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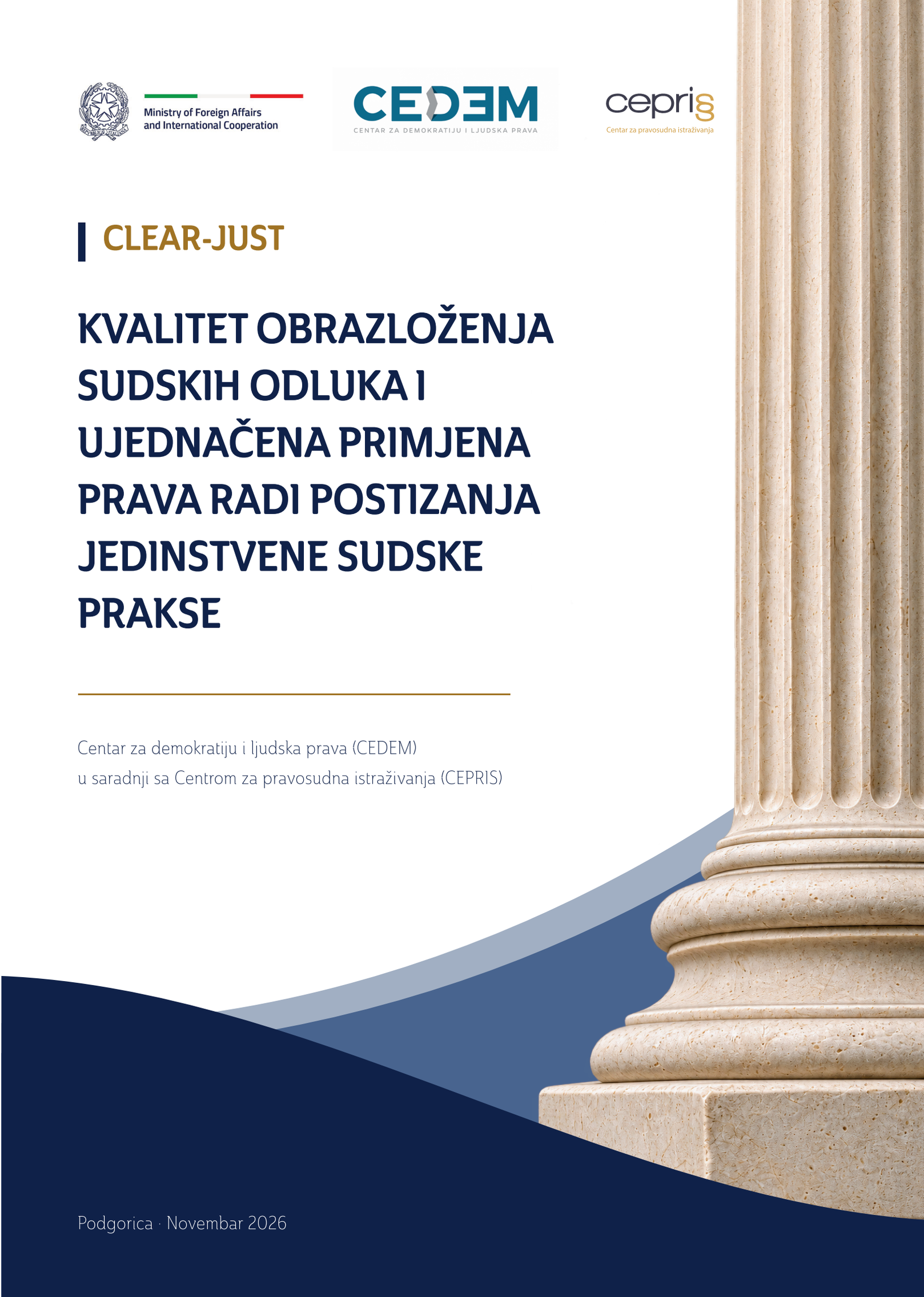
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CLEAR-JUST

KVALITET OBRAZLOŽENJA SUDSKIH ODLUKA I UJEDNAČENA PRIMJENA PRAVA RADI POSTIZANJA JEDINSTVENE SUDSKE PRAKSE

Centar za demokratiju i ljudska prava (CEDEM)
u saradnji sa Centrom za pravosudna istraživanja (CEPRIS)



Podgorica · Novembar 2026

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CLEAR-JUST

Dosljedno sudsko rezonovanje i harmonizovana sudska praksa
radi pravne sigurnosti

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Novembar, 2026.

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METODOLOŠKI OKVIR

Ovaj dokument objedinjuje, u jednu cjelinu različite metodološke okvire, od pregleda evropskih standarda, nacionalnih zakonodavnih okvira Crne Gore i Srbije, zaključno sam intervjuima predstavnika/ca pravosudnih institucija u objema zemljama.

Prvi dio sadrži zajednički uvod u evropske standarde — normativni i institucionalni okvir Savjeta Evrope (CCJE, CEPEJ, praksa ESLJP) vezan za kvalitet sudske odluke i jedinstvenu primjenu prava.

Drugi i **treći dio** sadrže pregled nacionalnih zakonodavnih okvira Crne Gore i Republike Srbije: ustavne odredbe, procesno zakonodavstvo, institucionalne mehanizme za obezbjeđivanje jedinstvene primjene prava i sistem profesionalnog ocjenjivanja rada sudija/tkinja u svakoj od ove dvije države.

Četvrti dio sadrži praktični vodič za unapređenje kvaliteta obrazloženja sudskih odluka: kratka uputstva o strukturi istrukturi, pravnom rezonovanju I obrazlaganju sudskih odluka, kontrolnu lista za procjenu kvaliteta obrazloženja sudskih odluka, odgovore na najčešća praktična pitanja i ilustrativne primjere iz sudske prakse.

Peti dio je analiza odgovora na upitnik koji je distribuiran nosiocima/teljkama pravosudnih funkcija u Crnoj Gori i Srbiji.

Šesti dio sadrži sažet zaključak koji povezuje sve prethodne djelove ovog dokumenta i sumira preporuke.

Radi jasnijeg pregleda izvora, fusnote su numerisane kontinuirano kroz cijeli dokument. Određeni djelovi zadržavaju sopstvene spiskove izvora, radi čitljivosti i preglednosti.

PRVI DIO

EVROPSKI STANDARDI

standardi Savjeta Evrope u pogledu kvaliteta sudskih odluka i jedinstvene primjene prava

1 UVOD

Kvalitet pravosuđa predstavlja jedno od temeljnih i kontinuiranih područja djelovanja Savjeta Evrope, što je potvrđeno brojnim konvencijama, preporukama, smjernicama i mišljenjima njegovih nadležnih tijela, kojima se uspostavljaju i dalje razvijaju evropski standardi u oblasti nezavisnosti, djelotvornosti i kvaliteta pravosuđa – Evropskog suda za ljudska prava (u daljem tekstu: **ESLJP**), Konsultativnog vijeća evropskih sudija (u daljem tekstu: **CCJE**), Konsultativnog vijeća evropskih tužilaca (CCPE) i Evropske komisije za efikasnost pravosuđa (u daljem tekstu: **CEPEJ**)[1]. Kvalitet pojedinačnih sudskih odluka, s jedne strane, i jedinstvena (ujednačena) primjena prava, s druge strane, predstavljaju dvije usko povezane i međuzavisne komponente istog cilja – postizanja pravne sigurnosti i jednakosti građana/ki pred zakonom, kao suštinskih elemenata vladavine prava[2].

Kvalitet pojedinačne sudske odluke ne može se posmatrati izolovano od dosljednosti sudske prakse u cjelini: odluka koja je makar formalno obrazložena, ali koja bez objašnjenja značajno odstupa od ustaljene prakse istog ili višeg suda, dovodi u pitanje predvidljivost prava jednako koliko i odluka koja uopšte nije obrazložena[3]. Iz tog razloga, ova analiza objema temama pristupa kao dvijema stranama istog standarda, koji bi se mogao označiti kao standard obrazloženog i dosljednog suđenja.

Metodološki, analiza polazi od klasičnih načela pravne države kako ih je formulisao Lon L. Fuller – kongruencija između zvaničnog postupanja i objavljenog pravila, jasnoća, odsustvo protivrečnosti i konstantnost – koja se u evropskoj praksi zaštite ljudskih prava prepoznaju, s jedne strane, kroz standard „propisanosti zakonom", odnosno „u skladu sa zakonom" iz čl. 8–11 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu: Konvencija ili **EKLJP**), a s druge strane kroz obavezu donošenja obrazloženih presuda koje odgovaraju na bitne navode stranaka, sadržanu u članu 6 Konvencije[4]. Pritom, važno je pojasniti da obaveza obrazlaganja odluka koja proizlazi iz člana 6 Konvencije ne zahtijeva detaljan odgovor na svaki pojedinačan argument stranke u postupku. Standard zavisi od prirode odluke i okolnosti konkretnog slučaja.[5]

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[1] CCJE, Mišljenje br. 11 (2008) „O kvalitetu sudskih odluka", CCJE(2008)5, 18. decembar 2008, opšti uvod, tačka 1; CEPEJ, Checklist for promoting the quality of justice and the courts, usvojena na 11. plenarnom zasjedanju CEPEJ, Strazbur, 2–3. jul 2008, Predgovor.

[2] CCJE, Mišljenje br. 20 (2017) „Uloga sudova u pogledu jedinstvene primjene prava", CCJE(2017)4, Strazbur, 10. novembar 2017, tačke 1 i 5.

[3] Up. CCJE, Mišljenje br. 20 (2017), tačka 6, i CCJE, Mišljenje br. 11 (2008), tačka 7.

[4] Fullerova načela zakonitosti preuzimaju se ovdje kao polazna analitička okosnica u skladu sa metodologijom usvojenom u konceptu projekta CLEAR-JUST (CEDEM/JUREC, Prijava projekta – Annex A1 Application Form 2025, tačka 2.1 „Background"); za standard propisanosti zakonom v. ESLJP, Guide on Article 10 of the Convention – Freedom of expression, ažurirano 28. februara 2026, §§ 74–82, i Guide on Article 8 of the Convention – Right to respect for private and family life, ažurirano 28. februara 2026, §§ 18–20.

[5] U predmetu *Pronina protiv Ukrajine*, predstavka br. 63566/00, presuda od 18. jula 2006. godine, ESLJP je razmatrao obavezu domaćih sudova da svoju odluku obrazlože i da se izjasne o relevantnim i odlučujućim argumentima stranaka. Utvrđujući povredu člana 6 stav 1 Konvencije, Sud je posebno istakao da domaći sudovi

U nastavku se najprije izlaže normativni i institucionalni okvir Savjeta Evrope, potom standardi kvaliteta sudske odluke, standardi vezani za jedinstvenu primjenu prava, veza ovih standarda sa članom 6 Konvencije i njihovo dopunsko uporište u čl. 8 i 10 Konvencije. Nakon objedinjavanja i sistematizacije relevantnih evropskih standarda i pravnih izvora, te uvodnog metodološkog osvrta na značaj nacionalnih pravnih okvira Crne Gore i Srbije, analiza se usmjerava na njihovu normativnu recepciju i praktičnu operacionalizaciju **u pravnom i institucionalnom okviru Crne Gore**.

II NORMATIVNI I INSTITUCIONALNI OKVIR SAVJETA EVROPE

A. Konvencija kao pravno obavezujući osnov

Osnovni pravni izvor jeste sama Konvencija, koja u članu 6, stav 1 jemči pravo na pravično suđenje pred nezavisnim i nepristrasnim sudom, obrazovanim na osnovu zakona[6]. Iz ove odredbe ESLJP je, kroz svoju praksu, izveo čitav niz proceduralnih zahtjeva, među kojima je i obaveza suda da obrazloži svoju odluku[7]. Članovi 8, 9, 10 i 11 Konvencije, koji štite pravo na poštovanje privatnog i porodičnog života, slobodu misli, savjesti i vjeroispovijesti, slobodu izražavanja i slobodu okupljanja, sadrže dodatni zahtjev – da svako miješanje državne vlasti u ta prava bude „propisano zakonom", odnosno „u skladu sa zakonom", što ESLJP tumači kao zahtjev pristupačnosti, jasnoće i predvidljivosti primjenjivog prava, uključujući i sudsku praksu kojom se to pravo tumači[8].

B. Instrumenti „mekog prava" Savjeta Evrope

Pored Konvencije, ključan izvor standarda predstavljaju mišljenja CCJE – konsultativnog tijela Savjeta Evrope sastavljenog od sudija/tkinja, koje od 2000. godine upućuje Komitetu ministara mišljenja o pitanjima od značaja za nezavisnost, efikasnost i odgovornost pravosuđa[9]. Za potrebe ove analize posebno su relevantna **Mišljenje br. 11** (2008) „O kvalitetu sudskih odluka"[10] i **Mišljenje br. 20** (2017) „Uloga sudova u pogledu jedinstvene primjene prava"[11]. Iako mišljenja CCJE formalno nemaju obavezujuću pravnu snagu, ona predstavljaju **autoritativnu i sistematizovanu interpretaciju standarda** koji proizlaze iz Konvencije, prakse ESLJP i drugih instrumenata Savjeta Evrope – prije svega Evropske povelje o zakonu za sudije (1998), Magna

nisu uopšte razmotrili bitan argument podnositeljke predstavke, iako je on bio konkretan, relevantan i od značaja za ishod postupka.

[6]Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, član 6 stav 1.

[7]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspekt); eng. Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), ažurirano 28. februara 2026, § 198 i dalje.

[8]ESLJP, Vodič kroz član 6 Konvencije, eng. Guide on Article 10, §§ 74, 80; Vodič kroz član 8, §§ 18–20.

[9]CCJE, Mišljenje br. 20 (2017), tačke 2–3.

[10]CCJE, Opinion No. 11 (2008) on the quality of judicial decisions, CCJE(2008)5, 18. decembar 2008.

[11]CCJE, Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, CCJE(2017)4, Strazbur, 10. novembar 2017.

Carta sudija (osnovna načela, 2010)[12] i Preporuke CM/Rec(2010)12 Komiteta ministara državama članicama o sudijama: nezavisnost, efikasnost i odgovornosti[13].

C. CEPEJ kao operativni mehanizam

CEPEJ svojim radom prevodi normativni standard u praktične, mjerljive alate. Posebno su relevantna dva dokumenta: **Kontrolna lista za unapređenje kvaliteta pravosuđa i sudova** (2008), koja funkcioniše kao instrument samoispitivanja (introspection tool) na tri nivoa – nacionalnom nivou, nivou suda i nivou pojedinačnog sudije/tkinje[14], i **Priručnik o unapređenju kvaliteta sudskih odluka** (2021), sačinjen u okviru projekta „Podrška reformi pravosuđa – jačanje nezavisnosti i profesionalizma pravosuđa u Jermeniji" (Partnerstvo za dobru upravu 2019–2021, Evropska unija/Savjet Evrope), koji sadrži operativne smjernice za sam proces izrade sudske odluke – od pripremne faze, preko izrade nacrta, do kontrole kvaliteta[15].

D. Doktrina „četvrte instance"

Poseban značaj za razumijevanje granica ovog standarda ima tzv. **doktrina „četvrte instance"**, prema kojoj ESLJP po pravilu ne preispituje ocjenu činjenica i primjenu domaćeg prava od strane nacionalnih sudova, osim ukoliko takve greške nisu očigledne i ne dovode do povrede prava zaštićenih Konvencijom[16]. Ova doktrina dodatno naglašava odgovornost domaćeg pravosudnog sistema da samostalno obezbijedi kvalitet svojih odluka, budući da se u velikom broju slučajeva neće naći pod spoljašnjom kontrolom ESLJP[17].

III STANDARDI KVALITETA SUDSKE ODLUKE

A. Pojam i indikatori kvaliteta

CCJE polazi od stava da visokokvalitetna sudska odluka jeste ona koja dolazi do ispravnog rezultata – u mjeri u kojoj to dostupni materijal sudiji/tkinji dozvoljava – i to na pravičan, brz, jasan i konačan način[18]. Prema Priručniku Savjeta Evrope o obrazloženju odluka u upravnom sporu (2024), kvalitet sudske odluke čine njene unutrašnje karakteristike (zakonitost odluke i ispravnost pravne analize) i spoljašnje karakteristike (jasnoća jezika, format, dužina, tehnička ispravnost), pri čemu se sve komponente odluke moraju sagledavati kao cjelina, budući da nije

[12] Magna Carta of European Judges, https://www.coe.int/en/web/ccje/magna-carta
[13] CCJE, Mišljenje br. 20 (2017), tačka 3.
[14] CEPEJ, Kontrolna lista za unapređenje kvaliteta pravosuđa i rada sudova, eng. Checklist for promoting the quality of justice and the courts (2008), Predgovor, str. 2–3.
[15] Priručnik o unapređenju kvaliteta sudskih odluka, Savjet Evrope, mart 2021, Sadržaj (poglavlja 1–5).
[16] Ibid, Uvod, str. 5–6, sa upućivanjem na ESLJP: García Ruiz protiv Španije [GC], § 28; Perez protiv Francuske [GC], § 82.
[17] Ibid, Uvod, str. 6.
[18] CCJE, Mišljenje br. 11 (2008), tačka 3.

moguće vještački odvojiti, na primjer, kvalitet obrazloženja od kvaliteta ocjene dokaza[19]. Kvalitet sudske odluke, međutim, ne zavisi isključivo od individualnog sudije/tkinje, već i od niza spoljašnjih faktora – kvaliteta zakonodavstva, adekvatnosti resursa pravosudnog sistema i kvaliteta pravnog obrazovanja[20]. CCJE u tom smislu preporučuje da nacionalni parlamenti prate uticaj zakonodavstva na pravosudni sistem, te da zakonodavstvo bude jasno i jednostavno za primjenu i usklađeno sa Konvencijom[21].

B. Obrazloženje kao centralni dio odluke

Obrazloženje predstavlja, prema jedinstvenom stavu CCJE, centralni dio svake sudske odluke, a njegov kvalitet u najvećoj mjeri određuje kvalitet odluke u cjelini[22]. Obaveza obrazlaganja ima dvostruku funkciju: s jedne strane, obavezuje sudiju/tkinju da svoje zaključivanje zasnuje na objektivnim argumentima i da odgovori na navode stranaka, čime odluka postaje razumljivija i prihvatljivija za stranke; s druge strane, predstavlja zaštitu od proizvoljnosti i omogućava društvu u cjelini da razumije funkcionisanje pravosudnog sistema[23].

Prema ustaljenoj praksi ESLJP, koja u ovom pogledu predstavlja neposredan izvor obavezujućeg prava za sve države članice Savjeta Evrope, sudovi nisu dužni da daju detaljan odgovor na svaki argument stranke, ali iz odluke mora jasno proizlaziti da su suštinska pitanja predmeta razmotrena i da je dat konkretan i jasan odgovor na argumente koji su odlučujući za ishod spora[24]. Sud će utvrditi povredu člana 6 stav 1 Konvencije, između ostalog, kada domaći sudovi zanemare konkretan, relevantan i važan argument koji je iznijela stranka[25], kao i u slučajevima kada se obrazloženje može kvalifikovati kao proizvoljno – bilo zato što obrazloženje uopšte nije dato, bilo zato što se zasniva na očigledno pogrešnom činjeničnom ili pravnom stavu suda, što dovodi do tzv. „uskraćivanja pravde"[26].

CCJE dodatno precizira sadržinske zahtjeve obrazloženja: ono mora biti dosljedno, jasno, nedvosmisleno i bez protivrečnosti, tako da omogući čitaocu/tetljki da prati lanac zaključivanja koji je sudiju/tkinju doveo do odluke[27]; mora odgovoriti na zahtjeve i navode stranaka, uključujući osnove tužbe i osnove odbrane[28]; mora sadržati ocjenu dopuštenosti, relevantnosti i dokazne snage izvedenih dokaza, kao i njihovu međusobnu povezanost[29]; i mora sadržati upućivanje na relevantne odredbe Ustava, nacionalnog, evropskog i međunarodnog prava, kao

[19]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu: značaj pravnog obrazloženja odluka, Savjet Evrope, decembar 2024, str. 19
[20]CCJE, Mišljenje br. 11 (2008), tačka 10.
[21]CCJE, Mišljenje br. 11 (2008), tačka 12.
[22]CCJE, Mišljenje br. 11 (2008), tačka 34; Priručnik (2021), Izvršni rezime, tačka 6.
[23]CCJE, Mišljenje br. 11 (2008), tačka 35.
[24]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspekt); eng. Guide on Article 6 (criminal limb), §§ 201–202, sa upućivanjem na Moreira Ferreira protiv Portugala (br. 2) [GC], 2017, § 84; Van de Hurk protiv Holandije, 1994, § 61; Boldea protiv Rumunije, 2007, § 30.
[25]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspect); eng. Guide on Article 6 (criminal limb), § 202, sa upućivanjem na Nechiporuk i Yonkalo protiv Ukrajine, 2011, § 280.
[26]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspekt); eng. Guide on Article 6 (criminal limb), § 203, sa upućivanjem na Moreira Ferreira protiv Portugala (br. 2) [GC], 2017, § 85.
[27]CCJE, Mišljenje br. 11 (2008), tačka 36.
[28]CCJE, Mišljenje br. 11 (2008), tačke 38–39.
[29]CCJE, Mišljenje br. 11 (2008), tačke 42–43.

i, gdje je to prikladno, na relevantnu sudsku praksu[30]. Obrazloženje pritom ne mora biti dugačko – potrebno je postići ravnotežu između sažetosti i razumljivosti odluke[31].

C. Jasnoća jezika i struktura odluke

Sve sudske odluke moraju biti razumljive, sastavljene jasnim i jednostavnim jezikom, kao preduslov da ih razumiju stranke u postupku i opšta javnost[32]. Iako se svakom sudiji/tkinji ostavlja sloboda izbora ličnog stila izlaganja, CCJE preporučuje da pravosudni organi sastave zbirku dobrih praksi radi olakšavanja izrade odluka[33]. Priručnik posebno naglašava međuzavisnost pravnog pisanja i pravnog rezonovanja: sudijsko pisanje je, za razliku od „predviđajućeg" pisanja advokata/ice (kojim se unaprijed procjenjuje kakav bi ishod spora sud vjerovatno donio, radi savjetovanja klijenta – za razliku od persuazivnog pisanja kojim se sudu argumentuje u korist klijenta), po svojoj prirodi objektivno i neutralno, jer treba da obrazloži ocjenu činjenica i dokaza u skladu sa primjenjivim pravnim okvirom, u potpuno nepristrasnom i objektivnom maniru[34].

D. Izvršivost odluke

Pravo na pravično suđenje iz člana 6 Konvencije, kako ga tumači ESLJP, ne podrazumijeva samo donošenje odluke u razumnom roku, već i njeno efektivno izvršenje u korist stranke koja je uspjela u sporu, budući da Konvencija ne uspostavlja teorijsku, već praktičnu i djelotvornu zaštitu prava[35]. Izreka odluke mora, prema tome, biti formulisana jasno i nedvosmisleno, bez mogućnosti različitog tumačenja obaveza, sankcija ili naloga koje sadrži[36].

E. Granice i metode evaluacije kvaliteta

CCJE upozorava da se kvalitet sudskih odluka ne može u potpunosti ocijeniti isključivo statističkim metodama (brojem predmeta, dužinom trajanja postupka, brojem izjavljenih žalbi na odlue sudova u prvom stepenu), već da iste moraju biti dopunjene metodama usmjerenim na ocjenu unutrašnje strukture odluke i usklađenosti njenog obrazloženja sa standardima Konvencije[37]. Svaka evaluacija se mora zasnivati prije svega na osnovnim načelima Konvencije, a ne isključivo na ekonomskim ili menadžerskim kriterijumima, i ne smije dovoditi u pitanje nezavisnost sudstva, niti se poistovjećivati sa ocjenom stručnosti pojedinačnog sudije/tkinje za druge svrhe[38]. CCJE podržava kombinovanje metoda samoevaluacije sudija/tkinje, evaluacije od strane viših sudova kroz praksu po pravnim ljekovima, kao i učešće spoljnih aktera

[30] CCJE, Mišljenje br. 11 (2008), tačka 44.
[31] CCJE, Mišljenje br. 11 (2008), tačka 40.
[32] CCJE, Mišljenje br. 11 (2008), tačka 32.
[33] CCJE, Mišljenje br. 11 (2008), tačka 33.
[34] Priručnik (2021), Uvod, str. 7.
[35] CCJE, Mišljenje br. 11 (2008), tačka 54.
[36] CCJE, Mišljenje br. 11 (2008), tačka 55(i).
[37] CCJE, Mišljenje br. 11 (2008), tačka 58; Priručnik (2021), Izvršni rezime, tačka 3.
[38] CCJE, Mišljenje br. 11 (2008), tačke 59–62.

(advokata/ica, tužilaca/teljki, akademske zajednice), pod uslovom punog poštovanja nezavisnosti sudstva[39].

IV STANDARD JEDINSTVENE PRIMJENE PRAVA

A. Značaj jedinstvene primjene prava

Jedinstvena primjena prava, prema CCJE Mišljenju br. 20, predstavlja neposrednu posljedicu načela jednakosti pred zakonom, dok razmatranja pravne sigurnosti i predvidljivosti čine sastavni dio vladavine prava[40]. U državi zasnovanoj na vladavini prava, građani i građanke opravdano očekuju da će biti tretirani jednako kao i drugi i da se mogu osloniti na prethodne odluke u uporedivim predmetima kako bi predvidjeli pravne posljedice svojih postupaka[41]. Postojanje protivrječnih sudskih odluka može stvoriti stanje pravne nesigurnosti koje umanjuje povjerenje javnosti u pravosudni sistem – jedan od suštinskih elemenata države zasnovane na vladavini prava[42].

B. Sudska praksa kao izvor prava

CCJE konstatuje da, bez obzira na to da li se sudska praksa smatra izvorom prava ili ne, odnosno da li su obavezujući ili ne, pozivanje na prethodne odluke predstavlja moćan instrument za sudije/tkinje, kako u sistemima precedentnog prava, tako i u sistemima kontinentalnog prava[43]. Dok u sistemima precedentnog prava odluke viših sudova formalno obavezuju, u sistemima kontinentalnog prava sudijska nezavisnost tradicionalno se tumači tako da sudije/tkinje, u donošenju odluka, obavezuje isključivo ustav, međunarodni ugovori i zakon, a ne sudske odluke donešene u sličnim predmetima[44]. Uprkos tome, CCJE primjećuje da se, u praksi, sudije u zemljama kontinentalnog prava rukovode sudskom praksom, naročito praksom najviših sudova, čiji zadatak obuhvata i obezbjeđenje jedinstvenosti sudske prakse, tako da se odlukama vrhovnih sudova, iz te perspektive, može pripisati šire dejstvo od samog konkretnog predmeta – što ih legitimno svrstava u izvore prava u širem smislu[45].

C. Mehanizmi obezbjeđenja jedinstvenosti sudske prakse

CCJE razlikuje formalne, polu-formalne i neformalne mehanizme ujednačavanja sudske prakse[46].Formalni postupci pred apelacionim, a naročito vrhovnim odnosno kasacionim sudovima, imaju najneposredniji uticaj na obezbjeđivanje ujednačenog tumačenja i primjene

[39]CCJE, Mišljenje br. 11 (2008), tačke 70–71.
[40]CCJE, Mišljenje br. 20 (2017), tačka 5.
[41]Isto.
[42]CCJE, Mišljenje br. 20 (2017), tačka 6, sa upućivanjem na ESLJP, Vinčić i drugi protiv Srbije, br. 44698/06, 1. decembar 2009.
[43]CCJE, Mišljenje br. 20 (2017), tačka 10.
[44]CCJE, Mišljenje br. 20 (2017), tačka 11.
[45]CCJE, Mišljenje br. 20 (2017), tačke 12–13.
[46]CCJE, Mišljenje br. 20 (2017), tačka 15.

prava. Kako ističe CCJE u Mišljenju br. 20, među takvim mehanizmima naročito se izdvajaju odlučivanje o pravnim ljekovima pojedinačnih stranaka, uključujući reviziju i kasaciju, posebni pravni ljekovi koje podnosi državni tužilac radi obezbjeđivanja jedinstvene primjene prava, davanje načelnih pravnih stavova i mišljenja od strane najviših sudova, kao i mehanizmi kojima niži sudovi upućuju pravna pitanja višem sudu radi njihovog prethodnog razjašnjenja u okviru konkretnog postupka[47]. Polu-formalni mehanizmi obuhvataju redovne sastanke sudija/tkinja istog ili različitih sudova, kao i izdavanje smjernica koje skreću pažnju na primjenjiva pravna načela u skladu sa ustaljenom sudskom praksom[48]. Neformalni mehanizmi, poput neformalnih konsultacija između sudija/tkinja i kontinuiranog pravnog usavršavanja i obrazovanja, takođe doprinose jedinstvenosti i predvidljivosti sudske prakse[49].

Prvenstvenu ulogu u razrješavanju kontradiktornosti sudske prakse ima Vrhovni sud, koji mora obezbijediti jedinstvenost sudske prakse kako bi ispravio nedosljednosti i time očuvao povjerenje javnosti u pravosudni sistem[50]. CCJE pritom naglašava da odgovornost Vrhovnog suda za obezbjeđenje jedinstvenosti sudske prakse ne treba tumačiti kao obavezu da Vrhovni sud interveniše što je češće moguće, budući da bi takav pristup, pored usporavanja rada Vrhovnog suda i umanjenja kvaliteta njegovog odlučivanja, neizbježno doveo i do protivrečnosti unutar prakse samog Suda[51]. Postojanje mehanizama za obezbjeđenje jedinstvenog postupanja unutar samog Vrhovnog suda (npr. upućivanje predmeta Opštoj sjednici Suda) od posebnog je značaja, budući da je naročito problematično kada Vrhovni sud sam postane izvor nesigurnosti i kontradiktorne prakse, umjesto da obezbjeđuje njenu ujednačenost[52]. Apelacioni sudovi takođe imaju važnu ulogu u obezbjeđivanju jedinstvene primjene prava, naročito u sistemima u kojima je pristup vrhovnom sudu ograničen i podliježe posebnim uslovima dopuštenosti pravnih ljekova, , čime apelacioni sudovi u praksi, u skladu sa svojom nadležnošću, postaju najviša instanca za većinu predmeta[53].

Postojanje specijalizovanih sudova na nižem nivou samo po sebi ne mora imati značajne negativne posljedice po jedinstvenost sudske prakse, ukoliko na vrhu strukture pravosuđa postoji jedan vrhovni sud opšte nadležnosti; međutim, ukoliko postoji više „vrhovnih" sudova ili više sudskih instanci koje imaju nadležnost da u konačnom odlučuju o istim ili srodnim pravnim pitanjima, to može prouzrokovati probleme u pogledu jedinstvene primjene prava, zbog čega je od suštinskog značaja da domaće pravo predvidi formalne ili neformalne mehanizme za prevazilaženje nedosljednosti između takvih nezavisnih vrhovnih sudova[54].

CCJE dodatno razmatra dva specifična instrumenta. Prvi su **obavezujuća tumačenja in abstracto** (npr. „odluke o jedinstvenosti", načelni pravni stavovi), koja se donose nezavisno od bilo kog konkretnog spora i bez mogućnosti da stranke i njihovi zastupnici iznesu svoje

[47] CCJE, Mišljenje br. 20 (2017), tačka 16.
[48] CCJE, Mišljenje br. 20 (2017), tačka 17.
[49] CCJE, Mišljenje br. 20 (2017), tačka 18.
[50] CCJE, Mišljenje br. 20 (2017), tačka 20, sa upućivanjem na ESLJP, Albu i drugi protiv Rumunije, br. 34796/09, 12. maj 2012.
[51] CCJE, Mišljenje br. 20 (2017), tačka 23.
[52] CCJE, Mišljenje br. 20 (2017), tačka 24.
[53] CCJE, Mišljenje br. 20 (2017), tačka 26.
[54] CCJE, Mišljenje br. 20 (2017), tačka 27.

argumente; iako CCJE priznaje da takvi instrumenti mogu imati pozitivan uticaj na ujednačenosti sudske prakse i pravnu sigurnost, oni istovremeno otvaraju pitanja u pogledu ustavne uloge sudstva u sistemu podjele vlasti[55]. Drugi je **institut prethodnog pitanja**, kojim niži sud, u okviru već pokrenutog postupka, upućuje pitanje povodom tumačenja prava vrhovnom sudu, čime se mogu spriječiti buduća razilaženja u praksi, iako takav mehanizam nosi i rizik od preuranjenog, autoritativnog odgovora koji može otežati dalji razvoj prava[56].

D. Odstupanje od ustaljene sudske prakse

Potreba za obezbjeđenjem jedinstvene primjene prava ne smije voditi ka rigidnosti, niti neopravdano ograničavati pravilan razvoj prava koji prati društvene i druge relevantne okolnosti, niti dovoditi u pitanje načelo sudijske nezavisnosti[57]. Razvoj sudske prakse sam po sebi nije suprostavljen principima djelotvornog i kvalitetnog ostvarivanja pravde, budući da bi propust da se sudska praksa razvija i prilagođava predstavljao rizik po reformu i unapređenje prava, kao i po same principe pravičnosti[58]. Kada sudodluči da odstupi od prethodne sudske prakse, to mora biti jasno navedeno u odluci: iz obrazloženja mora proizlaziti da je sudija/tkinja znao da je ustaljena sudska praksa u pogledu relevantnog pitanja bila drugačija, uz detaljno objašnjenje zašto prethodno usvojeni stav nije pravno održiv u konkretnom predmetu, čime se omogućava autentičan razvoj prava [59]. Samo na taj način moguće je utvrditi da li je odstupanje bilo proizvod slobodnog sudijskog uvjerenja ili je sud jednostavno zanemario prethodnu relevantnu sudsku praksu ili sa istom nije bio upoznat,. Nepoštovanje ovog zahtjeva može se smatrati arbitrarnim, čime se povređuje Konvencijom zajemčeno pravo na pravično suđenje[60].

E. Objavljivanje i izvještavanje o sudskoj praksi

Adekvatan sistem praćenja i izvještavanja o sudskoj praksi predstavlja preduslov za obezbjeđenje jedinstvene primjene prava. U najmanju ruku, odluke vrhovnih i apelacionih sudova treba da budu objavljene kako bi bile poznate ne samo strankama u konkretnom predmetu, već i drugim sudovima, advokatima, tužiocima, akademskoj zajednici i široj javnosti, omogućavajući im da se na njih pozivaju u budućim predmetima[61]. CEPEJ Kontrolna lista, u segmentu posvećenom „pravnoj sigurnosti" (dio II.3), postavlja pitanje da li postoji politika unapređenja pravne sigurnosti i da li postoje konkretni instrumenti koji se koriste u tu svrhu, poput internog sistema praćenja sudske prakse ili organizovanja sastanaka radi razmatranja relevantne prakse – čime ovaj operativni instrument neposredno prevodi standard CCJE u mjerljive indikatore na nivou pojedinačnih suda i sudskog sistema u cjelini[62].

[55]CCJE, Mišljenje br. 20 (2017), tačka 28.
[56]CCJE, Mišljenje br. 20 (2017), tačka 29.
[57]CCJE, Mišljenje br. 20 (2017), tačka 30.
[58]CCJE, Mišljenje br. 20 (2017), tačka 30, sa upućivanjem na ESLJP, Şahin i Şahin protiv Turske [GC], br. 13279/05, 20. oktobar 2011, § 58.
[59]CCJE, Mišljenje br. 20 (2017), tačka 32; CCJE, Mišljenje br. 11 (2008), tačka 49.
[60]CCJE, Mišljenje br. 20 (2017), tačka 32, sa upućivanjem na predmet Brezovic protiv Hrvatske, ESLJP.
[61]CCJE, Mišljenje br. 20 (2017), tačka 40.
[62]CEPEJ, Checklist (2008), Dio II „Job and operational process", odjeljak II.3 „Legal certainty".

F. Odgovornost sve tri grane vlasti i uloga pravnih profesija

CCJE naglašava da pojam jedinstvene primjene prava nije relevantan samo za sudsku vlast, već za sve organe države – zakonodavnu, izvršnu i sudsku – koji su međusobno povezani i zavisni, budući da svi imaju obavezu da podstiču razvoj koherentnih pravnih pravila i njihovu dosljednu primjenu[63]. Zakon mora biti, u najvećoj mogućoj mjeri, jasan, predvidljiv i logičan, a zakonodavac mora voditi računa o sudskoj praksi razvijenoj u oblastima u kojima se vrši izmjene zakona; česte, ponekad nekoherentne i hitne izmjene normativnog okvira nepovoljno utiču na kvalitet zakonodavstva i pravnu sigurnost, dok nejasno formulisani zakoni predstavljaju jedan od uzroka kontradiktorne sudske prakse, za čije je otklanjanje, u krajnjoj liniji, odgovoran zakonodavac[64].

Istovremeno, i advokati/ce i javni tužioci/teljke imaju važnu ulogu u obezbjeđenju jedinstvene primjene prava, budući da bi trebalo da vrše odgovarajuće istraživanje sudske prakse i iznose argumente o primjenjivosti, odnosno neprimjenjivosti prethodnih odluka[65]. Internacionalizacija prava, najzad, predstavlja dodatan izazov za obezbjeđenje jedinstvenosti primjene prava između različitih država, zbog čega je potrebno posvetiti dužnu pažnju potrebi jedinstvene primjene međunarodnih ugovora u svim državama ugovornicama, izbjegavajući kontradiktornosti između nacionalnog prava i međunarodnih ugovora, bez obzira na to da li država pripada monističkom ili dualističkom sistemu[66].

V VEZA IZMEDU DOSLJEDNOSTI SUDSKE PRAKSE I PRAVA NA PRAVIČNO SUDENJE (ČLAN 6 EKLJP)

ESLJP je razvio jasan stav prema kojem, iako se izvjesna razilaženja u tumačenju mogu prihvatiti kao svojstveno obilježje svakog pravosudnog sistema zasnovanog na mreži sudova, pod određenim okolnostima protivrječne odluke domaćih sudova – naročito sudova najviše instance – mogu predstavljati povredu zahtjeva pravičnog suđenja iz člana 6 stav 1 Konvencije[67]. Pri toj ocjeni potrebno je utvrditi: **(1)** da li postoje „duboke i dugotrajne razlike" u sudskoj praksi domaćih sudova; **(2)** da li domaće pravo predviđa mehanizam za prevazilaženje takvih nedosljednosti; **(3)** da li je taj mehanizam primijenjen; i **(4)** sa kojim pravnim dejstvom[68]. Ovaj test, prvobitno razvijen u predmetu Nejdet Şahin i Perihan Şahin protiv Turske, dosledno

[63]CCJE, Mišljenje br. 20 (2017), tačka 44.
[64]CCJE, Mišljenje br. 20 (2017), tačke 44–46.
[65]CCJE, Mišljenje br. 20 (2017), tačka 47.
[66]CCJE, Mišljenje br. 20 (2017), tačka 48.
[67]CCJE, Mišljenje br. 20 (2017), tačka 9; ESLJP, Guide on Article 6 (criminal limb), § 285.
[68]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspekt); eng. Guide on Article 6 (criminal limb), § 286, sa upućivanjem na Nejdet Şahin i Perihan Şahin protiv Turske [GC], br. 13279/05, 20. oktobar 2011, § 53, i Borg protiv Malte, 2016, § 108.

se primjenjuje i u predmetima koji se odnose na države regiona, uključujući predmet Tomić i drugi protiv Crne Gore[69].

Načelo pravne sigurnosti pritom jemči izvjesnu stabilnost pravnih situacija i doprinosi povjerenju javnosti u sudove, ali ne predstavlja apsolutno pravo na dosljednost sudske prakse: zahtjevi pravne sigurnosti i zaštite legitimnih očekivanja javnosti ne daju stečeno pravo na nepromjenljivost sudske prakse, budući da bi propust da se održi dinamičan i evolutivan pristup mogao ugroziti reformu ili unapređenje prava[70]. Iz ovoga proizlazi **jedno od centralnih metodoloških pravila ove analize**: standard koji se ovdje razmatra ne zahtijeva okamenjenu sudsku praksu, već obrazloženu, transparentnu i predvidljivu praksu.

