

ISSUES AFFECTING THE CONSISTENCY OF JUDICIAL DECISIONS AND BEST PRACTICES IN SECURING CONSISTENCY IN JUDICIAL DECISION MAKING



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ISSUES AFFECTING THE CONSISTENCY OF JUDICIAL DECISIONS AND BEST PRACTICES IN SECURING CONSISTENCY IN JUDICIAL DECISION MAKING

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2023

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Cover design and layout: Documents and Publications Production Department (SPDP), Council of Europe

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The [project](#) “Foster Transparency of Judicial Decisions and Enhancing the National Implementation of the European Convention on Human Rights” is implemented by the Council of Europe and funded by the EEA and Norway Grants Fund for Regional Cooperation.

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Executive summary

This report outlines the main outcomes of a two-day workshop organised by the Council of Europe project “Foster Transparency of Judicial Decisions and Enhancing the National Implementation of the European Convention on Human Rights” (TJENI) in June 2023, during which the topic of consistency of judicial decisions was tackled from both a methodological and a practical approach. The contributions of the workshop’s participants gave an excellent overview of existing official practices in different Council of Europe member states, the European Court of Human Rights (the Court), the European Union, as well as solutions presented by private providers. It became apparent that there are quite a few well-established, both institutional and practical, strategies to ensure consistency.

The first part of the report presents the methodological framework, while the second part focuses on the implementation of solutions in Council of Europe member states in the form of best practices. The report aims to do more than just analyse how consistently laws are applied – it also explores opportunities to combine and improve current best practices.

There are two principal strategies to ensure consistency of judicial decisions: on the one hand, the classical institutional approach through the intervention of appeal and high courts; and on the other hand, the wider dissemination of the case law and granting access to documents and materials throughout the judiciary, using special databases with judicial texts and their categorisation.

For the judiciary, the responsibility for consistency remains clearly on the shoulders of judges but comprehensive support for the administration of justice in terms of equipment and resources is required.

Finally, the optimum system is the one which takes into account all factors impacting consistency, not only from the angle of the judiciary but also involving the legislature and the executive.

Introduction

Consistency is a complex subject matter, involving various judicial and non-judicial factors. It requires a sound understanding of the process of judicial decision making to identify the reasons for inconsistencies and to improve the uniform application of the law. Nevertheless, consistency is a dogma which not only affects the judiciary but also the legislature and the executive.¹ The legislature plays a key role in setting norms and standards, while the executive ensures that judgments are implemented through analysis, proposals of legal changes, and change of practices requiring the involvement of various stakeholders by raising awareness of and publishing the respective information.

Enhancing the effectiveness of such an approach diminishes the necessity for intervention from higher courts. This aligns with the principle of subsidiarity, underscoring the responsibility of national authorities in Council of Europe member states to safeguard the rights outlined in the European Convention on Human Rights (the Convention). By bolstering mechanisms for coherence in judicial decision making at the national level, the need for recourse to higher judicial bodies is minimised. This decentralised approach not only promotes consistency but also highlights the fundamental role of domestic institutions in ensuring the effectiveness of the Convention system.

1. Consultative Council of European Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, p. 7, available at <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>, accessed 2 July 2023.

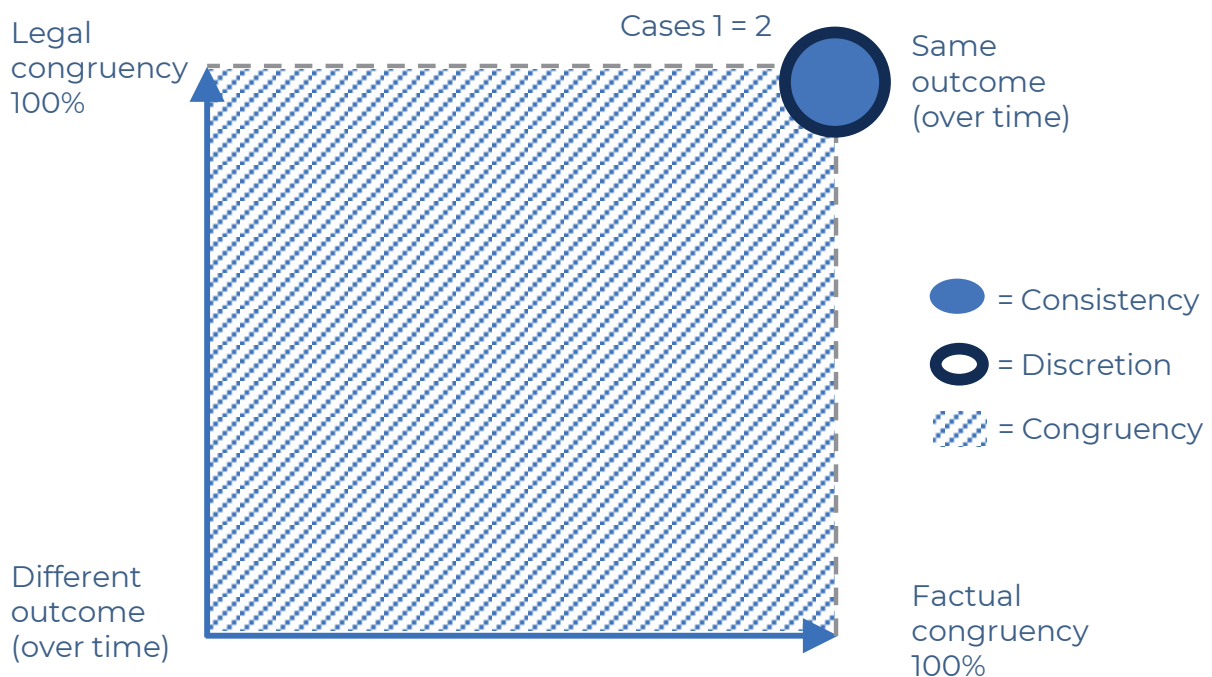
Definitions and principles

Consistency

To understand the full scope of consistency in the context of judicial decision making, the term “consistency” needs to be analysed and explained.

