most likely to bring to the attention of the superior court.

The combination of the both methods, or their subsequent use, is also possible.

Where the case is examined by the panel of judges[26], the above exercises are in practice performed during the discussion of the case by all the members of the panel.

It can be advised that the control of the draft judgement be conducted the next day.

Finally, the double control can be recommended for the most complex and controversial cases, using the same technics as described above, but anew (and, preferably, after the additional interval).

5. CHAPTER 3. STRUCTURE OF JUDICAL DECISIONS

Section 5.1 Introduction and description of the facts

The structure of judicial decisions represents the external presentation of their internal logic. Based on this understanding, each judgment will have:

- The introductory part;
- The descriptive part;
- The reasoning part, and
- The decision part.

Depending on the type of proceedings and the complexity of the case, each of the above parts might not be drafted with the same thoroughness. For instance, in cases in which the facts are not disputed by the parties there will be no need to present them in some detail: a short reference to the parties' submissions could be sufficient (obviously, if this is permitted by the domestic law).

By contrast, in those cases in which the essence of the dispute relates to the establishment of facts and/or their interpretation, the judge would normally be required to devote sufficient time to provide the most exhaustive desperation thereof.

[26] Which is normally envisaged by law of different countries for the examination of more complex cases.

The *introductory part* is intended to present the nature of the dispute and its context. Typically, this part reflects, in addition to the mandatory requisites required by the procedural laws of each country (described above - the name of the tribunal, its composition, the names of the parties, etc.), the subject matter of the dispute and the main procedural stages of the case[27].

In the countries in which judgments are pronounced on one date but delivered in writing on another date, those dates should be clearly indicated in the introductory part.

This part might also indicate the main investigative measures taken in the course of the proceedings, but without description of their results ("*the expertise was ordered on* …", "*the expert report was deposited with the court on*…", etc.).

If there are several claimants or respondents in the case, it would be useful, for the sake of brevity and clarity, to refer to each of them in the subsequent parts of the judgment by an abbreviated name ("*respondent 1*" and "*respondent 2*", etc.). The parties to the dispute should be indicated as to the date of the delivery of the judgment, even though they might have changed in the course of the proceedings[28].

By essence, this part should be short.

In certain cases, it might also be useful to place the dispute in the historical context.

As regards the context of the case, a short description of the underlying issues might be useful to enable the external reader to quickly understand the genesis of the dispute and its background and the surrounding factors[29].

The purpose of the *descriptive* part is to present the factual circumstances of the case and the parties' contentions.

It is noteworthy that the presentation of the facts of the case at this stage should not be equal to their *interpretation*. This part of the judgment is a basis for the subsequent analysis in light of the applicable legal norms. That is the reason why it is important that the facts indicated in the descriptive part are those which were established by the judge independently of the position of a particular party.

Nevertheless, where there is a dispute as to the establishment of certain facts, the descriptive part should reflect the existence of such dispute (while the conclusion will be reached in the next part of the judgment).

The parties to the judicial proceedings do not always present the facts of their case in a structured and easily accessible way. That is why the judge must have good analytical skills with a view to summarising the facts.

The challenge for any judge is to reconcile the need to present *all the relevant facts* of the case, and to make such presentation *as clear and as short as possible*. Several tools can be used to achieve this:

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[27] Such as the date of the introduction of the claim, the reception of the respondent's observations and/or of the counterclaim, the date on which the investigative stage of the proceedings was completed, any change of the composition of the court in the course of the proceedings, any changes of the parties' representatives, and so on.

[28] It could be required by the domestic law to reflect such change in the judgment.

[29] It is observed that the ECtHR often uses the references to the "background of the case" or the "genesis of the case".

- **To make succinct but full presentation of all relevant facts**.

The descriptive part of the judgment should reflect only those facts which are relevant for the resolution of the dispute at hand. All other facts might be summarised under the heading "other facts", with a very short description of them. In addition, special mentioning can be made to clearly indicate that those facts are not relevant for the case[30].