VI DOPUNSKI STANDARD: KVALITET ZAKONA I PREDVIDLJIVOST PREMA ČLANOVIMA 8. I 10. EKLJP

Zahtjev da miješanje javne vlasti u prava zaštićena čl. 8 i 10 Konvencije bude „propisano zakonom", odnosno „u skladu sa zakonom", ne iscrpljuje se u postojanju formalnog pravnog osnova u domaćem pravu, već obuhvata i pristupačnost i kvalitet tog prava[71]. Prema ustaljenoj praksi ESLJP, norma se ne može smatrati „zakonom" ukoliko nije formulisana sa dovoljnom preciznošću koja građaninu/ki omogućava da – po potrebi uz odgovarajući savjet – predvidi, u razumnoj mjeri, posljedice koje određena radnja može izazvati; pri tome se ne zahtijeva apsolutna izvjesnost, budući da bi ona neizbježno dovela do prekomjerne rigidnosti prava[72]. Ocjenjujući predvidljivost zakona, Sud istovremeno ispituje i njegov kvalitet, kako u pogledu jasnoće tako i u pogledu preciznosti[73].

Ovaj zahtjev direktno je povezan sa dosljednošću sudske prakse: kada ocjenjuje da li je primjenjivo pravo predvidljivo u svojim posljedicama i da li omogućava pojedincu da uskladi svoje ponašanje s njim, ESLJP može biti suočen upravo sa situacijom razilaženja u sudskoj praksi različitih sudova istog stepena nadležnosti[74]. Na taj način, standard „propisanosti zakonom" iz čl. 8–11 Konvencije i standard obrazloženog i doslednog suđenja iz člana 6 Konvencije međusobno se dopunjuju i objedinjuju u jedinstven zahtjev: da državna vlast, uključujući sudsku, postupa na način koji je unaprijed poznat, jasan, dosledan i predvidljiv za građanina.

[69]CCJE, Mišljenje br. 20 (2017), fusnota 4 uz tačku 8, sa upućivanjem na ESLJP, Tomić i drugi protiv Crne Gore, br. 18650/09 i dr., 17. april 2012.
[70]ESLJP, Vodič kroz član 6 Konvencije – pravo na pravično suđenje (krivično-pravni aspekt); eng. Guide on Article 6 (criminal limb), § 285, sa upućivanjem na Borg protiv Malte, br. 37537/13, 12. januar 2016, § 107.
[71]ESLJP, Guide on Article 10, § 80; Guide on Article 8, § 500, sa upućivanjem na Silver i drugi protiv Ujedinjenog Kraljevstva, 1983, § 87.
[72]ESLJP, Guide on Article 10, §§ 75, 79, sa upućivanjem na Perinçek protiv Švajcarske [GC], 2015, §§ 131, 135.
[73]ESLJP, Guide on Article 10, § 80.
[74]ESLJP, Guide on Article 8, § 558, sa upućivanjem na Klaus Müller protiv Njemačke, br. 24173/18, 19. novembar 2020, §§ 54–60.

VII SINTEZA I METODOLOŠKI OKVIR ZA DALJU ANALIZU

Iz izloženog proizlazi da standardi Savjeta Evrope kvalitet pravosuđa posmatraju kao jedinstvenu cjelinu sastavljenu od dva neodvojiva elementa: **kvaliteta pojedinačne sudske odluke** – prije svega kvaliteta njenog obrazloženja, ocjene dokaza i jasnoće jezika – i **dosljednosti**, odnosno jedinstvenosti sudske prakse kroz vrijeme i između sudova istog ili različitog stepena nadležnosti. Oba elementa proizlaze iz istog izvora – garancija prava na pravično suđenje iz člana 6 Konvencije i opšteg načela pravne sigurnosti koji se dodatno konkretizuju kroz zahtjev da svako ograničenje konvencijskog prava bude „propisano zakonom" iz čl. 8–11 Konvencije, kad god se sudskom praksom tumači ili primjenjuje pravna norma kojom se ograničavaju ta prava.

Ovaj okvir – sistematizovan kroz CCJE mišljenja br. 11 i 20, operativne instrumente CEPEJ i praksu ESLJP – predstavlja polazni analitički instrumentarij za dalje faze analize u okviru projekta CLEAR-JUST, u kojima će se navedeni standardi primijeniti kao mjerilo za ocjenu stanja u pogledu obrazloženosti sudskih odluka i dosljednosti sudske prakse u Crnoj Gori i Srbiji, u skladu sa **specifičnim ciljevima projekta** – podizanjem kvaliteta sudskog rezonovanja i pravne sigurnosti (SO1) i jačanjem dosljednosti i harmonizacije sudske prakse (SO2).

VIII OD EVROPSKOG STANDARDA DO NACIONALNOG OKVIRA: CRNA GORA I SRBIJA

Normativni okvir izložen u prethodnim djelovima ove analize nije samostalno primjenjiv pred nacionalnim sudom: CCJE mišljenja predstavljaju „meko pravo" bez neposredne obavezujuće snage, a i sama Konvencija svoje pune učinke ostvaruje tek posredstvom nacionalnog prava, koje standard propisanosti zakonom, obaveze obrazlaganja i jedinstvene primjene prava mora da inkorporira u vlastiti ustavni i zakonodavni poredak, kao i kroz izvršenje presuda ESLJP[75].

Projekat CLEAR-JUST ovaj standard analizira paralelno u dva nacionalna konteksta – Crne Gore i Srbije – koji dijele zajedničko istorijsko porijeklo pravnih sistema, pripadaju istoj kontinentalnoj pravnoj tradiciji i, u pregovorima o pristupanju Evropskoj uniji, prolaze kroz srodan proces reforme pravosuđa u okviru Poglavlja 23 (Pravosuđe i osnovna prava), koje kao jedno od ključnih mjerila upravo postavlja jačanje nezavisnosti, odgovornosti, nepristrasnosti i kvaliteta pravosuđa, uključujući dosljednost sudske prakse[76]. Paralelno posmatranje dva srodna, ali normativno i funkcionalno samostalna pravosudna sistema omogućava da se standard iz

[75] V. dio II ove analize; up. CCJE, Mišljenje br. 20 (2017), tačka 44, o odgovornosti svih grana vlasti, uključujući zakonodavnu, za koherentnost pravnih pravila i njihove primjene.
[76] Evropska komisija, Metodologija proširenja EU (2020) i godišnji izvještaji o Crnoj Gori i Srbiji u okviru Poglavlja 23 – Pravosuđe i osnovna prava; up. CEDEM/JUREC, Prijava projekta CLEAR-JUST, Annex A1 Application Form 2025, tačka 2.1 „Background".

prvog dijela ove analize ne primijeni mehanički, već uporedno – uočavajući gdje se normativna i institucionalna rješenja podudaraju, gdje odstupaju, te gdje jedno rješenje može pružiti koristan osnov za unapređenje ili bolje razumijevanje drugog sistema.

Metodološki, analiza nacionalnih okvira prati istu strukturu za obje države: najprije se izlaže ustavni i institucionalni okvir sudstva, sa posebnim osvrtom na položaj najvišeg suda i tijela nadležnog za nezavisnost sudstva; zatim se ispituje na koji način procesno zakonodavstvo – u parničnom, krivičnom, upravnom i ustavnosudskom postupku – određuje sadržinu obaveze obrazlaganja odluka i predviđa korektivne mehanizme za otklanjanje nedostataka u pogledu kvaliteta odluka i neujednačene sudske prakse; potom se razmatraju institucionalni mehanizmi namijenjeni obezbjeđivanju jedinstvene primjene prava; i, najzad, ispituje se da se li i na koji način se kvalitet obrazloženja odluka uzima u obzir prilikom ocjenjivanja rada sudija.

DRUGI DIO

NACIONALNI NORMATIVNI OKVIR: CRNA GORA

ustavni i zakonodavni okvir Crne Gore u oblasti kvaliteta sudskih odluka i jedinstvene primjene prava

IX USTAVNI OKVIR CRNE GORE

A. Pravo na pravično suđenje i pravni lijek

Ustav Crne Gore,[77] usvojen od strane Ustavotvorne skupštine Republike Crne Gore 19. oktobra 2007. godine i proglašen 22. oktobra 2007. godine, sa izmjenama i dopunama usvojenim 31. jula 2013. godine i 26. avgusta 2026. godine, evropske standarde koji se odnose na obrazloženo i dosljedno sudsko odlučivanje neposredno ugrađuje u normativni sadržaj dva temeljna prava.. Prvo je **pravo na pravni lijek**: „Svako ima pravo na pravni lijek protiv odluke kojom se odlučuje o njegovom pravu ili na zakonu zasnovanom interesu"[78]. Drugo, i za ovu analizu centralno, jeste **pravo na pravično suđenje** iz člana 32: „Svako ima pravo na pravično i javno suđenje u razumnom roku pred nezavisnim, nepristrasnim i zakonom ustanovljenim sudom"[79] – formulacija koja u bitnom preuzima standard sadržan u članu 6 stav 1 Konvencije, razmotren u dijelu II ove analize, čime se garancije pravičnog suđenja u crnogorskom ustavnom poretku uspostavljaju kao neposredno primjenjiva ustavna prava. .

B. Načela sudstva i javnost suđenja

Ustavna načela koja uređuju organizaciju i vršenje sudske vlasti neposredno predstavljaju normativni temelj za ostvarivanje standarda kvaliteta sudskih odluka, razrađenog u dijelu III ove analize: sud je samostalan i nezavisan, sudi na osnovu Ustava, zakona i potvrđenih i objavljenih međunarodnih ugovora, a osnivanje prijekih i vanrednih sudova je zabranjeno[80]. Raspravu pred sudom i javno izricanje presuda Ustav postavlja kao pravilo, dopuštajući isključenje javnosti samo izuzetno i u obimu koji je neophodan u demokratskom društvu – radi zaštite morala, javnog reda, prava i interesa maloljetnih lica, privatnog života stranaka, bračnih sporova, staranja i usvojenja, ili čuvanja tajne i bezbjednosti Crne Gore[81], što odgovara ograničenjima koja u pogledu javnosti suđenja dopušta i sam član 6 stav 1 Konvencije.

C. Vrhovni sud i ustavna osnova jedinstvene primjene zakona

Standard jedinstvene primjene prava, razrađen u CCJE Mišljenju br. 20, u crnogorskom pravnom poretku ima izričitu ustavnu osnovu. Član 124 Ustava određuje: „Vrhovni sud je najviši sud u Crnoj Gori. Vrhovni sud obezbjeđuje jedinstvenu primjenu zakona od strane sudova"[82]. Ovom odredbom uloga koju CCJE opisuje kao prvenstvenu odgovornost Vrhovnog suda za razrješavanje kontradiktornosti sudske prakse nije prepuštena isključivo unutrašnjoj organizaciji pravosuđa, već je uzdignuta na nivo izričite ustavne funkcije – što crnogorski okvir svrstava

[77] "Službeni list Crne Gore", broj 1/2007, 38/2013, 126/2026.
[78] Ustav Crne Gore, član 20.
[79] Ustav Crne Gore, član 32.
[80] Ustav Crne Gore, čl. 118–119.
[81] Ustav Crne Gore, član 120.
[82] Ustav Crne Gore, član 124 st. 1–2.

među one pravne sisteme u kojima obezbjeđenje jedinstvenosti sudske prakse predstavlja Ustavom utvrđen zadatak najvišeg suda, a ne tek posljedicu njegovog hijerarhijskog položaja.

Međutim, uprkos jasnom ustavnom razgraničenju nadležnosti, odnos Vrhovnog i Ustavnog suda predstavlja posebno složeno pitanje u Crnoj Gori, naročito imajući u vidu nadležnost Ustavnog suda da, odlučujući o ustavnoj žalbi, ukine pravosnažnu odluku Vrhovnog suda, kao najviše sudske instance u sistemu redovnog sudstva.

Ustav Crne Gore uspostavlja funkcionalno, a ne hijerarhijsko razgraničenje ove dvije institucije. Vrhovni sud je određen kao najviši sud u državi, sa nadležnošću da obezbjeđuje jedinstvenu primjenu zakona od strane sudova, dok je Ustavni sud samostalan i nezavisan organ čija je osnovna funkcija zaštita ustavnosti i zakonitosti i, između ostalog, odlučivanje o ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajemčenih Ustavom. Stoga se nadležnost Ustavnog suda po ustavnoj žalbi ne može tumačiti kao uspostavljanje njegove „više" instancione nadležnosti u odnosu na Vrhovni sud, već kao posebna ustavnopravna kontrola postupanja javne vlasti, uključujući sudsku vlast.

Istovremeno, ukidanje odluke Vrhovnog suda ne znači preuzimanje njegove funkcije niti ponovno odlučivanje o predmetu u svojstvu četvrte sudske instance. Ocjena činjenica, izvođenje i vrednovanje dokaza i tumačenje i primjena domaćeg prava, u načelu, pripadaju redovnim sudovima, dok je uloga ustavnog suda ograničena na ispitivanje da li su načinom odlučivanja ili ishodom postupka povrijeđena prava i slobode zajemčene Ustavom. Ipak, ta granica nije uvijek apsolutna: očigledno proizvoljno tumačenje ili primjena prava, nedostatak relevantnog i dostatnog obrazloženja, odstupanje od ustaljene sudske prakse bez opravdanog razloga ili druga arbitrarnost mogu poprimiti ustavnopravnu dimenziju i predstavljati povredu prava na pravično suđenje.

U tom smislu, normativni okvir treba posmatrati kroz princip funkcionalne komplementarnosti: Vrhovni sud obezbjeđuje jedinstvo i razvoj sudske prakse u okviru redovnog sudstva, dok Ustavni sud utvrđuje i štiti ustavne standarde ljudskih prava. Odluke Ustavnog suda donesene u postupku po ustavnoj žalbi imaju obavezujuće pravno dejstvo u skladu sa Ustavom i zakonom, zbog čega njihovo izvršenje podrazumijeva obavezu nadležnih sudova da otklone utvrđenu povredu, uz očuvanje njihove procesne i interpretativne autonomije u ponovnom odlučivanju.

Ključni izazov stoga leži u obezbjeđivanju jasne granice između ustavnosudske kontrole i redovne sudske revizije, kao i u razvoju djelotvornog institucionalnog dijaloga u funkciji zaštite ljudskih prava i pravne sigurnosti.

I prema praksi ESLJP, zadatak Ustavnog suda nije da preispituje zaključke redovnih sudova u pogledu činjeničnog stanja i primjene materijalnog prava)Pronina protiv Ukrajine, predstavka br.63566/00 od 25. oktobra 2000. godine), niti da supstituiše rad redovnih sudova u procjeni činjenica i dokaza, niti da kao sud „četvrte instance" ponovo razmatra žalbene navode koji su u cjelosti razmotreni u postupcima pred redovnim sudovima.

D. Sudski savjet kao „čuvar" nezavisnosti pravosuđa

Institucionalnu nezavisnost sudstva, kao preduslov nepristrasnog i kvalitetnog suđenja, Ustav povjerava Sudskom savjetu – „samostalnom i nezavisnom organu koji obezbjeđuje nezavisnost i samostalnost sudova i sudija"[83]. Shodno ustavnim amandmanima, usvojenim u avgustu 2026. godine, Sudski savjet ima predsjednika i devet članova, i to: predsjednika Vrhovnog suda Crne Gore, pet sudija koje bira i razrješava Konferencija sudija; četiri ugledna pravnika koje bira i razrješava Skupština Crne Gore na predlog nadležnog radnog tijela Skupštine po raspisanom javnom pozivu. Predsjednik Sudskog savjeta bira Sudski savjet iz reda svojih članova koji nisu nosioci sudijske funkcije, dvotrećinskom većinom glasova članova Sudskog savjeta.[84]. Shodno navedenim amandmanima, a u skladu sa preporukama Grupe država Savjeta Evrope protiv korupcije (GRECO), ministar pravde više nije član Sudskog savjeta. Sudski savjet bira i razrješava sudije/tkinje, predsjednike/ce sudova, utvrđuje prestanak sudijske funkcije i broj sudija, razmatra izvještaje o radu sudova, pritužbe na rad sudova i odlučuje o imunitetu sudije/tkinje[85].

E. Zakonitost akata i ustavna žalba

Načelo zakonitosti, koje CCJE i ESLJP povezuju sa zahtjevom predvidljivosti i pravne sigurnosti, Ustav izražava kroz zahtjev da zakon bude saglasan sa Ustavom i potvrđenim međunarodnim ugovorima, drugi propis saglasan sa Ustavom i zakonom, a pojedinačni pravni akt saglasan sa zakonom[86]. Zaštita ovih zahtjeva na individualnom nivou obezbjeđuje se kroz mehanizam ustavne žalbe: Ustavni sud odlučuje „o ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajamčenih Ustavom, nakon iscrpljivanja svih djelotvornih pravnih sredstava"[87], čime se, uz redovne pravne ljekove pred Vrhovnim sudom i Apelacionim sudom, uspostavlja poseban, ustavnopravni mehanizam zaštite od proizvoljnih ili neobrazloženih sudskih odluka.

X OBAVEZA OBRAZLOŽENJA SUDSKE ODLUKE U PROCESNOM ZAKONODAVSTVU

A. Parnični postupak

Zakon o parničnom postupku Crne Gore[88] sadržinu obrazloženja presude propisuje na način koji gotovo doslovno odgovara zahtjevima koje CCJE postavlja u Mišljenju br. 11. Prema članu 347, pisano izrađena presuda mora imati uvod, izreku, obrazloženje i uputstvo o pravu na pravni lijek, a u obrazloženju će sud izložiti „zahtjeve stranaka, činjenice koje su iznijele i dokaze koje

[83] Ustav Crne Gore, član 126.
[84] Ustav Crne Gore, član 127.
[85] Ustav Crne Gore, član 128.
[86] Ustav Crne Gore, čl. 145 i 148.
[87] Ustav Crne Gore, član 149 stav 1 tačka 3.
[88] Zakon o parničnom postupku, „Službeni list RCG", br. 22/04 od 2. aprila 2004, i „Službeni list CG", br. 28/05, 76/06, 73/10, 47/15 i 48/15.

su predložile, koje je od tih činjenica utvrđivao, zašto i kako ih je utvrdio, a ako ih je utvrdio dokazivanjem, koje dokaze je izveo i kako ih je ocijenio", uz obavezu da posebno navede koje je odredbe materijalnog prava primijenio[89]. Zakonom propisan instruktivni rok za izradu presude je 30 dana od zaključenja glavne rasprave, uz obavezu sudije/tkinje da predsjednika/cu suda pisano obavijesti o razlozima prekoračenja tog roka[90].

B. Krivični postupak

Zakonik o krivičnom postupku[91] sadržinu obrazloženja krivične presude uređuje još detaljnije. Prema članu 379, presuda mora imati uvod, izreku i obrazloženje, pri čemu će sud u obrazloženju „iznijeti razloge za svaku tačku presude", određeno i potpuno navesti koje činjenice i iz kojih razloga uzima kao dokazane ili nedokazane, „dajući pri tome naročito ocjenu vjerodostojnosti protivrječnih dokaza", iz kojih razloga nije uvažio pojedine predloge stranaka i kojim razlozima se rukovodio prilikom rješavanja pravnih pitanja[92]. Ako je optuženi sudskom presudom oglašen krivim za izvršenje krivičnog djela za koje je bio optužen, zakon dodatno zahtijeva da se u obrazloženju posebno navedu okolnosti koje je sud uzeo u obzir prilikom odmjeravanja kazne[93].

C. Upravni spor

Zakon o upravnom sporu[94] propisuje da presuda kojom sud odlučuje o zakonitosti upravnog akta sadrži „izreku i obrazloženje koje mora biti odvojeno od izreke", dok rješenje sadrži obrazloženje samo kada je to potrebno[95]. Ovim se, u oblasti upravnosudske zaštite, dosljedno primjenjuje isti standard obavezne obrazloženosti izreke koji važi u parničnom i krivičnom postupku.

D. Vanparnični postupak

Zakon o vanparničnom postupku[96] predviđa da se u ovoj vrsti postupka odluke po pravilu donose u obliku rješenja, ali da „rješenje protiv koga je dozvoljena posebna žalba i rješenje drugostepenog suda mora biti obrazloženo"[97], pri čemu se, kad zakonom nije drugačije određeno, shodno primjenjuju odredbe Zakona o parničnom postupku, uključujući i standard sadržine obrazloženja izložen u tački A ovog dijela[98].

[89] Zakon o parničnom postupku, član 347 st. 1 i 4.
[90] Zakon o parničnom postupku, član 340.
[91] Zakonik o krivičnom postupku, „Službeni list CG", br. 57/2009, 49/2010, 47/2014 – Odluka US CG, 2/2015 – Odluka US CG, 35/2015, 58/2015 – drugi zakon, 28/2018 – Odluka US CG, 116/2020 – Odluka US CG i 145/2021.
[92] Zakonik o krivičnom postupku, član 379 st. 1 i 6–7.
[93] Zakonik o krivičnom postupku, član 379 st. 8.
[94] Zakon o upravnom sporu, „Službeni list CG", br. 54/2016, 11/2024 – Odluka US CG i 53/2025.
[95] Zakon o upravnom sporu, član 38.
[96] Zakon o vanparničnom postupku, „Službeni list RCG", br. 27/2006 i „Službeni list CG", br. 20/2015.
[97] Zakon o vanparničnom postupku, član 17.
[98] Zakon o vanparničnom postupku, član 2.

E. Ustavni sud

Najzad, obaveza obrazlaganja proteže se i na odluke Ustavnog suda: prema Zakonu o Ustavnom sudu Crne Gore[99], „odluka, odnosno rješenje Ustavnog suda sadrži: uvod, izreku, odnosno dispozitiv i obrazloženje"[100], čime se isti strukturni standard – uvod, izreka, obrazloženje – dosljedno primjenjuje kroz čitav sistem redovnog, upravnog, vanparničnog i ustavnosudskog odlučivanja u Crnoj Gori.

XI NEDOSTATAK OBRAZLOŽENJA KAO BITNA POVREDA POSTUPKA

A. Parnični postupak: član 367 ZPP

Poseban značaj za standard obrazloženog suđenja ima način na koji procesno zakonodavstvo u Crnoj Gori tretira nedostatak ili nedostatnost obrazloženja kao razlog za ukidanje odluke. Zakon o parničnom postupku predviđa da se presuda može pobijati, između ostalog, „zbog bitne povrede odredaba parničnog postupka"[101], a član 367 stav 2 tačka 15 tu povredu izričito definiše na način koji gotovo doslovno preslikava zahtjeve iz CCJE Mišljenja br. 11 o dosljednosti, jasnoći i odsustvu protivrečnosti obrazloženja: bitna povreda postoji „ako presuda ima nedostataka zbog kojih se ne može ispitati, a naročito ako je izreka presude nerazumljiva, ako protivrječi sama sebi ili razlozima presude ili ako presuda nema uopšte razloga ili u njoj nijesu navedeni razlozi o odlučnim činjenicama ili su ti razlozi nejasni ili protivrječni ili ako o odlučnim činjenicama postoji protivrječnost između onoga što se u razlozima presude navodi o sadržini isprava ili zapisnika o iskazima datim u postupku i samih tih isprava ili zapisnika"[102].

B. Krivični postupak: član 386 ZKP

Zakonik o krivičnom postupku sadrži gotovo istovjetne razloge za preispitivanje i osporavanje odluka donijetih u krivičnom postupku . Presuda se može pobijati, između ostalog, zbog „bitne povrede odredaba krivičnog postupka"[103], koja prema članu 386 stav 1 tačke 8 i 9 uvijek postoji ako je „izreka presude nerazumljiva, protivrječna sama sebi ili razlozima presude", odnosno ako „presuda nema uopšte razloga ili u njoj nijesu navedeni razlozi o odlučnim činjenicama ili su ti razlozi potpuno nejasni ili u znatnoj mjeri protivrječni ili ako o odlučnim činjenicama postoji znatna protivrječnost između onog što se navodi u razlozima presude o sadržini isprava ili zapisnika o iskazima datim u postupku i samih tih isprava"[104].

[99]Zakon o Ustavnom sudu Crne Gore, „Službeni list CG", br. 11/2015, 55/2019, 92/25, 31/26.
[100]Zakon o Ustavnom sudu Crne Gore, član 47.
[101]Zakon o parničnom postupku, član 366 stav 1 tačka 1.
[102]Zakon o parničnom postupku, član 367 stav 2 tačka 15.
[103]Zakonik o krivičnom postupku, član 385 tačka 1.
[104]Zakonik o krivičnom postupku, član 386 stav 1 tač. 8–9.

C. Značaj podudarnosti dva procesna zakona

Podudarnost formulacija ZPP i ZKP nije slučajna – oba zakona nedostatak obrazloženja tretiraju kao apsolutno bitnu povredu postupka koja postoji po sili samog zakona, bez potrebe dokazivanja njenog uticaja na ishod postupka, za razliku od tzv. relativno bitnih povreda[105]. Time se zahtjev obrazloženosti sudske odluke, kao sastavni element prava na pravično suđenje, ugrađuje u procesni mehanizam kontrole zakonitosti i pravilnosti sudskog odlučivanja. Nedostatak obrazloženja tako poprima neposredan procesnopravni značaj, budući da, u zavisnosti od njegove prirode i intenziteta, može dovesti do utvrđivanja procesne povrede i zahtijevati ukidanje ili preinačenje odluke, što omogućava zaštitu ovog standarda već u postupku pred redovnim sudovima, a ne isključivo pred Ustavnim sudom ili ESLJP. .

XII INSTITUCIONALNI I PROCESNI MEHANIZMI ZA OBEZBJEDIVANJE JEDINSTVENEPRIMJENE PRAVA

Institucionalni mehanizmi se odnose na nadležnosti, uloge i međusobni odnos institucija koje obezbjeđuju zakonitost, ustavnost i ujednačavanje sudske prakse: Vrhovni sud, Ustavni sud, redovni sudovi, Sudski savjet itd. **Procesni mehanizmi** se odnose na pravne institute i postupke putem kojih se ostvaruje kontrola i korekcija sudskih odluka: žalba, revizija, vanredni pravni lijekovi, ustavna žalba, prethodno pitanje, ponavljanje postupka itd.

A. Vrhovni sud i Opšta sjednica

Zakon o sudovima[106] razrađuje ustavnu funkciju Vrhovnog suda iz člana 124 Ustava kroz nadležnost Opšte sjednice Vrhovnog suda, koja „utvrđuje načelne pravne stavove", razmatra pitanja od značaja za rad sudova i primjenu zakona, i po potrebi o tome obavještava Skupštinu[107]. Ovaj mehanizam predstavlja crnogorski normativni odgovor na formalne instrumente ujednačavanja sudske prakse koje CCJE Mišljenje br. 20 opisuje kao najneposredniji uticaj na jedinstveno tumačenje i primjenu prava.

B. Načelni pravni stav

Član 26 Zakona o sudovima definiše institut načelnog pravnog stava na sljedeći način: „Načelni pravni stav se zauzima o spornim pravnim pitanjima koja nastaju u sudskoj praksi radi obezbjeđivanja jedinstvene primjene zakona od strane sudova. Načelni pravni stav može se zauzeti po službenoj dužnosti ili na zahtjev suda"[108], a zakon 2020. godine proširuje ovaj mehanizam i na notare i javne izvršitelje, omogućavajući da se načelni pravni stav zauzme i na

[105]Up. Zakon o parničnom postupku, član 367 stav 1, koji relativno bitnu povredu vezuje za dokazivanje njenog uticaja na zakonitost i pravilnost presude, sa stavom 2 istog člana, koji apsolutno bitne povrede nabraja taksativno; analogno, Zakonik o krivičnom postupku, član 386 st. 1 i 2.
[106]Zakon o sudovima, „Službeni list CG", br. 11/2015 i 76/2020.
[107]Zakon o sudovima, čl. 24–25.
[108]Zakon o sudovima, član 26 st. 1–2.

zahtjev Notarske komore, odnosno Komore javnih izvršitelja, o spornim pravnim pitanjima koja nastaju u postupcima koje oni sprovode[109]. Ovaj institut odgovara upravo onom obliku „obavezujućeg tumačenja in abstracto" koji CCJE prepoznaje kao instrument sa pozitivnim uticajem na jedinstvenost sudske prakse, ali i kao instrument koji, s obzirom na to da se donosi bez konkretnog spora i bez učešća stranaka, otvara pitanja o ustavnoj ulozi sudstva u sistemu podjele vlasti[110].

C. Evidencija sudske prakse

Standard objavljivanja i izvještavanja o sudskoj praksi, koji CCJE postavlja kao preduslov jedinstvene primjene prava, zakon ugrađuje kroz obavezu da se „u sudovima vodi evidencija sudske prakse". Način vođenja evidencija i objavljivanja odluka bliže se uređuje Sudskim poslovnikom[111], dok se u okviru Vrhovnog suda posebno organizuje odjeljenje sudske prakse, uz građansko, krivično i upravno odjeljenje[112].

D. Vanredni pravni lijek u upravnom sporu

Zakon o upravnom sporu predviđa poseban mehanizam ujednačavanja upravnosudske prakse – zahtjev za ispitivanje sudske odluke, o kome odlučuje vijeće od troje sudija/tkinja Vrhovnog suda, po osnovu povrede materijalnog prava ili povrede pravila postupka[113], dok posebna glava zakona, posvećena „obaveznosti presuda", uređuje dejstvo pravosnažnih presuda donesenih u upravnom sporu[114].

E. Ustavna žalba kao mehanizam zaštite

Prema Zakonu o Ustavnom sudu, ustavna žalba se podnosi u roku od 60 dana, pod uslovom iscrpljivanja djelotvornih pravnih sredstava, osim izuzetno i prije njihovog iscrpljivanja ako sredstvo nije djelotvorno[115]. Ako utvrdi povredu, Ustavni sud usvaja žalbu, ukida osporeni akt i predmet vraća na ponovni postupak, a ako je pravno dejstvo akta već prestalo, određuje „način pravičnog zadovoljenja podnosioca ustavne žalbe zbog pretrpljene povrede", dok je nadležni organ dužan da postupi u roku od 30 dana i pritom poštuje pravne razloge Ustavnog suda[116] – čime ustavna žalba funkcioniše kao poslednja unutrašnja instanca zaštite od odluka koje ne zadovoljavaju standard obrazloženog i doslednog suđenja, prije eventualnog obraćanja ESLJ

[109]Zakon o sudovima, član 26 stav 3.
[110]Up. CCJE, Mišljenje br. 20 (2017), tačka 28.
[111]Zakon o sudovima, član 44.
[112]Zakon o sudovima, član 42.
[113]Zakon o upravnom sporu, čl. 40–55.
[114]Zakon o upravnom sporu, čl. 56–59.
[115]Zakon o Ustavnom sudu Crne Gore, čl. 68–69.
[116]Zakon o Ustavnom sudu Crne Gore, čl. 76–77.

XIII SUDSKI SAVJET I KVALITET SUDSKOG RADA

A. Nadležnosti Sudskog savjeta

Zakon o Sudskom savjetu i sudijama[117] razrađuje ustavnu nadležnost Sudskog savjeta iz člana 128 Ustava, povjeravajući mu, pored ostalog, odlučivanje o disciplinskoj odgovornosti sudija, vođenje evidencije o sudijama/tkinjama, razmatranje pritužbi na njihov rad i obrazovanje Komisije za ocjenjivanje sudija[118]. Zakon posebno naglašava da nezavisnost, samostalnost, odgovornost i profesionalnost sudova i sudija obezbjeđuje upravo Sudski savjet[119].

B. Periodično ocjenjivanje rada sudija

Poseban i za ovu analizu naročito značajan mehanizam profesionalne odgovornosti, stručnog razvoja i napredovanja sudija predstavlja periodično ocjenjivanje rada sudija/tkinja, koje se sprovodi svakih pet godina, uz mogućnost ranijeg ocjenjivanja u zakonom propisanim slučajevima, uključujući napredovanje sudije, radi procjene njihove stručnosti, kvantiteta i kvaliteta rada, kao i potrebe za stručnim usavršavanjem.[120] Odluku o ocjeni donosi Komisija za ocjenjivanje rada sudija koju obrazuje Sudski savjet, na osnovu predloga vijeća za ocjenjivanje sastavljenog od predsjednika/ca suda u kojem se sudija/tkinja ocjenjuje i četiri sudije/tkinje viših sudova[121]. Protiv konačne odluke Komisije može se pokrenuti upravni spor, čime je obezbijeđena i sudska kontrola zakonitosti postupka ocjenjivanja

C. Kvalitet obrazloženja odluka kao formalni kriterijum

Zakon kriterijume za ocjenjivanje rada sudija/tkinja dijeli na djelotvornost rada i opšte sposobnosti i stručne aktivnosti[122], a djelotvornost rada ocjenjuje se, pored kvantiteta i kvaliteta rada, i putem posebnog potkriterijuma – kvaliteta obrazloženja odluka: „Kvalitet obrazloženja odluka ocjenjuje se na osnovu jasnoće, konciznosti i potpunosti datih razloga"[123]. Time se zahtjev obrazložene sudske odluke, koji proizlazi iz prava na pravično suđenje i obaveze sudova da omoguće razumijevanje pravnih i činjeničnih razloga na kojima je odluka zasnovana, neposredno uvodi u sistem profesionalnog vrednovanja rada sudija, kroz uvid u pravosnažno završene predmete birane metodom slučajnog uzorka, predmete koje sudija sam izabere i predmete u kojima su odluke ukinute[124]. Konačna ocjena rada sudije/tkinje – odličan, dobar, zadovoljava ili ne zadovoljava – neposredno zavisi i od ocjene ovog potkriterijuma, budući da

[117] Zakon o Sudskom savjetu i sudijama, „Službeni list CG", br. 11/2015, 28/2015, 42/2018 i 60/2024.
[118] Zakon o Sudskom savjetu i sudijama, član 27 tač. 1, 4, 5 i 9.
[119] Zakon o Sudskom savjetu i sudijama, član 2.
[120] Zakon o Sudskom savjetu i sudijama, član 87.
[121] Zakon o Sudskom savjetu i sudijama, član 88.
[122] Zakon o Sudskom savjetu i sudijama, član 89.
[123] Zakon o Sudskom savjetu i sudijama, član 90 st. 1 tačka 3 i st. 5.
[124] Zakon o Sudskom savjetu i sudijama, član 92.

ocjena „ne zadovoljava" po kvalitetu obrazloženja odluka isključuje mogućnost da sudija/tkinja u cjelini bude ocijenjen/a kao odličan/a ili dobar/a[125].

Ovakvo normativno rješenje predstavlja značajno unapređenje u odnosu na pristup koji je kvalitet rada prvenstveno vezivao za statističke pokazatelje, naročito broj riješenih i ukinutih predmeta. Ono je u skladu sa preporukama Venecijanske komisije da se kvalitet rada sudija ne procjenjuje pretežno ili automatski na osnovu ishoda postupaka i broja ukinutih odluka, već da se uzmu u obzir kvalitet pravnog pisanja i obrazloženja, složenost predmeta i drugi relevantni kvalitativni elementi. Venecijanska komisija je posebno upozorila da broj odluka ukinutih u žalbenom postupku nije sam po sebi pouzdan pokazatelj kvaliteta sudijskog rada, budući da ukidanje može biti posljedica različitog pravnog vrednovanja složenog pitanja, a ne profesionalnog propusta sudije. U odnosu na Crnu Goru, Komisija je dodatno ukazala na potrebu da se kvalitet rada vrednuje, između ostalog, kroz kvalitet pravnog pisanja, složenost predmeta i nivo pravnog obrazloženja, umjesto oslanjanja na puku statistiku procesnih ishoda.

Nova Pravila za ocjenjivanje sudija i predsjednika sudova, usvojena 2025. godine i naknadno izmijenjena i dopunjena tokom 2026. godine, imaju za cilj da zakonske kriterijume operacionalizuju kroz konkretnije indikatore i metodologiju ocjenjivanja.[126]

U pogledu kvaliteta obrazloženja, normativno polazište čine tri osnovna elementa: jasnoća, konciznost i potpunost obrazloženja. Pri tome, ocjena ne bi trebalo da bude zasnovana na formalnoj strukturi ili stilskim karakteristikama odluke, već na tome da li obrazloženje omogućava strankama i višem sudu da razumiju odlučne činjenične i pravne razloge na kojima je odluka zasnovana. Posebno je relevantno da obrazloženje sadrži odgovor na odlučne argumente stranaka, jasnu vezu između utvrđenog činjeničnog stanja i primijenjenog materijalnog prava, kao i razloge zbog kojih su prihvaćeni ili odbijeni ključni dokazi i pravni navodi.

Za prvostepene odluke, relevantan standard kvaliteta stoga podrazumijeva da obrazloženje nije nerazumljivo, da sadrži razloge o odlučnim činjenicama i da ti razlozi nijesu nejasni, protivrječni ili međusobno nesaglasni. Kod drugostepenih odluka standard je zahtjevniji: obrazloženje treba da pruži konkretan odgovor na relevantne žalbene navode i, kada se odluka ukida ili predmet vraća na ponovno odlučivanje, da sadrži jasne i pravno relevantne razloge i upute prvostepenom sudu. Ovakav pristup je od posebnog značaja za dosljednost sudske prakse, jer kvalitet obrazloženja drugostepenih odluka neposredno utiče na razumljivost i predvidivost standarda koji se primjenjuju u nižestepenom sudstvu.

Uvođenje ovog podkriterijuma ima potencijal da značajno unaprijedi kvalitet sudskog odlučivanja, ali njegova primjena otvara i niz pitanja koja zahtijevaju pažljivu metodološku kontrolu. Prvi izazov odnosi se na objektivizaciju kriterijuma. Pojmovi poput „jasnoće", „konciznosti" i „potpunosti" nužno sadrže element vrijednosne procjene, zbog čega moraju biti

[125] Zakon o Sudskom savjetu i sudijama, član 97.
[126] Pravila za ocjenjivanje sudija i predsjednika sudova objavljena u „Službenom listu CG", br. 43/2025 od 7. maja 2025. godine. Pravila su potom mijenjana 2026. godine, uključujući izmjene objavljene u martu i junu 2026. godine.

operacionalizovani kroz dovoljno precizne i provjerljive indikatore kako bi se izbjegla arbitrarnost ili neujednačena praksa različitih vijeća za ocjenjivanje.

Drugi izazov odnosi se na razgraničenje kvaliteta obrazloženja od pravilnosti sudske odluke. Ocjenjivanje kvaliteta obrazloženja ne smije postati prikriveni mehanizam za ocjenjivanje toga da li se članovi tijela za ocjenjivanje slažu sa pravnim stavom sudije. U protivnom, sistem bi mogao zadirati u sudijsku nezavisnost i otvoriti prostor za indirektno sankcionisanje pravnog tumačenja koje, samo po sebi, nije proizvoljno. Ovo je posebno važno imajući u vidu standard prema kojem sudija mora imati prostor za autonomno pravno rezonovanje, dok različito pravno mišljenje samo po sebi ne predstavlja pokazatelj profesionalno neadekvatnog rada.

Treći izazov proizlazi iz mogućeg preklapanja kvaliteta obrazloženja sa kvalitetom rada i brojem ukinutih odluka. Ako se ista slabost u obrazloženju istovremeno odrazi na ocjenu kvaliteta rada i na ocjenu kvaliteta obrazloženja, postoji rizik od dvostrukog vrednovanja istog nedostatka. Istovremeno, ukidanje odluke od strane višeg suda ne može automatski značiti da je obrazloženje bilo nekvalitetno, jer razlog ukidanja može biti pitanje drugačijeg tumačenja prava ili drugačije ocjene procesnog pitanja. Venecijanska komisija upravo zbog toga upozorava na potrebu opreza pri korišćenju broja ukinutih odluka kao pokazatelja profesionalnog kvaliteta sudije.

Četvrti izazov predstavlja uzorkovanje odluka. Zakon predviđa da se ocjenjivanje zasniva, između ostalog, na pet pravosnažno završenih predmeta izabranih metodom slučajnog uzorka, pet predmeta koje bira sam sudija i pet pravosnažno završenih predmeta u kojima su odluke ukinute, takođe metodom slučajnog uzorka. Iako ovakav sistem povećava metodološku objektivnost, relativno mali broj predmeta može otežati pouzdanu generalizaciju o kvalitetu rada sudije, naročito kod sudija koji postupaju u veoma složenim ili heterogenim vrstama predmeta. Konačno, posebno pitanje predstavlja ujednačavanje prakse tijela za ocjenjivanje. Ako se kriterijumi kvaliteta obrazloženja ne primjenjuju jednako u različitim sudovima i prema različitim vrstama postupaka, postoji rizik da ocjena zavisi više od individualnog pristupa članova vijeća za ocjenjivanje nego od objektivno utvrđenog standarda. Zbog toga bi primjena novih pravila trebalo da bude praćena kontinuiranim praćenjem rezultata, obrazovanjem članova tijela za ocjenjivanje, izradom anonimizovanih primjera dobre i nedovoljno kvalitetne prakse, kao i periodičnom analizom međusobne konzistentnosti donesenih ocjena.