The ideal concept of consistency, which is finding completely identical cases (or facts) under identical legal frameworks to reach identical outcomes over time, will hardly occur or function in reality. Cases vary too much in their circumstances for this ideal consistency to function effectively.

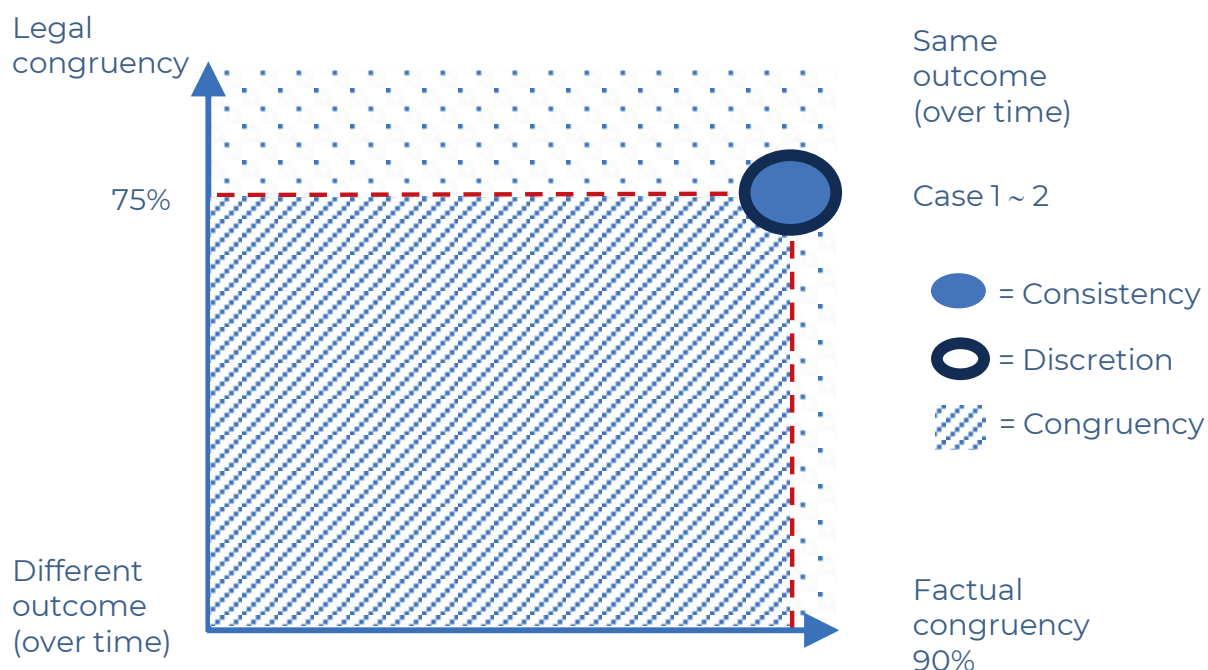
Figure 1: The ideal concept of consistency



Source: Authors' own work.

In practice, legal practitioners are struggling either because the underlying law is not exactly the same, or because the facts do not match the facts of previous cases. When dealing with such situations, the case needs to be applied and interpreted, reducing it to its crucial points and comparing it with other cases – in the best possible scenario cases already decided by the highest court. This process can be described as an abstract concept of consistency, aiming to achieve similar outcomes in similar cases over time while also leaving some space for discretion.

Figure 2: An abstract concept of consistency



Source: Authors' own work.

Generally speaking, judicial cases should be solved in a similar way if the underlying facts and the applicable legal frameworks are similar. The case law of the Court gives an idea of the approach to consistency in light of Article 6 of the European Convention on Human Rights. Not every deviation from previous case law or inconsistencies within the case law itself represent a violation of the Convention. In such cases, the Court takes into consideration the following criteria:

- ▶ whether the divergences in the case law are “profound and long-standing”;
- ▶ whether the domestic law provides for mechanisms capable of resolving such inconsistencies;
- ▶ whether those mechanisms were applied and to what effect.²

These criteria form an excellent foundation for the methodological framework of this study, as they highlight where significant inconsistencies arise within the current context. The first criterion has a qualitative and time-bound component, the second is about remedies and the third about the effectiveness of these remedies.

Principles

Consistency may not be a value by itself but it serves several crucial principles of the legal order.³ According to Opinion No. 20 (2017) of the Consultative Council of European Judges of the Council of Europe (CCJE), equality, legal certainty and predictability as part of the rule of law are just some of these principles.⁴ As good as consistency may be for these values, it should not cause inhibiting effects on the further development of the law or be at the expense of the independence of the deciding body if there is no room for discretion left.

2. Guide on Article 6 of the Convention – Right to a fair trial (civil limb), pp. 87-88, available at www.echr.coe.int/documents/d/echr/Guide_Art_6_eng, accessed 2 July 2023.
3. Mr Georg Stawa's (Council of Europe expert and counselor for southern and eastern Europe at the Austrian embassy in Belgrade) introductory speech at the Roundtable on the publication and dissemination of case law and materials: fostering consistency of jurisprudence, organised by the Council of Europe TJENI project on 1 and 2 June 2023. Available at: www.coe.int/en/web/national-implementation/-/roundtable-on-the-publication-and-dissemination-of-case-law-and-materials-fostering-consistency-of-jurisprudence, accessed 21 February 2024.
4. Consultative Council of European Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, available at <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>, accessed 2 July 2023.