- **To make a hierarchy of facts**.

Typically, any claim would contain one, or few, *outstanding* facts. It would be appropriate to place such a fact at the head of the list of facts with a view to highlighting its importance. It would also be necessary to give a detailed account of the circumstances relating to such facts. As regards those facts which are *prima facie* irrelevant, or less relevant, it would be advisable to place them at the bottom of the list of facts. Such a hierarchy of facts would provide any reader with intuitively suggested importance of each fact of the case.

- **To group, divide and otherwise structure the facts**.

Facts presenting similarities can be usefully grouped, while different groups of facts might be presented in a hierarchical manner as described above. In certain complex cases the facts can be presented in annexes to the judicial decision[31].

As regards the presentation of the parties' contentions, it is essential to provide at this stage the summary of them with references to the evidence on which the parties rely.

This presentation should be made with the aim to focus only on the most relevant and tangible arguments expressed by the parties. Rather than repeating them, the judge might wish to summarise the essential ideas relating to each argument using suitable expressions ("*the claimant argued*…", "*he further contended*…", "*additionally, he submitted*…", "*the respondent* disagreed…", "*he pointed out that*…", etc.).

It is recommended to avoid the simple quotation of the parties' submissions in order to present their contentions. Such an approach might appear as simplifying the work of judge. In reality, it is not. The parties' contentions can be better transposed to the judgment if they are preliminary assessed by the judge and formulated in the style of the judgment. Indeed, the parties' submissions would always differ in style from the language of the judgment. Also, by reformulating the parties' contentions, the judge will always conduct a logical operation of separating important ones from the less important, and otherwise structure them.

However, the precise quotation of the parties' submissions might be justified in certain cases, for instance if the judge wishes to emphasise the language used by the party (if it is offensive), or if it relates to the listing of certain items which cannot be easily summarised (the list of author's songs allegedly aired in violation of the copyright). Also, judges should bear in mind that even though their judgments are published, the parties' submissions are typically not[32]. That is why it is important to faithfully reflect in the judgment the essence of the parties' submissions.

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[30] For instance: "The claimant also indicated that he purchased in the past several other vehicles from the same vendor, and provided supporting documents in that relation. These purchases, however, do not pertain to the present dispute".

[31] This technic is routinely used by the ECtHR to present the facts of the grouped cases (containing several applicants) or in cases concerning multiple episodes.

[32] There are exceptions to this in some countries. In France, the Court of Cassation is generally annexing to its judgments the parties' argument for cassation. The ECtHR does not publish the parties' observations.

Section 5.2 Reasoning

The *reasoning* part is determinant to the quality of judicial decisions.

As described above, during this stage the national judge enjoys full liberty to resolve the case according to his or her convictions. The only limits to this liberty are those enshrined in Article 6 of the Convention.

In most legal orders this part of the judgment will contain the factual circumstances of the case as established by the court (and which might be different from the presentation submitted by the parties); the evidence supporting the conclusions of the court; the reasons why the court is not accepting certain types of evidence or certain arguments of the parties, and the reference to the applicable legal provisions.

Thus, the national judge is not required to reply to every argument raised by the parties in support of their claim. But he or she is expected to reply to the most essential of them, and to provide clear reasons why certain other arguments cannot be accepted. The reasoning cannot avoid responding to those arguments which are obviously decisive for the outcome of the case. Most importantly, it should clearly transpire from the judgment that the judge examined all the main issues of the case and analysed all the arguments the parties presented to him or to her. Failure to do so might leave the impression that the judge only partially read the submissions and omitted to respond to some of them. That would leave the parties, or at least one of them, dissatisfied with the outcome of proceedings and be the ground for lodging an appeal or an appeal in cassation.