U cjelini posmatrano, ovakvo institucionalno rješenje predstavlja značajnu tačku susreta evropskog standarda i domaćeg prava: dok CCJE upozorava da se kvalitet sudskih odluka ne smije ocjenjivati isključivo statističkim metodama, već i metodama usmjerenim na unutrašnju strukturu odluke (dio III.E ove analize), crnogorski zakon upravo takav pristup – ocjenu jasnoće, konciznosti i potpunosti obrazloženja na uzorku pravosnažnih odluka – ugrađuje kao sastavni dio redovnog sistema napredovanja i vrednovanja sudija/tkinja, uz zaštitu od proizvoljnosti kroz pravo sudije/tkinje da se izjasni o prijedlogu ocjene i mogućnost pokretanja upravnog spora protiv konačne odluke Komisije za ocjenjivanje[127].

[127] Zakon o Sudskom savjetu i sudijama, čl. 96 i 98.

XIV SINTEZA — SKLAD CRNOGORSKOG OKVIRA SA EVROPSKIM STANDARDIMA

Analiza zakonodavnog okvira Crne Gore pokazuje da su oba elementa evropskog standarda izložena u prvom dijelu ove analize – kvalitet pojedinačne sudske odluke i jedinstvena primjena prava – prihvaćena kroz slojevit sistem normi koji obuhvata Ustav, procesne zakone, zakone o organizaciji sudstva i zakon o statusu sudija. Ustav u članu 124 jedinstvenu primjenu zakona izričito povjerava Vrhovnom sudu, dok u čl. 20 i 32 pravo na pravni lijek i pravično suđenje uzdiže na rang ustavnog prava. Procesni zakoni – Zakon o parničnom postupku, Zakonik o krivičnom postupku, Zakon o upravnom sporu, Zakon o vanparničnom postupku i Zakon o Ustavnom sudu – sadržinu obrazloženja uređuju na način koji u bitnome odgovara zahtjevima CCJE Mišljenja br. 11, a nedostatak obrazloženja u parničnom i krivičnom postupku tretiraju kao apsolutno bitnu povredu postupka, po sili samog zakona.

U pogledu jedinstvene primjene prava, Zakon o sudovima institut načelnog pravnog stava i evidencije sudske prakse postavlja kao formalne mehanizme koji direktno odgovaraju instrumentima koje CCJE Mišljenje br. 20 prepoznaje kao najdjelotvornije, dok Zakon o Sudskom savjetu i sudijama ide korak dalje od samog normativnog uređenja obrazloženja: kvalitet obrazloženja odluka pretvara u formalni, periodično mjeren kriterijum sudijske evaluacije, čime se standard CCJE o potrebi ocjenjivanja unutrašnje strukture odluke, a ne samo statističkih pokazatelja, u crnogorskom pravu sprovodi kroz konkretan institucionalni mehanizam.

Zakonodavni okvir Crne Gore, prema tome, standard obrazloženog i dosljednog suđenja ne prihvata deklarativno, već ga sprovodi kroz konkretne, sankcionisane i mjerljive pravne mehanizme – od apsolutno bitne povrede postupka koja, ukoliko su ispunjeni zakonom propisani uslovi, predstavlja osnov za ukidanje osporene odluke u postupku po pravnom lijeku, , preko načelnog pravnog stava kao formalnog instrumenta ujednačavanja prakse, do kvaliteta obrazloženja kao kriterijuma sudijske karijere. Ostaje, međutim, otvoreno pitanje u kojoj mjeri se ovi normativno snažno postavljeni mehanizmi u praksi zaista i primjenjuju dosljedno, te u kojoj mjeri sudska praksa crnogorskih sudova, u svom stvarnom sadržaju, odgovara standardima izloženim u ovoj analizi.

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TREĆI DIO

NACIONALNI OKVIR: SRBIJA

ustavni i zakonodavni okvir Srbije u oblasti kvaliteta sudskih odluka i jedinstvene primjene prava

XV USTAVNI I INSTITUCIONALNI OKVIR SRBIJE

Ustav Republike Srbije, usvojen 2006. godine i izmijenjen proglašenjem Akta o promjeni Ustava 2022. godine [128], standard evropskog okvira o pravičnom i obrazloženom suđenju ugrađuje u tekst na način koji je gotovo doslovno podudaran sa crnogorskim ustavnim rješenjem izloženim u prethodnom dijelu ove analize: „Svako ima pravo da nezavisan, nepristrasan i zakonom već ustanovljen sud, pravično i u razumnom roku, javno raspravi i odluči o njegovim pravima i obavezama"[129], dok član 36 dodatno jemči „jednaku zaštitu prava pred sudovima i drugim državnim organima" i pravo na pravno sredstvo protiv odluke kojom se odlučuje o pravu, obavezi ili na zakonu zasnovanom interesu[130]. Ova gotovo identična formulacija dva ustava potvrđuje da oba pravna sistema pravo na pravično suđenje iz člana 6 Konvencije preuzimaju kao neposredno primjenjivu ustavnu normu, a ne tek kao međunarodnopravnu obavezu.

Načela sudstva iz sedmog dijela Ustava određuju da je sudska vlast jedinstvena na teritoriji Republike Srbije, da sudske odluke donose sudovi u ime naroda, da je raspravljanje pred sudom javno i da je osnivanje prijekih, privremenih ili vanrednih sudova zabranjeno[131], dok je „najviši sud u Republici Srbiji Vrhovni sud"[132], naziv koji je, u okviru reforme iz 2022. godine, zamijenio raniji naziv Vrhovni kasacioni sud. Za razliku od crnogorskog Ustava, koji u članu 124 izričito propisuje da Vrhovni sud „obezbjeđuje jedinstvenu primjenu zakona od strane sudova", Ustav Republike Srbije ne sadrži analognu odredbu na ustavnom nivou: funkcija obezbjeđenja jedinstvene primjene prava crnogorskom Vrhovnom sudu povjerena je neposredno Ustavom, dok je srpskom Vrhovnom sudu, kako će biti pokazano u nastavku, povjerena tek organskim zakonom. Ova razlika u normativnoj hijerarhiji, ustavno vs. zakonsko utemeljenje iste funkcije, predstavlja jednu od najznačajnijih strukturnih razlika između dva nacionalna okvira obuhvaćena ovom analizom.

Nezavisnost sudstva na institucionalnom nivou obezbjeđuje Visoki savet sudstva – „nezavisan državni organ koji obezbeđuje i jemči nezavisnost sudova, sudija, predsednika sudova i sudija porotnika"[133], u čijoj su nadležnosti izbor sudija/tkinja, sudija/tkinja porotnika, i predsjednika/ca sudova, odlučivanje o prestanku njihove funkcije, odliučivanje o premještaju i upućivanjue sudija/tkinja, i utvrđivanje potrebnog broja sudija/tkinjai sudija/tkinja porotnika, te odlučivanje o drugim pitanjima položaja sudija/tkinja, sudija/tkinja porotnika i predsjednika/ca sudova. Savjet čini 11 članova: šest sudija/tkinja koje biraju sudije/tkinje, četiri istaknuta pravnika/ce koje bira Narodna skupština dvotrećinskom većinom, i predsjednik/ca Vrhovnog suda po funkciji – sastav u kojem sudijska komponenta (sedam od jedanaest članova/ica, računajući i predsjednika/cu Vrhovnog suda) čini apsolutnu većinu, dok su predstavnici zakonodavne i izvšne vlasti isključeni iz članstva u Savetu, što je upravo bio jedan

[128] Ustav Republike Srbije, „Službeni glasnik RS", br. 98/2006 i 115/2021 (Akt o promjeni Ustava Republike Srbije).
[129] Ustav Republike Srbije, član 32 stav 1.
[130] Ustav Republike Srbije, član 36.
[131] Ustav Republike Srbije, član 142.
[132] Ustav Republike Srbije, član 143 stav 2.
[133] Ustav Republike Srbije, član 150.

od deklarisanih ciljeva ustavne reforme iz 2022. godine. Ovo se razlikuje od crnogorskog Sudskog savjeta, u kojem sudije/tkinje (četiri od deset članova, uz predsjednika/cu koji je po funkciji predsjednik/ca Vrhovnog suda) ne čine apsolutnu većinu, dok se dva mjesta rezervišu za predstavnike/ce parlamentarne većine i opozicije, razlika koja odražava dvije različite koncepcije ravnoteže između sudijske samouprave i demokratskog legitimiteta u sastavu tijela nadležnog za nezavisnost sudstva.

Ustavnu zaštitu od pojedinačnih akata kojima se povređuju ljudska prava, uključujući pravo na pravično i obrazloženo suđenje pred redovnim sudovima, obezbjeđuje ustavna žalba, koju Ustav definiše kao pravno sredstvo koje se „može izjaviti protiv pojedinačnih akata ili radnji državnih organa... kojima se povređuju ili uskraćuju ljudska ili manjinska prava i slobode zajemčene Ustavom, ako su iscrpljena ili nisu predviđena druga pravna sredstva za njihovu zaštitu"[134].

Nezavisno od ovog jemstva, Zakon o Ustavnom sudu propisuje i opšti standard kvaliteta za akte samog tog nezavisnog državnog organa: 'odluke, rešenja i zaključci Ustavnog suda sadrže: uvod, izreku i obrazloženje', s tim što se obrazloženje rešenja o odbacivanju ustavne žalbe, odnosno zaključka, izuzetno može ograničiti samo na pravni osnov za donošenje[135] – standard koji je, u svojoj osnovnoj strukturi, uporediv sa zahtjevima CCJE Mišljenja br. 11 izloženim u dijelu III ove analize, iako se ovdje ne odnosi na presude redovnih sudova, već na akte Ustavnog suda.

XVI OBAVEZA OBRAZLOŽENJA I SANKCIJA ZA NJEN NEDOSTATAK

Zakon o parničnom postupku[136] sadržinu obrazloženja uređuje na način koji, u svojoj osnovnoj strukturi, odgovara standardu CCJE Mišljenja br. 11 izloženom u dijelu III ove analize: „Pisano izrađena presuda mora da sadrži uvod, izreku i obrazloženje", pri čemu će sud u obrazloženju izložiti „zahteve stranaka i njihove navode o činjenicama na kojima se ti zahtevi zasnivaju, dokaze, činjenično stanje koje je utvrdio, kao i propise na kojima je sud zasnovao presudu"[137]. U obrazloženju presude zbog propuštanja, presude na osnovu priznanja, presude na osnovu odricanja, presude zbog izostanka i presude donijete na osnovu člana 291. stav 2. ZPP iznijeće se samo razlozi koji opravdavaju donošenje ovakvih presuda. Zakon pritom poznaje i posebnu, olakšanu kategoriju obrazloženja: u obrazloženju presude zbog propuštanja, presude na osnovu priznanja, presude na osnovu odricanja, presude zbog izostanka i presude donesene na osnovu člana 291. stav 2. Zakona o parničnom postupku, iznose se samo razlozi koji opravdavaju donošenje takve presude. Zakon pritom predviđa i osobenu kategoriju presuda

[134] Ustav Republike Srbije, član 170.
[135] Zakon o Ustavnom sudu, član 48.
[136] Zakon o parničnom postupku, „Službeni glasnik RS", br. 72/2011, 49/2013 – odluka US, 74/2013 – odluka US, 55/2014, 87/2018 i 18/2020.
[137] Zakon o parničnom postupku, član 355 st. 1 i 5.

bez ikakvog obrazloženja: „Presuda ne sadrži obrazloženje ako su se stranke odrekle prava na pravni lek"[138] – rješenje koje se, s obzirom na to da je posljedica slobodne dispozicije samih stranaka, može posmatrati kao legitiman izuzetak od pravila, uporediv sa ustaljenom praksom ESLJP o dopuštenosti odricanja od pojedinih proceduralnih jemstava, pod uslovom da je odricanje nedvosmisleno i informisano.

Zakonik o krivičnom postupku[139] sadržinu obrazloženja uređuje znatno detaljnije, nabrajajući čitav niz elemenata koje sud mora izložiti u zavisnosti od vrste presude, uz poštovanje pravila o iznošenju razloga za svaku tačku presude. – Sud mora obrazložiti činjenice koje je utvrdio i razloge zbog kojih ih uzima kao dokazane ili nedokazane, „ocenu verodostojnosti protivrečnih dokaza", razloge zbog kojih nije uvažio pojedine prijedloge stranaka, kao i, u slučaju osude, činjenice i okolnosti koje je cenio pri izboru krivične sankcije i njenom odmeravanju [140]. Zakonik istovremeno dopušta izostanak ili djelimično obrazloženje presude u tačno određenim slučajevima – kada su se stranke i branilac odmah po objavljivanju presude odrekli prava na žalbu, ili kada je optuženom izrečena kazna zatvora do tri godine, novčana kazna, kazna rada u javnom interesu, kazna oduzimanja vozačke dozvole, uslovna osuda ili sudska opomena, a na osnovu priznanja koje ispunjava zakonikom propisane uslove, s tim da stranke i dalje mogu zahtijevati dostavljanje obrazložene presude, čime im rok za žalbu počinje teći tek od dana dostavljanja prepisa obrazložene presude [141]. Ovo je najizrazitija osobenost srpskog procesnog prava u odnosu na crnogorski model izložen u prethodnom dijelu ove analize, koji ovakvu mogućnost ne poznaje: dok CCJE Mišljenje br. 11 dopušta da obrazloženje ne mora biti dugačko (dio III.B ove analize), Zakonik o krivičnom postupku Srbije ide korak dalje, dopuštajući, pod strogo određenim uslovima vezanim za priznanje i odricanje od pravnog lijeka, da obrazloženja uopšte i ne bude – rješenje koje zaslužuje dalju empirijsku pažnju u narednim fazama projekta CLEAR-JUST, imajući u vidu da odricanje od prava na obrazloženu odluku, prema praksi ESLJP, mora biti nedvosmisleno i praćeno odgovarajućim garancijama.

U pogledu sankcije za nedostatak obrazloženja, oba procesna zakona slijede istovjetnu logiku kao i crnogorski pandani izloženi u prethodnom dijelu ove analize: nedostatak obrazloženja predstavlja apsolutno bitnu povredu postupka: za razliku od relativno bitnih povreda, kod kojih je, pored same povrede, potrebno dokazati i da je ona bila ili mogla biti od uticaja na donošenje zakonite i pravilne presude, kod apsolutno bitnih povreda takav dodatni uticaj na ishod spora ne mora se posebno dokazivati. Zakon o parničnom postupku predviđa da bitna povreda odredaba parničnog postupka uvijek postoji „ako presuda ima nedostataka zbog kojih se ne može ispitati, a naročito ako je izreka presude nerazumljiva, ako protivreči sama sebi ili razlozima presude, ili ako presuda nema uopšte razloga ili u njoj nisu navedeni razlozi o bitnim činjenicama ili su ti razlozi nejasni ili protivrečni ili ako o bitnim činjenicama postoji protivrečnost između onoga što se u razlozima presude navodi o sadržini isprava, zapisnika o iskazima datim u postupku i samih tih isprava ili zapisnika ili izvedenim dokazima"[142], dok Zakonik o krivičnom

[138]Zakon o parničnom postupku, član 355 stav 7.
[139]Zakonik o krivičnom postupku, „Službeni glasnik RS", br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 i 35/2019.
[140]Zakonik o krivičnom postupku, član 428 st. 5–10.
[141]Zakonik o krivičnom postupku, član 429.
[142]Zakon o parničnom postupku, član 374 stav 2 tačka 12.

postupku istovjetno propisuje da bitna povreda odredaba krivičnog postupka postoji i ako „je izreka presude protivrečna sama sebi ili su razlozi presude protivrečni izreci, ili ako presuda nema uopšte razloga ili u njoj nisu navedeni razlozi o bitnim činjenicama ili su ti razlozi nejasni ili protivrečni ili ako o bitnim činjenicama postoji protivrečnost između onoga što se u razlozima presude navodi o sadržini isprava, zapisnika o iskazima datim u postupku i samih tih isprava ili zapisnika ili izvedenim dokazima“[143]. Gotovo doslovna podudarnost ovih odredaba sa crnogorskim članom 367 stav 2 tačka 15 Zakona o parničnom postupku i članom 386 stav 1 tačke 8–9 Zakonika o krivičnom postupku Crne Gore potvrđuje da oba pravna sistema, uprkos nezavisnom zakonodavnom razvoju posljednjih decenija, dijele zajedničko normativno naslijeđe u pogledu ovog pitanja, i da oba nedostatku obrazloženja pridaju isti stepen ozbiljnosti kakav mu, u okviru prava na pravično suđenje, pridaju i CCJE i ESLJP.

Isti standard – uvod, izreka, obrazloženje odvojeno od izreke – primjenjuje se i u upravnom sporu. Zakon o upravnim sporovima[144] propisuje da presuda sadrži, pored ostalih formalnih elemenata, „dispozitiv, obrazloženje i pouku o pravnom sredstvu“, s tim da „dispozitiv presude mora biti odvojen od obrazloženja“[145] – identičan strukturni zahtjev odvojenosti izreke od obrazloženja koji nalaže i crnogorski Zakon o upravnom sporu, a koji na nivou upravnog sudstva obje države doslovno prenosi opšti standard sadržine sudske odluke iz parničnog i krivičnog postupka.

Isti standard obrazloženosti proteže se i na vanparnični postupak. Zakon o vanparničnom postupku[146] predviđa da se odluke u ovom postupku donose u obliku rešenja, s tim što rešenje protiv koga je dozvoljena posebna žalba, kao i rešenje drugostepenog suda, mora biti obrazloženo[147], dok se, u pogledu pitanja koja nijesu posebno uređena, shodno primjenjuju odredbe Zakona o parničnom postupku[148] – rješenje koje, upućivanjem na opšti parnični standard, na indirektan način obezbjeđuje primjenu istog standarda obrazloženosti i u vanparničnim stvarima, slično rješenju koje poznaje i crnogorski Zakon o vanparničnom postupku.

XVII JEDINSTVENA PRIMJENA PRAVA: MEHANIZMI I SPORNA PITANJA

Zakon o uređenju sudova[149] jedinstvenu primjenu prava postavlja kao jedan od opštih ciljeva čitavog sudstva – sudovi, prema članu 2, „obezbeđuju ustavnost i zakonitost, jedinstvenu primenu prava i jednaku zaštitu svih pred zakonom“[150] – a zatim tu funkciju posebno povjerava

[143] Zakonik o krivičnom postupku, član 438 stav 2 tačka 2.
[144] Zakon o upravnim sporovima, „Službeni glasnik RS“, br. 111/2009.
[145] Zakon o upravnim sporovima, član 47.
[146] Zakon o vanparničnom postupku, „Sl. glasnik SRS", br. 25/82 i 48/88 i „Sl. glasnik RS", br. 46/95 – dr. zakon, 18/2005 – dr. zakon, 85/2012, 45/2013 – dr. zakon, 55/2014, 6/2015, 106/2015 – dr. zakon i 14/2022.
[147] Zakon o vanparničnom postupku, član 18 stav 2.
[148] Zakon o vanparničnom postupku, član 30 stav 2.
[149] Zakon o uređenju sudova, „Službeni glasnik RS“, br. 10/2023.
[150] Zakon o uređenju sudova, član 2.

Vrhovnom sudu, kao najvišem sudu opšte nadležnosti: „Vrhovni sud obezbeđuje jedinstvenu sudsku primenu prava i jednakost stranaka u sudskom postupku, razmatra primenu zakona i drugog propisa i rad sudova"[151]. Kao što je već napomenuto, riječ je o funkciji koja u crnogorskom pravu proizlazi neposredno iz Ustava, dok je u srpskom pravu utemeljena na nivou organskog zakona – razlika koja, iako ne mora nužno oslabiti djelotvornost same funkcije, ipak čini njenu ustavnopravnu zaštićenost različitom u slučaju eventualne izmjene zakona parlamentarne većine.

Na operativnom nivou, ujednačavanje sudske prakse unutar Vrhovnog suda odvija se prije svega kroz sjednicu odjeljenja, koja se saziva „ako između pojedinih veća nastane nesaglasnost u primeni propisa ili ako jedno veće odstupi od pravnog shvatanja prihvaćenog u svojoj praksi ili od pravnog shvatanja koje su prihvatila sva veća", pri čemu „pravno shvatanje usvojeno na sednici odeljenja obavezuje sva veća u sastavu odeljenja" i objavljuje se na internet stranici Vrhovnog suda[152]. Ovaj institut pravnog shvatanja predstavlja funkcionalni pandan crnogorskom načelnom pravnom stavu, ali sa jednom značajnom razlikom u dometu: dok crnogorski načelni pravni stav, usvojen na Opštoj sjednici Vrhovnog suda, obavezuje sudsku praksu u cjelini, pravno shvatanje, usvojeno na sjednici odjeljenja, formalno obavezuje samo vijeća u sastavu tog istog odjeljenja, radi se o užem, decentralizovanijem mehanizmu ujednačavanja. Opšta sjednica Vrhovnog suda Srbije, sa svoje strane, ima širi, ali delokrug koji ne uključuje odlučivanje o ujednačavanju sudske prakse: razmatra primjenu zakona i rad sudova, imenuje sudije/tkinje Ustavnog suda, daje mišljenje o kandidatu/tkinji za predsjednika Vrhovnog suda i donosi Poslovnik o radu Vrhovnog suda[153], bez izričitog ovlašćenja da usvaja pravna shvatanja obavezujuća za čitav sud.

Pitanje da li i u kojoj mjeri sudska praksa treba da postane formalni izvor prava predstavlja, u Srbiji, predmet žive i otvorene stručne rasprave. Društvo sudija Srbije, u analizi Zakona o parničnom postupku objavljenoj 2024. godine u okviru projekta podržanog od Ambasade Kraljevine Holandije, izričito zaključuje da „sudska praksa nije izvor prava u Srbiji, kao ni u drugim državama koje, kao i Srbija, pripadaju evropskom kontinentalnom sistemu prava", pozivajući se na ustavno načelo prema kojem je sudija „nezavisan i sudi na osnovu Ustava, potvrđenih međunarodnih ugovora, zakona... i drugih opštih akata"[154]. U istoj analizi se, pozivajući se na više mišljenja Venecijanske komisije – Izvještaj o nezavisnosti sudstva CDL-AD(2010)004 (2010), Mišljenje o nacrtima zakona o sudijama i o uređenju sudova CDL-AD(2008)007 (2008) i Mišljenje o nacrtu amandmana na zakone o sudstvu CDL-AD(2013)005 (2013) – upozorava da bi normativno nametanje obaveznosti sudske prakse moglo da podrije unutrašnju nezavisnost sudstva, odnosno nezavisnost pojedinačnog sudije u odnosu na više sudove i predsjednike/ce sudova, i da „šablonizira" suđenje na štetu slobodnog sudijskog uvjerenja[155]. Ova argumentacija stoji u zanimljivom, iako ne nužno protivrečnom, odnosu prema stavu CCJE iz Mišljenja br. 20,

[151]Zakon o uređenju sudova, član 32 stav 3.
[152]Zakon o uređenju sudova, član 45.
[153]Zakon o uređenju sudova, član 46.
[154]Društvo sudija Srbije, Zakon o parničnom postupku u funkciji ujednačene primene prava, Beograd, 2024, str. 69, sa upućivanjem na Ustav Republike Srbije, član 144.
[155]Isto, str. 69–71, sa upućivanjem na Venecijansku komisiju, CDL-AD(2010)004 (2010), tač. 68 i 73; CDL-AD(2008)007 (2008), tačka 109; CDL-AD(2013)005 (2013), tač. 103–108.

koje formalne mehanizme ujednačavanja prakse – uključujući obavezujuća tumačenja in abstracto – prepoznaje kao legitiman instrument pravne sigurnosti, uz istovremeno upozorenje da oni otvaraju pitanja podjele vlasti: oba stanovišta polaze od iste tenzije između predvidljivosti prava i sudijske nezavisnosti, ali joj pristupaju iz različite perspektive – CCJE naglašavajući korist za pravnu sigurnost, Venecijanska komisija i srpska strukovna zajednica naglašavajući rizik po unutrašnju nezavisnost pojedinačnog sudije.

Ova tenzija se posebno oštro ispoljila u raspravi o mogućem uvođenju tzv. pilot-presude bez obrazloženja kao odgovora na preopterećenost sudova masovnim, repetitivnim tužbama. Društvo sudija Srbije takvu mogućnost izričito odbacuje kao neprihvatljivu u pravnom sistemu koji počiva na vladavini prava, ocjenjujući da bi se njome „strankama uskraćivalo pravo na obrazloženu sudsku odluku, a time i pravo na pravično suđenje i na pravno sredstvo"[156], te dodaje da bi svako eventualno uvođenje takvog instrumenta prethodno moralo biti ispitano sa stanovišta ustavnosti, podjele vlasti i unutrašnje nezavisnosti sudija, uz obavezu detaljnog obrazlaganja svake takve odluke ukoliko bi uopšte bila uvedena[157]. Ovaj primjer neposredno ilustruje kako se standard obrazloženog suđenja, koji CCJE izvodi iz Mišljenja br. 11, a ESLJP iz člana 6 stav 1 Konvencije, u Srbiji ne primjenjuje samo kroz sudsku praksu, već aktivno oblikuje i tekuću zakonodavnu raspravu o reformi parničnog postupka, kroz izričito pozivanje strukovnog udruženja sudija na pravo na obrazloženu odluku kao ustavnu i konvencijsku garanciju.

XVIII VREDNOVANJE RADA SUDIJA

Zakon o sudijama[158] uređuje periodično vrednovanje rada sudija/tkinja, čija je svrha „procena, održavanje i unapređenje kvaliteta rada, uz poštovanje nezavisnosti sudije, u cilju jačanja poverenja javnosti u rad sudije i suda"[159]. Vrednovanje se sprovodi na osnovu javno objavljenih, objektivnih i sveobuhvatnih kriterijuma, izričito isključujući ocjenu primjene slobodnog sudijskog uvjerenja u ocjeni dokaza i tumačenju propisa, a obuhvata sljedeće osnovne kriterijume: stručno znanje i sposobnost njegove primjene, sposobnost analitičkog mišljenja i rješavanja pravnog pitanja, sposobnost donošenja odluke u primjerenom roku, vještinu vođenja rasprave, „sposobnost usmenog i pismenog izražavanja i argumentovanja", sposobnost organizovanja sudijskog posla i, kada je relevantno, sposobnost obavljanja rukovodećih poslova[160].

U poređenju sa crnogorskim rješenjem izloženim u prethodnom dijelu ove analize, u kojem Zakon o Sudskom savjetu i sudijama kvalitet obrazloženja odluka izdvaja kao samostalan, imenovan potkriterijum sa vlastitom formulom ocjenjivanja – „na osnovu jasnoće, konciznosti i potpunosti datih razloga", srpski Zakon o sudijama ne sadrži analogan, izdvojen kriterijum.

[156]Društvo sudija Srbije, Zakon o parničnom postupku u funkciji ujednačene primene prava, Beograd, 2024, str. 80–81, sa upućivanjem na Ustav Republike Srbije, član 1.
[157]Isto, str. 81.
[158]Zakon o sudijama, „Službeni glasnik RS", br. 10/2023 i 9/2026. i 56/2026.
[159]Zakon o sudijama, član 35.
[160]Zakon o sudijama, član 36 st. 1–3.

Kvalitet obrazloženja nije izdvojen kao samostalan kriterijum, ali je njegov kvalitet moguće posredno obuhvatiti kroz više postojećih kriterijuma, naročito sposobnost analitičkog mišljenja i rešavanja pravnog pitanja i sposobnost pismenog izražavanja i argumentovanja. Ovo predstavlja mjerljivu razliku u stepenu normativne granularnosti kojom se u dva uporediva sistema pristupa upravo onoj komponenti sudijskog rada koju CCJE, u Mišljenju br. 11, izdvaja kao centralnu za kvalitet sudske odluke u cjelini, razliku koja otvara pitanje, relevantno za dalje faze projekta CLEAR-JUST, da li opštija formulacija srpskog kriterijuma u praksi obezbjeđuje jednako djelotvoran podsticaj za kvalitet obrazloženja kao izdvojeni crnogorski potkriterijum, ili bi, obrnuto, mogla biti prednost utoliko što izbjegava rizik od formalizacije i „šablonizacije" ocjenjivanja obrazloženja na koji upozorava Venecijanska komisija.

XIX SINTEZA — USKLADENOST SRPSKOG OKVIRA SA EVROPSKIM STANDARDIMA

Analiza zakonodavnog okvira Srbije pokazuje da su **oba elementa evropskog standarda** izložena u prvom dijelu ove analize – kvalitet pojedinačne sudske odluke i jedinstvena primjena prava – prihvaćena kroz normativni sistem koji je, u svojim osnovnim crtama, uporediv sa crnogorskim: Ustav u čl. 32 i 36 pravo na pravično suđenje i pravno sredstvo uzdiže na rang ustavnog prava gotovo istovjetnom formulacijom kao i crnogorski Ustav, procesni zakoni – Zakon o parničnom postupku, Zakonik o krivičnom postupku i Zakon o upravnim sporovima – sadržinu obrazloženja uređuju na način koji u bitnome odgovara zahtjevima CCJE Mišljenja br. 11, a nedostatak obrazloženja tretiraju kao apsolutno bitnu povredu postupka.

Analiza je istovremeno pokazala i tri značajne **tačke razlikovanja** u odnosu na crnogorski okvir. Prvo, funkcija obezbjeđenja jedinstvene primjene prava Vrhovnom sudu je u Crnoj Gori povjerena neposredno Ustavom, dok je u Srbiji utemeljena na nivou organskog zakona, razlika u stepenu ustavnopravne zaštićenosti iste funkcije. Drugo, Zakonik o krivičnom postupku Srbije, za razliku od crnogorskog zakonika, dopušta izostanak ili djelimično obrazloženje presude u tačno određenim slučajevima vezanim za priznanje i odricanje od prava na žalbu, rješenje koje zaslužuje dalju empirijsku pažnju. Treće, pitanje formalizacije sudske prakse kao izvora prava predstavlja u Srbiji predmet otvorene i aktivne stručne rasprave, u kojoj strukovna zajednica sudija i Venecijanska komisija ukazuju na rizik po unutrašnju nezavisnost sudstva, dok Zakon o sudijama kvalitet obrazloženja ne izdvaja kao samostalan kriterijum vrednovanja, za razliku od crnogorskog rješenja.

Crna Gora i Srbija, prema tome, dijele isto polazište, standard obrazloženog i dosljednog suđenja izveden iz člana 6 Konvencije i sistematizovan kroz CCJE mišljenja br. 11 i 20, ali se razlikuju u stepenu formalizacije kojim taj standard prelivaju u konkretne, mjerljive pravne mehanizme: crnogorski okvir odlikuje se izričitijim ustavnim utemeljenjem i imenovanim, kvantifikovanim kriterijumima ocjenjivanja, dok se srpski okvir u većoj mjeri oslanja na opštije zakonske formulacije i ostavlja otvorenim, kroz stalnu stručnu i zakonodavnu raspravu, pitanje daljeg razvoja mehanizama jedinstvene primjene prava.

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ČETVRTI DIO

PRAKTIČNI VODIČ ZA KVALITET SUDSKOG OBRAZLOŽENJA

KAKO KORISTITI OVAJ VODIČ?

Kvalitet sudske odluke ne mjeri se samo ishodom koji ona proizvodi za stranke u postupku, već i time da li je taj ishod predstavljen na način koji stranke, viši sud, i javnost mogu razumjeti, provjeriti i, u slučaju neslaganja, osporiti kroz redovna pravna sredstva. Standard obrazloženog i dosljednog suđenja, izveden iz člana 6 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda i sistematizovan kroz mišljenja Savjetodavnog vijeća evropskih sudija (CCJE), predstavlja centralnu temu prethodnih analitičkih podloga izrađenih u okviru projekta CLEAR-JUST.

Ovaj Vodič predstavlja sljedeći, praktični korak u analizi. Zamišljen je kao **živi dokument,** a ne kao konačan tekst. Vodič se prvenstveno obraća sudijama/tkinjama, kao i sudijskim savjetnicima i savjetnicama koji učestvuju u izradi nacrta odluka, ali može biti koristan i široj pravosudnoj i akademskoj zajednici zainteresovanoj za pitanja kvaliteta sudskog obrazloženja. Kao i uputstva na koja se ugleda, i ovaj Vodič ima status stručne preporuke, a ne obavezujućeg propisa: njegova primjena zavisi od procesnih pravila, prakse i konteksta svakog pojedinačnog predmeta. Vodič ne zamjenjuje Zakon o upravnom sporu, Zakon o parničnom postupku, Zakonik o krivičnom postupku niti druge procesne zakone Crne Gore i Srbije, koji propisuju formalne elemente sudske odluke i koji su detaljno analizirani. Vodič je organizovan tako da prati prirodan **tok izrade sudske odluke** – od opšteg načela obrazloženosti (dio I), preko logike odlučivanja (dio II) i strukture teksta (dio III), do jezika i stila (dio IV). Dio V objedinjuje prethodne djelove u jedinstvenu checklistu koja se može koristiti kao posljednja provjera nacrta odluke prije njenog potpisivanja. Dio VI odgovara na pitanja koja se u praksi najčešće postavljaju, a dio VII ilustruje izložena načela kroz stvarne primjere iz prakse Evropskog suda za ljudska prava.

Numerisani pasusi (obilježeni sa [1], [2] itd.) sadrže uputstva i objašnjenja. Okviri sa oznakom SAVJET ZA PRAKSU izdvajaju konkretne, neposredno primjenjive preporuke. Checklista u dijelu V koristi kvadratiće (☐) koje čitalac/teljka može, u štampanoj ili elektronskoj verziji, označiti tokom sopstvene provjere nacrta odluke.

I ZLATNO PRAVILO: OBRAZLOŽENA I RAZUMLJIVA ODLUKA

[1] Svaka sudska odluka mora biti formulisana jasno, razumljivo i obrazloženo. Ovo je zlatno pravilo od kojeg polazi ovaj Vodič, preuzeto iz iste ideje na kojoj počiva CEELI Institut svoj vodič za sudijsko pisanje[16]: svaki čitalac/teljka odluke – bilo da je stranka, viši sud, ili predstavnik/ca

[16] CEELI Institute, A Guide to Judicial Writing, novembar 2023, tačka 3: „Every judgment must be framed in clear, comprehensible and reasoned terms. Thus every reader of every judgment should be able to understand the full content."

javnosti – mora biti u stanju da razumije njen puni sadržaj. Odluka se ne piše radi sudije/tkinje koji je donosi, već radi onih kojima je namijenjena.

[2] Dužnost obrazlaganja proizlazi neposredno iz sudijske zakletve i iz suštine sudijske funkcije. Svaki učesnik/ca u postupku ima pravo na obrazloženu odluku, a sudija ima odgovarajuću dužnost da to pravo ispuni[162]. Ova dužnost nije formalnost – ona omogućava stranci koja je izgubila spor da odluči da li će uložiti pravni lijek, omogućava višem sudu da izvrši djelotvornu kontrolu, i pokazuje da je sudijino diskreciono odlučivanje izvršeno na razuman i nearbitraran način.

[3] Obaveza obrazlaganja ima i disciplinsku funkciju prema samom sudiji: ona ga primorava da razdvoji relevantno od irelevantnog, da svoje zaključke izloži jasnim izrazima, i da svaki argument sagleda kritički prije nego što postane dio konačne odluke[163]. U tom smislu, čin pisanja obrazloženja nije puko bilježenje već donesene odluke, već sastavni dio samog procesa odlučivanja.

[4] Pravo na obrazloženu odluku predstavlja jednu od garancija prava na pravično suđenje iz člana 6 stav 1 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, iako to pravo nije u tekstu Konvencije izričito formulisano – do njega je Evropski sud za ljudska prava (ESLJP) došao tumačenjem, polazeći od načela da pojedinac/ka mora biti zaštićen od proizvoljnog presuđenja[164].

[5] ESLJP izvodi obavezu obrazlaganja iz člana 6 stav 1 Konvencije iz četiri razloga koja su podjednako uvjerljiva i za nacionalnog sudiju kao praktični argument u prilog pažljivom pisanju: obrazloženje pokazuje strankama da su saslušane; omogućava im da djelotvorno ulože pravni lijek; omogućava višem sudu da sprovede kontrolu; i omogućava javnosti da razmatra rad sudova[165]. Odsustvo bilo koje od ove četiri funkcije čini odluku ranjivom na osporavanje, kako pred višim sudom, tako i pred Ustavnim sudom u postupku po ustavnoj žalbi.

> **SAVJET ZA PRAKSU**
> *Prije potpisivanja odluke, postavite sebi pitanje: da li bi stranka koja je izgubila spor, čitajući samo obrazloženje, mogla da razumije zašto je izgubila i na osnovu čega bi mogla formulisati žalbu? Ako odgovor nije jasno potvrdan, obrazloženje treba unaprijediti.*

[6] Obim obrazloženja nije jednoobrazan, već zavisi od prirode odluke i okolnosti svakog pojedinog slučaja. Odluke o meritumu zahtijevaju potpunije obrazloženje od procesnih odluka (npr. odluke o odlaganju ročišta), dok odluke kojima se okončava postupak, uskraćuje pravo ili nameće obaveza po pravilu zahtijevaju najpotpunije obrazloženje[166]. Sudija/tkinja, međutim, nije

[162] CEELI Institute, A Guide to Judicial Writing, tačka 10.
[163] CEELI Institute, A Guide to Judicial Writing, tačka 11.
[164] ESLJP, Tatishvili protiv Rusije, predstavka br. 1509/02, 22. februar 2007, stav 58; up. Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 28.
[165] Up. ESLJP, Tatishvili protiv Rusije, stav 58, kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 28.
[166] Up. ESLJP, Ruiz Torija protiv Španije, 9. decembar 1994, st. 29–30; Van de Hurk protiv Holandije, 19. april 1994, stav 61; kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 14.

dužan da odgovori na svaki argument koji je stranka iznijela – dovoljno je da odgovori na one argumente koji su odlučujući za ishod spora.

[7] Dužnost obrazlaganja proteže se na svaku sudsku odluku i svaki sudski nalog, uključujući odluke o troškovima, odbijanje produženja roka, privremene mjere, odbacivanje tužbe zbog zloupotrebe prava, i sve vrste procesnih (interlokutornih) odluka[167]. Ono što se razlikuje nije postojanje dužnosti, već njen obim: procesna odluka zahtijeva kraće, ali i dalje razumljivo obrazloženje njenih razloga.

[8] Kontinuirano usavršavanje vještine pisanja obrazloženja predstavlja sastavni dio sudijske funkcije, a ne jednokratno stečenu vještinu[168]. Ovaj Vodič ne pretenduje da bude konačan priručnik, već polazna tačka koja će, kroz predstojeću fazu empirijskog istraživanja u okviru CLEAR-JUST projekta, biti dopunjena uvidima samih sudija/tkinja i sudijskih savjetnika/savjetnica iz Crne Gore i Srbije.

II PRAVNA LOGIKA I PROCES ODLUČIVANJA

[9] Donošenje sudske odluke je, u svojoj suštini, logički proces koji se odvija u tri koraka: sudija najprije utvrđuje činjenice koje su relevantne za rješenje predmeta; zatim utvrđuje pravno pitanje koje treba riješiti i primjenjivi pravni okvir; i, najzad, upoređujući okolnosti predmeta sa primjenjivom pravnom odredbom, donosi zaključak kojim se spor rješava[169]. Ova trostepena struktura – činjenice, pravo, zaključak – predstavlja klasičan pravni silogizam i osnovu je za svaku dobro obrazloženu odluku, bez obzira na vrstu postupka.

[10] Strogo pridržavanje pravila logike je od suštinske važnosti prilikom izrade sudske odluke. Ako pravni tekst sadrži logičke greške, to ugrožava sam cilj pisanja – uvjerljivost i prihvatljivost odluke. Osnovna logička pravila koja obrazloženje mora poštovati jesu: načelo identiteta (pojam mora u toku cijelog obrazloženja zadržati isto značenje), zakon protivrečnosti (dvije protivrečne tvrdnje ne mogu istovremeno biti tačne), zakon isključenog trećeg (između dvije protivrečne tvrdnje ne postoji treća mogućnost), zakon razloga i zakon dovoljnog razloga (svaki zaključak mora biti potkrijepljen dovoljnim razlogom)[170]. Kada obrazloženje krši neko od ovih pravila – na primjer, kada se u jednom dijelu teksta činjenično stanje opisuje na jedan način, a u drugom dijelu, bez objašnjenja, na drugačiji način – čitalac/teljka gubi povjerenje u cjelokupnu odluku, čak i ako je njen krajnji ishod ispravan.