Measuring consistency

To find strategies against inconsistencies and improve the uniform application of the law, an instrument is required to measure consistency and identify relevant deviations. The following seven-step scheme, based on the Court's case law, illustrates a possible approach:

- ▶ comparison of the facts;
- ▶ comparison of the legal framework (jurisdiction, branch of law, version of law, principles, procedures, substance);
- ▶ comparison of the results (divergencies?);
- ▶ qualitative assessment (profound divergences?);
- ▶ time component (long-standing divergences?);
- ▶ remedies (mechanisms to resolve divergences?);
- ▶ effectiveness (results-orientation of mechanisms).

The next step is to define how to improve the uniform application of the law or the harmonisation of case law without obstructing the discretionary power of the judicial body.

Forms of consistency

Vertical consistency

The most common way to achieve consistent application of the law in legal systems is a vertical approach where the higher courts are competent to harmonise the prior adjudication of lower instance courts. The role of the supreme courts is to ensure consistency and to resolve divergencies.⁵

While the judicial constraint exercised by higher instances in a hierarchical system may even be stronger in common law countries, which are legally bound by precedents, the effect and importance of high court adjudication is not to be underestimated in civil law countries.

In very rare cases, courts would deliberately risk their decisions to be quashed against the background of well-established case law. It is not only the chilling effect of a possible repetition of the trial but also sociological reasons that keep judges from deviating.

In certain cases, in particular in the event of major social changes, the interpretation of the law can also demand for certain adaptations. Vertical consistency takes time to evolve since legal action must be taken through legal remedies and higher courts will only take up the question in case of legal importance or major inconsistencies.

Horizontal consistency

Horizontal consistency is a phenomenon occurring between courts of different judicial branches (ordinary/administrative/constitutional), as well as between courts of the same level or within different bodies of the same court. There is therefore also an interest that decisions taken on the same level are consistent and that there are other strategies applied to serve this purpose. The better the system works at this stage, the less interference by higher courts will be required. This complies with the concept of subsidiarity, meaning that it is up to the national authorities of the Council of Europe member states to ensure the protection of the rights enshrined in the Convention.

5. *Beian vs. Romania*, No. 30658/05, paragraphs 36 and 37.

Reasons for inconsistencies

Figure 3: Reasons for inconsistencies



Source: Authors' own work.

Due to the complexity of the subject matter, there are several reasons for inconsistencies, and they may also differ whether they concern vertical or horizontal consistency. Deviations from case law may occur on purpose or without purpose – the latter happening more often. The reduction in the number of inconsistencies cannot only be seen as a duty of the judges themselves but also of the judicial administrations, since the quality of the infrastructure and resources provided will directly or indirectly affect the quality of adjudication.

Insufficient knowledge

The first and possibly most important reason for divergences in case law is lack of or insufficient knowledge. The sheer mass of decisions makes it hard to always be up to date and to know the entire case law, which may influence the application of the underlying law. Knowledge of the relevant case law, practice and experience are important. Accordingly, it concerns younger judges or members of scientific staff to a greater extent but due to the constant evolution of case law, senior fellows may also not be aware of all relevant case law developments.

Lack of time

Closely linked to the previous point, especially for first-instance judges, the time factor plays a major role. The heavy workload,⁶ not only in terms of decision making per se but also regarding the organisation of preliminary and main proceedings, does not leave much space for comprehensive case law research in every single case. For that reason, compromises have to be made to research where cases do not appear to have complicated legal questions at first sight.

Lack of resources

It is often the case that the higher the court, the better its resources. This not only applies to technical equipment but also to proper staffing. Because of the different functions of first-instance, appeal and high courts, the respective ratio of administrative and legal staff often depends on the level of the respective court.⁷ Often poorly equipped with scientific staff, judges at lower courts find themselves in a quite different situation to higher court judges who can rely on research divisions searching and analysing the relevant case law. In recent years, research methods have changed significantly because of digitisation.

6. According to the European Commission for the Efficiency of Justice (CEPEJ) "Backlog Reduction Tool", many jurisdictions experience "inadequate legal framework, inappropriate court network, increasing complexity of cases and insufficient court resources to deal with incoming cases. As a result, the accumulation of pending cases over time leads to delays in court proceedings, creating a backlog of cases and a potential violation of the 'reasonable time requirement'. Moreover, these delays increase the cost of court proceedings, contribute to legal uncertainty, and have a negative impact on public perception and trust in judicial systems." The Backlog Reduction Tool is available at: <https://rm.coe.int/cepej-2023-9final-backlog-reduction-tool-en-adopted/1680acf8ee>, accessed 2 July 2023.
7. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle, available at : <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279>, accessed on 2 July 2023.

Lack of exchange

Between courts of the same level or even inside courts, it happens that judges are not aware of other judges' legal interpretation or application of the underlying legal provisions. This particularly affects the uniform application of the law before established case law of higher courts exists, thus horizontal consistency. Covid-19 and increased telework options may have additionally worsened communication between peers on a daily basis.

Another contributing factor is that higher court decisions are usually available in case-law databases, whereas lower court decisions are often less accessible. Furthermore, while certain jurisdictions mandate lower courts to publish their decisions online, many of them grant judges' discretion in determining whether their decision is to be disseminated online. This variance in publication standards can contribute to hampering consistency in judicial decision making across different levels of the legal system.