In order to provide his or her conclusions additional authority, the judge could take benefit from the following tool: the counter-arguments to his or her conclusions. Thus, when reaching a conclusion as a result of the analysis conducted, the judge might test it against a counterargument opposite to the decision reached. Then, he or she would conduct a new analysis in a reversed manner with a view to demonstrating that this counter-argument is not viable, and, therefore, any other solution would be unsubstantiated and wrong.

Section 5.3 Decision

The *decision* part is the logical continuation of the preceding parts. In this part of the judgment the judge uses his or her judicial power to order certain modification to the established legal situation. This part of the judgment must be exhaustive and unambiguous.

If the court decides to grant the claim partially, there should be a clear indication which part is granted, and which one is dismissed.

In this part of the judgment the court might also be required to settle the issue of judicial fees and certain other issues.

As noted above, this part is crucial for the effective enforcement of the judgment.

6. CHAPTER 4. LOGIC OF JUDICIAL DECISIONS

Section 6.1 The role of logic in legal drafting

This document is not intended to reproduce the course of legal logic which is taught to prospective lawyers in the law schools.

Rather, it aims at stressing the important of strictly abiding by the rules of legal logic in the process of drafting of judicial decisions.

In this context it is important to note that the legal writing is primarily the logical writing, and the legal reasoning – the logical reasoning. The drafting of any legal text will be successful if general principles of legal logic are observed.

By contrast, if the legal document contains logical errors, this might jeopardise the very purpose of legal drafting. Therefore, the legal text shall be drafted in accordance with the rules of logic (the law of contradiction, the law of excluded middle (or third), the principle of identity). Where there is a collision of legal rules, the drafter shall determine the applicable provision on the basis of the collisional rules (lex specialis, lex posterior, lex superior).

Section 6.2 Legal logic applied in drafting judicial decisions

The process of drafting judicial decisions is subject to the rules of legal logic. Those rules are reflected in the provisions of the domestic and international law, and in other sources.

The process of judging is a logical process. First, the judge identifies the facts relevant for the resolution of the case. Then, he or she identifies the legal issues that need to be resolved and the applicable legal framework. Finally, by confronting the particular circumstances of the case with the applicable legal provision, the judge reaches the conclusion and, thereby, resolves the dispute.

The legal logic is guiding the judge when he or she is making a reasoned link between the argument of one of the parties whereby he or she is convinced, and the evidence that was established in the course of the case examination. In this context, it should be noted that the rules of legal logic warrant that the judge uses only straightforward expressions when describing its conclusions ("*the court established that*…", "*on the basis of this evidence, the court found that…", "therefore, the court concluded that…", etc).*

Legal logic rules are also helpful to dismiss certain arguments of the parties. Thus, the judge might identify in those arguments logical contradictions or inconsistences which are mutually irreconcilable.

Pertaining to the administration of evidence, the legal rules require that the judge makes a logical distinction between the circumstances that need to be proven and those which do not; from the circumstances whose existence is disputed and those in which certain details are disputed. For each situation, this logical exercise will enable the judge to determine what kind of evidence is needed and how such evidence could be obtained.

In most cases, the judge will rely on the deductive argumentation (the idea – the list of arguments in support of it – the available evidence – the conclusion). But in certain cases, the analysis can be based on the inductive argumentation (the description of situations or cases

with common factual or legal characteristics – the conclusion that these situations or cases belong to the same type - the conclusion that the same legal provisions shall apply to each of those situations or cases).

Legal logic is also indispensable to judges when dealing with the collision of legal norms. In such situations, the judge should give the priority to the most recent law over the old one; to the law having the higher authority (the Convention over the domestic law), and to the special law over the general one).

Obviously, in most situation judges apply legal logic automatically.

7. CHAPTER 5. TOOLS FOR SUCCESFULL REASONING AND DRAFTING

Section 7.1 Assessment of evidence

In most cases the assessment of evidence is determinant for the outcome of proceedings.