> **SAVJET ZA PRAKSU**
> *U obrazloženju koristite jasne, nedvosmislene formulacije koje jasno obilježavaju logički korak koji sudija preduzima: „sud je utvrdio da…“, „na osnovu ovih dokaza, sud*

[167]CEELI Institute, A Guide to Judicial Writing, tačka 12.
[168]CEELI Institute, A Guide to Judicial Writing, tačka 8 i tačka 60.
[169]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 21, okvir „Proces donošenja sudskih odluka je logički proces“.
[170]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 21.

> *je utvrdio da...", „stoga, sud je zaključio da...". Ovakve formulacije čine tok rezonovanja jasnijim za čitaoca/teljku i sprječavaju da se činjenični navodi pomiješaju sa pravnim zaključcima.*

[11] U najvećem broju predmeta, sudija/tkinja će se osloniti na deduktivno rezonovanje: polazi se od opšteg pravnog pravila (premisa), primjenjuje se na utvrđeno činjenično stanje, i izvodi se pojedinačni zaključak. U određenim slučajevima, međutim, rezonovanje može biti zasnovano i na induktivnom pristupu – kada se iz niza sličnih činjeničnih ili pravnih okolnosti izvodi zaključak da iste pripadaju istoj kategoriji, na koju se onda primjenjuje odgovarajuće pravno pravilo[171]. Oba pristupa su legitimna; važno je da odluka jasno pokazuje koji je od njih primijenjen, kako čitalac ne bi morao sam da rekonstruiše tok rezonovanja.

[12] Kada dođe do sukoba pravnih pravila, sudija/tkinja razrešava taj sukob primjenom uobičajenih pravila prevage: propis višeg pravnog ranga ima prednost nad propisom nižeg ranga (lex superior), propis kasnije donesen ima prednost nad ranije donesenim propisom iste snage (lex posterior), a poseban propis ima prednost nad opštim (lex specialis)[172]. Kada sudija/tkinja u obrazloženju primjenjuje jedno od ovih pravila prevage, korisno je to izričito navesti, jer se time obrazloženje dodatno legitimiše i olakšava kontrola od strane višeg suda.

[13] Pravna logika je posebno korisna prilikom upravljanja dokazima i argumentima stranaka. Ona sudiji/tkinji omogućava da napravi jasnu distinkciju između činjenica koje treba dokazivati i onih koje ne treba (jer nijesu sporne), kao i da identifikuje logičke protivrečnosti ili međusobno nepomirljive tvrdnje u argumentaciji stranaka, koje potom mogu poslužiti kao osnov za odbacivanje određenih argumenata[173]. Bilo koja situacija u kojoj sud odbacuje argument stranke zbog logičke protivrečnosti zaslužuje da to bude izričito i konkretno obrazloženo, umjesto paušalnog navoda da je argument „neosnovan".

[14] Prvi koraci u izradi obrazloženja mogu se, u savremenom vođenju postupka, preduzeti već u ranoj fazi, kroz upravljanje postupkom koje obezbjeđuje jasne i sažete podneske, saglasnost o što je moguće više činjeničnih pitanja, i, gdje je to moguće, zajednički spisak spornih pitanja o kojima sud treba da odluči[174]. Dobro vođen postupak olakšava kasniju izradu odluke i unapređuje njen kvalitet – sudija/tkinja, a ne stranke, treba da rukovodi tokom postupka od samog početka, imajući u vidu buduću izradu obrazloženja.

III STRUKTURA DOBRO OBRAZLOŽENE ODLUKE

[15] Iako ne postoje rigidna pravila koja bi važila za svaki predmet, korisno je, prije početka pisanja, unaprijed odrediti logički redosljed poglavlja odluke. U parničnim i upravnim predmetima, taj redosljed tipično obuhvata: strane u postupku; njihov spor i traženo pravno

[171] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 22.
[172] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 21.
[173] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 21–22.
[174] CEELI Institute, A Guide to Judicial Writing, tačke 13–17.

dejstvo, sažeto izloženi; pitanja o kojima sud treba da odluči; nesporne ili nesporne činjenice; činjenično stanje koje je sud utvrdio i razlozi za takva utvrđenja; primjenjiva pravna pravila i načela; primjenu tih pravila i načela na utvrđeno činjenično stanje; zaključke; i, gdje je to primjenjivo, konačne naloge[175]. Ovaj model, iako formulisan za opšti kontekst, gotovo se u potpunosti poklapa sa formalnim elementima koje za presudu propisuje procesno zakonodavstvo Crne Gore i Srbije.

[16] U dispozitivu (izreci) sud koristi svoja sudijska ovlašćenja da donese konkretnu, sveobuhvatnu i jasnu odluku o pravnoj situaciji. Ako sud djelimično usvaja tužbeni zahtjev, dispozitiv mora jasno naznačiti koji je dio usvojen, a koji odbijen[176]. Dispozitiv je jedan od najvažnijih elemenata odluke jer predstavlja konkretan ishod spora, te mora biti u skladu sa obrazloženjem i mora biti potpun, obuhvatajući sva pitanja koja su stranke pokrenule, kao i ona koja je sud pokrenuo po službenoj dužnosti.

[17] Kontekst slučaja (opis činjeničnog stanja i navoda stranaka) treba da bude potpun, ali sažet, i treba da obuhvati samo relevantne činjenice koje su funkcionalne za rješenje spora, manje relevantne okolnosti mogu biti objedinjene pod naslovom „ostale činjenice", uz kratak opis i naznaku da nijesu relevantne za predmet[177]. Bitno je da izlaganje činjenica u ovoj fazi ne bude istovremeno i njihova interpretacija – opisni dio odluke predstavlja osnov za naknadnu pravnu analizu, i mora odražavati činjenice onako kako ih je sud utvrdio nezavisno od stava bilo koje stranke.

> **SAVJET ZA PRAKSU**
> *Činjenice predstavite po važnosti, tako da čitalac odmah stekne uvid u značaj svake činjenice za predmet. Tvrdnje stranaka sažmite prema njihovim najvažnijim i najočiglednijim argumentima, koristeći ujednačene izraze poput „tužilac je tvrdio...", „tuženi je naveo...", „sud je dodatno primijetio...".*

[18] U dijelu koji sadrži razloge za odluku, sudija/tkinja ima punu slobodu da riješi predmet prema slobodnom sudijskom uvjerenju, jedino ograničenje ove slobode sadržano je u zahtjevima prava na pravično suđenje. Ovaj dio odluke po pravilu sadrži: činjenične okolnosti onako kako ih je sud utvrdio; dokaze koji podržavaju zaključke suda; razloge zbog kojih sud ne prihvata određene vrste dokaza ili argumenata stranaka; i upućivanje na primjenjive pravne odredbe[178]. Sud se ne mora izjasniti o svakom argumentu koji su stranke iznijele, ali se od njega očekuje da odgovori na najvažnije od njih i da pruži jasne razloge zbog kojih određeni drugi argumenti nijesu prihvaćeni – izbjegavanje odgovora na argumente koji su očigledno odlučujući za ishod predmeta ostavlja utisak da je sud samo djelimično razmotrio izlaganje stranaka.

[19] Sa stanovišta redakcije teksta, moguće su dvije osnovne opcije stila: „ediktalni" stil, koji počinje izrazima poput „uzimajući u obzir..." nakon čega slijedi lista stavki, i „direktni" stil, u kojem

[175]CEELI Institute, A Guide to Judicial Writing, tačka 35.
[176]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 22.
[177]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 23.
[178]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 26.

se obrazloženje piše kao tekst podijeljen na numerisane pasuse ili tematske cjeline sa naslovima[179]. Direktni stil, podijeljen na numerisane pasuse sa naslovima koji ukazuju čitaocu/teljki na prelazak sa jedne teme na drugu, po pravilu je pristupačniji široj publici i preporučljiviji je za složenije predmete.

[20] Bez obzira na izabrani stil, obrazloženje uobičajeno slijedi isti logički redosled za svako pitanje ili prigovor koji razmatra: sažeto ili detaljno izlaganje pitanja ili razloga; sažetak relevantnih pravnih odredbi koje se odnose na taj konkretan slučaj; relevantna interpretacija tih odredbi, uz citiranje sudske prakse gdje je to primjereno; i primjena tih odredbi na konkretan slučaj, odnosno rješenje tog pitanja[180]. Prilikom citiranja pravnih odredbi, moguće su tri opcije po stepenu detaljnosti – citiranje samo naziva relevantne odredbe, citiranje uz sažetak njenog sadržaja, ili citiranje uz doslovnu transkripciju teksta – pri čemu treća opcija čini presudu dužom, ali jasnijom i razumljivijom za treća lica koja nijesu pravni stručnjaci.

[21] Kada u sudskoj praksi postoji razilaženje po istom pravnom pitanju, od suštinske je važnosti da odluka jasno naznači koju od mogućih interpretacija sud prihvata i da ukratko izloži razloge za takav izbor. Formulacije poput „sud je svjestan različitih interpretacija, ali smatra da je opcija X ispravnija, iz sledećih razloga...“ pokazuju čitaocu/teljki da je sud svjestan postojanja divergentne prakse i pružaju čvrstu osnovu za odluku[181]. Suprotno postupanje – prećutno zanemarivanje postojanja divergentne prakse – ugrožava ne samo uvjerljivost konkretne odluke, već i standard doslednosti sudske prakse u cjelini, koji je predmet posebne pažnje prethodnih analitičkih podloga ovog projekta.

[22] Prije konačne finalizacije nacrta, korisno je izvršiti dodatnu proveru teksta iz perspektive drugačije od one koju je sudija imao tokom pisanja – na primjer, sagledavanjem nacrta iz ugla višeg suda koji bi razmatrao eventualnu žalbu, ili iz ugla strane koja je izgubila spor i koja bi najvjerovatnije formulisala određene prigovore[182]. Ovakva provjera pomaže da se identifikuju argumenti koji možda nijesu dovoljno obrađeni, i da se ojača autoritet odluke izričitim citiranjem sudske prakse višeg suda koja je primjenjiva na konkretan spor.

[22a] U praksi Upravnog suda Republike Srbije, ova opšta načela dodatno su razrađena kroz precizna pravila o jezičkom izrazu odluke: sud u svom radu koristi izraze iz zakona i izbjegava strane riječi koje nijesu opšte usvojene u radu suda, dok se u uvodu presude spor kratko označava korišćenjem zakonskih pravnih instituta[183]. Nazivi zakona i drugih propisa mogu se u tekstu navesti u skraćenom obliku (na primjer, ZUS, ZPP) kada je takva skraćenica opšte poznata,

[179]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 24; up. Francuski državni savjet, Vademecum sur la rédaction des décisions de la juridiction administrative, 2019: „Autor [upravnih presuda] takođe mora imati na umu da odluku koju priprema mogu čitati različite grupe čitalaca. Stoga mora nastojati da piše za sve ciljne grupe.“

[180]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 24–25.

[181]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 27.

[182]Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 27.

[183]Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 16 (Opšta pravila pri pisanju odluka i drugih pismena u sudu).

dok propisi koji nijesu u čestoj upotrebi moraju biti navedeni punim nazivom, uz označenje službenog glasila i broja u kome su objavljeni.

[22b] Isti priručnik precizno razgraničava dva sloja obrazloženja u upravnom sporu. Činjenično obrazloženje je ono u kojem sud najprije identifikuje činjenice koje su među strankama nesporne, a zatim posebno navodi sporne činjenice i svoj konkretan stav o tome koje su od njih utvrđene i na osnovu čega[184]. Pravno obrazloženje je ono u kojem sud precizno navodi materijalnopravni propis koji primjenjuje – sa punim nazivom, brojem službenog glasila i godinom objavljivanja – kao i sudsku praksu na koju se poziva, uz obavezu da, ako se poziva na pravni stav usvojen na sjednici svih sudija ili na odluku Ustavnog suda ili Evropskog suda za ljudska prava, navede njen broj i izvor objavljivanja[185]. Ako je odluka donesena na osnovu činjenica utvrđenih u upravnom postupku, sud nije dužan da ponavlja obrazloženje iz osporenog akta, već je dovoljno da se na njega pozove, ukoliko se radi o ponovljenim navodima koji su već obrazloženi u tom aktu – standard koji je u praksi ESLJP potvrđen u predmetu Van de Hurk protiv Holandije[186].

IV JASNOĆA, SAŽETOST I STIL PISANJA

[23] Dužina odluka predstavlja jednu od najčešće raspravljanih tema u pravnom svijetu. Sažetost je vrlina, ali je manje važna od tri nadređene vrline: jasnoće izraza, jasnog rezonovanja i razumljivosti[187]. Sudije/tkinje imaju velika radna opterećenja, a izrada obrazloženja je zahtjevan zadatak koji mora biti izvršen u razumnom roku – ovakav stvarni pritisak nije uvijek naklonjen kratkim odlukama, ali kratke odluke ne treba žrtvovati zarad lažnog utiska temeljitosti koji duži tekst ponekad stvara.

[24] Postoji nekoliko legitimnih tehnika za smanjenje dužine odluke, koje ne ugrožavaju njen kvalitet: podsticanje stranaka da se saglase o što je moguće više činjeničnih pitanja; upotreba fusnota za sporedne napomene; izdvajanje dužih citata iz sudske prakse ili propisa u prilog (aneks), umjesto njihovog doslovnog navođenja u tekstu; upućivanje na relevantne pasuse iz presuda citiranjem predmeta i broja stava ili strane, bez njihovog prepisivanja; upotreba indeksa i unutrašnjih naslova, posebno u dužim odlukama; i upotreba rječnika pojmova i skraćenica[188]. Ove tehnike su posebno korisne u predmetima sa opsežnom sudskom praksom ili obimnom dokumentacijom, gdje doslovno citiranje svakog izvora čini tekst nepreglednim.

> **SAVJET ZA PRAKSU**
> *Umjesto prepisivanja cijelog pasusa iz presude na koju se pozivate, navedite naziv*

[184] Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 31–32.
[185] Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 32–33.
[186] ESLJP, Van de Hurk protiv Holandije, 19. april 1994, kako je citirano u: Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 33, fusnota 20.
[187] CEELI Institute, A Guide to Judicial Writing, tačka 54.
[188] CEELI Institute, A Guide to Judicial Writing, tačka 56.

> *predmeta, broj predstavke i broj stava ili strane. Ovo skraćuje tekst, a čitaocu/teljki koji želi da provjeri izvor omogućava da ga lako pronađe.*

[25] Stil pisanja mora biti odlučan, objektivan i tehnički. Vrijednosne ili moralne procjene, mišljenja o djelotvornosti ili kvalitetu zakona, i političke ili sociološke ocjene treba izbjegavati[189]. Formulacije poput „čini se oportunim opredijeliti se za ovu tezu" ili „izgleda da..." ne bi trebalo koristiti u presudi, jer jezik koji se koristi u presudi mora biti odlučan – presuda, po samoj svojoj prirodi, odlučuje, i za sumnju u njoj nema mjesta. Ovakve neodlučne formulacije treba zamijeniti izjavama poput „sud smatra" ili „poželjno je opredijeliti se za ovu tezu".

[26] Ozbiljnost i neutralnost predstavljaju važan stilski element obrazloženja, koji odražava princip nepristrasnosti i jednake udaljenosti sudije od stranaka isključivo prema zakonu. Riječi koje se koriste u presudi ne bi trebalo da predstavljaju vrijednosne sudove o zakonima ili stavovima stranaka, kritike na račun stranaka ili advokata/ica, suvišnu ironiju, sterilan polemički ton, ili uvredljive i vulgarne izraze[190]. Iz istih razloga preporučuje se izbjegavanje pretjeranog naglašavanja putem uzvika ili znakova pitanja, kao i upotreba agresivnih grafičkih karaktera – podvlačenja, velikih slova ili podebljanog sloma teksta, koji odluci daju ton koji nije spojiv sa dostojanstvom sudske funkcije.

[27] Princip otvorenog pravosuđa (open justice) zahtijeva da svaka odluka bude objavljena u javnom zasijedanju, osim ako postoje uvjerljivi razlozi da se to ne učini. Ovo je tako jer sprovođenje pravde i pravni sistem pripadaju svima – stranke nemaju isključivo vlasništvo nad svojim predmetom, već se izlažu javnosti i javnom nadzoru, čime se promoviše transparentnost, sudijska odgovornost i povjerenje u sprovođenje pravde[191]. Izuzeci od ovog načela – na primjer, u predmetima koji uključuju maloljetnike ili osjetljive lične podatke – moraju biti izričito predviđeni zakonom i primjenjivi restriktivno.

[28] Predmeti koji uključuju djecu, lica koja nemaju punu poslovnu sposobnost, strance koji ne poznaju jezik postupka, ili nezastupane stranke, postavljaju posebne izazove djelotvorne komunikacije. U ovakvim slučajevima, potreba za jasnim i jednostavnim jezikom od strane suda posebno je izražena, u svim fazama postupka, od prvog zakazivanja do konačnog čina, odnosno objavljivanja presude suda[192]. Jedna od opcija koje sud u ovakvim slučajevima može razmotriti jeste sačinjavanje kratkog, objašnjavajućeg rezimea odluke, sastavljenog jednostavnim jezikom, koji prati odluku napisanu na uobičajen, tehnički način.

[29] Konačno, dobro poznavanje doktrine presedana (obavezujuće snage prethodnih odluka viših sudova, odnosno ubjedljive snage prethodnih odluka u kontinentalnim pravnim sistemima) predstavlja preduslov discipline u citiranju sudske prakse. Sudija/tkinja se mora zapitati: da li je odluka koju citira odluka nadređenog ili istorodnog suda koja, kao presedan, koja moze biti relevantna za predmet? Ako je odgovor potvrdan, da li se njeno pravno shvatanje (ratio

[189] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 26.
[190] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 24.
[191] CEELI Institute, A Guide to Judicial Writing, tačka 39.
[192] CEELI Institute, A Guide to Judicial Writing, tačke 47–48.

decidendi) uopšte odnosi na pitanje koje sudija/tkinja treba da riješi?[193]. Nedisciplinovano opterećivanje suda nebitnom sudskom praksom predstavlja jedno od pitanja koje bi trebalo razmotriti već na najranijem ročištu za pripremu predmeta, ograničavanjem dužine podnesaka i broja citiranih izvora.

V KONTROLNA LISTA KRITERIJUMA ZA OCJENU KVALITETA OBRAZLOŽENJA SUDSKIH ODLUKA

Kontrolna lista koja slijedi preuzeta je, bez izmjena u formulaciji pojedinačnih stavki, iz praktičnih vodiča izrađenih u okviru projekta CLEAR-JUST za Crnu Goru i Srbiju, i ovdje je predstavljena kao jedinstveni, zajednički instrument samoprocjene za oba pravosudna sistema. Njena osnova je kontrolna lista koju je razvila Evropska komisija za efikasnost pravosuđa (CEPEJ), dopunjena standardima ESLJP i CCJE koji su detaljno izloženi u analitičkim podlogama CLEAR-JUST projekta o evropskim standardima kvaliteta sudskih odluka[194]. Checklista je organizovana u šest kategorija koje odgovaraju šest različitih aspekata kvaliteta obrazloženja: razumljivost, potpunost, pravnu logiku, doslednost, formu, i posebne kategorije predmeta. Ne očekuje se da svaka odluka ispuni doslovno svaku stavku – checklista je oruđe za samoprocjenu, a ne obavezujući dokument.

Stavke checkliste identične su za oba pravosudna sistema, sa jednim izuzetkom: nacionalni dodatak za Srbiju sadrži jednu dodatnu stavku, zasnovanu na Priručniku za izradu sudskih odluka u Upravnom sudu Republike Srbije, koja je u tekstu koji slijedi posebno označena kao stavka specifična za Srbiju.

A Razumljivost i jasnoća

- ☐ Da li su izjava i razlozi za odluku razumljivi čitaocu koji nije pravni stručnjak?[195]
- ☐ Da li je odluka napisana jasnim i jednostavnim jezikom, uzimajući u obzir da svaki sudija može odabrati lični stil, ali da razlozi moraju biti koherentno organizovani?
- ☐ Da li obrazloženje izbjegava zastarjele ili latinske izraze i riječi koje nijesu razumljive većini čitalaca, osim gdje je njihova upotreba neophodna i objašnjena?
- ☐ Da li je odluka, u predmetima koji uključuju nezastupane stranke, djecu ili lica koja ne poznaju jezik postupka, praćena jasnim objašnjenjem ishoda?
- ☐ Da li su strane u postupku uvijek označene punim ličnim imenom, a ne isključivo po redu nabrajanja (prvotužilac, drugotuženi i sl.)?

[193]CEELI Institute, A Guide to Judicial Writing, tačka 57.
[194]CEPEJ, Checklist for promoting the quality of justice and the courts (2008), kako je prevedeno i sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 19–20.
[195]CEPEJ checklist, kako je citirano u: Roagna, 2024, str. 19.

B Potpunost i sistematičnost razloga

- ☐ Da li su razlozi za odluku detaljni i sistematični, prateći jasan i logičan redosled?[196]
- ☐ Da li je sud odgovorio na sve argumente stranaka koji su odlučujući za ishod predmeta, iako nije bio dužan da odgovori na svaki pojedinačni navod?
- ☐ Da li obrazloženje jasno pokazuje da je sud ispitao sva glavna pitanja u predmetu i analizirao sve argumente koje su stranke iznijele?
- ☐ Da li je, u predmetima koji se odnose na kvalifikovana (relativna) prava iz čl. 8–11 EKLJP, čl. 1 Protokola br. 1 i čl. 2 Protokola br. 4, primijenjen test u tri koraka – zakonitost, legitimnost, neophodnost i proporcionalnost?[197]
- ☐ Da li je, u slučaju odbijanja žalbe, jasno naznačeno da li apelacioni sud u potpunosti prihvata razloge prvostepene odluke, ili dodaje sopstveno obrazloženje tamo gdje su prvostepeni razlozi neodgovarajući, nekoherentni ili protivrečni?
- ☐ Da li su neodređeni pravni pojmovi (pravni standardi) koji nijesu na odgovarajući način razrađeni u odluci, propisima ili sudskoj praksi, korišćeni sa oprezom, imajući u vidu njihovo ograničeno dejstvo?
- ☐ Da li se, kada je odluka zasnovana na činjenicama već utvrđenim u upravnom postupku, obrazloženje pravilno poziva na ranije izloženo obrazloženje osporenog akta umjesto da ga doslovno ponavlja, u skladu sa standardom koji je ESLJP potvrdio u predmetu Van de Hurk protiv Holandije?[198] **(nacionalni dodatak za Srbiju)**

C Pravna logika i unutrašnja dosljednost

- ☐ Da li obrazloženje poštuje osnovna pravila logike – načelo identiteta, zakon protivrečnosti, zakon isključenog trećeg i zakon dovoljnog razloga?
- ☐ Da li je jasno naznačeno da li je primijenjeno deduktivno ili induktivno rezonovanje?
- ☐ Da li su korišćene jasne formulacije koje obilježavaju logičke korake rezonovanja („sud je utvrdio da...“, „na osnovu ovih dokaza, sud je utvrdio da...“, „stoga, sud je zaključio da...“)?
- ☐ Da li je, u slučaju sukoba pravnih pravila, izričito naznačeno koje je pravilo prevage primijenjeno (lex superior, lex posterior, lex specialis)?
- ☐ Da li je opisni dio odluke (kontekst slučaja) odvojen od njegove interpretacije, tako da činjenice budu iznesene onako kako ih je sud utvrdio, a ne kako ih tumači jedna od strana?

[196] CEPEJ checklist, kako je citirano u: Roagna, 2024, str. 19.
[197] Test u 3 koraka razvijen u praksi ESLJP; up. Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 14–17.
[198] Up. Priručnik za izradu sudskih odluka u Upravnom sudu, Upravni sud Republike Srbije / Pravosudna akademija, uz podršku Misije OEBS u Srbiji, 2022–2023 (procijenjeno), str. 33, fusnota 20, sa upućivanjem na ESLJP, Van de Hurk protiv Holandije, 19. april 1994.

D Dosljednost sa ustaljenom sudskom praksom

- ☐ Da li je, kada odluka odstupa od ustaljene sudske prakse po istom pravnom pitanju, to odstupanje izričito naznačeno i detaljno obrazloženo?[199]
- ☐ Da li obrazloženje, u slučaju razilaženja sudske prakse po istom pravnom pitanju, jasno naznačava koju interpretaciju sud prihvata i zbog čega?
- ☐ Da li je odluka donesena na predvidljiv i ustaljen način primjene prava, izbjegavajući duboke i dugotrajne razlike u odlučivanju u sličnim predmetima?
- ☐ Da li su, kada je to primjereno, u obrazloženju citirane relevantne odluke Evropskog suda za ljudska prava ili više domaće instance?

E Forma, dužina i stil

- ☐ Da li postoje specifična pravila i standardi koji se koriste za prezentaciju odluke – naslovi, numerisani pasusi, jasna struktura?[200]
- ☐ Da li je dužina odluke srazmjerna složenosti predmeta, uz korišćenje tehnika za kontrolu dužine gdje je to moguće (fusnote, upućivanje na izvore umjesto njihovog prepisivanja, prilozi za duže citate)?
- ☐ Da li je stil pisanja odlučan, objektivan i tehnički, bez vrijednosnih sudova, ironije ili izraza koji nijesu spojivi sa dostojanstvom sudske funkcije?
- ☐ Da li je dispozitiv jasno odvojen od obrazloženja i da li je potpun, sveobuhvatan i u skladu sa obrazloženjem?
- ☐ Da li je odluka, gdje je to potrebno zbog njene dužine ili složenosti, praćena indeksom, rječnikom pojmova ili skraćenica?

F Posebne kategorije predmeta

- ☐ Da li se, u slučaju masovnih ili ponavljajućih predmeta, koriste standardizovane odluke i pravila na način koji ne ugrožava individualizovano razmatranje svakog predmeta?[201]
- ☐ Da li je, u predmetima kod kojih postoji zahtjev za hitnim postupanjem (npr. izborni sporovi, zaštita prava na suđenje u razumnom roku), obrazloženje prilagođeno tako da bude sažeto, ali potpuno?
- ☐ Da li je uzeto u obzir da li domaći zakon izričito isključuje pristup sudu za određenu kategoriju predmeta, i da li je to isključenje opravdano objektivnim razlozima?

[199]Up. Ustavni sud Crne Gore, Ustavni sud Republike Srbije (**Уж** 41/2009, 30. mart 2011) i ESLJP, praksa citirana u analitičkim podlogama CLEAR-JUST projekta o evropskim standardima kvaliteta sudskih odluka.
[200]CEPEJ checklist, kako je citirano u: Roagna, 2024, str. 19.
[201]CEPEJ checklist, kako je citirano u: Roagna, 2024, str. 19.

VI NAJČEŠĆA PITANJA

P: Da li sve sudske odluke moraju biti obrazložene?

O: Prema praksi ESLJP, obaveza obrazlaganja treba da se odnosi na odluke tokom postupka i na konačne odluke. Obim ove obaveze zavisi od prirode odluke i okolnosti slučaja. Kao opšte pravilo, odluke koje se odnose na upravljanje postupkom (na primjer, odluka o odlaganju ročišta) ne moraju imati specifično obrazloženje, osim ako je drugačije propisano zakonom[202].

P: Da li apelacioni sud mora sam da izloži sopstveno obrazloženje, ili može samo da potvrdi razloge nižeg suda?

O: Apelacioni sud može ispuniti svoju obavezu obrazlaganja jednostavnim uključivanjem ili odobravanjem obrazloženja nižeg suda prilikom odbijanja žalbe – ali samo pod dva uslova: da je prvostepena odluka već bila dovoljno obrazložena, omogućavajući strankama da djelotvorno koriste pravo na žalbu, i da se odluka nižeg suda bavila suštinskim pitanjima koja su bila predmet apelacione nadležnosti[203]. Ako je prvostepeno obrazloženje bilo neodgovarajuće, nekoherentno ili protivrečno, apelacioni sud je dužan da ispravi te nedostatke sopstvenim obrazloženjem.

P: Kako pomiriti pravo na obrazloženu odluku i pravo na suđenje u razumnom roku?

O: Ova dva zahtjeva nijesu suprotstavljena, već se moraju posmatrati zajedno. CCJE u Mišljenju br. 11 navodi da bi, radi postizanja kvalitetnih odluka na način koji je proporcionalan interesima koji su u pitanju, sudije trebalo da rade unutar zakonodavnog i proceduralnog okvira koji im omogućava da slobodno odlučuju i efikasno raspolažu vremenskim resursima potrebnim za pravilno rješavanje slučaja[204]. U praksi, princip sažetosti djelimično je funkcionalan upravo cilju suđenja u razumnom roku: sud može, poštujući ovaj princip, izostaviti detaljno obrazloženje za procesna pitanja koja nijesu sporna, dok materijalna, odlučujuća pitanja i dalje moraju biti potpuno obrazložena.

P: Da li se odluke ESLJP mogu koristiti kao model za izradu domaćih presuda?

O: Da. ESLJP predstavlja jedinstven izvor standarda za sastavljanje sudskih odluka. Njegove presude i odluke, koje su lako dostupne i prevedene na više jezika država članica Savjeta Evrope, mogu se smatrati „mjerilom standarda" za kvalitet sudskih odluka u Evropi i šire. Bez obzira na to protiv koje je države članice predstavka podnesena, ESLJP primjenjuje sličan format i stil pisanja u svojim odlukama[205]. Sudska praksa ESLJP takođe definiše obim

[202] Up. ESLJP, praksa sistematizovana u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 14.
[203] Up. ESLJP, Helle protiv Finske, 19. decembar 1997, st. 59–60; García Ruiz protiv Španije, 21. januar 1999, stav 26; kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 14 i 26.
[204] CCJE, Mišljenje br. 11 (2008), kako je citirano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 17.
[205] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 24.

svakog prava sadržanog u Konvenciji, pomažući sudijama u državama članicama da pravilno primijene Konvenciju u svojim odlukama.

P: Šta ako se sudska praksa po istom pravnom pitanju razilazi između odjeljenja istog suda ili između različitih sudova?

O: Razilaženje sudske prakse samo po sebi ne predstavlja povredu prava na pravično suđenje – različiti sudovi mogu doći do različitih, ali racionalnih i obrazloženih zaključaka u vezi sa istim pravnim pitanjem postavljenim u sličnim činjeničnim okolnostima, jer je to inherentno svojstvo svakog pravosudnog sistema[206]. Ono što obrazloženje mora da sadrži jeste jasna svijest o postojanju divergentne prakse i konkretni razlozi zbog kojih sud prihvata jednu, a odbacuje drugu interpretaciju. Mehanizmi institucionalnog ujednačavanja prakse – poput opštih sjednica i sjednica odjeljenja – detaljno su izloženi u prethodnoj analitičkoj podlozi CLEAR-JUST projekta o nacionalnom zakonodavnom okviru.

P: Da li vrijeme koje protekne od donošenja do promulgacije (otpravljanja) odluke utiče na njen kvalitet?

O: Ne poboljšava ga. Pouzdanost i kvalitet odluke se ne unapređuju protokom vremena, niti se time povećava poštovanje prema strankama. U najvećem broju predmeta, najkvalitetnija odluka je ona koja je započeta i završena na najranijem mogućem datumu nakon okončanja rasprave[207]. Tamo gdje je neophodno rezervisati donošenje odluke za kasniji datum, dobra praksa je da se strankama u otvorenom zasijedanju saopšti datum na koji će rezervisana odluka biti dostupna, a u svakom slučaju kada rok ne može biti ispoštovan, stranke treba pravovremeno obavijestiti, uz odgovarajuće objašnjenje.

P: Šta ako različiti sudovi (ili različita vijeća istog suda) u Srbiji donesu različite odluke u istoj činjeničnoj i pravnoj situaciji?

O: Ustavni sud Republike Srbije je zauzeo stav da donošenje različitih odluka u istoj činjeničnoj i pravnoj situaciji može dovesti do povrede prava na jednaku pravnu zaštitu prava pred sudom, koje jamči član 36 Ustava[208]. Isti stav izrazio je i ESLJP u predmetu Beian protiv Rumunije, ukazujući na rizike koje duboka i dugotrajna razilaženja u sudskoj praksi najvišeg suda predstavljaju za pravnu sigurnost[209]. Razlozi pravne sigurnosti i zaštite legitimnih očekivanja učesnika u postupku pritom ne podrazumijevaju apsolutno pravo na ustaljenu sudsku praksu – sudska nezavisnost i samostalnost u odlučivanju ostaju zaštićene – ali cilj pravne sigurnosti mora se sljediti uz dužno poštovanje tih vrijednosti, kroz izričito obrazloženje kad god sud odstupa od ranije zauzetog stava (up. checklist, kategorija D).

[206]Up. praksa ESLJP sistematizovana u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 9.
[207]CEELI Institute, A Guide to Judicial Writing, tačka 20.
[208]Ustavni sud Republike Srbije, **Уж** 41/2009, 30. mart 2011; kako je citirano u: Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 30.
[209]ESLJP, Beian protiv Rumunije (br. 2), 6. decembar 2007; kako je sistematizovano u: Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 30.

VII ILUSTRATIVNI PRIMJERI IZ PRAKSE

Prva tri primjera koja slijede preuzeta su iz prakse Evropskog suda za ljudska prava, kako su sistematizovani u priručniku Savjeta Evrope pripremljenom za sudije Upravnog suda Crne Gore[210]. Odabrani su zato što ilustruju konkretne, često ponavljajuće nedostatke obrazloženja na koje ESLJP dosledno ukazuje, i podjednako su relevantni za srpski kontekst. Četvrti primjer preuzet je neposredno iz Priručnika za izradu sudskih odluka u Upravnom sudu Republike Srbije i ilustruje kada je dopušteno da sud obrazloženje osporenog akta preuzme umjesto da ga ponavlja.

◆ Primjer 1: Kada je kratko obrazloženje ipak nedovoljno – Hirvisaari protiv Finske

Predmet se odnosio na odluku Osiguravajućeg suda kojom je podnositeljki predstavke invalidska penzija promijenjena iz pune u djelimičnu. Odluka Penzionog odbora, na koju se podnositeljka prvobitno žalila, sadržala je samo opšte navode o uslovima za penziju i kratku konstataciju da su njeni simptomi „blagi", bez preciziranja koji su to elementi doveli do takvog zaključka. Osiguravajući sud je žalbu odbio pozivajući se prosto na razloge iz odluke Penzionog odbora, bez ikakvog sopstvenog obrazloženja[211]. ESLJP je utvrdio povredu člana 6 stav 1 Konvencije, ocijenivši da naizgled kontradiktorno obrazloženje Penzionog odbora, kao i naknadno odobravanje takvog neadekvatnog obrazloženja od strane Osiguravajućeg suda kao apelacionog tijela, nije ispunilo zahtjeve prava na pravično suđenje.

> **POUKA ZA PRAKSU**
> *Kada niži organ svoje obrazloženje svede na paušalnu ocjenu bez preciziranja elemenata na kojima se ta ocjena zasniva, apelacioni sud ne smije samo potvrditi takvu odluku – dužan je da sam ponudi konkretno, sopstveno obrazloženje, posebno kada je upravo neadekvatnost prvostepenog obrazloženja bila glavna žalba podnosioca.*

◆ Primjer 2: Kada obrazloženje ne provjerava sopstvenu činjeničnu premisu – Tatishvili protiv Rusije

Podnositeljka predstavke, rođena u Gruziji, a bez državljanstva bivšeg SSSR-a, tražila je registraciju prebivališta u Moskvi. Ruski sudovi su odbili njen zahtjev pozivajući se na navodni „ugovor" između Rusije i Gruzije o viznom režimu za gruzijske državljane, a da pritom nijesu provjerili ni da li takav ugovor uopšte postoji, ni da li je podnositeljka bila gruzijska državljanka[212]. ESLJP je utvrdio da je obrazloženje nekoherentno i neadekvatno – ne samo zato

[210] Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 12–13 i 22–24.

[211] ESLJP, Hirvisaari protiv Finske, predstavka br. 49684/99, 27. septembar 2001, st. 30–33; kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 12–13.

[212] ESLJP, Tatishvili protiv Rusije, predstavka br. 1509/02, 22. februar 2007, st. 61–62; kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 22–24.

što je bilo kratko, već zato što se zasnivalo na činjeničnoj premisi (postojanju „ugovora") koju sud nikada nije provjerio, iako je ta premisa bila odlučujuća za ishod predmeta.

POUKA ZA PRAKSU

Svaka činjenična premisa na kojoj obrazloženje počiva mora biti provjerena i, gdje je to sporno, izričito utvrđena u odluci – posebno kada je ta premisa odlučujuća za ishod spora. Pozivanje na okolnost čije postojanje nikada nije provjereno čini cijelo obrazloženje ranjivim, bez obzira na to koliko je ono inače detaljno.

Primjer 3: Kvalifikovana prava i test u tri koraka – Nekvedavičius protiv Litvanije

Podnosiocu predstavke je odlukom Regionalnog upravnog suda dodijeljena djelimična restitucija prava vlasništva nad zemljištem, ali bez precizirane forme restitucije ili roka za njeno izvršenje. I pored pravosnažnosti odluke, državni organi nijesu preduzimali potrebne mjere za njeno izvršenje godinama, pozivajući se na složenost izvršenja presude o restituciji[213]. ESLJP je utvrdio povredu člana 6 stav 1 Konvencije, naglašavajući da mjere koje su domaći organi preduzeli u vezi sa izvršenjem presude o restituciji nijesu bile adekvatne, potrebne, ponavljajuće i djelotvorne, i da je primarna obaveza državnih vlasti, kada pojedinac dobije presudu protiv države, da upotrijebe sva odgovarajuća sredstva kako bi je izvršile.

POUKA ZA PRAKSU

Kada je odlukom dosuđeno pravo čije izvršenje zahtijeva dalje upravno postupanje, obrazloženje treba, gdje je to moguće, da precizira formu i rok izvršenja – nedovoljno precizna izreka otvara prostor za dalje odugovlačenje i naknadno sporenje, čime se sam smisao pravosnažne odluke dovodi u pitanje.

Primjer 4: Preuzimanje obrazloženja osporenog akta — kada je to dopušteno

Za razliku od prethodna tri primjera, koji ilustruju kada preuzimanje ili paušalno potvrđivanje tuđeg obrazloženja predstavlja povredu prava na pravično suđenje, koristan je i suprotan primjer – kada je takvo preuzimanje legitimno. Prema praksi Upravnog suda Republike Srbije, kada se odluka donosi na osnovu činjenica koje su već utvrđene u upravnom postupku, sud nije dužan da ponovo iznosi obrazloženje iz osporenog akta – dovoljno je da se na njega pozove, pod uslovom da se radi o ponovljenim navodima koji su u tom aktu već obrazloženi[214]. Ovaj standard je ESLJP potvrdio upravo u predmetu Van de Hurk protiv Holandije, gdje je pojasnio da obaveza suda da obrazloži svoju odluku i uzme u obzir argumente stranaka ne podrazumijeva da sud mora detaljno odgovoriti na sve navode iznesene u postupku, već samo na one koje ocijeni pravno relevantnim.

POUKA ZA PRAKSU

Poziv na ranije obrazloženje nije sam po sebi manjkav – manjkav je samo kada zamjenjuje sopstvenu analizu suda o pitanjima koja su prvi put ili na nov način

[213]ESLJP, Nekvedavičius protiv Litvanije, predstavka br. 1471/05, 10. decembar 2013; kako je sistematizovano u: Ivana Roagna, Odlučivanje o tužbama u upravnom sporu, 2024, str. 22.
[214]Priručnik za izradu sudskih odluka u Upravnom sudu, 2022–2023 (procijenjeno), str. 33, s pozivom na ESLJP, Van de Hurk protiv Holandije, 19. april 1994.

istaknuta pred njim. Prije nego što se osloni na obrazloženje osporenog akta, sud treba da provjeri da li tužba unosi novi argument na koji akt nije mogao odgovoriti, jer takav argument zahtijeva sopstveno, novo obrazloženje suda.

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PETI DIO

ANALIZA NALAZA UPITNIKA

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U okviru projekta CLEAR-JUST sproveden je upitnik među nosiocima/teljkama pravosudnih funkcija u Crnoj Gori i Srbiji, sa ciljem da neposredno provjeri u kojoj mjeri evropski standardi, nacionalni zakonodavni okviri i praktični vodič sa checklistom odgovaraju stvarnoj praksi izrade sudskog obrazloženja. Upitnik je sadržao dvadesetšest pitanja: šesnaest pitanja sa skalom ocjenjivanja od 1 do 5, i preostala pitanja otvorenog tipa, u kojima su ispitanici mogli slobodno opisati sopstveno iskustvo, izazove sa kojima se susreću i predloge za unapređenje.