Lack of continuity

Given that judges rely on the support of other staff members, high turnover rates can be detrimental to consistency. In very few cases, courts have at their disposal concepts to compensate for fluctuation of employees and to secure knowledge transfer properly. Well-trained and experienced personnel cannot be replaced in due time without affecting efficiency. Short-term contracts may appear cost-effective but in the long run the loss of qualified and efficient personnel will definitely lead to repercussions on consistency. The same applies to the absence of proper internal career paths resulting in the loss of human resources.

Lack of awareness raising and training

Awareness of the requirement for consistent adjudication cannot be taken for granted but must actively be increased by initial and continuous training. Due to constant time pressure and efficiency requirements, judges often narrow down their view to their legal fields without having in mind the big picture of human rights principles and standards. Since consistency is not the product of a single decision but the outcome of an overall practice, for the individual, the importance of the goal is hard to visualise. Deficits often show up too late without any chance of intervention.

Lack of a digital environment

Paper-based case management may have properly worked in the past. Sticking to outdated court operations deprives judicial users of the opportunities that modern court case management systems offer. Constant access to files and court practice, as well as searchability of decisions, promote consistency, either by research or by using existing decisions as templates for future adjudication.

Discretionary power and new developments

Inconsistencies are not always a consequence of human failure or a malfunction of the system. They can also be an expression of a vivid legal system or a reaction to legal amendments. Legal questions may also remain unanswered over a long time because no one challenges them. Moreover, only because a legal question has been answered differently, it does not mean automatically that there is no room left for a deviating decision within the discretion of the judicial body. In the long term, social change may also lead to an alteration of case law. Here, deviation is a desired effect for most cases induced by superior courts. However, deviations require persuasive reasons. This approach can be found, *inter alia* in the Czech Republic⁸ and Slovakia.⁹

8. Article 13, Civil Code.

9. Article 2, Code of Civil Procedure.

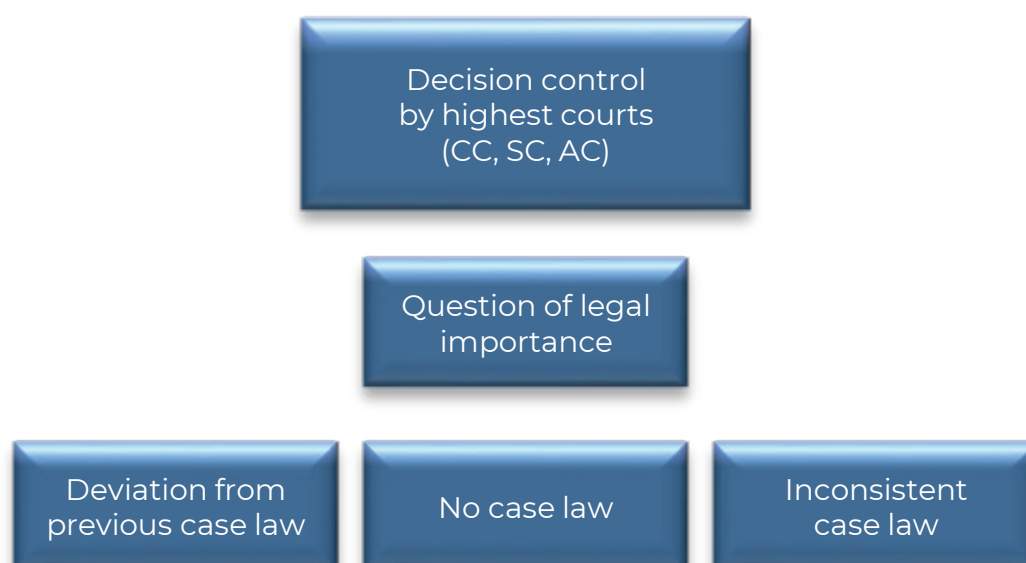
Strategies and best practices

There are quite a few classical and modern strategies to overcome inconsistencies. They are of institutional, practical, organisational, sociological, or technological nature. Many good practices identified in Council of Europe member states focus on improving publication and dissemination of case law.

Hierarchy of courts (vertical hierarchy)

It is the core task of higher and superior courts to correct procedural or substantive misinterpretations of lower courts. This affects the right application or interpretation of the law. To do this, the level of expertise required shall be guaranteed either by more experienced legal professionals or through a consultative process among professionals with a variety of experiences, such as that represented in chambers of judges. For criminal matters, Article 2 of Protocol No. 7 to the Convention¹⁰ lays down the right of appeal securing exactly this function.

Figure 4: The hierarchy of courts



Source: Authors' own work.

The classical approach of an *ex-post* examination and correction of possible inconsistencies by higher courts is common in most Council of Europe member states while there are different models in place and stakeholders involved, as suggested by the speakers of the Roundtable on the publication and dissemination of case law and materials.

10. Right of appeal in criminal matters: everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law; this right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

A representative of Armenia's Court of Cassation referred to its role in ensuring the uniform application of laws and eliminating fundamental violations of human rights and freedoms under Article 171 of the Constitution of Armenia. The same applies to the Lithuanian Supreme Court, which will develop a uniform court practice in the interpretation and application of statutes and other legal acts pursuant to Article 23 of the Law on Courts of Lithuania. Accordingly, the Supreme Court of Lithuania analyses and summarises the case law of the European Union and international courts as well as other legal sources. In the Romanian model, it is the High Court of Cassation that is competent for appeals in the interest of the law¹¹ and preliminary rulings on questions of law in civil¹² and criminal¹³ matters. To ensure the uniform interpretation and application of the law by all courts, different stakeholders (the prosecutor general, the leading board of the High Court of Cassation and Justice, the leading boards of the courts of appeal, as well as the people's advocate) have the duty to ask the High Court of Cassation and Justice to rule on questions of law that have been resolved differently by the courts. The decision only concerns the interest of the law and has no effect on the judgments under consideration or on the position of the parties in those proceedings. A referral to the High Court of Cassation and Justice for a preliminary ruling may only be lodged by a panel of the High Court of Cassation and Justice, the court of appeal or the tribunal as a last instance. The decision on questions of law is binding from the date of publication of the decision in the Official Gazette of Romania, and for the court that requested the decision from the date of delivery of the decision.