It is recalled that the Convention does not lay down rules on evidence as such, and the admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts. This means that the national judge is better placed to determine the particular rules which need to be applied to the dispute at issue and decide of the issues of the admissibility of evidence.

However, as regards the admissibility of evidence, the domestic rules might in some cases not be in conformity with the European standards. This primarily concerns the issues that may arise under Article 8 of the Convention which guarantees the right for a private and family life (e.g., the admissibility of evidence obtained without the consent of the person such as the video – or audio recording; surveillance of employees and "tracing" of their itineraries, etc.). In some instances, domestic rules might prevent or limit the parties' possibilities to submit alternative evidence, which also might not be in compliance with the European standards (e.g., as regards the expertise obtained from the non-state expert institutions).

The above principles also apply to the probative value of evidence and the burden of proof.

The corollary to the above considerations is that, according to the well-established case-law of the ECtHR, it is not its role to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. It must examine whether the proceedings as a whole, including the way in which the evidence was obtained, were fair; this involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found[33].

Typically, domestic procedural codes provide for an "open" list of the sources of evidence, which means that the party is normally entitled to provide any evidence. The role of judge in assessing the evidence will be first of all to ascertain that the origin of the evidence and the way it was obtained is not in contradiction with the domestic and European rules.

[33] See, in particular, *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, judgment of 17 October 2019).

Assessing of evidence is a complex process during which the judge may face a number of issues to be resolved, including the origin of the evidence, its coexistence with other evidence, the probatory force of the evidence, and so on. As always, the judge should be especially careful to ensure that during the administration of evidence the fundamental principles of fair trial are respected.

In civil proceedings, the parties usually have opposite interests, so the main task for the judge will be to guarantee to each party the opportunity to provide his or her comments about the evidence submitted by another party. If the evidence is for some reasons not accepted, the judge should explain in some details the reasons why this is so.

Also, judges should be aware about the tactic of certain parties to provide "excessive" evidence, i.e. the evidence which they realistically cannot prove, or even in which there are contradictions. This is usually done with the hope to increase the chances of success of the claim. In practice, judges will need to use the rules of legal logic to exclude such "excessive" evidence from the debates.

Section 7.2 Legal research

Legal research is a number of methods lawyers, including judges, use to identify the legal provision applicable to the legal situation at issue. This process may be relatively easy when the legal issue is simple. For instance, in a dispute about the failure of the buyer to pay the agreed price to the seller, the judge will have to refer to only few provisions of the civil code and to establish the reasons why the payment was not performed.

In more complex situations, the judge might face a more difficult task: which legal provision is to be applied, supposing there is a collision between several provisions? How to interpret the legal provision, if its content or scope of application is unclear?

Even more complex situations may arise if the dispute is international. The issues of the competence of the tribunal, of the law applicable to the dispute, of the application of international or bilateral conventions or of foreign law are just the most common issues the judge may face.

Most often, the legal research will encompass the consultation of the following sources:

- *The legislation*

The access to the *domestic* legislation does not typically warrant any concern. In addition to various databases, most countries publish their legislation, at least the primary one, on the governmental websites. The only reflex of the judge in dealing with the domestic legislation should be to routinely check that it is still in force. In this context, it is observed that in some cases legal provisions may technically remain in force while declared unconstitutional, in full or in part. Also, judges should be specifically attentive when applying legal provisions which are no longer in force.

In case of doubts about the scope or purpose of the legal provision, judges might need to consult the preparatory works which are typically available on the websites of Parliaments.

As regards the *foreign* legislation, its use can be necessary in cases in which the applicable collision rules of the international private law would designate it as the applicable law. Rules for the application of foreign law differ significantly from country to country. In certain of them, judges have relative liberty to find the applicable law, while in others the provision of certified

legal assessment from state institutions would be required. In applying foreign law, the national judge would be also required to take into account a broader context of foreign country the law of which is being applied.