Analizu čini ukupno 21 popunjenih upitnika – jedanaest iz Crne Gore i deset iz Srbije – koje su popunili sudije/tkinje, sudijski savjetnici/savjetnice, državni tužioci/tužiteljke i advokati/advokatice. U skladu sa metodologijom upitnika, odgovori se u ovom dijelu dokumenta prikazuju anonimno: ne navode se imena ispitanika, već isključivo njihova profesionalna kategorija i država, kako bi se sačuvala povjerljivost pojedinačnih odgovora uz zadržavanje analitičke vrijednosti nalaza.

Uzorak

Struktura uzorka po profesionalnoj kategoriji i državi prikazana je u tabeli koja slijedi. Uzorak iz Crne Gore je, za razliku od srpskog, izraženije okrenut tužilaštvu (pet ispitanika/ca), dok je srpski uzorak ravnomjerno raspoređen između sudija, advokata i tužilaca. Ovu razliku u strukturi uzorka treba imati u vidu prilikom tumačenja uporednih nalaza koji slijede. Dio razlika u prosječnim ocjenama može odražavati razlike u profesionalnoj perspektivi ispitanika, a ne isključivo razlike između dva pravosudna sistema.

Profesionalna kategorija	Crna Gora	Srbija
Sudije/tkinje	2	4
Sudijski savjetnici/savjetnice	1	0
Državni tužioci/tužiteljke	5	3
Advokati/advokatice	2	3
Ostalo (obuka/administracija pravosuđa)	1	0
Ukupno	11	10

Kvantitativni pregled

Tabela koja slijedi prikazuje prosječnu ocjenu za svako od šesnaest pitanja sa skalom 1–5, upoređenu između crnogorskog i srpskog uzorka. Broj u zagradi naveden je samo kada je manji od deset – dio ispitanika ostavio je pojedina pitanja na skali neodgovorena. Viša ocjena ne znači uvijek povoljniji nalaz: kod pitanja o uticaju opterećenja, anonimizacije, pritisaka ili potencijala

ocjene kvaliteta, viša ocjena označava veći uticaj tog faktora, dok kod pitanja o kvalitetu, dosljednosti, dostupnosti i korisnosti, viša ocjena označava povoljniju ocjenu.

Pitanje	Crna Gora	Srbija
Kvalitet obrazloženja sudskih odluka	3,73	2,40
Dosljednost sudske prakse	3,45	2,80
Jasnoća i razumljivost odluka	3,64	3,00
Vođenje računa o ranijim odlukama	3,45	2,80
Korišćenje (domaće/međunarodne) prakse kao reference	3,82	2,60
Citiranje relevantne sudske prakse u odlukama	3,09	2,40
Lakoća pronalaženja relevantnih presuda	2,91	2,40
Dostupnost presuda javnosti	3,50 (n=9)	2,20
Uticaj anonimizacije na transparentnost	1,82	2,70
Uticaj opterećenja predmetima na kvalitet	3,50 (n=9)	3,80
Da li su reforme tretirale kvalitet odluka	2,70 (n=9)	1,70
Efikasnost nadzora viših sudova	3,62 (n=7)	2,56 (n=9)
Potencijal ocjene kvaliteta obrazloženja za ujednačenost	3,00 (n=9)	3,56 (n=9)
Uticaj političkih/medijskih pritisaka	2,62 (n=7)	3,40
Korisnost praktičnog vodiča (benchbook)	3,67 (n=8)	3,90
Korisnost uvođenja obavezne sudske prakse	3,56 (n=8)	3,44 (n=9)

Najizraženija razlika odnosi se na **ocjenu kvaliteta obrazloženja** (Crna Gora 3,73; Srbija 2,40) i dostupnost presuda javnosti (Crna Gora 3,50; Srbija 2,20), gdje crnogorski ispitanici/e dosljedno daju povoljnije ocjene – slična razlika postoji i kod korišćenja prakse kao reference i citiranja sudske prakse u odlukama. Obrnut odnos postoji kod tri pitanja: srpski ispitanici/e procjenjuju da **opterećenje predmetima** ima veći uticaj na kvalitet (3,80 naspram 3,50), da **politički i medijski pritisci** imaju izraženiji uticaj (3,40 naspram 2,62), i da bi **ocjena kvaliteta obrazloženja** imala veći potencijal doprinosa ujednačenosti prakse (3,56 naspram 3,00) nego što to procjenjuju crnogorski ispitanici. Kod ocjene korisnosti praktičnog vodiča i uvođenja obavezne sudske prakse, dva uzorka se gotovo poklapaju.

Zajednički nalazi

Preopširnost i formalizam bez suštinske analize

Više ispitanika/ca iz oba uzorka opisuje obrazloženja kao preopširna, formalna i usmjerena na prepisivanje sadržine dokaza umjesto na njihovu suštinsku ocjenu. „Previše formalnosti i citiranja sadržine dokaza a malo suštinskog obrazloženja" (tužilac, Crna Gora); „Pretjerani formalizam, zbog kojeg se gubi fokus sa suštine... Krivične presude su za najjednostavnija djela... previše obimne" (tužilac, Crna Gora). Do istog nalaza dolazi i zbirna analiza upitnika iz Srbije, koja preopširnost i kopiranje dokaza bez prave analize izdvaja kao najčešću zamjerku.

Slaba veza između utvrđenih činjenica i pravne kvalifikacije

„Nedovoljno obrazložena ocjena dokaza, nepotpuno utvrđeno činjenično stanje, nepozivanje na sudsku praksu" (sudija, Crna Gora). Srpski uzorak ovaj nalaz formuliše eksplicitnije, navodeći izostanak jasne veze između utvrđenih činjenica i pravne kvalifikacije kao jedan od najčešćih nedostataka.

Nedovoljna pretraživost domaće sudske prakse

„Baza Evropskog suda za ljudska prava i Suda pravde EU [je dostupna], a domaća sudska praksa teško dostupna, pretrage jako loše" (tužiteljka, Crna Gora). Zbirna analiza iz Srbije na isti problem ukazuje kroz nalaz o „neuređenim bazama presuda" i odsustvu jedinstvene, javno dostupne i kvalitetno pretražive baze.

Anonimizacija: legitimna zaštita podataka, ali sa cijenom po upotrebljivost

Ispitanici/e iz oba uzorka anonimizaciju vide kao opravdanu zaštitu ličnih podataka, ali upozoravaju na njenu cijenu po transparentnost i pretraživost: „Nemogućnost identifikovanja povezanih predmeta, ne može se pratiti da li se radi o istom događaju ili licima u više postupaka" (sutkinja, Crna Gora); „Utiče na zaštitu podataka učesnika, ne na samu transparentnost odluka kao tačne" (sudijski savjetnik, Crna Gora). Zbirna analiza iz Srbije ovaj nalaz dodatno razrađuje: prekomjerna anonimizacija uklanja činjenični kontekst i posebno smanjuje upotrebljivost odluka u složenim, krivičnim, privrednim ili politički osjetljivim predmetima.

Opterećenost predmetima kao sistemski pritisak na kvalitet

Oba uzorka ocjenjuju da broj predmeta po sudiji značajno utiče na kvalitet obrazloženja (Crna Gora 3,50; Srbija 3,80) – jedan od najviše ocijenjenih faktora uticaja u čitavom upitniku u obje države.

Oprez prema formalnom uvođenju obavezujuće sudske prakse i ocjene kvaliteta u profesionalno vrednovanje

Iako većina ispitanika prepoznaje potencijalne koristi (veća pravna sigurnost, predvidljivost), izražena je i jasna zabrinutost zbog rizika formalizma: „Ne može [doprinijeti ujednačenosti]. To bi stvorilo prostor za zloupotrebe, a i kvalitet obrazloženja nije presudan sa ujednačenom praksom" (tužilac, Crna Gora); „Postoji opasnost da kod sudija prvostepenog suda dođe do površnog odlučivanja zbog utvrđene norme koju treba da postignu" (advokat, Crna Gora). Zbirna analiza iz Srbije dolazi do istog zaključka: dio ispitanika vidi potencijal za veću predvidivost, dok drugi upozoravaju na rizik rigidnosti, formalizma i zloupotrebe u uslovima slabih institucija.

Široka podrška praktičnom vodiču (benchbook)

Korisnost praktičnog vodiča za izradu sudskih odluka, sa fokusom na kvalitet obrazloženja, ocijenjena je visoko u oba uzorka (Crna Gora 3,67; Srbija 3,90) – nalaz koji neposredno potvrđuje svrhu Četvrtog dijela ovog dokumenta.

Nalazi specifični za Crnu Goru

Vidljivije oslanjanje na evropske i regionalne izvore

Crnogorski ispitanici, za razliku od srpskih, često navode korišćenje šireg kruga evropskih i regionalnih baza: „Sudije i tužioci uglavnom koriste HUDOC bazu... Regionalnu bazu sudske prakse ESLJP-a AIRE centra, baze Ustavnih sudova iz regiona, CURIA/InfoCuria, EUR-LEX" (predstavnica institucije za obuku u pravosuđu, Crna Gora) – nalaz koji upućuje na relativno razvijeniju naviku oslanjanja na komparativne i međunarodne izvore u odnosu na ono što opisuje srpski uzorak.

Konkretno uočeno kašnjenje u odlučivanju po žalbama kao prepreka harmonizaciji

„Viši sud [u Podgorici] ne funkcioniše u pravoj mjeri, jer se odluke po žalbama ne donose ni po 2 godine i više. Vrhovni sud utiče na harmonizaciju sudske prakse bez odluke po zahtjevima za zaštitu zakonitosti!" (tužilac, Crna Gora) – konkretan operativni nalaz koji nadopunjuje inače povoljniju prosječnu ocjenu efikasnosti nadzora viših sudova u crnogorskom uzorku.

Izraženija rezerva prema uvrštavanju ocjene kvaliteta obrazloženja u profesionalno vrednovanje sudija

Oba negativna odgovora na ovo pitanje u čitavom uzorku (obje države) potiču iz crnogorskog uzorka, i to od ispitanika najbliže institucionalnoj administraciji pravosuđa, a ne od sudija koje same donose odluke – nalaz koji zaslužuje pažnju prilikom eventualnog oblikovanja kriterijuma za profesionalno vrednovanje.

Nesrazmjerna dužina obrazloženja i kod najjednostavnijih predmeta

„Krivične presude su za najjednostavnija djela i u najjednostavnijim postupcima previše obimne" (tužilac, Crna Gora) – zapažanje koje preopširnost, kao zajednički nalaz, dodatno precizira na konkretnu kategoriju predmeta.

Nalazi specifični za Srbiju

Advokati/ce kao najkritičnija profesionalna grupa

Zbirna analiza upitnika iz Srbije nalazi da su advokati/ice dosljedno najkritičniji prema kvalitetu obrazloženja, jasnoći odluka i korisnosti obavezne sudske prakse, dok su sudije nešto umjerenije. Ovaj obrazac u crnogorskom uzorku nije moguće provjeriti na uporediv način, s obzirom na to da uzorak sadrži samo jednog predstavnika advokature.

Izraženija zabrinutost zbog neindividualizovanih krivičnih obrazloženja

Tužioci/teljke u srpskom uzorku posebno naglašavaju krivičnopravni aspekt problema – neindividualizovana, šablonska obrazloženja, opšte fraze i nedovoljnu analizu kontradiktornih dokaza i prakse ESLJP – nalaz koji je u crnogorskom uzorku prisutan, ali rjeđe i manje eksplicitno artikulisan.

◆Znatno niža ocjena efikasnosti nadzora viših sudova

Srpski uzorak ocjenjuje efikasnost nadzora viših sudova osjetno niže od crnogorskog (2,56 naspram 3,62) – razliku koju zbirna analiza objašnjava neadekvatnim i nedovoljno dostupnim bazama odluka, nedovoljnom ulogom Vrhovnog suda u harmonizaciji, slabom internom komunikacijom sudova i različitim standardima apelacionih sudova.

◆Izraženiji utisak da politički i medijski pritisci oblikuju sudsku praksu

Srpski ispitanici/e ocjenjuju uticaj političkih i medijskih pritisaka znatno više od crnogorskih (3,40 naspram 2,62) – najveća pojedinačna razlika u ovom pravcu u čitavom upitniku.

◆Reforme pravosuđa ocijenjene kao izrazito nedovoljne

Srpski uzorak ocjenjuje da su dosadašnje reforme pravosuđa u znatno manjoj mjeri tretirale pitanje kvaliteta sudskih odluka nego što to procjenjuje crnogorski uzorak (1,70 naspram 2,70) – najniža pojedinačna ocjena u čitavom upitniku, sa najčešćim odgovorima „uopšte nisu" ili „u maloj mjeri".

◆Zaključci i preporuke

Nalazi upitnika, uzeti zajedno sa evropskim standardima i nacionalnim okvirima izloženim u prethodnim djelovima ovog dokumenta, upućuju na sljedeće preporuke, zajedničke za oba pravosudna sistema: ◆Uspostaviti jedinstvenu, javno dostupnu i kvalitetno pretraživu bazu pravnosnažnih sudskih odluka, sa jasnim metapodacima i standardizovanom anonimizacijom koja štiti lične podatke učesnika u postupku, ali ne uklanja činjenični kontekst neophodan za razumijevanje i poređenje predmeta. ◆Dopuniti praktični vodič i checklistu izložene u Četvrtom i Šestom dijelu ovog dokumenta uvidima iz upitnika – posebno smjernicama za sažimanje činjeničnog jezgra, selektivnu ocjenu ključnih dokaza i jasnu vezu između utvrđenih činjenica i pravne kvalifikacije, koje ispitanici iz oba uzorka izdvajaju kao najveći nedostatak postojeće prakse. ◆Ojačati ulogu viših sudova (Vrhovnog i apelacionih) u harmonizaciji sudske prakse kroz redovnije objavljivanje usvojenih pravnih stavova i skraćenje rokova odlučivanja po žalbama, imajući u vidu konkretno uočeno kašnjenje u Crnoj Gori i osjetno nižu ocjenu efikasnosti nadzora u Srbiji. ◆Prilikom eventualnog uvođenja ocjene kvaliteta obrazloženja u profesionalno vrednovanje sudija, ili uvođenja formalno obavezujuće sudske prakse, postupiti obazrivo i uz jasne, transparentne i unaprijed poznate kriterijume – ispitanici u obje države iskazuju otvorenu zabrinutost da bi neoprezno sprovođenje ovakvih mjera moglo dovesti do formalizma, površnog odlučivanja ili zloupotrebe. ◆Rasteretiti sudije/tkinje, sudijske savjetnike/savjetnice i tužioce kroz bolje upravljanje predmetima, jačanje kadrovskih kapaciteta i digitalizaciju – opterećenje brojem predmeta izdvaja se, u obje države, kao jedan od najznačajnijih pojedinačnih faktora koji utiču na kvalitet obrazloženja.

ŠESTI DIO

ZAKLJUČAK

Kvalitet i dosljednost obrazloženja sudskih odluka, teme na kojima počiva čitav ovaj dokument, nijesu samo stručno pitanje unutrašnje organizacije pravosuđa – neposredno su povezani i sa **procesom pristupanja Evropskoj uniji**, kroz Poglavlje 23 (Pravosuđe i osnovna prava), u okviru kojeg Evropska komisija ocjenjuje efikasnost, nezavisnost i odgovornost pravosuđa obje države . Iako Komisija ne izdvaja kvalitet obrazloženja kao posebno pregovaračko mjerilo u okviru Piglavlja 23, nalazi ovog upitnika, o preopširnosti i formalizmu obrazloženja, neujednačenoj praksi i ograničenoj dostupnosti baza presuda, uklapaju se upravo u te šire kategorije efikasnosti i odgovornosti pravosuđa po kojima se cijeni napredak u Poglavlju 23.

Crna Gora je trenutno *predvodnica* procesa proširenja: od 33 pregovaračka poglavlja, do jula 2026. **privremeno je zatvoreno 18**, uz izraženu namjeru Vlade da zatvori sva preostala poglavlja do kraja 2026. godine. Shodno metodologiji vođenja pristupnih pregovora sa EU, Poglavlja 23 i 24, ostaju otvorena sve do završetka procesa, odnosno ispunjenja završnih mjerila za čije je sprovođenje usvojen akcioni plan. Izvještaj Evropske komisije za 2025. godinu ocjenjuje crnogorsko pravosuđe kao pravosuđe koje se nalazi „između umjerenog i dobrog nivoa pripremljenosti", uz određeni napredak u izvještajnom periodu – izbor predsjednika Vrhovnog suda u punom mandatu, sprovođenje Strategije reforme pravosuđa 2024–2027. i jačanje finansijske nezavisnosti pravosuđa, kroz regulisanje starosne granice za penzionisanje nosilaca pravosudnih funkcija i pitanja njihovih zarada i drugih materijalnih prava izdvajaju se kao pozitivni koraci. Istovremeno, Komisija ukazuje na dublju institucionalnu i političku krizu izazvanu jednostranim okončanjem mandata sudije Ustavnog suda krajem 2024. godine, na nepopunjena sudijska mjesta (243 od planiranih 329) i na zaostatke predmeta, naročito pred Višim sudom u Podgorici – nalaz koji se neposredno poklapa sa zapažanjem crnogorskog uzorka u ovom upitniku o kašnjenju u odlučivanju po žalbama.[215]

Pregovori Srbije sa Evropskom unijom trenutno su usporeni: Izvještaj Evropske komisije za 2025. godinu bilježi odsustvo napretka u Poglavlju 23 tokom izvještajnog perioda, uz izričitu zabrinutost zbog **nazadovanja u vladavini prava**. Komisija navodi visok stepen političkog pritiska na pravosuđe i tužilaštvo, uz ograničen institucionalni odgovor na takav pritisak, kao i strukturne nedostatke – 383 od 3.102 sudijska mjesta i 237 od 894 tužilačka mjesta ostaju upražnjena, a Ustavni sud posluje sa četiri nepopunjena mjesta . Ovi nalazi gotovo doslovno se poklapaju sa najizraženijim zapažanjem srpskog uzorka u ovom upitniku – ocjenom uticaja političkih i medijskih pritisaka na sudsku praksu kao najvišom pojedinačnom ocjenom u čitavom istraživanju.

Za obje države, naredni koraci na putu ka članstvu i unapređenje kvaliteta sudskog obrazloženja predstavljaju, u suštini, iste korake posmatrane iz različitih uglova. Crna Gora treba da učvrsti ostvareni napredak sprovođenjem završnih mjerila, zaštitom nezavisnosti Ustavnog suda i smanjenjem zaostataka, naročito u žalbenom postupku. Srbija treba da preokrene ocjenu odsustva napretka rješavanjem upravo onih pitanja koja njeni sopstveni ispitanici u ovom upitniku najglasnije ističu – smanjenjem političkog pritiska na donosioce odluka i popunjavanjem

[215] Sudski savjet Crne Gore, Godišnji izvještaj o radu Sudskog savjeta i ukupnom stanju u sudstvu za 2025. godinu, Podgorica, mart 2026, str. 164 i 177–179.

sudijskih i tužilačkih mjesta. U oba slučaja, unapređenje kvaliteta i dosljednosti sudskog obrazloženja, kroz alate poput Vodiča i checkliste iz ovog dokumenta, predstavlja neposredan i praktičan doprinos ispunjavanju kriterijuma Poglavlja 23, a ne aktivnost odvojenu od procesa pristupanja.

Nalazi upitnika već ukazuju na **šest institucionalnih pravaca djelovanja**: jedinstvenu i javno dostupnu bazu presuda, standardizovanu anonimizaciju, jačanje uloge viših sudova harmonizaciji, oprez pri eventualnoj formalizaciji ocjene kvaliteta obrazloženja u profesionalno vrednovanje sudija, rasterećenje sudija/tkinja i sudijskih savjetnika/savjetnica, i dopunu Vodiča i checkliste uvidima iz upitnika. Ovaj poslednji pravac zaslužuje konkretizaciju: sljedeće teme, izvedene neposredno iz otvorenih odgovora ispitanika, predstavljaju prioritetan sadržaj za naredno, dopunjeno izdanje Vodiča.

- **Individualizacija krivičnih obrazloženja**

Modul posvećen izbjegavanju šablonskih formulacija u krivičnim predmetima, sa fokusom na jasnu vezu između ocjene dokaza i pravne kvalifikacije – nedostatak koji su i crnogorski i srpski ispitanic/ei najčešće navodili kao centralni problem.

- **Proširenje kruga izvora sudske prakse**

Smjernice za korišćenje regionalnih i evropskih baza (HUDOC, CURIA/InfoCuria, EUR-LEX), po modelu koji su opisali crnogorski ispitanici/e, kao praktičan predložak za širu upotrebu u srpskom pravosuđu.

- **Standardizovana anonimizacija**

Uputstvo koje štiti lične podatke učesnika/ca u postupku bez brisanja činjeničnog konteksta neophodnog za razumijevanje i poređenje predmeta, posebno u krivičnim i privrednim stvarima.

- **Srazmjernost obima obrazloženja**

Praktične smjernice za prilagođavanje dužine i strukture obrazloženja složenosti predmeta, uključujući najjednostavnija prekršajna i upravna pitanja, gdje su ispitanici/e uočili nesrazmjernu obimnost u odnosu na složenost stvari.

- **Obrazlaganje pod pritiskom**

Modul o očuvanju profesionalne nezavisnosti i dosljednosti obrazloženja u predmetima izloženim političkoj ili medijskoj pažnji – tema koju su srpski ispitanici/e posebno naglašavali, a koja se neposredno nadovezuje i na nalaze o Poglavlju 23 iz prethodnog odjeljka.

- **Rokovi i nadzor po žalbama**

Dodatak checklisti koji uključuje samoprocjenu blagovremenosti odlučivanja po pravnim ljekovima, kao odgovor na konkretno uočeno kašnjenje u odlučivanju po žalbama u crnogorskom uzorku.

Iskustvo ovog upitnika pokazuje da civilno društvo – u ovom projektu CEDEM i JUREC/CEPRIS – može doprinijeti unapređenju kvaliteta sudskog obrazloženja aktivnostima koje ne zavise od zakonodavnih izmjena i mogu započeti odmah, u okviru naredne faze projekta CLEAR-JUST ili srodnih inicijativa. Preporuke su sljedeće: ◆Organizovanje obuka za sudije/tkinje, sudijske savjetnike/savjetnice i tužioce, u saradnji sa pravosudnim akademijama obje države, sa ciljem uvrštavanja Vodiča i checkliste u redovan program stručnog usavršavanja. ◆ Ponavljanje istog ili sličnog upitnika u redovnim intervalima (na primjer, svake dvije do tri godine) kako bi se uspostavila osnovica za mjerenje stvarnog uticaja preporuka i reformi tokom vremena. ◆Javno zastupanje uspostavljanja jedinstvene baze presuda i usvajanja smjernica za obrazloženje pred nadležnim institucijama (Vrhovni sud, Sudski/Tužilački savjet, ministarstva pravde), oslanjajući se na nalaze ovog upitnika kao dokaznu osnovu. ◆Nezavisno civilno praćenje, uporedo sa zvaničnim izvještajima Evropske komisije, pitanja koja su ispitanici izdvojili kao najosjetljivija – politički i medijski pritisci na pravosuđe, popunjenost sudijskih i tužilačkih mjesta, i efikasnost nadzora viših sudova. ◆Povezivanje crnogorskih i srpskih organizacija civilnog društva koje se bave pravosuđem radi razmjene iskustava, zajedničkog zagovaranja pred institucijama Evropske unije i usklađivanja preporuka za obje države. ◆Predstavljanje nalaza ovog dokumenta strukovnim udruženjima – sudijskim i tužilačkim udruženjima, advokatskim komorama – i akademskoj zajednici, kroz okrugle stolove i javne rasprave, kao osnovu za dalji dijalog o unapređenju pravosuđa.

Sagledana zajedno, ova tri pravca – evropske integracije, institucionalna i stručna reforma pravosuđa, i angažman civilnog društva – nijesu paralelni procesi, već tri lica istog cilja: sudsko obrazloženje koje je dosljedno, uvjerljivo i razumljivo onima kojima je namijenjeno. Ovaj dokument, u svom sadašnjem obimu, **predstavlja doprinos tom cilju** iz stručne i analitičke perspektive; njegova dalja sudbina, kroz obuke, zagovaranje i naredna izdanja, zavisiće od toga koliko će nalazi predstavljeni ovdje zaista biti korišćeni u praksi..

Ministry of Foreign Affairs and International Cooperation

CEDEM
CENTAR ZA DEMOKRATIJU I LJUDSKA PRAVA

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Centar za pravosudna istraživanja

CLEAR-JUST

QUALITY OF REASONING OF COURT DECISIONS AND UNIFORM APPLICATION OF LAW FOR THE PURPOSE OF ACHIEVING CONSISTENT CASE LAW

Centre for Democracy and Human Rights (CEDEM)
in cooperation with the Judicial Research Centre (CEPRIS/JUREC)



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CLEAR-JUST

Consistent Judicial Reasoning and Harmonised Case Law
for Legal Certainty

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Centre for Democracy and Human Rights (CEDEM), Podgorica
in cooperation with the Judicial Research Centre (CEPRIS/JUREC), Belgrade

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METHODOLOGICAL FRAMEWORK

This document brings together, into a single whole, various methodological frameworks, ranging from a review of European standards and the national legislative frameworks of Montenegro and Serbia, to interviews with representatives of judicial institutions in both countries.

Part One contains a common introduction to European standards — the normative and institutional framework of the Council of Europe (CCJE, CEPEJ, ECtHR case law) relating to the quality of court decisions and the uniform application of law.

Parts Two and **Three** contain an overview of the national legislative frameworks of Montenegro and the Republic of Serbia: constitutional provisions, procedural legislation, institutional mechanisms for ensuring the uniform application of law and the system of professional performance evaluation of judges in each of the two states.

Part Four contains a practical guide for improving the quality of reasoning of court decisions: brief guidance on the structure, legal reasoning and statement of reasons of court decisions, a checklist for assessing the quality of reasoning of court decisions, answers to the most frequent practical questions and illustrative examples from case law.

Part Five is an analysis of the responses to a questionnaire distributed to judicial office holders in Montenegro and Serbia.

Part Six contains a concise conclusion linking all the preceding parts of this document and summarising the recommendations.

For a clearer overview of sources, footnotes are numbered continuously throughout the entire document. Certain parts retain their own lists of sources, for the sake of readability and clarity.

PART ONE

EUROPEAN STANDARDS

Council of Europe standards regarding the quality of court decisions and the uniform application of law

1 INTRODUCTION

The quality of the judiciary is one of the fundamental and continuous areas of activity of the Council of Europe, as confirmed by numerous conventions, recommendations, guidelines and opinions of its competent bodies, which establish and further develop European standards in the field of judicial independence, efficiency and quality – the European Court of Human Rights (hereinafter: **ECtHR**), the Consultative Council of European Judges (hereinafter: **CCJE**), the Consultative Council of European Prosecutors (CCPE) and the European Commission for the Efficiency of Justice (hereinafter: **CEPEJ**)[1]. The quality of individual court decisions, on the one hand, and the uniform (harmonised) application of law, on the other, represent two closely related and interdependent components of the same objective – achieving legal certainty and the equality of citizens before the law, as essential elements of the rule of law[2].

The quality of an individual court decision cannot be viewed in isolation from the consistency of case law as a whole: a decision which is at least formally reasoned, but which departs significantly and without explanation from the settled case law of the same or a higher court, calls into question the foreseeability of law just as much as a decision that is not reasoned at all[3]. For this reason, this analysis approaches both topics as two sides of the same standard, which could be described as the standard of reasoned and consistent adjudication.

Methodologically, the analysis proceeds from the classical principles of the rule of law as formulated by Lon L. Fuller – congruence between official action and the declared rule, clarity, absence of contradiction and constancy – which in European human rights protection practice are recognised, on the one hand, through the standard of "prescribed by law" or "in accordance with the law" under Articles 8–11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or **ECHR**), and on the other hand, through the obligation to deliver reasoned judgments responding to the essential submissions of the parties, contained in Article 6 of the Convention[4]. In this regard, it is important to clarify that the obligation to give reasons for decisions arising from Article 6 of the Convention does not require a detailed answer to every individual argument of a party to the proceedings. The standard depends on the nature of the decision and the circumstances of the particular case.[5]

[1]CCJE, Opinion No. 11 (2008) "On the Quality of Judicial Decisions", CCJE(2008)5, 18 December 2008, general introduction, para. 1; CEPEJ, Checklist for promoting the quality of justice and the courts, adopted at the 11th plenary meeting of the CEPEJ, Strasbourg, 2–3 July 2008, Foreword.
[2]CCJE, Opinion No. 20 (2017) "The Role of Courts with Respect to the Uniform Application of the Law", CCJE(2017)4, Strasbourg, 10 November 2017, paras. 1 and 5.
[3]Cf. CCJE, Opinion No. 20 (2017), para. 6, and CCJE, Opinion No. 11 (2008), para. 7.
[4]Fuller's principles of legality are adopted here as the initial analytical framework in accordance with the methodology adopted in the concept of the CLEAR-JUST project (CEDEM/JUREC, Project Application – Annex A1 Application Form 2025, point 2.1 "Background"); for the standard of "prescribed by law", see ECtHR, Guide on Article 10 of the Convention – Freedom of expression, updated 28 February 2026, §§ 74–82, and Guide on Article 8 of the Convention – Right to respect for private and family life, updated 28 February 2026, §§ 18–20.
[5] In the case of *Pronina v. Ukraine*, application no. 63566/00, judgment of 18 July 2006, the ECtHR examined the obligation of domestic courts to give reasons for their decision and to address the relevant and decisive arguments

What follows first sets out the normative and institutional framework of the Council of Europe, then the standards of quality of the court decision, the standards relating to the uniform application of law, the link between these standards and Article 6 of the Convention and their complementary basis in Articles 8 and 10 of the Convention. Following the consolidation and systematisation of the relevant European standards and legal sources, and an introductory methodological note on the significance of the national legal frameworks of Montenegro and Serbia, the analysis turns to their normative reception and practical operationalisation **within the legal and institutional framework of Montenegro**.

II NORMATIVE AND INSTITUTIONAL FRAMEWORK OF THE COUNCIL OF EUROPE

A. The Convention as a Legally Binding Basis

The fundamental legal source is the Convention itself, which in Article 6, paragraph 1 guarantees the right to a fair trial before an independent and impartial tribunal established by law[6]. From this provision the ECtHR has, through its case law, derived a whole series of procedural requirements, including the obligation of the court to give reasons for its decision[7]. Articles 8, 9, 10 and 11 of the Convention, which protect the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly, contain an additional requirement – that any interference by a public authority with those rights be "prescribed by law" or "in accordance with the law", which the ECtHR interprets as a requirement of accessibility, clarity and foreseeability of the applicable law, including the case law by which that law is interpreted[8].

B. Council of Europe "Soft Law" Instruments

In addition to the Convention, a key source of standards are the opinions of the CCJE – a consultative body of the Council of Europe composed of judges, which since 2000 has been submitting opinions to the Committee of Ministers on matters relevant to the independence, efficiency and accountability of the judiciary[9]. For the purposes of this analysis, **Opinion No. 11** (2008) "On the Quality of Judicial Decisions"[10] and **Opinion No. 20** (2017) "The Role of Courts

of the parties. Finding a violation of Article 6 § 1 of the Convention, the Court particularly emphasised that the domestic courts had not examined at all an essential argument of the applicant, although it was specific, relevant and of significance for the outcome of the proceedings.

[6]European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 § 1.

[7]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), updated 28 February 2026, § 198 et seq.

[8]ECtHR, Guide on Article 10, §§ 74, 80; Guide on Article 8, §§ 18–20.

[9]CCJE, Opinion No. 20 (2017), paras. 2–3.

[10]CCJE, Opinion No. 11 (2008) on the quality of judicial decisions, CCJE(2008)5, 18 December 2008.

with Respect to the Uniform Application of the Law"[11] are particularly relevant. Although the opinions of the CCJE formally have no binding legal force, they represent an **authoritative and systematised interpretation of the standards** deriving from the Convention, the case law of the ECtHR and other Council of Europe instruments – above all the European Charter on the Statute for Judges (1998), the Magna Carta of Judges (Fundamental Principles, 2010)[12] and Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities[13].

C. CEPEJ as an Operational Mechanism

Through its work, the CEPEJ translates the normative standard into practical, measurable tools. Two documents are particularly relevant: the **Checklist for Promoting the Quality of Justice and the Courts** (2008), which functions as an introspection tool at three levels – the national level, the court level and the level of the individual judge[14], and the **Handbook on Improving the Quality of Judicial Decisions** (2021), prepared within the project "Support to Judicial Reform – Strengthening the Independence and Professionalism of the Judiciary in Armenia" (Partnership for Good Governance 2019–2021, European Union/Council of Europe), which contains operational guidelines for the very process of drafting a court decision – from the preparatory phase, through drafting, to quality control[15].

D. The "Fourth Instance" Doctrine

Of particular importance for understanding the limits of this standard is the so-called **"fourth instance" doctrine**, according to which the ECtHR, as a rule, does not review the assessment of facts and the application of domestic law by national courts, unless such errors are manifest and lead to a violation of rights protected by the Convention[16]. This doctrine further emphasises the responsibility of the domestic judicial system to ensure the quality of its decisions independently, since in a large number of cases they will not come under the external scrutiny of the ECtHR[17].

III STANDARDS OF QUALITY OF THE COURT DECISION

A. Concept and Indicators of Quality

[11]CCJE, Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, CCJE(2017)4, Strasbourg, 10 November 2017.
[12] Magna Carta of European Judges, https://www.coe.int/en/web/ccje/magna-carta
[13]CCJE, Opinion No. 20 (2017), para. 3.
[14]CEPEJ, Checklist for promoting the quality of justice and the courts (2008), Foreword, pp. 2–3.
[15]Handbook on Improving the Quality of Judicial Decisions, Council of Europe, March 2021, Contents (Chapters 1–5).
[16]Ibid., Introduction, pp. 5–6, with reference to the ECtHR: García Ruiz v. Spain [GC], § 28; Perez v. France [GC], § 82.
[17]Ibid., Introduction, p. 6.

The CCJE proceeds from the position that a high-quality court decision is one which reaches the correct outcome – insofar as the material available to the judge permits – and does so in a fair, speedy, clear and definitive manner[18]. According to the Council of Europe Handbook on the Reasoning of Decisions in Administrative Disputes (2024), the quality of a court decision consists of its internal characteristics (the lawfulness of the decision and the correctness of the legal analysis) and its external characteristics (clarity of language, format, length, technical accuracy), whereby all components of the decision must be viewed as a whole, since it is not possible to artificially separate, for example, the quality of the reasoning from the quality of the assessment of evidence[19]. The quality of a court decision, however, does not depend solely on the individual judge, but also on a number of external factors – the quality of legislation, the adequacy of the resources of the judicial system and the quality of legal education[20]. In this sense, the CCJE recommends that national parliaments monitor the impact of legislation on the judicial system, and that legislation be clear, simple to apply and in conformity with the Convention[21].

B. Reasoning as the Central Part of the Decision

According to the unanimous position of the CCJE, the reasoning is the central part of every court decision, and its quality determines, to the greatest extent, the quality of the decision as a whole[22]. The obligation to give reasons has a dual function: on the one hand, it obliges the judge to base his or her reasoning on objective arguments and to respond to the submissions of the parties, thereby making the decision more comprehensible and acceptable to the parties; on the other hand, it constitutes a safeguard against arbitrariness and enables society as a whole to understand the functioning of the judicial system[23].

According to the settled case law of the ECtHR, which in this respect constitutes a direct source of binding law for all member States of the Council of Europe, courts are not obliged to give a detailed answer to every argument of a party, but it must be clear from the decision that the essential issues of the case have been examined and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the dispute[24]. The Court will find a violation of Article 6 § 1 of the Convention, inter alia, where the domestic courts disregard a specific, pertinent and important argument raised by a party[25], as well as in cases where the reasoning may be characterised as arbitrary – either because no reasoning was given

[18]CCJE, Opinion No. 11 (2008), para. 3.
[19]Ivana Roagna, Deciding on Claims in Administrative Disputes: The Importance of Legal Reasoning of Decisions, Council of Europe, December 2024, p. 19
[20]CCJE, Opinion No. 11 (2008), para. 10.
[21]CCJE, Opinion No. 11 (2008), para. 12.
[22]CCJE, Opinion No. 11 (2008), para. 34; Handbook (2021), Executive Summary, para. 6.
[23]CCJE, Opinion No. 11 (2008), para. 35.
[24]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), §§ 201–202, with reference to Moreira Ferreira v. Portugal (no. 2) [GC], 2017, § 84; Van de Hurk v. the Netherlands, 1994, § 61; Boldea v. Romania, 2007, § 30.
[25]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), § 202, with reference to Nechiporuk and Yonkalo v. Ukraine, 2011, § 280.

at all, or because it is based on a manifest factual or legal error by the court, resulting in a so-called "denial of justice"[26].

The CCJE further specifies the substantive requirements of reasoning: it must be consistent, clear, unambiguous and free of contradictions, so as to allow the reader to follow the chain of reasoning which led the judge to the decision[27]; it must respond to the claims and submissions of the parties, including the grounds of the claim and the grounds of the defence[28]; it must contain an assessment of the admissibility, relevance and probative value of the evidence adduced, as well as their interrelationship[29]; and it must contain a reference to the relevant provisions of the Constitution and of national, European and international law, as well as, where appropriate, to relevant case law[30]. The reasoning need not be lengthy – a balance must be struck between conciseness and comprehensibility of the decision[31].

C. Clarity of Language and Structure of the Decision

All court decisions must be intelligible, drafted in clear and simple language, as a precondition for their being understood by the parties to the proceedings and by the general public[32]. Although each judge is left free to choose his or her personal style of presentation, the CCJE recommends that judicial bodies compile collections of good practice in order to facilitate the drafting of decisions[33]. The Handbook particularly emphasises the interdependence of legal writing and legal reasoning: judicial writing, unlike the "predictive" writing of lawyers (by which the likely outcome of a dispute is assessed in advance for the purpose of advising a client – as opposed to persuasive writing by which a case is argued before the court in the client's favour), is by its nature objective and neutral, since it must give reasons for the assessment of facts and evidence in accordance with the applicable legal framework, in a completely impartial and objective manner[34].

D. Enforceability of the Decision

The right to a fair trial under Article 6 of the Convention, as interpreted by the ECtHR, entails not only the delivery of a decision within a reasonable time, but also its effective enforcement in favour of the successful party, since the Convention establishes not theoretical, but practical and effective protection of rights[35]. The operative part of the decision must therefore be

[26]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), § 203, with reference to Moreira Ferreira v. Portugal (no. 2) [GC], 2017, § 85.
[27]CCJE, Opinion No. 11 (2008), para. 36.
[28]CCJE, Opinion No. 11 (2008), paras. 38–39.
[29]CCJE, Opinion No. 11 (2008), paras. 42–43.
[30]CCJE, Opinion No. 11 (2008), para. 44.
[31]CCJE, Opinion No. 11 (2008), para. 40.
[32]CCJE, Opinion No. 11 (2008), para. 32.
[33]CCJE, Opinion No. 11 (2008), para. 33.
[34]Handbook (2021), Introduction, p. 7.
[35]CCJE, Opinion No. 11 (2008), para. 54.

formulated clearly and unambiguously, without any possibility of differing interpretations of the obligations, sanctions or orders it contains[36].

E. Limits and Methods of Quality Evaluation

The CCJE warns that the quality of court decisions cannot be fully assessed by statistical methods alone (the number of cases, the length of proceedings, the number of appeals lodged against first-instance decisions), but that these must be supplemented by methods aimed at assessing the internal structure of the decision and the conformity of its reasoning with Convention standards[37]. Every evaluation must be based primarily on the fundamental principles of the Convention, and not exclusively on economic or managerial criteria, and must not call into question the independence of the judiciary, nor be equated with the assessment of the professional competence of an individual judge for other purposes[38]. The CCJE supports a combination of methods of self-evaluation by judges, evaluation by higher courts through their case law on legal remedies, as well as the participation of external actors (lawyers, prosecutors, the academic community), provided that the independence of the judiciary is fully respected[39].