Extended chambers (horizontal hierarchy)

Different court sections sometimes develop contradictory adjudication or the legal issue in question is of major legal importance. Therefore, many systems use the instrument of extended or grand chambers to unify case law or to strengthen one legal position over the other. This approach tackles horizontal inconsistencies and is more common in higher or supreme courts.

For example, all Austrian highest courts know the concept of extended chambers to strengthen the position taken by the respective court or its chambers. The Supreme Court and the Supreme Administrative Court extend their chambers by four or six members, while the Constitutional Court has its plenary with 14 instead of six members in the chambers.

In Germany, Article 95 of the Basic Law¹⁴ in conjunction with the Law to preserve the uniformity of jurisdiction of the Supreme Federal Courts¹⁵ establishes the joint senate deciding on whether or not an envisaged deviation will be accepted as the new case law in the respective matter. It is called upon if one of the supreme courts, namely the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court or the Federal Social Court want to deviate from a decision of one of the others or a decision of the joint senate itself.

Judgment databases and knowledge-sharing platforms

For an overview of the case law in place and to detect or avoid deviations, it is crucial to have a publication or reporting system in place.¹⁶ The idea of collections of judgments is not new but has gained importance because of digitisation. Web-based access and search engines make these collections a powerful tool to detect or prevent deviations. Knowledge-sharing platforms are the next step, providing users with a more categorised and comprehensive interface. This big picture approach is also followed by research platforms which offer different sources of law, e-journals or commentaries.

11. Article 97, point 2 and Articles 514-518 of the Code of Civil Procedure, as well as Article 40 and Articles 471-474 of the Code of Criminal Procedure.

12. Article 97, point 3 and Articles 519-521 of the Code of Civil Procedure.

13. Articles 475-477 of the Code of Criminal Procedure.

14. Available at www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, accessed 2 July 2023.

15. Available at www.gesetze-im-internet.de/rspreinhg/, accessed 2 July 2023.

16. Consultative Council of European Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, pp. 7 and 9, available at <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>, accessed 2 July 2023.

Figure 5: The HUDOC database of the Court

The screenshot displays the HUDOC database interface. At the top left is the HUDOC logo with the text 'European Court of Human Rights'. To the right is a search bar and a 'SEARCH' button. Below the search bar are links for 'Useful Links', 'Preferences', 'Advanced Search', 'Help', and 'Other Languages'. The main content area is divided into two columns. The left column, titled 'NARROW YOUR SEARCH', contains a 'DOCUMENT COLLECTIONS' section with a tree view of document types and counts, such as 'Case-Law (190237)', 'Judgments (80681)', 'Decisions (58667)', 'Communicated Cases (15364)', 'Advisory Opinions (54)', 'Reports (4260)', and 'Resolutions (18737)'. The right column shows search results for '190254 Results Found', sorted by 'Relevance'. It lists several cases, including 'CASE OF DICU AND OTHERS v. ROMANIA', 'CASE OF PŁOSKONKA v. POLAND', 'CASE OF PAVLYUCHENKO AND OTHERS v. RUSSIA', 'CASE OF KULYK v. UKRAINE', 'CASE OF RECHENKO AND OTHERS v. RUSSIA', and 'CASE OF MOLIBOZHENKO AND OTHERS v. RUSSIA'. Each case entry includes its reference number, date, language availability, and court details.

Source: Screenshot taken from <https://hudoc.echr.coe.int/>, accessed 2 July 2023.

The HUDOC database of the Court contains more than 180 000 documents in different languages that are updated twice a week. By default, only Grand Chamber and chamber judgments are selected, yet there are several ways to adapt the search parameters to include decisions of committees and the European Commission of Human Rights, the predecessor of the Court.

There are four levels of importance, with key cases on top officially selected by the Court Jurisconsult in charge of the quality and consistency of the case law (leading cases). The second level covers important cases which make a significant contribution to the case law due to the modification, clarification or interpretation of case law. These are followed by cases that do not make a significant contribution to the case law, however, do not merely apply existing case law, and lastly, by repetitive cases.

Besides search options with case titles and application numbers, detailed functions are provided to specify the enquiry regarding linked cases, various procedural aspects, applied rules, aspects of applicability, conclusions (violation and admissibility) or separate opinions of judges. There is also access to the requests for an advisory opinion from the highest domestic courts, reports and resolutions of the Committee of Ministers, as well as weekly selections of judgments and their analysis.

The decisions are, by default, provided in English or French, the two official languages of the Council of Europe. However, non-official translations in various other languages are also available. These are often provided by external entities, such as governments, universities and institutes, and are not official texts of the Court.

Figure 6: The knowledge-sharing platform of the Court



Source: Screenshot taken from <https://ks.echr.coe.int/>, accessed 2 July 2023.