The *bilateral* or *multilateral* agreements are most often available on the websites of the Ministry of Justice and of the Ministry of Foreign Affairs, or in other sources. In applying them, judges should take into account the explanatory reports and other sources of interpretation.

The *international* legislation (notably, treaties and conventions) can typically be accessed on the websites of the relevant international organisations under whose auspices they were elaborated[34]. When applying such legislation, the judge would normally start by checking that his or her country is a part of the relevant convention. In addition, he or she would check if there are any declarations or reservations of the relevant state to the treaty, and if that is applicable to his/her issue.

Also, the date of entry into force of the treaty can be of importance in certain cases[35].

In order to interpret the treaty provisions, the judge would have to recourse to the same sources as for the bilateral or multilateral agreements. In addition, for certain treaties there might be a designated judicial or quasi-judicial body tasked with the powers to interpret the provisions of the relevant treaty.

- *The case-law of higher courts*

The case-law of highest courts is generally relied on by judges of lower courts in order to substantiate their decisions. In some countries, this case-law is thematically systematised, for instance in the form of the rulings of the plenums or other judicial or advisory panels of judges. Although the access to this source is normally easy, the rules of its use vary significantly from country to country. In some jurisdictions the legal tradition requires systematic reference to the case-law of higher courts while in others this would be seen as superfluous.

The use of the case-law of courts of the same level of jurisdiction, least of the lower courts, is less typical for there are more authority associated with the practice of superior courts. Nevertheless, the use of the case-law of the courts of the same level might be of importance, especially if the legal questions put before the judge are relatively new.

In this context, it should be recalled that divergences in case-law between domestic courts or within the same court cannot, in themselves, be considered contrary to the Convention[36]. That is why it is normal in principle for the courts to adopt judgments not in line with existing practice. However, special explanations should be provided in such cases with a view to ensuring the acceptance of the new practice by the parties, the higher courts and by the society in general.

This being said, it is also important to note that the Court has emphasised the importance of putting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case-law. It is the Contracting States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments[37].

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[34] For the CoE treaties, see : https://www.coe.int/en/web/conventions/full-list

[35] For instance, the Convention will not produce its effect to the disputed facts if they had occurred before it was ratified by the member state.

[36] See, in particular: *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], appl. No. 13279/05, judgment of 20 October 2011.

[37] *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], cited above.

In case of the remittal of the case for a fresh consideration after the appeal or the appeal in cassation, lower courts are generally expected if not abide, at least to take into account the reasons adopted by the higher courts. However, the practice of different countries is not uniform in that regard[38].

In certain cases, domestic courts might need to review the final judgment after the judgment of the ECtHR finding a violation of one of the Article of the Convention in respect of the respondent state. The reopening of proceedings is a standard individual measures envisaged by Article 46 of the Convention, especially in cases relating to the violation of Article 6 of the Convention. Generally, the supreme courts are examining the request for the reopening of proceedings. In the course of this process, the domestic courts are expected to fully understand the scope of the ECtHR's judgment and to translate its findings into the new decision compliant with the substance of the ECtHR's findings. If this is not done correctly, the applicant might lodge a new complaint with the ECtHR, which might then result in another judgment of violation against the respective member state[39].

- *The Convention and the case-law of the ECtHR*

In legal orders of the member state of the CoE the Convention and the case-law of the ECtHR have special place. The Convention, as interpreted by the ECtHR, is a permanent guide for the application of the domestic, foreign and international law at the national level.

The access to the ECtHR's case-law is easy through the HUDOC database[40]. The majority of the judgments and decisions delivered against each member state of the CoE are translated in the national languages. In addition, the most notorious judgments, especially those delivered by the Grand Chamber, are also translated into various languages of the member states.

However, it is not easy to effectively follow the ECtHR's jurisprudence. Each month, several dozens and sometimes hundreds of judgments and decisions are delivered by the ECtHR, which makes it difficult if at all possible to be acquainted with all of them.