IV STANDARD OF UNIFORM APPLICATION OF LAW

A. Significance of the Uniform Application of Law

According to CCJE Opinion No. 20, the uniform application of law is a direct consequence of the principle of equality before the law, while considerations of legal certainty and foreseeability form an integral part of the rule of law[40]. In a State governed by the rule of law, citizens legitimately expect to be treated in the same way as others and to be able to rely on previous decisions in comparable cases in order to foresee the legal consequences of their actions[41]. The existence of conflicting court decisions may create a state of legal uncertainty which diminishes public confidence in the judicial system – one of the essential elements of a State governed by the rule of law[42].

B. Case Law as a Source of Law

The CCJE notes that, regardless of whether case law is considered a source of law or not, and whether it is binding or not, reference to previous decisions is a powerful instrument for judges, both in common law systems and in civil law systems[43]. While in common law systems

[36]CCJE, Opinion No. 11 (2008), para. 55(i).
[37]CCJE, Opinion No. 11 (2008), para. 58; Handbook (2021), Executive Summary, para. 3.
[38]CCJE, Opinion No. 11 (2008), paras. 59–62.
[39]CCJE, Opinion No. 11 (2008), paras. 70–71.
[40]CCJE, Opinion No. 20 (2017), para. 5.
[41]Ibid.
[42]CCJE, Opinion No. 20 (2017), para. 6, with reference to ECtHR, Vinčić and Others v. Serbia, no. 44698/06, 1 December 2009.
[43]CCJE, Opinion No. 20 (2017), para. 10.

the decisions of higher courts are formally binding, in civil law systems judicial independence is traditionally interpreted to mean that judges, in rendering decisions, are bound exclusively by the constitution, international treaties and the law, and not by court decisions rendered in similar cases[44]. Nevertheless, the CCJE observes that, in practice, judges in civil law countries are guided by case law, in particular the case law of the highest courts, whose task also includes ensuring the uniformity of case law, so that the decisions of supreme courts may, from that perspective, be attributed an effect broader than the specific case itself – which legitimately places them among the sources of law in a broader sense[45].

C. Mechanisms for Ensuring the Uniformity of Case Law

The CCJE distinguishes between formal, semi-formal and informal mechanisms for harmonising case law[46].Formal proceedings before appellate courts, and in particular before supreme or cassation courts, have the most direct impact on ensuring the uniform interpretation and application of law. As the CCJE points out in Opinion No. 20, such mechanisms notably include deciding on legal remedies lodged by individual parties, including revision and cassation, special legal remedies lodged by the public prosecutor in order to ensure the uniform application of law, the issuing of principled legal positions and opinions by the highest courts, as well as mechanisms by which lower courts refer legal questions to a higher court for preliminary clarification in the context of specific proceedings[47]. Semi-formal mechanisms include regular meetings of judges of the same or different courts, as well as the issuing of guidelines drawing attention to the applicable legal principles in accordance with settled case law[48]. Informal mechanisms, such as informal consultations between judges and continuous legal training and education, also contribute to the uniformity and foreseeability of case law[49].

The primary role in resolving contradictions in case law lies with the Supreme Court, which must ensure the uniformity of case law in order to correct inconsistencies and thereby maintain public confidence in the judicial system[50]. The CCJE emphasises in this regard that the responsibility of the Supreme Court for ensuring the uniformity of case law should not be interpreted as an obligation for the Supreme Court to intervene as often as possible, since such an approach, in addition to slowing down the work of the Supreme Court and diminishing the quality of its decision-making, would inevitably also lead to contradictions within the case law of the Court itself[51]. The existence of mechanisms for ensuring consistent action within the Supreme Court itself (e.g. referral of cases to the General Session of the Court) is of particular importance, since it is especially problematic when the Supreme Court itself becomes a source of uncertainty and contradictory case law, instead of ensuring its uniformity[52]. Appellate courts

[44]CCJE, Opinion No. 20 (2017), para. 11.
[45]CCJE, Opinion No. 20 (2017), paras. 12–13.
[46]CCJE, Opinion No. 20 (2017), para. 15.
[47]CCJE, Opinion No. 20 (2017), para. 16.
[48]CCJE, Opinion No. 20 (2017), para. 17.
[49]CCJE, Opinion No. 20 (2017), para. 18.
[50]CCJE, Opinion No. 20 (2017), para. 20, with reference to ECtHR, Albu and Others v. Romania, no. 34796/09, 12 May 2012.
[51]CCJE, Opinion No. 20 (2017), para. 23.
[52]CCJE, Opinion No. 20 (2017), para. 24.

also play an important role in ensuring the uniform application of law, particularly in systems in which access to the supreme court is restricted and subject to special conditions of admissibility of legal remedies, whereby appellate courts in practice, in accordance with their jurisdiction, become the highest instance for the majority of cases[53].

The existence of specialised courts at a lower level need not in itself have significant negative consequences for the uniformity of case law, provided that a single supreme court of general jurisdiction exists at the top of the judicial structure; however, if there are several "supreme" courts or several judicial instances with jurisdiction to decide with finality on the same or related legal issues, this may give rise to problems with regard to the uniform application of law, which is why it is essential that domestic law provide for formal or informal mechanisms for overcoming inconsistencies between such independent supreme courts[54].

The CCJE further considers two specific instruments. The first are **binding interpretations in abstracto** (e.g. "uniformity decisions", principled legal positions), which are adopted independently of any specific dispute and without the possibility for the parties and their representatives to present their arguments; although the CCJE recognises that such instruments may have a positive impact on the uniformity of case law and legal certainty, they at the same time raise questions as to the constitutional role of the judiciary in the system of separation of powers[55]. The second is the **preliminary question procedure**, by which a lower court, in the course of pending proceedings, refers a question concerning the interpretation of law to the supreme court, which may prevent future divergences in case law, although such a mechanism also carries the risk of a premature, authoritative answer that may hinder the further development of law[56].

D. Departure from Settled Case Law

The need to ensure the uniform application of law must not lead to rigidity, nor unjustifiably restrict the proper development of law in line with social and other relevant circumstances, nor call into question the principle of judicial independence[57]. The development of case law is not in itself contrary to the principles of the effective and high-quality administration of justice, since a failure to develop and adapt case law would pose a risk to the reform and improvement of law, as well as to the very principles of fairness[58]. When a court decides to depart from previous case law, this must be clearly stated in the decision: it must be apparent from the reasoning that the judge was aware that settled case law on the relevant issue was different, with a detailed explanation of why the previously adopted position is not legally tenable in the specific case, thereby enabling the genuine development of law[59]. Only in this way is it possible to establish whether the departure was the product of free judicial conviction or whether the court simply

[53]CCJE, Opinion No. 20 (2017), para. 26.
[54]CCJE, Opinion No. 20 (2017), para. 27.
[55]CCJE, Opinion No. 20 (2017), para. 28.
[56]CCJE, Opinion No. 20 (2017), para. 29.
[57]CCJE, Opinion No. 20 (2017), para. 30.
[58]CCJE, Opinion No. 20 (2017), para. 30, with reference to ECtHR, Şahin and Şahin v. Turkey [GC], no. 13279/05, 20 October 2011, § 58.
[59]CCJE, Opinion No. 20 (2017), para. 32; CCJE, Opinion No. 11 (2008), para. 49.

disregarded, or was unaware of, the previous relevant case law. Failure to comply with this requirement may be regarded as arbitrary, thereby violating the right to a fair trial guaranteed by the Convention[60].

E. Publication and Reporting of Case Law

An adequate system of monitoring and reporting on case law is a precondition for ensuring the uniform application of law. At the very least, the decisions of supreme and appellate courts should be published so that they are known not only to the parties to the particular case, but also to other courts, lawyers, prosecutors, the academic community and the wider public, enabling them to rely on them in future cases[61]. The CEPEJ Checklist, in the section devoted to "legal certainty" (Part II.3), raises the question of whether there is a policy for improving legal certainty and whether there are specific instruments used for that purpose, such as an internal system for monitoring case law or the organisation of meetings to discuss relevant case law – whereby this operational instrument directly translates the CCJE standard into measurable indicators at the level of individual courts and of the judicial system as a whole[62].

F. Responsibility of All Three Branches of Power and the Role of the Legal Professions

The CCJE emphasises that the concept of uniform application of law is relevant not only to the judiciary, but to all State bodies – legislative, executive and judicial – which are interconnected and interdependent, since all of them are under an obligation to foster the development of coherent legal rules and their consistent application[63]. The law must be, to the greatest extent possible, clear, foreseeable and logical, and the legislature must take into account the case law developed in the areas in which the law is being amended; frequent, sometimes incoherent and urgent amendments to the normative framework adversely affect the quality of legislation and legal certainty, while unclearly formulated laws are one of the causes of contradictory case law, for the elimination of which the legislature is ultimately responsible[64].

At the same time, both lawyers and public prosecutors play an important role in ensuring the uniform application of law, since they should carry out appropriate research of case law and present arguments on the applicability or non-applicability of previous decisions[65]. Finally, the internationalisation of law represents an additional challenge to ensuring the uniform application of law across different States, which is why due attention must be paid to the need for uniform application of international treaties in all Contracting States, avoiding contradictions between national law and international treaties, regardless of whether a State follows a monist or dualist system[66].

[60] CCJE, Opinion No. 20 (2017), para. 32, with reference to the case of Brezovec v. Croatia, ECtHR.
[61] CCJE, Opinion No. 20 (2017), para. 40.
[62] CEPEJ, Checklist (2008), Part II "Job and operational process", Section II.3 "Legal certainty".
[63] CCJE, Opinion No. 20 (2017), para. 44.
[64] CCJE, Opinion No. 20 (2017), paras. 44–46.
[65] CCJE, Opinion No. 20 (2017), para. 47.
[66] CCJE, Opinion No. 20 (2017), para. 48.

V LINK BETWEEN CONSISTENCY OF CASE LAW AND THE RIGHT TO A FAIR TRIAL (ARTICLE 6 ECHR)

The ECtHR has developed a clear position according to which, although certain divergences in interpretation may be accepted as an inherent feature of any judicial system based on a network of courts, under certain circumstances conflicting decisions of domestic courts – particularly courts of last instance – may constitute a breach of the fair trial requirement under Article 6 § 1 of the Convention[67]. In making that assessment, it is necessary to establish: **(1)** whether "profound and long-standing differences" exist in the case law of the domestic courts; **(2)** whether domestic law provides for a mechanism for overcoming such inconsistencies; **(3)** whether that mechanism has been applied; and **(4)** to what legal effect[68]. This test, originally developed in the case of Nejdet Şahin and Perihan Şahin v. Turkey, has been consistently applied in cases concerning States of the region as well, including the case of Tomić and Others v. Montenegro[69].

The principle of legal certainty guarantees a certain stability of legal situations and contributes to public confidence in the courts, but it does not constitute an absolute right to consistency of case law: the requirements of legal certainty and the protection of the legitimate expectations of the public do not confer an acquired right to the immutability of case law, since a failure to maintain a dynamic and evolutive approach could hinder reform or improvement of the law[70]. From this follows **one of the central methodological rules of this analysis**: the standard considered here does not require ossified case law, but rather reasoned, transparent and foreseeable case law.

VI COMPLEMENTARY STANDARD: QUALITY OF LAW AND FORESEEABILITY UNDER ARTICLES 8 AND 10 ECHR

The requirement that an interference by a public authority with the rights protected by Articles 8 and 10 of the Convention be "prescribed by law" or "in accordance with the law" is not exhausted by the existence of a formal legal basis in domestic law, but also encompasses

[67]CCJE, Opinion No. 20 (2017), para. 9; ECtHR, Guide on Article 6 (criminal limb), § 285.
[68]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), § 286, with reference to Nejdet Şahin and Perihan Şahin v. Turkey [GC], no. 13279/05, 20 October 2011, § 53, and Borg v. Malta, 2016, § 108.
[69]CCJE, Opinion No. 20 (2017), footnote 4 to para. 8, with reference to ECtHR, Tomić and Others v. Montenegro, no. 18650/09 et al., 17 April 2012.
[70]ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), § 285, with reference to Borg v. Malta, no. 37537/13, 12 January 2016, § 107.

the accessibility and quality of that law[71]. According to the settled case law of the ECtHR, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable, the consequences which a given action may entail; absolute certainty is not required, since it would inevitably lead to excessive rigidity of the law[72]. In assessing the foreseeability of the law, the Court at the same time examines its quality, both in terms of clarity and in terms of precision[73].

This requirement is directly linked to the consistency of case law: when assessing whether the applicable law is foreseeable in its consequences and whether it enables the individual to regulate his or her conduct accordingly, the ECtHR may be confronted precisely with a situation of divergence in the case law of different courts of the same level of jurisdiction[74]. In this way, the standard of "prescribed by law" under Articles 8–11 of the Convention and the standard of reasoned and consistent adjudication under Article 6 of the Convention complement each other and merge into a single requirement: that State authority, including the judiciary, act in a manner which is known in advance, clear, consistent and foreseeable for the citizen.

VII SYNTHESIS AND METHODOLOGICAL FRAMEWORK FOR FURTHER ANALYSIS

It follows from the foregoing that Council of Europe standards view the quality of the judiciary as a single whole composed of two inseparable elements: **the quality of the individual court decision** – above all the quality of its reasoning, the assessment of evidence and the clarity of language – and **consistency**, that is, the uniformity of case law over time and between courts of the same or different levels of jurisdiction. Both elements derive from the same source – the guarantees of the right to a fair trial under Article 6 of the Convention and the general principle of legal certainty, which are further specified through the requirement that any restriction of a Convention right be "prescribed by law" under Articles 8–11 of the Convention, whenever case law interprets or applies a legal norm restricting those rights.

This framework – systematised through CCJE Opinions Nos. 11 and 20, the operational instruments of the CEPEJ and the case law of the ECtHR – constitutes the initial analytical toolkit for the further phases of analysis within the CLEAR-JUST project, in which the said standards will be applied as a benchmark for assessing the state of affairs with regard to the reasoning of court decisions and the consistency of case law in Montenegro and Serbia, in accordance with the **specific objectives of the project** – raising the quality of judicial reasoning and legal certainty (SO1) and strengthening the consistency and harmonisation of case law (SO2).

[71]ECtHR, Guide on Article 10, § 80; Guide on Article 8, § 500, with reference to Silver and Others v. the United Kingdom, 1983, § 87.
[72]ECtHR, Guide on Article 10, §§ 75, 79, with reference to Perinçek v. Switzerland [GC], 2015, §§ 131, 135.
[73]ECtHR, Guide on Article 10, § 80.
[74]ECtHR, Guide on Article 8, § 558, with reference to Klaus Müller v. Germany, no. 24173/18, 19 November 2020, §§ 54–60.

VIII FROM THE EUROPEAN STANDARD TO THE NATIONAL FRAMEWORK: MONTENEGRO AND SERBIA

The normative framework set out in the preceding parts of this analysis is not independently applicable before a national court: CCJE opinions constitute "soft law" without direct binding force, and the Convention itself achieves its full effect only through national law, which must incorporate the standards of lawfulness, the obligation to give reasons and uniform application of law into its own constitutional and legislative order, as well as through the execution of ECtHR judgments[75].

The CLEAR-JUST project analyses this standard in parallel in two national contexts – Montenegro and Serbia – which share a common historical origin of their legal systems, belong to the same continental legal tradition and, in the negotiations on accession to the European Union, are undergoing a similar process of judicial reform under Chapter 23 (Judiciary and Fundamental Rights), which sets as one of its key benchmarks precisely the strengthening of the independence, accountability, impartiality and quality of the judiciary, including the consistency of case law[76]. Parallel observation of two related, but normatively and functionally autonomous judicial systems allows the standard from Part One of this analysis to be applied not mechanically, but comparatively – identifying where the normative and institutional solutions coincide, where they diverge, and where one solution may provide a useful basis for improving or better understanding the other system.

Methodologically, the analysis of the national frameworks follows the same structure for both States: first, the constitutional and institutional framework of the judiciary is set out, with particular reference to the position of the highest court and of the body responsible for judicial independence; next, it is examined how procedural legislation – in civil, criminal, administrative and constitutional court proceedings – determines the content of the obligation to give reasons for decisions and provides for corrective mechanisms for remedying deficiencies in the quality of decisions and inconsistent case law; thereafter, the institutional mechanisms intended to ensure the uniform application of law are considered; and, finally, it is examined whether and how the quality of the reasoning of decisions is taken into account in the evaluation of the work of judges.

[75]See Part II of this analysis; cf. CCJE, Opinion No. 20 (2017), para. 44, on the responsibility of all branches of power, including the legislature, for the coherence of legal rules and their application.
[76]European Commission, EU Enlargement Methodology (2020) and annual reports on Montenegro and Serbia under Chapter 23 – Judiciary and Fundamental Rights; cf. CEDEM/JUREC, CLEAR-JUST Project Application, Annex A1 Application Form 2025, point 2.1 "Background".

PART TWO

NATIONAL NORMATIVE FRAMEWORK: MONTENEGRO

Constitutional and legislative framework of Montenegro in the field of the quality of court decisions and the uniform application of law

IX CONSTITUTIONAL FRAMEWORK OF MONTENEGRO

A. The Right to a Fair Trial and to a Legal Remedy

The Constitution of Montenegro,[77] adopted by the Constitutional Assembly of the Republic of Montenegro on 19 October 2007 and proclaimed on 22 October 2007, as amended on 31 July 2013 and 26 August 2026, directly incorporates the European standards relating to reasoned and consistent judicial decision-making into the normative content of two fundamental rights. The first is the **right to a legal remedy**: "Everyone shall have the right to a legal remedy against a decision deciding on his or her right or legally based interest"[78]. The second, and central to this analysis, is the **right to a fair trial** under Article 32: "Everyone shall have the right to a fair and public trial within a reasonable time before an independent, impartial court established by law"[79] – a formulation which essentially adopts the standard contained in Article 6 § 1 of the Convention, discussed in Part II of this analysis, whereby the guarantees of a fair trial are established in the Montenegrin constitutional order as directly applicable constitutional rights.

B. Principles of the Judiciary and Publicity of Trials

The constitutional principles governing the organisation and exercise of judicial power directly constitute the normative foundation for the realisation of the standard of quality of court decisions, elaborated in Part III of this analysis: the court is autonomous and independent, adjudicates on the basis of the Constitution, laws and ratified and published international treaties, and the establishment of courts-martial and extraordinary courts is prohibited[80]. The Constitution establishes hearings before the court and public pronouncement of judgments as the rule, permitting the exclusion of the public only exceptionally and to the extent necessary in a democratic society – in order to protect morals, public order, the rights and interests of minors, the private life of the parties, in matrimonial disputes, guardianship and adoption proceedings, or to protect secrecy and the security of Montenegro[81], which corresponds to the limitations on the publicity of trials permitted by Article 6 § 1 of the Convention itself.

C. The Supreme Court and the Constitutional Basis for Uniform Application of Laws

The standard of uniform application of law, elaborated in CCJE Opinion No. 20, has an explicit constitutional basis in the Montenegrin legal order. Article 124 of the Constitution provides: "The Supreme Court shall be the highest court in Montenegro. The Supreme Court

[77] Official Gazette of Montenegro, Nos. 1/2007, 38/2013, 126/2026.
[78] Constitution of Montenegro, Article 20.
[79] Constitution of Montenegro, Article 32.
[80] Constitution of Montenegro, Articles 118–119.
[81] Constitution of Montenegro, Article 120.

shall ensure the uniform application of laws by the courts"[82]. By this provision, the role which the CCJE describes as the primary responsibility of the Supreme Court for resolving contradictions in case law is not left exclusively to the internal organisation of the judiciary, but is elevated to the level of an explicit constitutional function – which places the Montenegrin framework among those legal systems in which ensuring the uniformity of case law is a task of the highest court established by the Constitution, and not merely a consequence of its hierarchical position.

However, despite the clear constitutional delimitation of competences, the relationship between the Supreme Court and the Constitutional Court represents a particularly complex issue in Montenegro, especially in view of the competence of the Constitutional Court, when deciding on a constitutional appeal, to quash a final decision of the Supreme Court, as the highest judicial instance in the system of ordinary courts.

The Constitution of Montenegro establishes a functional, rather than a hierarchical, delimitation between these two institutions. The Supreme Court is designated as the highest court in the State, with competence to ensure the uniform application of laws by the courts, while the Constitutional Court is an autonomous and independent body whose basic function is the protection of constitutionality and legality and, inter alia, deciding on constitutional appeals for violations of human rights and freedoms guaranteed by the Constitution. Therefore, the competence of the Constitutional Court in respect of constitutional appeals cannot be interpreted as establishing its "higher" instance jurisdiction in relation to the Supreme Court, but rather as a special constitutional review of the actions of public authorities, including the judiciary.

At the same time, the quashing of a decision of the Supreme Court does not mean taking over its function or re-deciding the case in the capacity of a fourth judicial instance. The assessment of facts, the taking and evaluation of evidence and the interpretation and application of domestic law, in principle, fall within the remit of the ordinary courts, while the role of the constitutional court is limited to examining whether the manner of decision-making or the outcome of the proceedings violated the rights and freedoms guaranteed by the Constitution. Nevertheless, that boundary is not always absolute: a manifestly arbitrary interpretation or application of law, the absence of relevant and sufficient reasoning, departure from settled case law without justified reason or other arbitrariness may acquire a constitutional dimension and constitute a violation of the right to a fair trial.

In this sense, the normative framework should be viewed through the principle of functional complementarity: the Supreme Court ensures the uniformity and development of case law within the ordinary judiciary, while the Constitutional Court establishes and protects constitutional human rights standards. Decisions of the Constitutional Court rendered in constitutional appeal proceedings have binding legal effect in accordance with the Constitution and the law, which is why their execution entails an obligation on the competent courts to

[82]Constitution of Montenegro, Article 124, paragraphs 1–2.

remedy the violation found, while preserving their procedural and interpretative autonomy in the renewed decision-making.

The key challenge therefore lies in ensuring a clear boundary between constitutional review and ordinary judicial review, as well as in developing an effective institutional dialogue in the service of the protection of human rights and legal certainty.

According to the case law of the ECtHR as well, the task of the Constitutional Court is not to review the conclusions of the ordinary courts as regards the facts and the application of substantive law (Pronina v. Ukraine, application no. 63566/00 of 25 October 2000), nor to substitute for the ordinary courts in assessing facts and evidence, nor to reconsider, as a "fourth instance" court, appeal submissions which were fully examined in the proceedings before the ordinary courts.

D. The Judicial Council as the "Guardian" of Judicial Independence

The Constitution entrusts the institutional independence of the judiciary, as a precondition for impartial and high-quality adjudication, to the Judicial Council – "an autonomous and independent body which shall ensure the independence and autonomy of courts and judges"[83]. Pursuant to the constitutional amendments adopted in August 2026, the Judicial Council has a president and nine members, namely: the President of the Supreme Court of Montenegro; five judges elected and dismissed by the Conference of Judges; and four eminent lawyers elected and dismissed by the Parliament of Montenegro on the proposal of the competent working body of the Parliament following a public call. The President of the Judicial Council is elected by the Judicial Council from among its members who are not judicial office holders, by a two-thirds majority of the votes of the members of the Judicial Council.[84]. Pursuant to the said amendments, and in line with the recommendations of the Council of Europe Group of States against Corruption (GRECO), the Minister of Justice is no longer a member of the Judicial Council. The Judicial Council elects and dismisses judges and court presidents, establishes the termination of judicial office and the number of judges, considers reports on the work of the courts and complaints about the work of the courts, and decides on the immunity of judges[85].

E. Legality of Acts and the Constitutional Appeal

The principle of legality, which the CCJE and the ECtHR link to the requirement of foreseeability and legal certainty, is expressed in the Constitution through the requirement that a law be in conformity with the Constitution and ratified international treaties, that other regulations be in conformity with the Constitution and the law, and that an individual legal act be in conformity with the law[86]. The protection of these requirements at the individual level is ensured through the mechanism of the constitutional appeal: the Constitutional Court decides "on a constitutional appeal for a violation of human rights and freedoms guaranteed by the

[83] Constitution of Montenegro, Article 126.
[84] Constitution of Montenegro, Article 127.
[85] Constitution of Montenegro, Article 128.
[86] Constitution of Montenegro, Articles 145 and 148.

Constitution, after all effective legal remedies have been exhausted"[87], thereby establishing, alongside ordinary legal remedies before the Supreme Court and the Court of Appeal, a special constitutional-law mechanism of protection against arbitrary or unreasoned court decisions.

X OBLIGATION TO GIVE REASONS FOR COURT DECISIONS IN PROCEDURAL LEGISLATION

A. Civil Procedure

The Law on Civil Procedure of Montenegro[88] prescribes the content of the reasoning of a judgment in a manner which corresponds almost verbatim to the requirements set by the CCJE in Opinion No. 11. Under Article 347, a judgment drawn up in writing must contain an introduction, an operative part, a statement of reasons and instructions on the right to a legal remedy, and in the statement of reasons the court shall set out "the claims of the parties, the facts they have presented and the evidence they have proposed, which of those facts it has established, why and how it has established them, and if it has established them by taking evidence, which evidence it has taken and how it has assessed it", with the obligation to state in particular which provisions of substantive law it has applied[89]. The instructional time limit prescribed by law for drawing up a judgment is 30 days from the closing of the main hearing, with an obligation on the judge to notify the president of the court in writing of the reasons for exceeding that time limit[90].

B. Criminal Procedure

The Criminal Procedure Code[91] regulates the content of the reasoning of a criminal judgment in even greater detail. Under Article 379, a judgment must contain an introduction, an operative part and a statement of reasons, whereby in the statement of reasons the court shall "set out the reasons for each point of the judgment", state specifically and completely which facts it considers proven or unproven and for what reasons, "giving in particular an assessment of the credibility of contradictory evidence", for what reasons it did not accept particular motions of the parties and by what reasons it was guided in resolving legal questions[92]. If the accused has been found guilty by a court judgment of committing the criminal offence with which he or she

[87]Constitution of Montenegro, Article 149, paragraph 1, item 3.
[88]Law on Civil Procedure, Official Gazette of the Republic of Montenegro, No. 22/04 of 2 April 2004, and Official Gazette of Montenegro, Nos. 28/05, 76/06, 73/10, 47/15 and 48/15.
[89]Law on Civil Procedure, Article 347, paragraphs 1 and 4.
[90]Law on Civil Procedure, Article 340.
[91]Criminal Procedure Code, Official Gazette of Montenegro, Nos. 57/2009, 49/2010, 47/2014 – Decision of the Constitutional Court of Montenegro, 2/2015 – Decision of the Constitutional Court of Montenegro, 35/2015, 58/2015 – other law, 28/2018 – Decision of the Constitutional Court of Montenegro, 116/2020 – Decision of the Constitutional Court of Montenegro and 145/2021.
[92]Criminal Procedure Code, Article 379, paragraphs 1 and 6–7.

was charged, the law additionally requires that the statement of reasons specifically state the circumstances which the court took into account when determining the sentence[93].

C. Administrative Dispute

The Law on Administrative Disputes[94] provides that a judgment by which the court decides on the lawfulness of an administrative act contains "an operative part and a statement of reasons which must be separate from the operative part", while a ruling contains a statement of reasons only where necessary[95]. In this way, in the field of administrative judicial protection, the same standard of mandatory reasoning of the operative part applicable in civil and criminal proceedings is consistently applied.

D. Non-Contentious Proceedings

The Law on Non-Contentious Proceedings[96] provides that in this type of proceedings decisions are, as a rule, rendered in the form of a ruling, but that "a ruling against which a separate appeal is allowed and a ruling of the second-instance court must be reasoned"[97], whereby, unless otherwise provided by law, the provisions of the Law on Civil Procedure apply mutatis mutandis, including the standard of the content of reasoning set out in Section A of this Part[98].

E. The Constitutional Court

Finally, the obligation to give reasons also extends to decisions of the Constitutional Court: according to the Law on the Constitutional Court of Montenegro[99], "a decision or ruling of the Constitutional Court shall contain: an introduction, an operative part or dispositive, and a statement of reasons"[100], whereby the same structural standard – introduction, operative part, statement of reasons – is consistently applied throughout the entire system of ordinary, administrative, non-contentious and constitutional court decision-making in Montenegro.

[93]Criminal Procedure Code, Article 379, paragraph 8.
[94]Law on Administrative Disputes, Official Gazette of Montenegro, Nos. 54/2016, 11/2024 – Decision of the Constitutional Court of Montenegro and 53/2025.
[95]Law on Administrative Disputes, Article 38.
[96]Law on Non-Contentious Proceedings, Official Gazette of the Republic of Montenegro, No. 27/2006 and Official Gazette of Montenegro, No. 20/2015.
[97]Law on Non-Contentious Proceedings, Article 17.
[98]Law on Non-Contentious Proceedings, Article 2.
[99]Law on the Constitutional Court of Montenegro, Official Gazette of Montenegro, Nos. 11/2015, 55/2019, 92/25, 31/26.
[100]Law on the Constitutional Court of Montenegro, Article 47.

XI LACK OF REASONING AS A MATERIAL PROCEDURAL VIOLATION

A. Civil Procedure: Article 367 of the LCP

Of particular importance for the standard of reasoned adjudication is the manner in which procedural legislation in Montenegro treats the absence or insufficiency of reasoning as a ground for quashing a decision. The Law on Civil Procedure provides that a judgment may be challenged, inter alia, "on account of a material violation of the provisions of civil procedure"[101], and Article 367, paragraph 2, item 15 explicitly defines that violation in a manner which almost verbatim reflects the requirements of CCJE Opinion No. 11 concerning the consistency, clarity and absence of contradiction of reasoning: a material violation exists "if the judgment has deficiencies due to which it cannot be examined, and in particular if the operative part of the judgment is incomprehensible, if it contradicts itself or the reasons for the judgment, or if the judgment contains no reasons at all or no reasons are given regarding the decisive facts, or those reasons are unclear or contradictory, or if, regarding the decisive facts, there is a contradiction between what is stated in the reasons for the judgment about the content of documents or records of statements given in the proceedings and those documents or records themselves"[102].

B. Criminal Procedure: Article 386 of the CPC

The Criminal Procedure Code contains almost identical grounds for reviewing and challenging decisions rendered in criminal proceedings. A judgment may be challenged, inter alia, on account of a "material violation of the provisions of criminal procedure"[103], which under Article 386, paragraph 1, items 8 and 9 always exists if "the operative part of the judgment is incomprehensible, contradicts itself or the reasons for the judgment", or if "the judgment contains no reasons at all or no reasons are given regarding the decisive facts, or those reasons are entirely unclear or contradictory to a considerable extent, or if, regarding the decisive facts, there is a considerable contradiction between what is stated in the reasons for the judgment about the content of documents or records of statements given in the proceedings and those documents themselves"[104].

C. Significance of the Correspondence between the Two Procedural Laws

The correspondence between the wording of the LCP and the CPC is not accidental – both laws treat the lack of reasoning as an absolutely material procedural violation which exists by operation of law, without any need to prove its effect on the outcome of the proceedings, as

[101] Law on Civil Procedure, Article 366, paragraph 1, item 1.
[102] Law on Civil Procedure, Article 367, paragraph 2, item 15.
[103] Criminal Procedure Code, Article 385, item 1.
[104] Criminal Procedure Code, Article 386, paragraph 1, items 8–9.

opposed to so-called relatively material violations[105]. In this way, the requirement that a court decision be reasoned, as an integral element of the right to a fair trial, is built into the procedural mechanism for reviewing the lawfulness and correctness of judicial decision-making. The lack of reasoning thus acquires direct procedural significance, since, depending on its nature and intensity, it may lead to a finding of a procedural violation and require the quashing or reversal of the decision, which makes it possible to protect this standard already in proceedings before the ordinary courts, and not exclusively before the Constitutional Court or the ECtHR.

XII INSTITUTIONAL AND PROCEDURAL MECHANISMS FOR ENSURING THE UNIFORM APPLICATION OF LAW

Institutional mechanisms refer to the competences, roles and mutual relationship of the institutions that ensure legality, constitutionality and the harmonisation of case law: the Supreme Court, the Constitutional Court, the ordinary courts, the Judicial Council, etc. **Procedural mechanisms** refer to the legal institutes and procedures through which court decisions are reviewed and corrected: appeal, revision, extraordinary legal remedies, constitutional appeal, preliminary question, reopening of proceedings, etc.

A. The Supreme Court and the General Session

The Law on Courts[106] elaborates the constitutional function of the Supreme Court under Article 124 of the Constitution through the competence of the General Session of the Supreme Court, which "adopts principled legal positions", considers issues of importance for the work of the courts and the application of laws, and, where necessary, informs the Parliament thereof[107]. This mechanism constitutes the Montenegrin normative response to the formal instruments for harmonising case law which CCJE Opinion No. 20 describes as having the most direct impact on the uniform interpretation and application of law.

B. The Principled Legal Position

Article 26 of the Law on Courts defines the institute of the principled legal position as follows: "A principled legal position shall be adopted on contentious legal issues arising in case law for the purpose of ensuring the uniform application of laws by the courts. A principled legal position may be adopted ex officio or at the request of a court"[108], and in 2020 the law extended this mechanism to notaries and public bailiffs, enabling a principled legal position to be adopted also at the request of the Chamber of Notaries or the Chamber of Public Bailiffs, on contentious

[105]Cf. Law on Civil Procedure, Article 367, paragraph 1, which links a relatively material violation to proof of its effect on the lawfulness and correctness of the judgment, with paragraph 2 of the same Article, which exhaustively lists absolutely material violations; analogously, Criminal Procedure Code, Article 386, paragraphs 1 and 2.
[106]Law on Courts, Official Gazette of Montenegro, Nos. 11/2015 and 76/2020.
[107]Law on Courts, Articles 24–25.
[108]Law on Courts, Article 26, paragraphs 1–2.

legal issues arising in the proceedings they conduct[109]. This institute corresponds precisely to the form of "binding interpretation in abstracto" which the CCJE recognises as an instrument with a positive impact on the uniformity of case law, but also as an instrument which, given that it is adopted without a specific dispute and without the participation of the parties, raises questions about the constitutional role of the judiciary in the system of separation of powers[110].

C. Records of Case Law

The standard of publication and reporting of case law, which the CCJE sets as a precondition for the uniform application of law, is incorporated by the law through the obligation that "records of case law shall be kept in the courts". The manner of keeping records and publishing decisions is regulated in more detail by the Court Rules of Procedure[111], while a case law department is specifically organised within the Supreme Court, alongside the civil, criminal and administrative departments[112].

D. Extraordinary Legal Remedy in Administrative Disputes

The Law on Administrative Disputes provides for a special mechanism for harmonising administrative court case law – the request for review of a court decision, which is decided by a panel of three judges of the Supreme Court, on the grounds of a violation of substantive law or a violation of the rules of procedure[113], while a separate chapter of the law, devoted to the "binding nature of judgments", regulates the effect of final judgments rendered in administrative disputes[114].

E. The Constitutional Appeal as a Protective Mechanism

Under the Law on the Constitutional Court, a constitutional appeal is lodged within 60 days, provided that effective legal remedies have been exhausted, save exceptionally even before their exhaustion if the remedy is not effective[115]. If it finds a violation, the Constitutional Court upholds the appeal, quashes the impugned act and remits the case for reconsideration, and if the legal effect of the act has already ceased, it determines "the manner of just satisfaction of the appellant for the violation suffered", while the competent authority is obliged to act within 30 days, respecting the legal reasoning of the Constitutional Court[116] – whereby the constitutional appeal functions as the last domestic instance of protection against decisions that

[109]Law on Courts, Article 26, paragraph 3.
[110]Cf. CCJE, Opinion No. 20 (2017), para. 28.
[111]Law on Courts, Article 44.
[112]Law on Courts, Article 42.
[113]Law on Administrative Disputes, Articles 40–55.
[114]Law on Administrative Disputes, Articles 56–59.
[115]Law on the Constitutional Court of Montenegro, Articles 68–69.
[116]Law on the Constitutional Court of Montenegro, Articles 76–77.

do not meet the standard of reasoned and consistent adjudication, before a possible application to the ECtHR

XIII THE JUDICIAL COUNCIL AND THE QUALITY OF JUDICIAL WORK

A. Competences of the Judicial Council

The Law on the Judicial Council and Judges[117] elaborates the constitutional competence of the Judicial Council under Article 128 of the Constitution, entrusting it, inter alia, with deciding on the disciplinary liability of judges, keeping records on judges, considering complaints about their work and establishing the Commission for the Evaluation of Judges[118]. The law particularly emphasises that it is precisely the Judicial Council that ensures the independence, autonomy, accountability and professionalism of the courts and judges[119].

B. Periodic Evaluation of the Work of Judges

A distinct mechanism of professional accountability, professional development and promotion of judges, which is particularly significant for this analysis, is the periodic evaluation of the work of judges, carried out every five years, with the possibility of earlier evaluation in cases prescribed by law, including the promotion of a judge, in order to assess their professional competence, the quantity and quality of their work, and their need for professional training.[120] The decision on the evaluation is adopted by the Commission for the Evaluation of the Work of Judges established by the Judicial Council, on the basis of a proposal of an evaluation panel composed of the president of the court in which the judge is being evaluated and four judges of higher courts[121]. An administrative dispute may be initiated against the final decision of the Commission, thereby also ensuring judicial review of the lawfulness of the evaluation procedure

C. Quality of Reasoning of Decisions as a Formal Criterion

The law divides the criteria for evaluating the work of judges into work effectiveness and general abilities and professional activities[122], and work effectiveness is assessed, in addition to the quantity and quality of work, also by means of a special sub-criterion – the quality of reasoning of decisions: "The quality of reasoning of decisions shall be assessed on the basis of the clarity, conciseness and completeness of the reasons given"[123]. In this way, the requirement

[117]Law on the Judicial Council and Judges, Official Gazette of Montenegro, Nos. 11/2015, 28/2015, 42/2018 and 60/2024.
[118]Law on the Judicial Council and Judges, Article 27, items 1, 4, 5 and 9.
[119]Law on the Judicial Council and Judges, Article 2.
[120]Law on the Judicial Council and Judges, Article 87.
[121]Law on the Judicial Council and Judges, Article 88.
[122]Law on the Judicial Council and Judges, Article 89.
[123]Law on the Judicial Council and Judges, Article 90, paragraph 1, item 3 and paragraph 5.

of a reasoned court decision, which derives from the right to a fair trial and the obligation of courts to enable an understanding of the legal and factual reasons on which the decision is based, is directly introduced into the system of professional evaluation of the work of judges, through review of finally concluded cases selected by random sampling, cases selected by the judge himself or herself, and cases in which decisions were quashed[124]. The final assessment of the work of a judge – excellent, good, satisfactory or unsatisfactory – also depends directly on the assessment of this sub-criterion, since an "unsatisfactory" mark for the quality of reasoning of decisions precludes the possibility of the judge being assessed overall as excellent or good[125].

This normative solution represents a significant improvement compared to an approach which linked the quality of work primarily to statistical indicators, in particular the number of resolved and quashed cases. It is in line with the recommendations of the Venice Commission that the quality of the work of judges should not be assessed predominantly or automatically on the basis of the outcomes of proceedings and the number of quashed decisions, but that the quality of legal writing and reasoning, the complexity of cases and other relevant qualitative elements should be taken into account. The Venice Commission has specifically warned that the number of decisions quashed on appeal is not in itself a reliable indicator of the quality of judicial work, since quashing may be the result of a different legal assessment of a complex issue rather than a professional failing of the judge. With regard to Montenegro, the Commission further pointed to the need to evaluate the quality of work, inter alia, through the quality of legal writing, the complexity of cases and the level of legal reasoning, instead of relying on mere statistics of procedural outcomes.

The new Rules for the Evaluation of Judges and Court Presidents, adopted in 2025 and subsequently amended and supplemented during 2026, aim to operationalise the statutory criteria through more specific indicators and an evaluation methodology.[126]

As regards the quality of reasoning, the normative starting point consists of three basic elements: clarity, conciseness and completeness of the reasoning. The assessment should not be based on the formal structure or stylistic features of the decision, but on whether the reasoning enables the parties and the higher court to understand the decisive factual and legal reasons on which the decision is based. It is particularly relevant that the reasoning contains a response to the decisive arguments of the parties, a clear link between the facts established and the substantive law applied, as well as the reasons for which key evidence and legal submissions were accepted or rejected.

For first-instance decisions, the relevant quality standard therefore entails that the reasoning is not incomprehensible, that it contains reasons regarding the decisive facts and that those reasons are not unclear, contradictory or mutually inconsistent. For second-instance decisions the standard is more demanding: the reasoning should provide a specific response to the

[124] Law on the Judicial Council and Judges, Article 92.
[125] Law on the Judicial Council and Judges, Article 97.
[126] Rules for the Evaluation of Judges and Court Presidents published in the Official Gazette of Montenegro, No. 43/2025 of 7 May 2025. The Rules were subsequently amended in 2026, including amendments published in March and June 2026.

relevant grounds of appeal and, where the decision is quashed or the case is remitted for a new decision, it should contain clear and legally relevant reasons and instructions to the first-instance court. Such an approach is of particular importance for the consistency of case law, since the quality of reasoning of second-instance decisions directly affects the intelligibility and foreseeability of the standards applied by the lower courts.