The knowledge-sharing platform of the Court is more a “one-stop-shop” contextual and analytical platform than a database. It is updated regularly by a network of case law experts at the Registry of the Court with special expertise regarding Convention articles and transversal themes. Currently, there are 28 article pages and eight transversal themes available (for example environment, immigration, prisoners’ rights, social rights) and six other transversal themes in the making (for example children’s rights, international humanitarian law, minority rights, etc.). Furthermore, the platform provides Grand Chamber

judgments and decisions, pending Grand Chamber cases, pending interstate cases, a list of all requests for advisory opinions made to the Court under protocol No. 16, as well as a list of key cases and other useful material. The idea of a single contextualised and regularly updated platform originated in 2018, leading to the external version of the platform being published in October 2022.

The European Case Law Identifier (ECLI) grants access to case law in a cross-border context. ECLI was introduced in 2011, establishing a common, univocal identifier for case law decisions and standardising a set of mandatory and optional metadata elements. So far, the Court of Justice of the European Union, the Court, the European Patent Office and about 17 to 20 EU member states have adopted ECLI at various levels. The ECLI search engine is available on the e-Justice portal¹⁷ since May 2016. Currently, more than 12.5 million decisions are accessible. It is not a database as there is no centralised storage. However, decisions are searchable by both the ECLI metadata and full texts of the decisions.

There are challenges, such as differing national practices regarding publication rules, accessibility, quality checks, anonymisation, the lack of uniform identifiers, the absence of a common set of metadata which is critical for technical interoperability, diverse classification schemes (area of law), as well as language barriers. It is planned for ECLI to enhance its coverage, implement support for the new ECLI XL standard, integrate it with e-translation (machine translations) and adopt a visual representation of the ECLI references.

The British and Irish Legal Information Institute (BAILII) was founded in 2000 and is based at the Institute of Advanced Legal Studies at the University of London. This platform provides primary and secondary materials, such as case law, legislation and treaties, as well as judicial speeches and journal publications. Furthermore, access to leading cases categorised by subject is offered, accompanied by content lists and various social media feeds.

17. Available at <https://e-justice.europa.eu/home?action=home>, accessed 2 July 2023.

There are multiple jurisdictions available, among many others those of Ireland, the United Arab Emirates, the United Kingdom and the financial services division of the Cayman Islands. Furthermore, thousands of documents of the Court of Justice of the European Union, the Court and the Board of Appeal of the European Supervisory Authorities are accessible.

Apart from its main task of publishing case law, BAILII manages case law amendments and takedowns, provides new legislation and secondary legal materials, maintains the database of cross-references, tracks down missing judgments, responds to non-court queries, offers support to legal education and offers social media feeds. It provides free and anonymous public access to information as it does not use cookies and trackers or collect personal information and data. However, there are still challenges to overcome, such as high data requests, limited resources, staffing, funding, exceeding user expectations and, of course, consistency.

CYLAW, a legal database of the Cyprus Bar Association, was founded in 2002 and is run by the Cyprus Legal Information Institute. It is a free access site that provides public access to primary legal information (case law, laws, legislation) without editing it, except for the consolidation of legislation and providing metadata. Working in close co-operation with the Supreme Court, CYLAW is provided with anonymised judgments as soon as they are issued, and official law reports of the Supreme Court containing keyword summaries. The database has about 250 000 documents, including judgments of the Court of Justice of the European Union published in Greek and of the Supreme Court of Greece for civil criminal matters. CYLAW is based on an algorithm developed by a Greek professor and the search function can be fed by a multitude of metadata.

When it comes to national experiences, the focus of most Council of Europe member states clearly lies on publication engines to face the issue of inconsistency of adjudication. Armenia implemented a new website of its Court of Cassation, including, *inter alia* decisions and statistical data¹⁸ based on legal initiatives as of 2016. The French Court of Cassation has followed an open data policy with the objective to publish all court decisions on its Judilibre platform by 2025. In Greece, different external and internal databases exist (Legal Council of the State,¹⁹ Court of Audit,²⁰ internal civil and criminal database, integrated administrative court case management system linked to ECLI). In Lithuania, platform LITEKO is the main database, not only providing adjudication of Lithuanian courts²¹ but also their court hearing schedules.²² The Polish approach seems to be a little more decentralised with five different databases dealing with case law of ordinary courts,²³ administrative courts,²⁴ the constitutional tribunal, the Supreme Court²⁵ and the court.²⁶ Portugal relies on two databases, one run by the Institute for the Financial Management and Equipment of Justice under the umbrella of the Ministry of Justice,²⁷ the other one maintained by the Judicial High Council,²⁸ largely based on the ECLI standard.

Private solutions such as those of vLEX (Spain) and Infoplex (Lithuania) are research, information and prediction platforms covering diverse fields of applications. The artificial intelligence (AI) tool Vincent of vLEX is an engine analysing and detecting similarities between documents cutting across more than 120 jurisdictions. It is multi-language compatible, includes other languages and translates the results automatically. Infoplex provides, *inter alia* a precedent map displaying the selected case in between its precedents and following cases referring to it. Thus, the map creates links to other relevant cases in the given context. The same applies to the *ratio decidendi* search providing a decent overview of similar cases. For the Supreme Court level, a special filtering option is implemented to detect deviations.

18. The website is launched within the project "Supporting the criminal justice reform and harmonising the application of European standards in Armenia", co-funded by the European Union and the Council of Europe, available at www.cassationcourt.am/en/, accessed 2 July 2023.