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[38] For instance, in France, if the case is remitted for a fresh consideration after the appeal in cassation, the practice allows the court of appeal to adopt one more time the similar judgment (the case is remitted for the new examination to the court of appeal other than the initial one). If the case is quashed anew and remitted for one more examination, the court of appeal must abide, even though this is not provided in the legislation.

[39] The ECtHR had already several occasions to deal with such situations. See, for instance, the Grand Chamber judgment in the case of *Bochan (No. 2) v. Ukraine*, appl. No. 22251/08, judgment of 5 February 2015. Importantly, judges might bear in mind that, unlike some other extraordinary appeals, the procedure of the examination of the requests for the reopening of proceedings after the judgment of the ECtHR is typically covered by the guaranties of fair trial enshrined in Article 6 of the Convention: "However, the foregoing considerations should not detract from the importance, for the effectiveness of the Convention system, of ensuring that domestic procedures are in place which allow a case to be revisited in the light of a finding that the safeguards of a fair trial afforded by Article 6 have been violated. On the contrary, such procedures may be regarded as an important aspect of the execution of its judgments as governed by Article 46 of the Convention and their availability demonstrates a Contracting State's (…) The Court observes in this connection Recommendation No. R (2000) 2 adopted by the Committee of Ministers, in which the States Parties to the Convention are called upon to ensure that there are adequate possibilities of reopening proceedings at domestic level where the Court has found a violation of the Convention (see paragraph 28 above). It reaffirms its view that such measures may represent "the most efficient, if not the only, means of achieving restitutio in integrum" (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited at paragraph 33 above, §§ 33 and 89; and *Steck-Risch and Others*, cited above)" (§ 58).

[40] https://www.echr.coe.int/Pages/home.aspx?p=home&c=

To facilitate the knowledge of its case-law, the ECtHR publishes on its website various thematic guidelines and handbooks. For example, for civil and administrative judges the guide of fair trial would be of great interest because it summarises the most important issues arising under Article 6 of the Convention[41].

The use of the ECtHR's case-law should not be the goal in itself. This case-law might be used by certain legal practitioners to "embellish" their legal texts. This is wrong. In most cases, the reference to the ECtHR's case is totally unnecessary in the domestic proceedings.

However, if the judge is confronted with the situation when one of the parties raises certain issues under the Convention and relies on specific case-law of the ECtHR, the judge might need to answer that argument. In so doing, he or she would first of all examine the content of the judgment or decision relied on.

Then, he or she would need to assess to which extent the jurisprudence invoked in support of the party's argument is pertinent for the proceedings at issue. In certain cases, it might be fully out of scope of the issue being examined, in which case the judge would easily dismiss it as irrelevant. In some other cases the judgment or decision would meet, fully or partially, the considerations underlying the party's argument.

However, before adopting the party's argument in light of the authority invoked in its support, the judge might wish to conduct few additional checks with a view to ascertaining that the adduced case-law is legally applicable. First, the judge would need to verify that the judgment or decision in question had not become obsolete owing to the new case-law adopted by the ECtHR[42]. This can be done by different ways. For instance, the judge might make a research in the HUDOC system using as a keyword the name of the judgment or decision invoked. Thus, he or she might discover new jurisprudence departing from the previous one.

If the judgment or decisions concern another member state, the judge might need to establish to which extent the legal situations are comparable. Most often, beyond seemingly similar factual circumstances, he or she might discover quite a different legal framework. In that case, the judge should be able to dismiss the proposed case-law.

It is also important to emphasise that the national judge is also the judge of the Convention. This means that he or she has all the powers to apply the Convention directly to the dispute at issue, without any recourse to the ECtHR's case-law (which, in addition, might be non-existent for the particular question). The direct application of the Convention means that the judge can, for instance, apply the provisions thereof to substantiate his or her decision without recourse to the domestic law.