The introduction of this sub-criterion has the potential to significantly improve the quality of judicial decision-making, but its application also raises a number of issues that require careful methodological control. The first challenge concerns the objectivisation of the criterion. Concepts such as "clarity", "conciseness" and "completeness" necessarily contain an element of value judgement, which is why they must be operationalised through sufficiently precise and verifiable indicators in order to avoid arbitrariness or inconsistent practice among different evaluation panels.

The second challenge concerns distinguishing the quality of reasoning from the correctness of the court decision. The evaluation of the quality of reasoning must not become a disguised mechanism for assessing whether the members of the evaluation body agree with the legal position of the judge. Otherwise, the system could encroach upon judicial independence and open the door to indirect sanctioning of a legal interpretation which, in itself, is not arbitrary. This is particularly important in view of the standard according to which a judge must have room for autonomous legal reasoning, while a different legal opinion does not in itself indicate professionally inadequate work.

The third challenge arises from a possible overlap between the quality of reasoning, the quality of work and the number of quashed decisions. If the same weakness in reasoning is reflected simultaneously in the assessment of the quality of work and in the assessment of the quality of reasoning, there is a risk of the same deficiency being counted twice. At the same time, the quashing of a decision by a higher court cannot automatically mean that the reasoning was of poor quality, since the reason for quashing may be a matter of a different interpretation of the law or a different assessment of a procedural issue. It is precisely for this reason that the Venice Commission warns of the need for caution in using the number of quashed decisions as an indicator of the professional quality of a judge.

The fourth challenge is the sampling of decisions. The law provides that the evaluation is based, inter alia, on five finally concluded cases selected by random sampling, five cases selected by the judge himself or herself, and five finally concluded cases in which decisions were quashed, also selected by random sampling. Although such a system increases methodological objectivity, the relatively small number of cases may make it difficult to generalise reliably about the quality of a judge's work, particularly for judges handling very complex or heterogeneous types of cases. Finally, a separate issue is the harmonisation of the practice of the evaluation bodies. If the criteria for the quality of reasoning are not applied equally across different courts and different types of proceedings, there is a risk that the assessment will depend more on the individual approach of the members of the evaluation panel than on an objectively established standard. For this reason, the application of the new rules should be accompanied by continuous monitoring of results, training of members of the

evaluation bodies, the preparation of anonymised examples of good and insufficiently good practice, as well as a periodic analysis of the mutual consistency of the assessments made.

Taken as a whole, this institutional solution represents a significant point of convergence between the European standard and domestic law: while the CCJE warns that the quality of court decisions must not be assessed solely by statistical methods, but also by methods focused on the internal structure of the decision (Part III.E of this analysis), Montenegrin law incorporates precisely such an approach – the assessment of the clarity, conciseness and completeness of reasoning on a sample of final decisions – as an integral part of the regular system of promotion and evaluation of judges, with protection against arbitrariness through the right of the judge to comment on the proposed assessment and the possibility of initiating an administrative dispute against the final decision of the Evaluation Commission[127].

XIV SYNTHESIS — ALIGNMENT OF THE MONTENEGRIN FRAMEWORK WITH EUROPEAN STANDARDS

The analysis of the legislative framework of Montenegro shows that both elements of the European standard set out in Part One of this analysis – the quality of the individual court decision and the uniform application of law – have been adopted through a layered system of norms comprising the Constitution, procedural laws, laws on the organisation of the judiciary and the law on the status of judges. The Constitution, in Article 124, expressly entrusts the uniform application of laws to the Supreme Court, while in Articles 20 and 32 it elevates the right to a legal remedy and to a fair trial to the rank of a constitutional right. The procedural laws – the Law on Civil Procedure, the Criminal Procedure Code, the Law on Administrative Disputes, the Law on Non-Contentious Proceedings and the Law on the Constitutional Court – regulate the content of reasoning in a manner which essentially corresponds to the requirements of CCJE Opinion No. 11, and treat the lack of reasoning in civil and criminal proceedings as an absolutely material procedural violation, by operation of law.

As regards the uniform application of law, the Law on Courts establishes the institute of the principled legal position and records of case law as formal mechanisms which directly correspond to the instruments that CCJE Opinion No. 20 recognises as the most effective, while the Law on the Judicial Council and Judges goes a step beyond the mere normative regulation of reasoning: it turns the quality of reasoning of decisions into a formal, periodically measured criterion of judicial evaluation, whereby the CCJE standard on the need to assess the internal structure of the decision, and not only statistical indicators, is implemented in Montenegrin law through a specific institutional mechanism.

The legislative framework of Montenegro, therefore, does not accept the standard of reasoned and consistent adjudication merely declaratively, but implements it through specific, sanctioned and measurable legal mechanisms – from the absolutely material procedural

[127] Law on the Judicial Council and Judges, Articles 96 and 98.

violation which, if the conditions prescribed by law are met, constitutes a ground for quashing the impugned decision in legal remedy proceedings, through the principled legal position as a formal instrument for harmonising case law, to the quality of reasoning as a criterion of a judicial career. It remains an open question, however, to what extent these normatively robust mechanisms are actually applied consistently in practice, and to what extent the case law of the Montenegrin courts, in its actual content, corresponds to the standards set out in this analysis.

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PART THREE

NATIONAL FRAMEWORK: SERBIA

Constitutional and legislative framework of Serbia in the field of the quality of court decisions and the uniform application of law

XV CONSTITUTIONAL AND INSTITUTIONAL FRAMEWORK OF SERBIA

The Constitution of the Republic of Serbia, adopted in 2006 and amended by the promulgation of the Act on Amendments to the Constitution in 2022 [128], incorporates the standard of the European framework on fair and reasoned adjudication into its text in a manner that is almost literally identical to the Montenegrin constitutional solution set out in the previous part of this analysis: "Everyone shall have the right to a public hearing before an independent, impartial tribunal previously established by law, which shall, fairly and within a reasonable time, decide on his or her rights and obligations"[129], while Article 36 additionally guarantees "equal protection of rights before courts and other State authorities" and the right to a legal remedy against a decision deciding on a right, obligation or legally based interest[130]. This almost identical wording of the two constitutions confirms that both legal systems adopt the right to a fair trial under Article 6 of the Convention as a directly applicable constitutional norm, and not merely as an obligation under international law.

The principles of the judiciary set out in Part Seven of the Constitution provide that judicial power is unified on the territory of the Republic of Serbia, that court decisions are rendered by courts in the name of the people, that hearings before the court are public and that the establishment of courts-martial, temporary or extraordinary courts is prohibited[131], while "the highest court in the Republic of Serbia is the Supreme Court"[132], a name which, as part of the 2022 reform, replaced the former name Supreme Court of Cassation. Unlike the Montenegrin Constitution, which in Article 124 expressly provides that the Supreme Court "shall ensure the uniform application of laws by the courts", the Constitution of the Republic of Serbia does not contain an analogous provision at the constitutional level: the function of ensuring the uniform application of law is entrusted to the Montenegrin Supreme Court directly by the Constitution, whereas it is entrusted to the Serbian Supreme Court, as will be shown below, only by an organic law. This difference in the normative hierarchy, constitutional vs. statutory foundation of the same function, represents one of the most significant structural differences between the two national frameworks covered by this analysis.

The independence of the judiciary at the institutional level is ensured by the High Judicial Council – "an independent State body which ensures and guarantees the independence of courts, judges, court presidents and lay judges"[133], whose competences include the election of judges, lay judges and court presidents, deciding on the termination of their office, deciding on the transfer and secondment of judges, determining the required number of judges and lay judges, and deciding on other matters concerning the status of judges, lay judges and court

[128] Constitution of the Republic of Serbia, Official Gazette of the RS, Nos. 98/2006 and 115/2021 (Act on Amendments to the Constitution of the Republic of Serbia).
[129] Constitution of the Republic of Serbia, Article 32, paragraph 1.
[130] Constitution of the Republic of Serbia, Article 36.
[131] Constitution of the Republic of Serbia, Article 142.
[132] Constitution of the Republic of Serbia, Article 143, paragraph 2.
[133] Constitution of the Republic of Serbia, Article 150.

presidents. The Council consists of 11 members: six judges elected by judges, four eminent lawyers elected by the National Assembly by a two-thirds majority, and the President of the Supreme Court ex officio – a composition in which the judicial component (seven of the eleven members, including the President of the Supreme Court) constitutes an absolute majority, while representatives of the legislative and executive branches are excluded from membership in the Council, which was precisely one of the declared objectives of the 2022 constitutional reform. This differs from the Montenegrin Judicial Council, in which judges (four of ten members, together with the president, who is ex officio the President of the Supreme Court) do not constitute an absolute majority, while two seats are reserved for representatives of the parliamentary majority and opposition, a difference which reflects two different conceptions of the balance between judicial self-governance and democratic legitimacy in the composition of the body responsible for judicial independence.

Constitutional protection against individual acts violating human rights, including the right to a fair and reasoned trial before the ordinary courts, is ensured by the constitutional appeal, which the Constitution defines as a legal remedy that "may be lodged against individual acts or actions of State bodies... which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or are not provided for"[134].

Independently of this guarantee, the Law on the Constitutional Court also prescribes a general quality standard for the acts of that independent State body itself: 'decisions, rulings and conclusions of the Constitutional Court shall contain: an introduction, an operative part and a statement of reasons', provided that the statement of reasons of a ruling dismissing a constitutional appeal, or of a conclusion, may exceptionally be limited to the legal basis for its adoption[135] – a standard which, in its basic structure, is comparable to the requirements of CCJE Opinion No. 11 set out in Part III of this analysis, although it here relates not to judgments of the ordinary courts, but to acts of the Constitutional Court.

XVI OBLIGATION TO GIVE REASONS AND THE SANCTION FOR ITS ABSENCE

The Law on Civil Procedure[136] regulates the content of reasoning in a manner which, in its basic structure, corresponds to the standard of CCJE Opinion No. 11 set out in Part III of this analysis: "A judgment drawn up in writing must contain an introduction, an operative part and a statement of reasons", whereby in the statement of reasons the court shall set out "the claims of the parties and their submissions on the facts on which those claims are based, the evidence,

[134] Constitution of the Republic of Serbia, Article 170.
[135] Law on the Constitutional Court, Article 48.
[136] Law on Civil Procedure, Official Gazette of the RS, Nos. 72/2011, 49/2013 – Constitutional Court decision, 74/2013 – Constitutional Court decision, 55/2014, 87/2018 and 18/2020.

the facts it has established, as well as the regulations on which the court based the judgment"[137]. In the statement of reasons of a judgment by default, a judgment on admission, a judgment on waiver, a judgment for non-appearance and a judgment rendered under Article 291, paragraph 2 of the LCP, only the reasons justifying the rendering of such judgments shall be set out. The law also recognises a special, simplified category of reasoning: in the statement of reasons of a judgment by default, a judgment on admission, a judgment on waiver, a judgment for non-appearance and a judgment rendered under Article 291, paragraph 2 of the Law on Civil Procedure, only the reasons justifying the rendering of such a judgment are set out. The law also provides for a distinct category of judgments without any statement of reasons at all: "A judgment shall not contain a statement of reasons if the parties have waived the right to a legal remedy"[138] – a solution which, given that it is the result of the free disposition of the parties themselves, may be regarded as a legitimate exception to the rule, comparable to the settled case law of the ECtHR on the permissibility of waiving certain procedural guarantees, provided that the waiver is unequivocal and informed.

The Criminal Procedure Code[139] regulates the content of reasoning in considerably greater detail, listing a whole series of elements which the court must set out depending on the type of judgment, in compliance with the rule on stating reasons for each point of the judgment. – The court must give reasons regarding the facts it has established and the reasons for which it considers them proven or unproven, "the assessment of the credibility of contradictory evidence", the reasons for which it did not accept particular motions of the parties, as well as, in the event of a conviction, the facts and circumstances it took into account in selecting the criminal sanction and determining its measure [140]. At the same time, the Code permits the absence of a statement of reasons or a partial statement of reasons in precisely defined cases – where the parties and defence counsel waived the right to appeal immediately upon the pronouncement of the judgment, or where the accused was sentenced to imprisonment of up to three years, a fine, community service, revocation of a driving licence, a suspended sentence or a judicial admonition, on the basis of a confession meeting the conditions prescribed by the Code, provided that the parties may still request service of a reasoned judgment, in which case the time limit for appeal begins to run only from the date of service of a copy of the reasoned judgment [141]. This is the most pronounced particularity of Serbian procedural law in relation to the Montenegrin model set out in the previous part of this analysis, which does not recognise such a possibility: while CCJE Opinion No. 11 allows that reasoning need not be lengthy (Part III.B of this analysis), the Criminal Procedure Code of Serbia goes a step further, permitting, under strictly defined conditions related to confession and waiver of legal remedy, that there be no reasoning at all – a solution which deserves further empirical attention in the subsequent phases of the CLEAR-JUST project, bearing in mind that a waiver of the right to a reasoned

[137]Law on Civil Procedure, Article 355, paragraphs 1 and 5.
[138]Law on Civil Procedure, Article 355, paragraph 7.
[139]Criminal Procedure Code, Official Gazette of the RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.
[140]Criminal Procedure Code, Article 428, paragraphs 5–10.
[141]Criminal Procedure Code, Article 429.

decision, according to the case law of the ECtHR, must be unequivocal and accompanied by appropriate safeguards.

As regards the sanction for the lack of reasoning, both procedural laws follow the same logic as their Montenegrin counterparts set out in the previous part of this analysis: the lack of reasoning constitutes an absolutely material procedural violation: unlike relatively material violations, where, in addition to the violation itself, it must also be proven that it had or could have had an effect on the rendering of a lawful and correct judgment, in the case of absolutely material violations such an additional effect on the outcome of the dispute need not be specifically proven. The Law on Civil Procedure provides that a material violation of the provisions of civil procedure always exists "if the judgment has deficiencies due to which it cannot be examined, and in particular if the operative part of the judgment is incomprehensible, if it contradicts itself or the reasons for the judgment, or if the judgment contains no reasons at all or no reasons are given regarding the essential facts, or those reasons are unclear or contradictory, or if, regarding the essential facts, there is a contradiction between what is stated in the reasons for the judgment about the content of documents or records of statements given in the proceedings and those documents or records themselves or the evidence taken"[142], while the Criminal Procedure Code identically provides that a material violation of the provisions of criminal procedure also exists if "the operative part of the judgment contradicts itself or the reasons for the judgment contradict the operative part, or if the judgment contains no reasons at all or no reasons are given regarding the essential facts, or those reasons are unclear or contradictory, or if, regarding the essential facts, there is a contradiction between what is stated in the reasons for the judgment about the content of documents or records of statements given in the proceedings and those documents or records themselves or the evidence taken"[143]. The almost literal correspondence of these provisions with Montenegrin Article 367, paragraph 2, item 15 of the Law on Civil Procedure and Article 386, paragraph 1, items 8–9 of the Criminal Procedure Code of Montenegro confirms that both legal systems, despite independent legislative development in recent decades, share a common normative heritage on this issue, and that both attach to the lack of reasoning the same degree of seriousness as that attached to it, within the framework of the right to a fair trial, by both the CCJE and the ECtHR.

The same standard – introduction, operative part, statement of reasons separate from the operative part – also applies in administrative disputes. The Law on Administrative Disputes[144] provides that a judgment contains, in addition to other formal elements, "the operative part, the statement of reasons and instructions on the legal remedy", provided that "the operative part of the judgment must be separate from the statement of reasons"[145] – an identical structural requirement of separation of the operative part from the statement of reasons as that imposed by the Montenegrin Law on Administrative Disputes, which at the level of the administrative judiciary of both States literally transposes the general standard of the content of a court decision from civil and criminal proceedings.

[142]Law on Civil Procedure, Article 374, paragraph 2, item 12.
[143]Criminal Procedure Code, Article 438, paragraph 2, item 2.
[144]Law on Administrative Disputes, Official Gazette of the RS, No. 111/2009.
[145]Law on Administrative Disputes, Article 47.

The same standard of reasoning extends to non-contentious proceedings as well. The Law on Non-Contentious Proceedings[146] provides that decisions in these proceedings are rendered in the form of a ruling, provided that a ruling against which a separate appeal is allowed, as well as a ruling of the second-instance court, must be reasoned[147], while, with regard to matters not specifically regulated, the provisions of the Law on Civil Procedure apply mutatis mutandis[148] – a solution which, by referring to the general civil procedure standard, indirectly ensures the application of the same standard of reasoning in non-contentious matters as well, similar to the solution provided for by the Montenegrin Law on Non-Contentious Proceedings.

XVII UNIFORM APPLICATION OF LAW: MECHANISMS AND CONTENTIOUS ISSUES

The Law on the Organisation of Courts[149] sets the uniform application of law as one of the general objectives of the entire judiciary – courts, according to Article 2, "ensure constitutionality and legality, the uniform application of law and equal protection of all before the law"[150] – and then specifically entrusts that function to the Supreme Court, as the highest court of general jurisdiction: "The Supreme Court ensures the uniform judicial application of law and the equality of parties in court proceedings, and considers the application of laws and other regulations and the work of the courts"[151]. As already noted, this is a function which in Montenegrin law derives directly from the Constitution, whereas in Serbian law it is founded at the level of an organic law – a difference which, although it need not necessarily weaken the effectiveness of the function itself, nevertheless makes its constitutional protection different in the event of a possible amendment of the law by a parliamentary majority.

At the operational level, the harmonisation of case law within the Supreme Court takes place primarily through the session of the department, which is convened "if a disagreement arises between individual panels in the application of regulations or if a panel departs from a legal view accepted in its case law or from a legal view accepted by all panels", whereby "a legal view adopted at the session of the department is binding on all panels of the department" and is published on the website of the Supreme Court[152]. This institute of the legal view is the functional counterpart of the Montenegrin principled legal position, but with one significant difference in scope: while the Montenegrin principled legal position, adopted at the General Session of the Supreme Court, binds case law as a whole, the legal view, adopted at the session of a department, formally binds only the panels within that same department, making it a

[146] Law on Non-Contentious Proceedings, Official Gazette of the SRS, Nos. 25/82 and 48/88 and Official Gazette of the RS, Nos. 46/95 – other law, 18/2005 – other law, 85/2012, 45/2013 – other law, 55/2014, 6/2015, 106/2015 – other law and 14/2022.
[147] Law on Non-Contentious Proceedings, Article 18, paragraph 2.
[148] Law on Non-Contentious Proceedings, Article 30, paragraph 2.
[149] Law on the Organisation of Courts, Official Gazette of the RS, No. 10/2023.
[150] Law on the Organisation of Courts, Article 2.
[151] Law on the Organisation of Courts, Article 32, paragraph 3.
[152] Law on the Organisation of Courts, Article 45.

narrower, more decentralised harmonisation mechanism. The General Session of the Supreme Court of Serbia, for its part, has a broader remit, which does not, however, include deciding on the harmonisation of case law: it considers the application of laws and the work of the courts, appoints judges of the Constitutional Court, gives an opinion on the candidate for President of the Supreme Court and adopts the Rules of Procedure of the Supreme Court[153], without explicit authority to adopt legal views binding on the entire court.

The question of whether and to what extent case law should become a formal source of law is, in Serbia, the subject of a lively and open professional debate. The Judges' Association of Serbia, in an analysis of the Law on Civil Procedure published in 2024 within a project supported by the Embassy of the Kingdom of the Netherlands, expressly concludes that "case law is not a source of law in Serbia, nor in other States which, like Serbia, belong to the European continental legal system", invoking the constitutional principle according to which a judge is "independent and adjudicates on the basis of the Constitution, ratified international treaties, laws... and other general acts"[154]. The same analysis, invoking several opinions of the Venice Commission – the Report on the Independence of the Judicial System CDL-AD(2010)004 (2010), the Opinion on the Draft Laws on Judges and on the Organisation of Courts CDL-AD(2008)007 (2008) and the Opinion on the Draft Amendments to the Laws on the Judiciary CDL-AD(2013)005 (2013) – warns that the normative imposition of binding case law could undermine the internal independence of the judiciary, that is, the independence of an individual judge vis-à-vis higher courts and court presidents, and "stereotype" adjudication to the detriment of free judicial conviction[155]. This argumentation stands in an interesting, though not necessarily contradictory, relationship with the position of the CCJE in Opinion No. 20, which recognises formal mechanisms for harmonising case law – including binding interpretations in abstracto – as a legitimate instrument of legal certainty, while at the same time warning that they raise issues of separation of powers: both positions proceed from the same tension between the foreseeability of law and judicial independence, but approach it from different perspectives – the CCJE emphasising the benefit for legal certainty, the Venice Commission and the Serbian professional community emphasising the risk to the internal independence of the individual judge.

This tension manifested itself particularly sharply in the debate on the possible introduction of so-called pilot judgments without reasoning as a response to the overburdening of courts with mass, repetitive lawsuits. The Judges' Association of Serbia expressly rejects such a possibility as unacceptable in a legal system based on the rule of law, considering that it would "deprive the parties of the right to a reasoned court decision, and thereby of the right to a fair trial and to a legal remedy"[156], and adds that any possible introduction of such an instrument would first have to be examined from the standpoint of constitutionality, separation of powers and the internal independence of judges, with an obligation to give detailed reasons for every

[153] Law on the Organisation of Courts, Article 46.
[154] Judges' Association of Serbia, The Law on Civil Procedure in the Service of Uniform Application of Law, Belgrade, 2024, p. 69, with reference to the Constitution of the Republic of Serbia, Article 144.
[155] Ibid., pp. 69–71, with reference to the Venice Commission, CDL-AD(2010)004 (2010), paras. 68 and 73; CDL-AD(2008)007 (2008), para. 109; CDL-AD(2013)005 (2013), paras. 103–108.
[156] Judges' Association of Serbia, The Law on Civil Procedure in the Service of Uniform Application of Law, Belgrade, 2024, pp. 80–81, with reference to the Constitution of the Republic of Serbia, Article 1.

such decision if it were introduced at all[157]. This example directly illustrates how the standard of reasoned adjudication, which the CCJE derives from Opinion No. 11 and the ECtHR from Article 6 § 1 of the Convention, is applied in Serbia not only through case law, but also actively shapes the ongoing legislative debate on the reform of civil procedure, through the professional association of judges explicitly invoking the right to a reasoned decision as a constitutional and Convention guarantee.

XVIII EVALUATION OF THE WORK OF JUDGES

The Law on Judges[158] regulates the periodic evaluation of the work of judges, the purpose of which is "the assessment, maintenance and improvement of the quality of work, with respect for the independence of the judge, with the aim of strengthening public confidence in the work of the judge and the court"[159]. Evaluation is carried out on the basis of publicly announced, objective and comprehensive criteria, expressly excluding any assessment of the exercise of free judicial conviction in the assessment of evidence and the interpretation of regulations, and covers the following basic criteria: professional knowledge and the ability to apply it, the capacity for analytical thinking and resolving legal issues, the ability to render decisions within an appropriate time, skill in conducting hearings, "the ability to express oneself orally and in writing and to present arguments", the ability to organise judicial work and, where relevant, the ability to perform managerial duties[160].

In comparison with the Montenegrin solution set out in the previous part of this analysis, in which the Law on the Judicial Council and Judges singles out the quality of reasoning of decisions as an autonomous, named sub-criterion with its own assessment formula – "on the basis of the clarity, conciseness and completeness of the reasons given", the Serbian Law on Judges does not contain an analogous, separate criterion. The quality of reasoning is not singled out as an autonomous criterion, but its quality may be indirectly captured through several existing criteria, in particular the capacity for analytical thinking and resolving legal issues and the ability to express oneself in writing and to present arguments. This represents a measurable difference in the degree of normative granularity with which the two comparable systems approach precisely that component of judicial work which the CCJE, in Opinion No. 11, singles out as central to the quality of the court decision as a whole, a difference which raises the question, relevant for the further phases of the CLEAR-JUST project, of whether the more general formulation of the Serbian criterion in practice provides an equally effective incentive for the quality of reasoning as the separate Montenegrin sub-criterion, or whether, conversely, it might be an advantage insofar as it avoids the risk of formalisation and "stereotyping" of the assessment of reasoning of which the Venice Commission warns.

[157] Ibid., p. 81.
[158] Law on Judges, Official Gazette of the RS, Nos. 10/2023 and 9/2026 and 56/2026.
[159] Law on Judges, Article 35.
[160] Law on Judges, Article 36, paragraphs 1–3.

XIX SYNTHESIS — ALIGNMENT OF THE SERBIAN FRAMEWORK WITH EUROPEAN STANDARDS

The analysis of the legislative framework of Serbia shows that **both elements of the European standard** set out in Part One of this analysis – the quality of the individual court decision and the uniform application of law – have been adopted through a normative system which is, in its basic features, comparable to the Montenegrin one: the Constitution, in Articles 32 and 36, elevates the right to a fair trial and to a legal remedy to the rank of a constitutional right in almost identical wording to the Montenegrin Constitution, and the procedural laws – the Law on Civil Procedure, the Criminal Procedure Code and the Law on Administrative Disputes – regulate the content of reasoning in a manner which essentially corresponds to the requirements of CCJE Opinion No. 11, and treat the lack of reasoning as an absolutely material procedural violation.

At the same time, the analysis has revealed three significant **points of divergence** from the Montenegrin framework. First, the function of ensuring the uniform application of law is entrusted to the Supreme Court in Montenegro directly by the Constitution, whereas in Serbia it is founded at the level of an organic law, a difference in the degree of constitutional protection of the same function. Second, the Criminal Procedure Code of Serbia, unlike the Montenegrin Code, permits the absence of a statement of reasons or a partial statement of reasons in precisely defined cases related to confession and waiver of the right to appeal, a solution which deserves further empirical attention. Third, the question of formalising case law as a source of law is, in Serbia, the subject of an open and active professional debate, in which the professional community of judges and the Venice Commission point to the risk to the internal independence of the judiciary, while the Law on Judges does not single out the quality of reasoning as an autonomous evaluation criterion, unlike the Montenegrin solution.

Montenegro and Serbia, therefore, share the same starting point, the standard of reasoned and consistent adjudication derived from Article 6 of the Convention and systematised through CCJE Opinions Nos. 11 and 20, but differ in the degree of formalisation with which they translate that standard into specific, measurable legal mechanisms: the Montenegrin framework is characterised by a more explicit constitutional foundation and named, quantified evaluation criteria, while the Serbian framework relies to a greater extent on more general statutory formulations and leaves open, through ongoing professional and legislative debate, the question of the further development of mechanisms for the uniform application of law.

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PART FOUR

PRACTICAL GUIDE TO THE QUALITY OF JUDICIAL REASONING

HOW TO USE THIS GUIDE?

The quality of a court decision is measured not only by the outcome it produces for the parties to the proceedings, but also by whether that outcome is presented in a manner which the parties, the higher court and the public can understand, verify and, in case of disagreement, challenge through ordinary legal remedies. The standard of reasoned and consistent adjudication, derived from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and systematised through the opinions of the Consultative Council of European Judges (CCJE), is the central theme of the preceding analytical background papers prepared within the CLEAR-JUST project.

This Guide represents the next, practical step in the analysis. It is conceived as a **living document,** and not as a final text. The Guide is addressed primarily to judges, as well as to judicial advisers who participate in drafting decisions, but it may also be useful to the wider judicial and academic community interested in issues of the quality of judicial reasoning. Like the guidance on which it is modelled, this Guide has the status of a professional recommendation, and not of a binding regulation: its application depends on the procedural rules, practice and context of each individual case. The Guide does not replace the Law on Administrative Disputes, the Law on Civil Procedure, the Criminal Procedure Code or other procedural laws of Montenegro and Serbia, which prescribe the formal elements of a court decision and which have been analysed in detail. The Guide is organised so as to follow the natural **course of drafting a court decision** – from the general principle of reasoning (Part I), through the logic of decision-making (Part II) and the structure of the text (Part III), to language and style (Part IV). Part V brings the preceding parts together into a single checklist which may be used as a final check of a draft decision before it is signed. Part VI answers the questions most frequently raised in practice, and Part VII illustrates the principles set out through actual examples from the case law of the European Court of Human Rights.

Numbered paragraphs (marked [1], [2], etc.) contain guidance and explanations. Boxes labelled PRACTICE TIP highlight specific, directly applicable recommendations. The checklist in Part V uses boxes (☐) which the reader may, in the printed or electronic version, tick off during their own review of the draft decision.

I THE GOLDEN RULE: A REASONED AND COMPREHENSIBLE DECISION

[1] Every court decision must be formulated clearly, comprehensibly and with reasons. This is the golden rule from which this Guide proceeds, drawn from the same idea on which the CEELI

Institute bases its guide to judicial writing[161]: every reader of the decision – whether a party, a higher court or a member of the public – must be able to understand its full content. A decision is not written for the sake of the judge who renders it, but for the sake of those for whom it is intended.

[2] The duty to give reasons derives directly from the judicial oath and from the very essence of the judicial function. Every participant in the proceedings has the right to a reasoned decision, and the judge has a corresponding duty to fulfil that right[162]. This duty is not a formality – it enables the losing party to decide whether to lodge a legal remedy, enables the higher court to exercise effective review, and shows that the judge's discretionary decision-making has been exercised in a reasonable and non-arbitrary manner.

[3] The obligation to give reasons also has a disciplining function in relation to the judge himself or herself: it compels the judge to separate the relevant from the irrelevant, to set out his or her conclusions in clear terms, and to consider each argument critically before it becomes part of the final decision[163]. In this sense, the act of writing the reasoning is not a mere recording of a decision already taken, but an integral part of the decision-making process itself.

[4] The right to a reasoned decision is one of the guarantees of the right to a fair trial under Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, although that right is not expressly formulated in the text of the Convention – the European Court of Human Rights (ECtHR) arrived at it by way of interpretation, proceeding from the principle that the individual must be protected against arbitrary adjudication[164].

[5] The ECtHR derives the obligation to give reasons from Article 6 § 1 of the Convention for four reasons, which are equally persuasive for the national judge as a practical argument in favour of careful writing: the reasoning shows the parties that they have been heard; it enables them to lodge a legal remedy effectively; it enables the higher court to exercise review; and it enables the public to scrutinise the work of the courts[165]. The absence of any of these four functions makes the decision vulnerable to challenge, both before the higher court and before the Constitutional Court in constitutional appeal proceedings.

> **PRACTICE TIP**
> *Before signing the decision, ask yourself: would the losing party, reading only the reasoning, be able to understand why it lost and on what basis it could formulate an appeal? If the answer is not clearly affirmative, the reasoning should be improved.*

[161]CEELI Institute, A Guide to Judicial Writing, November 2023, point 3: "Every judgment must be framed in clear, comprehensible and reasoned terms. Thus every reader of every judgment should be able to understand the full content."
[162]CEELI Institute, A Guide to Judicial Writing, point 10.
[163]CEELI Institute, A Guide to Judicial Writing, point 11.
[164]ECtHR, Tatishvili v. Russia, application no. 1509/02, 22 February 2007, § 58; cf. Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 28.
[165]Cf. ECtHR, Tatishvili v. Russia, § 58, as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 28.

[6] The scope of the reasoning is not uniform, but depends on the nature of the decision and the circumstances of each individual case. Decisions on the merits require fuller reasoning than procedural decisions (e.g. decisions on adjourning a hearing), while decisions terminating proceedings, denying a right or imposing an obligation as a rule require the fullest reasoning[166]. The judge is, however, not obliged to respond to every argument raised by a party – it is sufficient to respond to those arguments which are decisive for the outcome of the dispute.

[7] The duty to give reasons extends to every court decision and every court order, including decisions on costs, refusals to extend a time limit, interim measures, dismissal of a claim for abuse of rights, and all types of procedural (interlocutory) decisions[167]. What differs is not the existence of the duty, but its scope: a procedural decision requires a shorter, but still comprehensible statement of its reasons.

[8] Continuous improvement of the skill of writing reasons is an integral part of the judicial function, and not a skill acquired once and for all[168]. This Guide does not purport to be a definitive handbook, but rather a starting point which, through the forthcoming phase of empirical research within the CLEAR-JUST project, will be supplemented by the insights of judges and judicial advisers from Montenegro and Serbia themselves.

II LEGAL LOGIC AND THE DECISION-MAKING PROCESS

[9] Rendering a court decision is, in essence, a logical process which takes place in three steps: the judge first establishes the facts relevant to the resolution of the case; then identifies the legal issue to be resolved and the applicable legal framework; and, finally, by comparing the circumstances of the case with the applicable legal provision, reaches a conclusion resolving the dispute[169]. This three-step structure – facts, law, conclusion – represents the classic legal syllogism and is the basis of every well-reasoned decision, regardless of the type of proceedings.

[10] Strict adherence to the rules of logic is of essential importance when drafting a court decision. If a legal text contains logical errors, this undermines the very purpose of writing – the persuasiveness and acceptability of the decision. The basic logical rules which the reasoning must observe are: the principle of identity (a concept must retain the same meaning throughout the reasoning), the law of contradiction (two contradictory statements cannot both be true at the same time), the law of the excluded middle (there is no third possibility between two contradictory statements), the law of reason and the law of sufficient reason (every conclusion must be supported by sufficient reason)[170]. When the reasoning breaches one of these rules –

[166]Cf. ECtHR, Ruiz Torija v. Spain, 9 December 1994, §§ 29–30; Van de Hurk v. the Netherlands, 19 April 1994, § 61; as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 14.
[167]CEELI Institute, A Guide to Judicial Writing, point 12.
[168]CEELI Institute, A Guide to Judicial Writing, points 8 and 60.
[169]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 21, box "The process of rendering court decisions is a logical process".
[170]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 21.

for example, when the facts are described in one way in one part of the text, and differently, without explanation, in another part – the reader loses confidence in the decision as a whole, even if its final outcome is correct.

> **PRACTICE TIP**
> *In the reasoning, use clear, unambiguous formulations which clearly mark the logical step the judge is taking: "the court has established that…", "on the basis of this evidence, the court has established that…", "therefore, the court has concluded that…". Such formulations make the course of reasoning clearer for the reader and prevent factual statements from being mixed up with legal conclusions.*

[11] In the majority of cases, the judge will rely on deductive reasoning: one starts from a general legal rule (the premise), applies it to the established facts, and draws an individual conclusion. In certain cases, however, the reasoning may also be based on an inductive approach – where, from a series of similar factual or legal circumstances, the conclusion is drawn that they belong to the same category, to which the corresponding legal rule is then applied[171]. Both approaches are legitimate; what is important is that the decision clearly shows which of them has been applied, so that the reader does not have to reconstruct the course of reasoning on his or her own.

[12] When a conflict of legal rules arises, the judge resolves that conflict by applying the customary rules of precedence: a regulation of higher legal rank prevails over a regulation of lower rank (lex superior), a later regulation prevails over an earlier regulation of the same force (lex posterior), and a special regulation prevails over a general one (lex specialis)[172]. When the judge applies one of these rules of precedence in the reasoning, it is useful to state this expressly, since this further legitimises the reasoning and facilitates review by the higher court.

[13] Legal logic is particularly useful in managing the evidence and arguments of the parties. It enables the judge to draw a clear distinction between facts which need to be proven and those which do not (because they are not in dispute), as well as to identify logical contradictions or mutually irreconcilable claims in the parties' argumentation, which may then serve as a basis for rejecting certain arguments[173]. Any situation in which the court rejects a party's argument on account of a logical contradiction deserves to be reasoned expressly and specifically, rather than by a blanket statement that the argument is "unfounded".

[14] In modern case management, the first steps in drafting the reasoning may be taken already at an early stage, through case management that ensures clear and concise submissions, agreement on as many factual issues as possible, and, where possible, a joint list of the disputed issues on which the court is to decide[174]. Well-managed proceedings facilitate the subsequent drafting of the decision and improve its quality – it is the judge, and not the parties, who should

[171]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 22.
[172]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 21.
[173]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 21–22.
[174]CEELI Institute, A Guide to Judicial Writing, points 13–17.

direct the course of the proceedings from the very beginning, bearing in mind the future drafting of the reasoning.

III STRUCTURE OF A WELL-REASONED DECISION

[15] Although there are no rigid rules applicable to every case, it is useful, before starting to write, to determine in advance the logical order of the sections of the decision. In civil and administrative cases, that order typically comprises: the parties to the proceedings; their dispute and the legal relief sought, set out concisely; the issues on which the court is to decide; the undisputed or uncontested facts; the facts established by the court and the reasons for such findings; the applicable legal rules and principles; the application of those rules and principles to the established facts; the conclusions; and, where applicable, the final orders[175]. This model, although formulated for a general context, coincides almost entirely with the formal elements prescribed for a judgment by the procedural legislation of Montenegro and Serbia.

[16] In the dispositive (operative part), the court uses its judicial powers to render a specific, comprehensive and clear decision on the legal situation. If the court partially upholds the claim, the dispositive must clearly indicate which part has been upheld and which part dismissed[176]. The dispositive is one of the most important elements of the decision because it represents the concrete outcome of the dispute, and it must therefore be consistent with the reasoning and be complete, covering all issues raised by the parties, as well as those raised by the court of its own motion.

[17] The context of the case (the description of the facts and of the parties' submissions) should be complete, but concise, and should cover only the relevant facts that are functional to the resolution of the dispute; less relevant circumstances may be grouped under the heading "other facts", with a brief description and an indication that they are not relevant to the case[177]. It is essential that the presentation of the facts at this stage does not at the same time constitute their interpretation – the descriptive part of the decision is the basis for the subsequent legal analysis, and must reflect the facts as established by the court independently of the position of either party.

> **PRACTICE TIP**
> *Present the facts in order of importance, so that the reader immediately gains an insight into the significance of each fact for the case. Summarise the parties' claims according to their most important and most evident arguments, using uniform expressions such as "the claimant argued...", "the defendant stated...", "the court further observed...".*

[175] CEELI Institute, A Guide to Judicial Writing, point 35.
[176] Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 22.
[177] Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 23.

[18] In the part containing the reasons for the decision, the judge has full freedom to decide the case according to free judicial conviction, the only limitation on this freedom being contained in the requirements of the right to a fair trial. This part of the decision as a rule contains: the factual circumstances as established by the court; the evidence supporting the court's conclusions; the reasons for which the court does not accept certain types of evidence or arguments of the parties; and a reference to the applicable legal provisions[178]. The court need not address every argument raised by the parties, but it is expected to respond to the most important of them and to provide clear reasons why certain other arguments have not been accepted – avoiding a response to arguments that are clearly decisive for the outcome of the case leaves the impression that the court has only partially considered the parties' submissions.

[19] From the standpoint of drafting the text, two basic stylistic options are possible: the "edictal" style, which begins with expressions such as "taking into account..." followed by a list of items, and the "direct" style, in which the reasoning is written as a text divided into numbered paragraphs or thematic sections with headings[179]. The direct style, divided into numbered paragraphs with headings that signal to the reader the transition from one topic to another, is as a rule more accessible to a wider audience and is preferable for more complex cases.

[20] Regardless of the style chosen, the reasoning usually follows the same logical order for each issue or objection it considers: a concise or detailed statement of the issue or grounds; a summary of the relevant legal provisions relating to that specific case; the relevant interpretation of those provisions, citing case law where appropriate; and the application of those provisions to the specific case, that is, the resolution of that issue[180]. When citing legal provisions, three options are possible according to the degree of detail – citing only the title of the relevant provision, citing it together with a summary of its content, or citing it together with a verbatim transcription of the text – whereby the third option makes the judgment longer, but clearer and more comprehensible to third parties who are not legal experts.

[21] Where there is a divergence in case law on the same legal issue, it is of essential importance that the decision clearly indicate which of the possible interpretations the court accepts and briefly set out the reasons for such a choice. Formulations such as "the court is aware of the different interpretations, but considers option X to be more correct, for the following reasons..." show the reader that the court is aware of the existence of divergent case law and provide a firm basis for the decision[181]. The opposite approach – tacitly disregarding the existence of divergent case law – undermines not only the persuasiveness of the specific decision, but also the standard of consistency of case law as a whole, which is the subject of particular attention in the preceding analytical background papers of this project.

[178]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 26.
[179]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 24; cf. French Council of State, Vademecum sur la rédaction des décisions de la juridiction administrative, 2019: "The author [of administrative judgments] must also bear in mind that the decision he or she is preparing may be read by different groups of readers. He or she must therefore endeavour to write for all target groups."
[180]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 24–25.
[181]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 27.