19. Available at www.nsk.gr/, accessed 2 July 2023.

20. Available at www.elsyn.gr/, accessed 2 July 2023.

21. Available at <http://liteko.teismai.lt/viesasprendimupaiaska/detalipaiaska.aspx?detali=2>, accessed 2 July 2023.

22. Available at <https://liteko.teismai.lt/tvarkarasciai/paiaska.aspx>, accessed 2 July 2023.

23. Available at <https://orzeczenia.ms.gov.pl/>, accessed 2 July 2023.

24. Available at <https://orzeczenia.nsa.gov.pl/cbo/query>, accessed 2 July 2023.

25. Available at www.sn.pl/orzecznictwo/sitepages/baza_orzecen.aspx, available at 2 July 2023.

26. Available at <https://etpcz.ms.gov.pl/>, accessed 2 July 2023.

27. Available at www.dgsi.pt, accessed 2 July 2023.

28. Available at <https://jurisprudencia.csm.org.pt/>, accessed 2 July 2023.

Peer-to-peer exchange

A conventional but most effective way to overcome unwanted inconsistencies are regular legal discussions between colleagues. This affects primarily the horizontal dimension of consistency. It raises awareness in terms of possible inconsistencies in legal interpretation, can contribute to an approximation of contradicting positions and may also serve the principle of subsidiarity by anticipating serious deficits as to compliance with constitutional or human rights' adjudication.

Due to the changed working conditions because of the Covid-19 pandemic, daily informal exchange has significantly decreased. It is therefore all the more important to establish regular meetings between judges or scientific staff, *in situ*, online, or by intranet solutions or knowledge-sharing spaces.

Human resources and knowledge management

Given that consistency needs broad knowledge of case law, especially at courts with temporary appointments of judges, it is important to have well-trained and highly qualified personnel. The same applies to the selection of judges, which should take into account individuals of excellent education and broad experience. Their initial and advanced training should include units concerning basic legal principles and their relevance for the practice. In Austria, for example, judicial training centres play an important role in promoting a high level of knowledge and expertise, also in terms of case law of the Court and the Court of Justice of the European Union, not only by providing special training but also by visits to these courts. The Council of Europe Programme for Human Rights Education for Legal Professionals (HELP) and the European Judicial Training Network (EJTN) should also be mentioned in this context.

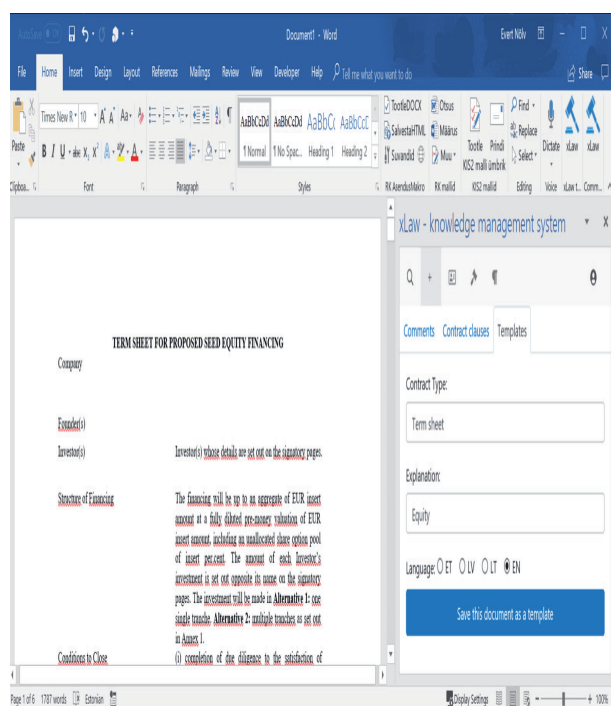
Due to tight budgetary restrictions, staff planning is sometimes too short term so that fluctuation of employees cannot be faced in due time and qualified candidates are not available. Organisational strategies receive little attention and there is space for further improvement.

Digital tools

Advanced court case management systems are a prerequisite for a contemporary court operation. From a technical point of view, these systems offer innumerable opportunities which are often not used or not timely established. Regarding consistency, not only access to decisions issued by colleagues but also the implementation of template management solutions can have a unifying effect on adjudication. Many practitioners in the judiciary would agree on how important it is to have good templates to structure decisions or to have small building blocks with the relevant case law.

In addition, applying categorisation and tagging systems within digital tools significantly enhances the searchability and utility of legal databases, thereby fostering greater consistency in judicial decisions. By categorising cases based on relevant criteria such as legal principles, jurisdiction and case outcomes, these systems enable judges, legal professionals and researchers to efficiently locate precedents and relevant judicial decisions. Tags further refine searches by identifying specific legal issues, facilitating targeted exploration of relevant case law. Consistent use of categorisation and tagging ensures uniformity in accessing legal information and can contribute to a greater coherence of judicial decisions.

Figure 7: The xLaw add-in in MS Word



An example of an advanced court case management system is xLaw, an Estonian solution broadly used by judges, available as a desktop and mobile application. xLaw offers different useful services in a personalised knowledge management tool, facilitating the daily business of practitioners. It relates to the EUR-LEX platform and creates automated links to relevant legislation cited in documents in the desired language version. It also has a personal commentary function which remains linked to the document for further editing. Moreover, it is applicable to the Estonian domestic Official Gazette. For judgments, legal summaries are provided as well as links to the relevant legal provisions, keywords leading to relevant adjudication and the history of the present judgment including lower instances. It also features an add-in for MS Word, allowing to administer personal templates and building blocks.

AI-based solutions

The possible future use of AI-based support for judges may be a chance to ensure consistency of judicial decisions. While supportive functions could be useful in terms of drafting, they may also raise fair trial concerns if intruding the very core of judicial decision making. Several legal acts aim to regulate AI-based judicial tools to prevent discriminatory decision making.²⁹

The French Court of Cassation, together with the National Institute for Research in Digital Science and Technology (INRIA),³⁰ is currently doing research on an AI-based engine for the detection of divergencies in case law.