It should also be mentioned that the practice of the CM of the CoE relating to the execution of judgments of the ECtHR can be of great interest for judges and, more broadly, to legal professionals. As national judges are not only the judges of the Convention but also *the judges of the execution of judgments of the ECtHR*, in some cases they might need to assess the state of execution of certain judgments by the relevant member states. Several tools are available on the website of the CoE to satisfy this need, among which the specifically dedicated research system HUDOC EXEC[43]. In addition, the "country fact sheets", elaborated by the CM's Secretariat, provide a concise but full picture of the state of the execution of the ECtHR's judgments against all member states of the CoE.

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[41] https://www.echr.coe.int/documents/guide_art_6_eng.pdf

[42] The ECtHR's case-law can also be modified, even though this happens rarely.

[43] https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22]}

As noted above, in applying any legal provision the judge should always be guided by the Convention and its underlying principles.

- *The doctrine*

Similarly to the case-law, the doctrine will not be used by the judge in each and every case, especially in routine or repetitive cases. By contrast, in some cases it can be of help. Commented codes are the typical example of the doctrinal assessment of legal provisions. In addition, various articles and other publications often provide useful guidance for judges.

The use of *foreign* legal doctrine is less common. However, nothing appears to prevent its use in the domestic proceedings (provided it is correctly translated).

The doctrine about the Convention and the case-law of the ECtHR can also be relied on in the course of the domestic judicial proceedings.

- *Comparative law*

The recourse to the comparative law can be a useful and efficient way for the judge to reason his or her decisions. This would typically concern new, controversial or borrowed legal concepts, situations or practices.

In several cases raising important public issues, the ECtHR conducted the comparative review of legislation and practices in the CoE member states[44].

Section 7.3 Language

The quality of judicial decisions depends to a big extent on the language used by judges.

As a matter of principle, judicial decisions should be drafted in the modern, correct and easily readable language. It is also advised that the sentences used in judicial decisions be as short as practically possible (understandably, not to the detriment of the ideas expressed).

Importantly, the language of the judicial decision should be easily understandable by anyone, not only by lawyers. In this context, the reference can be made to the guidelines on the language of judicial decisions elaborated by the French Ministry of Justice in 1977. It was advised to the French judges, among other things, to avoid using traditional legal Latin terminology; terminology borrowed from English and other languages; old-fashioned and complicated words, etc.

Any quotations in the judgment (of legal provision, geographical or personal name, name of the company or association) should be compliant with the national rules and be uniform throughout the whole text of the judgment.

In order to achieve the clearest possible presentation of facts or reasons in the judgment it is recommended to write one fact, or one idea, by sentence.

The use of clear language is also important for the enforcement of judgments as it prevents difficulties in interpreting certain parts of the judicial decision.

[44] For instance, in the Grand Chamber judgment *Lambert v. France*, appl. 46043/14, of 5 June 2015 which concerned the issue of the artificial maintaining in life of an irremediably ill person.

8. GENERAL CONCLUSIONS AND RECOMMENDATIONS

Conclusions

1) The quality of judicial decisions is an important aspect of the quality of the judiciary in general. Therefore, all the actors of justice should constantly improve their reasoning and drafting skills with a view to achieving the ultimate goal of drafting judgments of good quality.

2) The quality of judgments cannot be achieved through a magical "recipe". Only permanent and systematic work on improving the quality of legislation, the knowledge of the domestic and international law by all actors of justice can allow the efficient functioning of justice and the production of judgments of good quality.

3) The quality of justice can objectively be in certain concurrence with equally important requirement to examine cases within reasonable time, as provided in Article 6 of the Convention. To find a right balance between these two requirements, judges should take full benefit from the tools elaborated by various CoE bodies, including first of all the CEPEJ and the CCJE.

4) The quality of judgments can be improved, and there are several tools capable of helping judges and assistants of judges in this process. These tools are not codified in any single legal documents. Rather, they are the product of the reflexive analysis of different sources, including the Convention and the case-law of the ECtHR.