[22] Before finalising the draft, it is useful to carry out an additional review of the text from a perspective different from the one the judge had while writing – for example, by viewing the draft from the standpoint of the higher court that would consider a possible appeal, or from the standpoint of the losing party that would most likely formulate certain objections[182]. Such a review helps to identify arguments that may not have been sufficiently addressed, and to strengthen the authority of the decision by expressly citing the case law of the higher court applicable to the specific dispute.

[22a] In the practice of the Administrative Court of the Republic of Serbia, these general principles have been further elaborated through precise rules on the linguistic expression of the decision: in its work the court uses statutory terms and avoids foreign words that are not generally accepted in the work of the court, while in the introduction of the judgment the dispute is briefly designated using statutory legal institutes[183]. The titles of laws and other regulations may be cited in the text in abbreviated form (for example, LAD, LCP) where such an abbreviation is generally known, while regulations that are not in frequent use must be cited by their full title, with an indication of the official gazette and the issue in which they were published.

[22b] The same handbook precisely distinguishes between two layers of reasoning in an administrative dispute. The factual reasoning is that in which the court first identifies the facts that are undisputed between the parties, and then separately states the disputed facts and its specific position as to which of them have been established and on what basis[184]. The legal reasoning is that in which the court precisely states the substantive-law regulation it applies – with its full title, the number of the official gazette and the year of publication – as well as the case law it relies on, with an obligation, if it relies on a legal position adopted at a session of all judges or on a decision of the Constitutional Court or of the European Court of Human Rights, to state its number and source of publication[185]. If the decision is rendered on the basis of facts established in the administrative proceedings, the court is not obliged to repeat the reasoning of the impugned act, but it is sufficient to refer to it, where repeated submissions already reasoned in that act are concerned – a standard confirmed in the case law of the ECtHR in the case of Van de Hurk v. the Netherlands[186].

IV CLARITY, CONCISENESS AND WRITING STYLE

[23] The length of decisions is one of the most frequently debated topics in the legal world. Conciseness is a virtue, but it is less important than three overriding virtues: clarity of expression,

[182]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 27.
[183]Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), p. 16 (General rules for writing decisions and other court documents).
[184]Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), pp. 31–32.
[185]Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), pp. 32–33.
[186]ECtHR, Van de Hurk v. the Netherlands, 19 April 1994, as cited in: Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), p. 33, footnote 20.

clarity of reasoning and comprehensibility[187]. Judges have heavy workloads, and drafting the reasoning is a demanding task that must be carried out within a reasonable time – such real pressure does not always favour short decisions, but short decisions should not be sacrificed for the false impression of thoroughness which a longer text sometimes creates.

[24] There are several legitimate techniques for reducing the length of a decision which do not undermine its quality: encouraging the parties to agree on as many factual issues as possible; using footnotes for ancillary remarks; placing longer quotations from case law or regulations in an annex, instead of reproducing them verbatim in the text; referring to the relevant paragraphs of judgments by citing the case and the paragraph or page number, without transcribing them; using indexes and internal headings, especially in longer decisions; and using glossaries of terms and abbreviations[188]. These techniques are particularly useful in cases with extensive case law or voluminous documentation, where verbatim citation of every source makes the text unwieldy.

> **PRACTICE TIP**
> *Instead of transcribing an entire paragraph from the judgment you are relying on, state the name of the case, the application number and the paragraph or page number. This shortens the text, and enables a reader who wishes to verify the source to find it easily.*

[25] The writing style must be decisive, objective and technical. Value or moral judgements, opinions on the effectiveness or quality of the law, and political or sociological assessments should be avoided[189]. Formulations such as "it seems expedient to opt for this thesis" or "it appears that..." should not be used in a judgment, since the language used in a judgment must be decisive – a judgment, by its very nature, decides, and there is no room in it for doubt. Such indecisive formulations should be replaced by statements such as "the court considers" or "it is preferable to opt for this thesis".

[26] Seriousness and neutrality are an important stylistic element of the reasoning, reflecting the principle of impartiality and of the judge's equal distance from the parties, guided solely by the law. The words used in a judgment should not constitute value judgements about laws or the positions of the parties, criticism of the parties or their lawyers, superfluous irony, a sterile polemical tone, or offensive and vulgar expressions[190]. For the same reasons, it is recommended to avoid excessive emphasis by means of exclamation or question marks, as well as the use of aggressive typographical devices – underlining, capital letters or bold type – which give the decision a tone incompatible with the dignity of the judicial function.

[27] The principle of open justice requires that every decision be pronounced in a public session, unless there are compelling reasons not to do so. This is so because the administration of justice and the legal system belong to everyone – the parties do not have exclusive

[187]CEELI Institute, A Guide to Judicial Writing, point 54.
[188]CEELI Institute, A Guide to Judicial Writing, point 56.
[189]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 26.
[190]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 24.

ownership of their case, but are exposed to the public and to public scrutiny, which promotes transparency, judicial accountability and confidence in the administration of justice[191]. Exceptions to this principle – for example, in cases involving minors or sensitive personal data – must be expressly provided for by law and applied restrictively.

[28] Cases involving children, persons without full legal capacity, foreigners who do not know the language of the proceedings, or unrepresented parties pose particular challenges for effective communication. In such cases, the need for clear and simple language on the part of the court is particularly pronounced, at all stages of the proceedings, from the first scheduling to the final act, that is, the pronouncement of the court's judgment[192]. One of the options the court may consider in such cases is the preparation of a short, explanatory summary of the decision, drafted in plain language, accompanying the decision written in the usual, technical manner.

[29] Finally, a good knowledge of the doctrine of precedent (the binding force of previous decisions of higher courts, or the persuasive force of previous decisions in continental legal systems) is a precondition for discipline in citing case law. The judge must ask himself or herself: is the decision being cited a decision of a superior or equivalent court which, as a precedent, may be relevant to the case? If the answer is affirmative, does its legal reasoning (ratio decidendi) actually relate to the issue the judge has to resolve?[193]. Undisciplined burdening of the court with irrelevant case law is one of the issues that should be addressed already at the earliest preparatory hearing, by limiting the length of submissions and the number of sources cited.

V CHECKLIST OF CRITERIA FOR ASSESSING THE QUALITY OF REASONING OF COURT DECISIONS

The checklist that follows has been taken, without changes to the wording of the individual items, from the practical guides prepared within the CLEAR-JUST project for Montenegro and Serbia, and is presented here as a single, common self-assessment instrument for both judicial systems. Its basis is the checklist developed by the European Commission for the Efficiency of Justice (CEPEJ), supplemented by the ECtHR and CCJE standards set out in detail in the analytical background papers of the CLEAR-JUST project on European standards of quality of court decisions[194]. The checklist is organised into six categories corresponding to six different aspects of the quality of reasoning: comprehensibility, completeness, legal logic, consistency,

[191]CEELI Institute, A Guide to Judicial Writing, point 39.
[192]CEELI Institute, A Guide to Judicial Writing, points 47–48.
[193]CEELI Institute, A Guide to Judicial Writing, point 57.
[194]CEPEJ, Checklist for promoting the quality of justice and the courts (2008), as translated and systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 19–20.

form, and special categories of cases. It is not expected that every decision will literally meet every item – the checklist is a self-assessment tool, and not a binding document.

The checklist items are identical for both judicial systems, with one exception: the national supplement for Serbia contains one additional item, based on the Handbook for Drafting Court Decisions in the Administrative Court of the Republic of Serbia, which is specifically marked in the text that follows as an item specific to Serbia.

A Comprehensibility and clarity

- ☐ Are the statement and the reasons for the decision comprehensible to a reader who is not a legal expert?[195]
- ☐ Is the decision written in clear and simple language, bearing in mind that each judge may choose a personal style, but that the reasons must be coherently organised?
- ☐ Does the reasoning avoid archaic or Latin expressions and words that are not comprehensible to most readers, except where their use is necessary and explained?
- ☐ Is the decision, in cases involving unrepresented parties, children or persons who do not know the language of the proceedings, accompanied by a clear explanation of the outcome?
- ☐ Are the parties to the proceedings always designated by their full name, and not solely by their order of listing (first claimant, second defendant, etc.)?

B Completeness and systematic nature of the reasons

- ☐ Are the reasons for the decision detailed and systematic, following a clear and logical order?[196]
- ☐ Has the court responded to all the arguments of the parties that are decisive for the outcome of the case, even though it was not obliged to respond to every individual submission?
- ☐ Does the reasoning clearly show that the court examined all the main issues in the case and analysed all the arguments raised by the parties?
- ☐ In cases concerning qualified (relative) rights under Articles 8–11 ECHR, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4, has the three-step test – lawfulness, legitimacy, necessity and proportionality – been applied?[197]
- ☐ Where an appeal is dismissed, is it clearly indicated whether the appellate court fully accepts the reasons of the first-instance decision, or adds its own reasoning where the first-instance reasons are inadequate, incoherent or contradictory?
- ☐ Have indeterminate legal concepts (legal standards) that are not adequately elaborated in the decision, regulations or case law been used with caution, bearing in mind their limited effect?

[195] CEPEJ checklist, as cited in: Roagna, 2024, p. 19.
[196] CEPEJ checklist, as cited in: Roagna, 2024, p. 19.
[197] Three-step test developed in the case law of the ECtHR; cf. Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 14–17.

- ☐ Where the decision is based on facts already established in the administrative proceedings, does the reasoning properly refer to the reasoning previously set out in the impugned act instead of repeating it verbatim, in accordance with the standard confirmed by the ECtHR in the case of Van de Hurk v. the Netherlands?[198] **(national supplement for Serbia)**

C Legal logic and internal consistency

- ☐ Does the reasoning respect the basic rules of logic – the principle of identity, the law of contradiction, the law of the excluded middle and the law of sufficient reason?
- ☐ Is it clearly indicated whether deductive or inductive reasoning has been applied?
- ☐ Have clear formulations been used to mark the logical steps of reasoning ("the court has established that…", "on the basis of this evidence, the court has established that…", "therefore, the court has concluded that…")?
- ☐ In the event of a conflict of legal rules, is it expressly indicated which rule of precedence has been applied (lex superior, lex posterior, lex specialis)?
- ☐ Is the descriptive part of the decision (the context of the case) separated from its interpretation, so that the facts are set out as established by the court, and not as interpreted by one of the parties?

D Consistency with settled case law

- ☐ Where the decision departs from settled case law on the same legal issue, is that departure expressly indicated and reasoned in detail?[199]
- ☐ Where there is a divergence in case law on the same legal issue, does the reasoning clearly indicate which interpretation the court accepts and why?
- ☐ Has the decision been rendered in a foreseeable and settled manner of applying the law, avoiding profound and long-standing differences in deciding similar cases?
- ☐ Where appropriate, have relevant decisions of the European Court of Human Rights or of a higher domestic instance been cited in the reasoning?

E Form, length and style

[198] Cf. Handbook for Drafting Court Decisions in the Administrative Court, Administrative Court of the Republic of Serbia / Judicial Academy, with the support of the OSCE Mission to Serbia, 2022–2023 (estimated), p. 33, footnote 20, with reference to ECtHR, Van de Hurk v. the Netherlands, 19 April 1994.

[199] Cf. Constitutional Court of Montenegro, Constitutional Court of the Republic of Serbia (**Už** 41/2009, 30 March 2011) and ECtHR, case law cited in the analytical background papers of the CLEAR-JUST project on European standards of quality of court decisions.

- ☐ Are there specific rules and standards used for the presentation of the decision – headings, numbered paragraphs, a clear structure?[200]
- ☐ Is the length of the decision proportionate to the complexity of the case, using techniques for controlling length where possible (footnotes, references to sources instead of transcribing them, annexes for longer quotations)?
- ☐ Is the writing style decisive, objective and technical, without value judgements, irony or expressions incompatible with the dignity of the judicial function?
- ☐ Is the dispositive clearly separated from the reasoning, and is it complete, comprehensive and consistent with the reasoning?
- ☐ Where necessary on account of its length or complexity, is the decision accompanied by an index, a glossary of terms or abbreviations?

F Special categories of cases

- ☐ In the case of mass or repetitive cases, are standardised decisions and rules used in a manner that does not undermine the individualised consideration of each case?[201]
- ☐ In cases requiring urgent action (e.g. electoral disputes, protection of the right to a trial within a reasonable time), has the reasoning been adapted so as to be concise, yet complete?
- ☐ Has account been taken of whether domestic law expressly excludes access to court for a particular category of cases, and whether that exclusion is justified by objective reasons?

VI FREQUENTLY ASKED QUESTIONS

Q: Must all court decisions be reasoned?

A: According to the case law of the ECtHR, the obligation to give reasons should apply to decisions taken during the proceedings and to final decisions. The scope of this obligation depends on the nature of the decision and the circumstances of the case. As a general rule, decisions relating to the management of proceedings (for example, a decision to adjourn a hearing) need not have specific reasoning, unless otherwise provided by law[202].

Q: Must the appellate court set out its own reasoning, or may it simply endorse the reasons of the lower court?

A: The appellate court may fulfil its obligation to give reasons by simply incorporating or endorsing the reasoning of the lower court when dismissing an appeal – but only under two conditions: that the first-instance decision was already sufficiently reasoned, enabling

[200] CEPEJ checklist, as cited in: Roagna, 2024, p. 19.
[201] CEPEJ checklist, as cited in: Roagna, 2024, p. 19.
[202] Cf. ECtHR, case law systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 14.

the parties to exercise their right of appeal effectively, and that the decision of the lower court addressed the essential issues falling within the appellate jurisdiction[203]. If the first-instance reasoning was inadequate, incoherent or contradictory, the appellate court is obliged to remedy those deficiencies by its own reasoning.

Q: How can the right to a reasoned decision be reconciled with the right to a trial within a reasonable time?

A: These two requirements are not opposed, but must be viewed together. In Opinion No. 11, the CCJE states that, in order to achieve high-quality decisions in a manner proportionate to the interests at stake, judges should work within a legislative and procedural framework that enables them to decide freely and to make efficient use of the time resources needed to resolve the case properly[204]. In practice, the principle of conciseness is in part functional precisely to the objective of a trial within a reasonable time: the court may, while respecting this principle, omit detailed reasoning on procedural issues that are not in dispute, while substantive, decisive issues must still be fully reasoned.

Q: May ECtHR decisions be used as a model for drafting domestic judgments?

A: Yes. The ECtHR is a unique source of standards for drafting court decisions. Its judgments and decisions, which are easily accessible and translated into many languages of the member States of the Council of Europe, may be regarded as a "benchmark" for the quality of court decisions in Europe and beyond. Regardless of the member State against which an application has been lodged, the ECtHR applies a similar format and writing style in its decisions[205]. The case law of the ECtHR also defines the scope of each right contained in the Convention, helping judges in member States to apply the Convention correctly in their decisions.

Q: What if case law on the same legal issue diverges between departments of the same court or between different courts?

A: A divergence in case law does not in itself constitute a violation of the right to a fair trial – different courts may reach different, but rational and reasoned, conclusions on the same legal issue arising in similar factual circumstances, since this is an inherent feature of every judicial system[206]. What the reasoning must contain is a clear awareness of the existence of divergent case law and specific reasons why the court accepts one interpretation and rejects another. The mechanisms for institutional harmonisation of case law – such as general sessions and department sessions – are set out in detail in the preceding analytical background paper of the CLEAR-JUST project on the national legislative framework.

[203]Cf. ECtHR, Helle v. Finland, 19 December 1997, §§ 59–60; García Ruiz v. Spain, 21 January 1999, § 26; as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 14 and 26.
[204]CCJE, Opinion No. 11 (2008), as cited in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 17.
[205]Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 24.
[206]Cf. ECtHR case law systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 9.

Q: Does the time that elapses between the rendering and the promulgation (dispatch) of a decision affect its quality?

A: It does not improve it. The reliability and quality of a decision are not enhanced by the passage of time, nor does this increase respect for the parties. In the majority of cases, the best-quality decision is one that is started and completed at the earliest possible date after the conclusion of the hearing[207]. Where it is necessary to reserve the decision for a later date, it is good practice to inform the parties in open court of the date on which the reserved decision will be available, and in any case where the time limit cannot be met, the parties should be informed in a timely manner, with an appropriate explanation.

Q: What if different courts (or different panels of the same court) in Serbia render different decisions in the same factual and legal situation?

A: The Constitutional Court of the Republic of Serbia has taken the position that rendering different decisions in the same factual and legal situation may lead to a violation of the right to equal legal protection of rights before the court, guaranteed by Article 36 of the Constitution[208]. The same position was expressed by the ECtHR in the case of Beian v. Romania, pointing to the risks which profound and long-standing divergences in the case law of the highest court pose to legal certainty[209]. The requirements of legal certainty and the protection of the legitimate expectations of participants in the proceedings do not, however, imply an absolute right to settled case law – judicial independence and autonomy in decision-making remain protected – but the objective of legal certainty must be pursued with due respect for those values, through express reasoning whenever the court departs from a previously adopted position (cf. checklist, category D).

VII ILLUSTRATIVE EXAMPLES FROM PRACTICE

The first three examples that follow are taken from the case law of the European Court of Human Rights, as systematised in the Council of Europe handbook prepared for judges of the Administrative Court of Montenegro[210]. They were selected because they illustrate specific, frequently recurring deficiencies in reasoning which the ECtHR consistently points out, and are equally relevant to the Serbian context. The fourth example is taken directly from the Handbook for Drafting Court Decisions in the Administrative Court of the Republic of Serbia and illustrates when the court is permitted to adopt the reasoning of the impugned act instead of repeating it.

◆ Example 1: When brief reasoning is nevertheless insufficient – Hirvisaari v. Finland

[207] CEELI Institute, A Guide to Judicial Writing, point 20.
[208] Constitutional Court of the Republic of Serbia, **Už** 41/2009, 30 March 2011; as cited in: Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), p. 30.
[209] ECtHR, Beian v. Romania (no. 2), 6 December 2007; as systematised in: Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), p. 30.
[210] Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 12–13 and 22–24.

The case concerned a decision of the Insurance Court by which the applicant's disability pension was changed from a full to a partial pension. The decision of the Pension Board, against which the applicant had originally appealed, contained only general statements on the conditions for a pension and a brief observation that her symptoms were "mild", without specifying which elements had led to such a conclusion. The Insurance Court dismissed the appeal simply by referring to the reasons of the Pension Board's decision, without any reasoning of its own[211]. The ECtHR found a violation of Article 6 § 1 of the Convention, holding that the seemingly contradictory reasoning of the Pension Board, as well as the subsequent endorsement of such inadequate reasoning by the Insurance Court as an appellate body, did not satisfy the requirements of the right to a fair trial.

LESSON FOR PRACTICE

Where a lower body reduces its reasoning to a blanket assessment without specifying the elements on which that assessment is based, the appellate court must not simply confirm such a decision – it is obliged to provide specific reasoning of its own, particularly where the inadequacy of the first-instance reasoning was precisely the applicant's main complaint.

◆ Example 2: When the reasoning does not verify its own factual premise – Tatishvili v. Russia

The applicant, born in Georgia and without citizenship of the former USSR, sought registration of her residence in Moscow. The Russian courts rejected her request by referring to an alleged "agreement" between Russia and Georgia on the visa regime for Georgian nationals, without verifying either whether such an agreement existed at all or whether the applicant was a Georgian national[212]. The ECtHR found that the reasoning was incoherent and inadequate – not only because it was brief, but because it was based on a factual premise (the existence of an "agreement") which the court had never verified, although that premise was decisive for the outcome of the case.

LESSON FOR PRACTICE

Every factual premise on which the reasoning rests must be verified and, where disputed, expressly established in the decision – particularly where that premise is decisive for the outcome of the dispute. Reliance on a circumstance whose existence has never been verified makes the entire reasoning vulnerable, however detailed it may otherwise be.

◆ Example 3: Qualified rights and the three-step test – Nekvedavičius v. Lithuania

[211] ECtHR, Hirvisaari v. Finland, application no. 49684/99, 27 September 2001, §§ 30–33; as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 12–13.

[212] ECtHR, Tatishvili v. Russia, application no. 1509/02, 22 February 2007, §§ 61–62; as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, pp. 22–24.

By a decision of the Regional Administrative Court, the applicant was granted partial restitution of property rights to land, but without a specified form of restitution or time limit for its enforcement. Despite the decision being final, the State authorities failed for years to take the measures necessary for its enforcement, citing the complexity of enforcing the restitution judgment[213]. The ECtHR found a violation of Article 6 § 1 of the Convention, emphasising that the measures taken by the domestic authorities in connection with the enforcement of the restitution judgment were not adequate, necessary, repeated and effective, and that the primary obligation of the State authorities, when an individual obtains a judgment against the State, is to use all appropriate means to enforce it.

LESSON FOR PRACTICE

Where a decision awards a right whose enforcement requires further administrative action, the reasoning should, where possible, specify the form and time limit of enforcement – an insufficiently precise operative part opens the door to further delay and subsequent litigation, thereby calling into question the very purpose of a final decision.

◆ Example 4: Adopting the reasoning of the impugned act — when it is permissible

Unlike the previous three examples, which illustrate when adopting or summarily endorsing another body's reasoning constitutes a violation of the right to a fair trial, the opposite example is also useful – when such adoption is legitimate. According to the practice of the Administrative Court of the Republic of Serbia, where a decision is rendered on the basis of facts already established in the administrative proceedings, the court is not obliged to set out again the reasoning of the impugned act – it is sufficient to refer to it, provided that repeated submissions already reasoned in that act are concerned[214]. This standard was confirmed by the ECtHR precisely in the case of Van de Hurk v. the Netherlands, where it clarified that the obligation of a court to give reasons for its decision and to take into account the arguments of the parties does not mean that the court must respond in detail to all submissions made in the proceedings, but only to those it considers legally relevant.

LESSON FOR PRACTICE

Reference to earlier reasoning is not in itself deficient – it is deficient only when it replaces the court's own analysis of issues raised before it for the first time or in a new way. Before relying on the reasoning of the impugned act, the court should verify whether the claim introduces a new argument to which the act could not have responded, since such an argument requires the court's own, new reasoning.

[213]ECtHR, Nekvedavičius v. Lithuania, application no. 1471/05, 10 December 2013; as systematised in: Ivana Roagna, Deciding on Claims in Administrative Disputes, 2024, p. 22.
[214]Handbook for Drafting Court Decisions in the Administrative Court, 2022–2023 (estimated), p. 33, with reference to ECtHR, Van de Hurk v. the Netherlands, 19 April 1994.

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— Helle v. Finland, 19 December 1997.
— García Ruiz v. Spain [GC], application no. 30544/96, 21 January 1999.
— Beian v. Romania (no. 2), 6 December 2007.

◆ *Case law of the Constitutional Court of the Republic of Serbia*

— Constitutional Court of the Republic of Serbia, 41/2009, 30 March 2011.

PART FIVE

ANALYSIS OF QUESTIONNAIRE FINDINGS

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Within the CLEAR-JUST project, a questionnaire was conducted among judicial office holders in Montenegro and Serbia, with the aim of directly verifying the extent to which European standards, national legislative frameworks and the practical guide with its checklist correspond to the actual practice of drafting judicial reasoning. The questionnaire contained twenty-six questions: sixteen questions with a rating scale from 1 to 5, and the remaining open-ended questions, in which respondents could freely describe their own experience, the challenges they face and proposals for improvement.

The analysis comprises a total of 21 completed questionnaires – eleven from Montenegro and ten from Serbia – completed by judges, judicial advisers, state prosecutors and lawyers. In accordance with the questionnaire methodology, the responses are presented anonymously in this part of the document: the names of respondents are not given, but only their professional category and country, in order to preserve the confidentiality of individual responses while retaining the analytical value of the findings.

Sample

The structure of the sample by professional category and country is shown in the table that follows. The sample from Montenegro, unlike the Serbian one, is more strongly oriented towards the prosecution service (five respondents), while the Serbian sample is evenly distributed among judges, lawyers and prosecutors. This difference in the structure of the sample should be borne in mind when interpreting the comparative findings that follow. Some of the differences in average scores may reflect differences in the professional perspective of the respondents, and not exclusively differences between the two judicial systems.

Professional category	Montenegro	Serbia
Judges	2	4
Judicial advisers	1	0
State prosecutors	5	3
Lawyers	2	3
Other (judicial training/administration)	1	0
Total	11	10

Quantitative overview

The table that follows shows the average score for each of the sixteen questions with a 1–5 scale, compared between the Montenegrin and Serbian samples. The number in brackets is given only where it is less than ten – some respondents left certain scale questions unanswered.

A higher score does not always mean a more favourable finding: for questions on the impact of workload, anonymisation, pressures or the potential of quality assessment, a higher score indicates a greater impact of that factor, while for questions on quality, consistency, accessibility and usefulness, a higher score indicates a more favourable assessment.

Question	Montenegro	Serbia
Quality of reasoning of court decisions	3.73	2.40
Consistency of case law	3.45	2.80
Clarity and comprehensibility of decisions	3.64	3.00
Taking account of earlier decisions	3.45	2.80
Use of (domestic/international) case law as a reference	3.82	2.60
Citing relevant case law in decisions	3.09	2.40
Ease of finding relevant judgments	2.91	2.40
Public accessibility of judgments	3.50 (n=9)	2.20
Impact of anonymisation on transparency	1.82	2.70
Impact of caseload on quality	3.50 (n=9)	3.80
Whether reforms have addressed the quality of decisions	2.70 (n=9)	1.70
Effectiveness of supervision by higher courts	3.62 (n=7)	2.56 (n=9)
Potential of assessing the quality of reasoning for uniformity	3.00 (n=9)	3.56 (n=9)
Impact of political/media pressure	2.62 (n=7)	3.40
Usefulness of a practical guide (benchbook)	3.67 (n=8)	3.90
Usefulness of introducing binding case law	3.56 (n=8)	3.44 (n=9)

The most pronounced difference concerns the **assessment of the quality of reasoning** (Montenegro 3.73; Serbia 2.40) and the public accessibility of judgments (Montenegro 3.50; Serbia 2.20), where Montenegrin respondents consistently give more favourable scores – a similar difference exists for the use of case law as a reference and the citing of case law in decisions. The reverse relationship exists for three questions: Serbian respondents assess that **caseload** has a greater impact on quality (3.80 compared to 3.50), that **political and media**

pressure has a more pronounced impact (3.40 compared to 2.62), and that **assessing the quality of reasoning** would have a greater potential to contribute to the uniformity of case law (3.56 compared to 3.00) than Montenegrin respondents assess. As regards the assessment of the usefulness of a practical guide and of introducing binding case law, the two samples almost coincide.

Common findings

Excessive length and formalism without substantive analysis

Several respondents from both samples describe the reasoning as excessively lengthy, formal and focused on transcribing the content of evidence instead of its substantive assessment. "Too much formality and citing of the content of evidence and little substantive reasoning" (prosecutor, Montenegro); "Excessive formalism, which causes the focus to be lost from the essence... Criminal judgments for the simplest offences are... too voluminous" (prosecutor, Montenegro). The aggregate analysis of the questionnaires from Serbia reaches the same finding, singling out excessive length and copying of evidence without real analysis as the most frequent complaint.

Weak link between the established facts and the legal qualification

"Insufficiently reasoned assessment of evidence, incompletely established facts, failure to refer to case law" (judge, Montenegro). The Serbian sample formulates this finding more explicitly, citing the absence of a clear link between the established facts and the legal qualification as one of the most frequent deficiencies.

Insufficient searchability of domestic case law

"The database of the European Court of Human Rights and of the Court of Justice of the EU [is available], while domestic case law is hard to access, searches very poor" (prosecutor, Montenegro). The aggregate analysis from Serbia points to the same problem through the finding on "disorganised databases of judgments" and the absence of a single, publicly accessible and properly searchable database.

Anonymisation: legitimate data protection, but at a cost to usability

Respondents from both samples see anonymisation as a justified protection of personal data, but warn of its cost to transparency and searchability: "Impossibility of identifying related cases, it cannot be tracked whether the same event or persons are involved in several proceedings" (judge, Montenegro); "It affects the protection of the participants' data, not the transparency of decisions as such" (judicial adviser, Montenegro). The aggregate analysis from Serbia elaborates this finding further: excessive anonymisation removes the factual context and particularly reduces the usability of decisions in complex, criminal, commercial or politically sensitive cases.

Caseload as systemic pressure on quality

Both samples assess that the number of cases per judge significantly affects the quality of reasoning (Montenegro 3.50; Serbia 3.80) – one of the most highly rated impact factors in the entire questionnaire in both countries.

Caution regarding the formal introduction of binding case law and of quality assessment into professional evaluation

Although the majority of respondents recognise the potential benefits (greater legal certainty, foreseeability), clear concern was also expressed about the risk of formalism: "It cannot [contribute to uniformity]. It would create room for abuse, and the quality of reasoning is not decisive for uniform case law" (prosecutor, Montenegro); "There is a danger that first-instance judges will resort to superficial decision-making because of the set quota they have to achieve" (lawyer, Montenegro). The aggregate analysis from Serbia reaches the same conclusion: some respondents see the potential for greater foreseeability, while others warn of the risk of rigidity, formalism and abuse in conditions of weak institutions.

Broad support for a practical guide (benchbook)

The usefulness of a practical guide for drafting court decisions, with a focus on the quality of reasoning, was rated highly in both samples (Montenegro 3.67; Serbia 3.90) – a finding which directly confirms the purpose of Part Four of this document.

Findings specific to Montenegro

More visible reliance on European and regional sources

Montenegrin respondents, unlike Serbian ones, frequently mention the use of a wider range of European and regional databases: "Judges and prosecutors mostly use the HUDOC database... the AIRE Centre's regional database of ECtHR case law, the databases of constitutional courts in the region, CURIA/InfoCuria, EUR-LEX" (representative of a judicial training institution, Montenegro) – a finding which points to a relatively more developed habit of relying on comparative and international sources compared with what the Serbian sample describes.

Specifically observed delay in deciding on appeals as an obstacle to harmonisation

"The High Court [in Podgorica] does not function to the proper extent, since decisions on appeals are not rendered even for 2 years or more. The Supreme Court influences the harmonisation of case law without deciding on requests for the protection of legality!" (prosecutor, Montenegro) – a specific operational finding which complements the otherwise more favourable average assessment of the effectiveness of supervision by higher courts in the Montenegrin sample.

More pronounced reservation towards including the assessment of the quality of reasoning in the professional evaluation of judges

Both negative responses to this question in the entire sample (both countries) come from the Montenegrin sample, and from the respondents closest to the institutional administration of the judiciary, rather than from the judges who themselves render decisions – a finding which deserves attention in any future design of criteria for professional evaluation.

Disproportionate length of reasoning even in the simplest cases

"Criminal judgments for the simplest offences and in the simplest proceedings are too voluminous" (prosecutor, Montenegro) – an observation which further narrows down excessive length, as a common finding, to a specific category of cases.

Findings specific to Serbia

Lawyers as the most critical professional group

The aggregate analysis of the questionnaires from Serbia finds that lawyers are consistently the most critical of the quality of reasoning, the clarity of decisions and the usefulness of binding case law, while judges are somewhat more moderate. This pattern cannot be verified in a comparable manner in the Montenegrin sample, given that the sample contains only one representative of the legal profession.

More pronounced concern about non-individualised criminal reasoning

Prosecutors in the Serbian sample particularly emphasise the criminal-law aspect of the problem – non-individualised, template reasoning, general phrases and insufficient analysis of contradictory evidence and of ECtHR case law – a finding which is present in the Montenegrin sample, but less frequently and less explicitly articulated.

Considerably lower assessment of the effectiveness of supervision by higher courts

The Serbian sample rates the effectiveness of supervision by higher courts markedly lower than the Montenegrin one (2.56 compared to 3.62) – a difference which the aggregate analysis explains by inadequate and insufficiently accessible databases of decisions, the insufficient role of the Supreme Court in harmonisation, weak internal communication within courts and differing standards of the appellate courts.

A more pronounced impression that political and media pressure shapes case law

Serbian respondents rate the impact of political and media pressure considerably higher than Montenegrin respondents (3.40 compared to 2.62) – the largest single difference in this direction in the entire questionnaire.

Judicial reforms assessed as markedly insufficient

The Serbian sample assesses that judicial reforms to date have addressed the issue of the quality of court decisions to a considerably lesser extent than the Montenegrin sample assesses (1.70 compared to 2.70) – the lowest single score in the entire questionnaire, with the most frequent answers being "not at all" or "to a small extent".

Conclusions and recommendations

The findings of the questionnaire, taken together with the European standards and national frameworks set out in the preceding parts of this document, point to the following recommendations, common to both judicial systems: ◆Establish a single, publicly accessible and properly searchable database of final court decisions, with clear metadata and standardised anonymisation which protects the personal data of participants in the proceedings, but does not remove the factual context necessary for understanding and comparing cases. ◆Supplement the practical guide and checklist set out in Parts Four and Six of this document with insights from the questionnaire – in particular with guidance on condensing the factual core, selective assessment of key evidence and a clear link between the established facts and the legal qualification, which respondents from both samples single out as the greatest deficiency of existing practice. ◆Strengthen the role of the higher courts (the Supreme Court

and the appellate courts) in harmonising case law through more regular publication of adopted legal positions and shortening of the time limits for deciding on appeals, bearing in mind the specifically observed delay in Montenegro and the markedly lower assessment of the effectiveness of supervision in Serbia. ◆In any future introduction of the assessment of the quality of reasoning into the professional evaluation of judges, or of formally binding case law, proceed with caution and with clear, transparent and previously known criteria – respondents in both countries express open concern that the incautious implementation of such measures could lead to formalism, superficial decision-making or abuse. ◆Relieve the burden on judges, judicial advisers and prosecutors through better case management, strengthening of staffing capacities and digitalisation – caseload stands out, in both countries, as one of the most significant individual factors affecting the quality of reasoning.

PART SIX

CONCLUSION

The quality and consistency of the reasoning of court decisions, the themes on which this entire document rests, are not merely a professional issue of the internal organisation of the judiciary – they are also directly linked to the **process of accession to the European Union**, through Chapter 23 (Judiciary and Fundamental Rights), within which the European Commission assesses the efficiency, independence and accountability of the judiciary of both States. Although the Commission does not single out the quality of reasoning as a separate negotiating benchmark under Chapter 23, the findings of this questionnaire, on the excessive length and formalism of reasoning, inconsistent case law and limited accessibility of databases of judgments, fit precisely into those broader categories of efficiency and accountability of the judiciary by which progress under Chapter 23 is assessed.

Montenegro is currently the *frontrunner* in the enlargement process: of the 33 negotiating chapters, **18 had been provisionally closed** by July 2026, with the Government's stated intention to close all remaining chapters by the end of 2026. In accordance with the methodology of the EU accession negotiations, Chapters 23 and 24 remain open until the end of the process, that is, until the fulfilment of the closing benchmarks for the implementation of which an action plan has been adopted. The European Commission's 2025 Report assesses the Montenegrin judiciary as being "between a moderate and a good level of preparation", with some progress in the reporting period – the election of a President of the Supreme Court with a full mandate, the implementation of the Judicial Reform Strategy 2024–2027 and the strengthening of the financial independence of the judiciary, through regulating the retirement age of judicial office holders and the issues of their salaries and other material rights, stand out as positive steps. At the same time, the Commission points to a deeper institutional and political crisis caused by the unilateral termination of the mandate of a Constitutional Court judge at the end of 2024, to unfilled judicial posts (243 out of a planned 329) and to case backlogs, particularly before the High Court in Podgorica – a finding which coincides directly with the observation of the Montenegrin sample in this questionnaire concerning delays in deciding on appeals.[215]

Serbia's negotiations with the European Union are currently slowed down: the European Commission's 2025 Report records an absence of progress under Chapter 23 during the reporting period, with explicit concern about **backsliding in the rule of law**. The Commission cites a high degree of political pressure on the judiciary and the prosecution service, with a limited institutional response to such pressure, as well as structural deficiencies – 383 of 3,102 judicial posts and 237 of 894 prosecutorial posts remain vacant, and the Constitutional Court operates with four vacant seats. These findings coincide almost literally with the most pronounced observation of the Serbian sample in this questionnaire – the assessment of the impact of political and media pressure on case law as the highest single score in the entire survey.

For both States, the next steps on the path to membership and the improvement of the quality of judicial reasoning are, in essence, the same steps viewed from different angles. Montenegro

[215] Judicial Council of Montenegro, Annual Report on the Work of the Judicial Council and the Overall State of the Judiciary for 2025, Podgorica, March 2026, pp. 164 and 177–179.

should consolidate the progress achieved by implementing the closing benchmarks, protecting the independence of the Constitutional Court and reducing backlogs, particularly in appeal proceedings. Serbia should reverse the assessment of an absence of progress by addressing precisely those issues which its own respondents in this questionnaire highlight most loudly – reducing political pressure on decision-makers and filling judicial and prosecutorial posts. In both cases, improving the quality and consistency of judicial reasoning, through tools such as the Guide and checklist in this document, represents a direct and practical contribution to meeting the Chapter 23 criteria, and not an activity separate from the accession process.

The findings of the questionnaire already point to **six institutional lines of action**: a single and publicly accessible database of judgments, standardised anonymisation, strengthening the role of higher courts in harmonisation, caution in any formalisation of the assessment of the quality of reasoning in the professional evaluation of judges, relieving the burden on judges and judicial advisers, and supplementing the Guide and checklist with insights from the questionnaire. This last line deserves to be made concrete: the following topics, derived directly from the respondents' open-ended answers, represent priority content for the next, supplemented edition of the Guide.

- **Individualisation of criminal reasoning**

A module devoted to avoiding template formulations in criminal cases, with a focus on a clear link between the assessment of evidence and the legal qualification – a deficiency which both Montenegrin and Serbian respondents most frequently cited as the central problem.

- **Broadening the range of case law sources**

Guidelines for the use of regional and European databases (HUDOC, CURIA/InfoCuria, EUR-LEX), following the model described by Montenegrin respondents, as a practical template for wider use in the Serbian judiciary.

- **Standardised anonymisation**

Guidance which protects the personal data of participants in the proceedings without deleting the factual context necessary for understanding and comparing cases, particularly in criminal and commercial matters.

- **Proportionality of the scope of reasoning**

Practical guidelines for adapting the length and structure of reasoning to the complexity of the case, including the simplest misdemeanour and administrative matters, where respondents observed disproportionate volume relative to the complexity of the matter.

- **Reasoning under pressure**

A module on preserving professional independence and consistency of reasoning in cases exposed to political or media attention – a topic which Serbian respondents particularly emphasised, and which also ties in directly with the findings on Chapter 23 from the previous section.

- **Time limits and supervision on appeal**

An addition to the checklist which includes self-assessment of the timeliness of deciding on legal remedies, as a response to the specifically observed delay in deciding on appeals in the Montenegrin sample.

The experience of this questionnaire shows that civil society – in this project CEDEM and JUREC/CEPRIS – can contribute to improving the quality of judicial reasoning through activities that do not depend on legislative amendments and can begin immediately, within the next phase of the CLEAR-JUST project or related initiatives. The recommendations are as follows: ◆Organising training for judges, judicial advisers and prosecutors, in cooperation with the judicial academies of both States, with the aim of including the Guide and checklist in the regular programme of professional training. ◆ Repeating the same or a similar questionnaire at regular intervals (for example, every two to three years) in order to establish a baseline for measuring the actual impact of recommendations and reforms over time. ◆Public advocacy before the competent institutions (the Supreme Court, the Judicial/Prosecutorial Council, the ministries of justice) for the establishment of a single database of judgments and the adoption of guidelines on reasoning, relying on the findings of this questionnaire as an evidentiary basis. ◆Independent civil society monitoring, alongside the official reports of the European Commission, of the issues which respondents singled out as the most sensitive – political and media pressure on the judiciary, the filling of judicial and prosecutorial posts, and the effectiveness of supervision by higher courts. ◆Connecting Montenegrin and Serbian civil society organisations working on the judiciary for the exchange of experience, joint advocacy before the institutions of the European Union and the harmonisation of recommendations for both States. ◆Presenting the findings of this document to professional associations – associations of judges and prosecutors, bar associations – and to the academic community, through round tables and public debates, as a basis for further dialogue on improving the judiciary.

Taken together, these three lines – European integration, institutional and professional reform of the judiciary, and civil society engagement – are not parallel processes, but three faces of the same objective: judicial reasoning that is consistent, persuasive and comprehensible to those for whom it is intended. This document, in its present scope, **represents a contribution to that objective** from a professional and analytical perspective; its future, through training, advocacy and subsequent editions, will depend on the extent to which the findings presented here are actually used in practice.