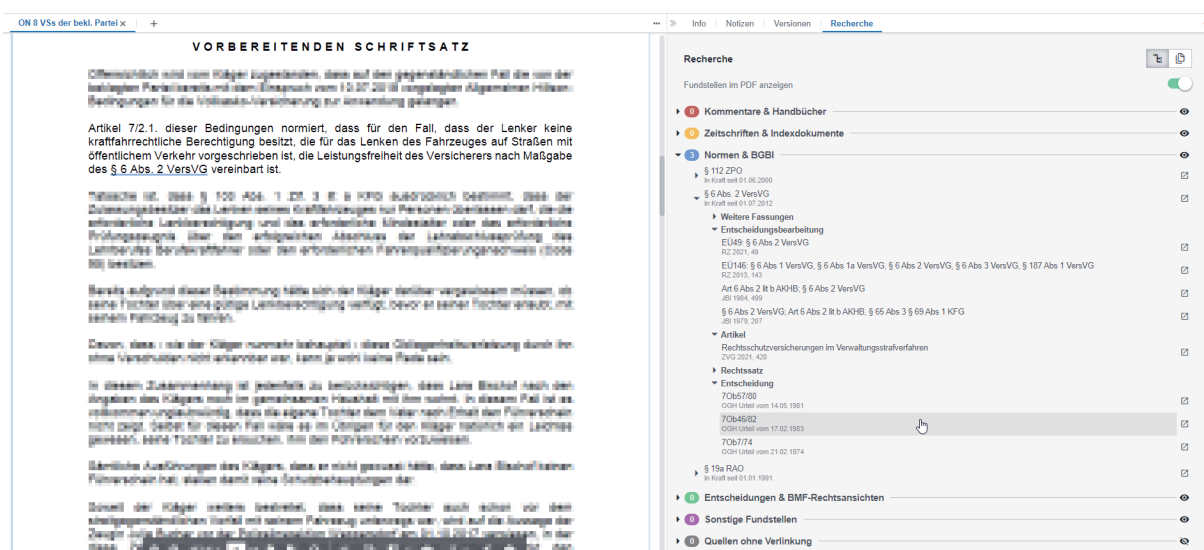
Linkbutler, a product of an Austrian publishing house,³¹ is used by the ordinary judiciary. It automatically recognises legal sources and citations in documents and links these with the content of the research database of the publishing house. To ensure security, the official documents of the judiciary are not being uploaded to the publishing house, only the citations are transferred to retrieve the respective information from the database.

29. European Commission for the Efficiency of Justice (CEPEJ), European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, available at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>, accessed 2 July 2023; Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM(2021) 206 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF, accessed 2 July 2023.

30. Available at www.inria.fr/fr, accessed 2 July 2023.

31. Available at www.manz.at/rechtaktuell/manz-digital/2021/03/linkbutler-im-dienste-der-justiz, accessed 2 July 2023.

Figure 8: Linkbutler



Source: The Austrian Ministry of Justice.

Solutions like ChatGPT could be a future option to scan decisions and to detect divergencies. At the moment, due to the 32 000-character limit of ChatGPT, it cannot be applied to longer decisions. Moreover, it requires a systematic approach to include all decisions. The overall question of the use of AI in the judiciary requires a thorough analysis to make sure all possible risks are mitigated.

Other factors

One of the crucial factors outside the judiciary influencing consistency is the quality of laws. The more exact laws are designed, the less need there is for different or deviating interpretations of laws. Thus, the legislator is also responsible for designing coherent legislation which is clear, foreseeable and consistent.³² Against this background, the right conclusions from rulings of the Court may also have positive effects on increasing consistency. The execution process of such decisions requires active participation of national authorities, in particular judges, public prosecutors and law-enforcement officials, as well as other authorities and national human rights' institutions.³³ While in many cases there is a need for legislative changes after finding a violation, interpretation of already existing domestic law may have a huge impact. This requires good knowledge of the applicable standards, a clear obligation to apply these standards in the domestic system (for example stipulated by national constitutional courts) and a functioning supervision system.

32. Consultative Council of European Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, p. 8, available at <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>, accessed 2 July 2023.

33. Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights underlines the need to reinforce domestic capacity to execute the Court's judgments, noting, *inter alia*, the importance of early information and effective co-ordination of all state actors involved in the execution process.

Conclusions

Enhanced access to court decisions through digitalisation seems to go along with higher expectations of consistency of adjudication. This situation is reflected in the various initiatives launched by Council of Europe member states, as well as by private providers to promote the uniform application and interpretation of the law in line with the standards set by the Court and the Council of Europe.

The importance of this subject matter is illustrated in the number of tools used and the approaches taken to achieve greater consistency at national, regional and European levels. However, there remains space for an even more holistic approach to tackle the issue of consistency of judicial decision making to enhance the uniform implementation of the Convention in Council of Europe member states.

Consistency in jurisprudence is a complex subject matter, involving various judicial and non-judicial factors. Inconsistencies in case law across and within jurisdictions can lead to confusion and hinder legal certainty and the individual's right to a fair trial enshrined in Article 6 of the European Convention on Human Rights. Its maintenance requires understanding of the process of judicial decision making, the reasons for inconsistencies and improvement of the uniform application of the law.

This publication outlines the main outcomes of a two-day workshop organised by the Council of Europe project "Foster Transparency of Judicial Decisions and Enhancing the National Implementation of the European Convention on Human Rights" (TJENI) in June 2023, during which the topic of consistency of judicial decisions was tackled from both a methodological and a practical approach.

The first part of the report presents the methodological framework, while the second part focuses on the solutions in Council of Europe member states and best practices.

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.