5) The improvement of the quality of judicial decisions is an open and evolving process. As the training of 23-24 February 2021 for a selected number of Armenian judges and assistants of judges demonstrated, many of them are using in their daily practice various tools to streamline and optimise the drafting process.

6) In terms of quality of judicial decisions, the content is as much important as the form. Clear language allows better understanding of the reasons underlying the judgment, while the reasons can be expressed clearly and concisely only though appropriate language. The structure of the judgment, the organisation of its parts and subparts, the numbering of paragraphs and subparagraphs, the page numbering are as important as the legal constructions of logical thinking of the judgment.

7) The constant development of the computer science and technique is a challenge but also the opportunity for judges. Already now computers allow to make the drafting process easier and faster (think only about the *copy-paste* or *spelling-check*). The use of templates, especially for the routine or repetitive cases, can even more simplify the judges' work and liberate additional time to deal with more complex cases.

Recommendations

The following recommendations can be provided:

1) As the quality of judicial decisions depends on the constant and systematic improvement of the reasoning and drafting skills, special arrangements should be put in place in the judiciary with a view to ensuring some form of "institutionalised" training on this issue. These trainings should be included into the training programmes for

judges at all levels (initial and post-graduate). These training should not be formalistic repetition of the rules of logic and basic drafting skills. Rather, these trainings should be focused on the developing the capacity to think the law through the Convention principles and to translate this into sound and well-reasoned judgments.

2) The knowledge of the Convention, the case-law of the ECtHR and, more broadly, of the CoE system, is crucial for the developing of advanced reasoning and drafting skills. To that end, judges should be invited to continuously learn the Convention and to follow the development of the case-law of the ECtHR. As this process is time-consuming, special arrangements could be envisaged within courts, for instance a "Convention referent", or a judge (or assistant of judge), who is tasked to monitor the development of the ECtHR's case-law and to inform his or her colleagues about such development. Supreme courts could play a special role in this process.

3) As recommended by the CCJE (Opinion No. 11), the system of evaluation of the quality of judicial decisions should be put in place, with the participation of all actors of justice. This evaluation, which can be based on various methods, should not be used to evaluate the performance of individual judges. Neither should it be any kind of "competition" between various courts. Rather, this evaluation should be aimed at taking objectively stock of the current situation within the judicial system with a view to identifying the possible shortcomings and defining the ways to solve them.

4) Judges should be encouraged to establish a working dialogue with other legal professions, especially with lawyers. Such a dialogue should be aimed at sharing their respective experiences and expressing their particular needs and concerns. *Formalised agreements* between the representative bodies of the judiciary and the bar association could improve the quality of judicial decisions by setting certain standards of written submissions of the lawyers to the courts[45]. In parallel with that, special mechanisms should be put in place to make certain that *clearly unsubstantiated* claims are not lodged with the courts. This can be attained, for instance, by reinforcing the liability of the parties for lodging dilatory claims. In the area of the free legal aid special safeguards should be put in place against the court actions deprived of any serious perspective.

5) Supreme courts should play special role in disseminating the knowledge about the effective legal drafting. By their position within the judicial system and the possibility of dialogue with supreme courts of other countries, they are better placed to lead the process of the constant improvement of the quality of judicial decisions within the judicial system. Understandably, they should lead by example, ensuring that their judgments are drafted in accordance with the best international standards.

6) The judgments and decisions of the ECtHR should be regarded as the models of the successful legal drafting. They reflect the practice of the ECtHR in dealing with several legal orders and various legal issues. They should be systematically translated into the national language and widely disseminated.

[45] For example, in France, a Protocol of understanding was concluded on 13 December 2011 between the Paris Court of Appeal and 7 bar associations on the form and the content of the written submissions submitted by lawyers in the framework of various proceedings. This Protocol established detailed structure according to which lawyers should present their arguments and the supporting evidence.