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**COMMENTS ON THE PROPOSED CONCEPTS**

**AND CONCEPT PROPOSALS FOR AMENDMENTS**

**TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA**

1. **Introductory remarks**

Remaining consistent with [its proposals](https://www.mpravde.gov.rs/files/Dru%C5%A1tvo%20sudija%20Srbije%20-%20komentari%20u%20vezi%20sa%20izmenama%20Ustava.pdf) for amending the Constitution of the Republic of Serbia (hereinafter: “the Constitution”) in the part concerning the judicial branch, which were proposed to the Ministry of Justice on 30/06/2017, adding to the conclusions of the first round table organized on 21/07/2017 by the Ministry, in cooperation with the Office for Cooperation with Civil Society, regarding [the proposals tabled by civil society organizations](https://www.mpravde.gov.rs/tekst/16110/konsultacije-u-vezi-sa-izmenom-ustava-republike-srbije-u-delu-koji-se-odnosi-na-pravosudje.php), the Judges’ Association of Serbia (hereinafter: “the Judges’ Association”) hereby makes the following remarks:

With regard to the proposal of possible amendments to the Constitution, the proposals of all professional associations (Judges’ Association, Prosecutors’ Association, YUCOM, Belgrade Center for Human Rights, CEPRIS), as well as other non-governmental associations, are essentially identical or in mutual agreement.

Of the presented proposals for amending constitutional provisions concerning the judicial authority, including those of the Judges’ Association, the only fundamentally different proposals were tabled by the so-called Rule of Law Academic Network ROLAN (hereinafter: “the Network”)[[1]](#footnote-2).

It is true that certain proposals of the Network, supported by the Judges’ Association and other professional and non-governmental associations and probably embraced by other players, such as the suggestions to revoke the so-called trial term for judges, for the High Judicial Council (hereinafter: “HJC”) to elect and dismiss judges, to abandon the election of HJC members from autonomous provinces, the proposal to ban representatives from the judicial and executive branch or attorneys at law from membership in the HJC, to forbid members of the HJC from being members of political parties, as well as to restore the old name of the highest court – Supreme Court of Serbia. However, the Network presented a series of other proposals, which the Judges’ Association finds unacceptable.

Given that the potential concepts proposed by the Network, were already been put forward by the representatives of the executive branch in previous years, on different occasions and in written materials, the Judges’ Association paid particular attention to them, especially since it finds that they might threaten the independence of judges and the judiciary. Therefore, the Judges’ Association will, in this paper, present the reasons why it believes that these proposals should not be accepted. In developing this paper, the Judges’ Association used, without specific reference, its [publications](http://sudije.rs/index.php/o-nama/164-publikacije/95-publikacije.html)[[2]](#footnote-3), as well as parts of already published analyses and scientific papers of its members, with their consent.

1. **The main problems in the judicial system – misconceptions**
	1. **Absence of checks and balances of the three powers**

In the [text](https://www.mpravde.gov.rs/files/ROLAN-predlog%20izmene%20Ustava.pdf)[[3]](#footnote-4) accompanying the proposals of the Network, the authors recognize that the principles of separation of powers and independence of the judiciary, enshrined in Article 4 of the Constitution, represent, in the Republic of Serbia, *“the greatest challenge for establishing a mutual equilibrium”[[4]](#footnote-5)* between the three branches of power. Starting from such a statement, all matters have been analyzed, in the rest of the text, not from the aspect of an independent judiciary in a system of separation of powers, but from the angle of checks and balances between the three powers.

Although it is common knowledge that judicial independence in Serbia is threatened by other branches of power, although it does not, in any way whatsoever, restrict the functioning of the legislative or executive branch, the paper considers the guarantees of judicial independence as *“a means of establishing a system that guarantees a balance between the branches of power and averts a wrongful interpretation and/or misapplication of the concept of judicial independence“[[5]](#footnote-6)*.

* 1. **Absence of the Acquis and the power of the government to choose the concepts**

The said paper also recognizes the *“absence of the Acquis in Chapter 23, which, among other things, deals with the reforms of the justice system”[[6]](#footnote-7),* as well as that candidate states have been vested with the freedom to choose, among several acceptable solutions, the ones that fit them best, although that freedom of choice is often illusory and *“undermined by selective application, namely the interpretation of the relevant standards by the European Commission itself”[[7]](#footnote-8).*

While it is said that *“several dozen international documents, adopted by the relevant bodies of the United Nations (hereinafter: “UN”), the Council of Europe (hereinafter: “CoE”) and European Commission (hereinafter: “EC”) were used as a source of EU standards*”*[[8]](#footnote-9),* the text mainly invokes documents of the CoE Venice Commission (hereinafter: “VC”) as a source, as well as the VC itself, as the most relevant interpreter of European standards.

We often had the opportunity, in the last couple of years, to hear from representatives of the executive and other politicians similar ideas – about the need to restrict the judicial power in order to establish a system of checks and balances; as well as about the possibility (right) of the candidate state, in the absence of European acquis for the judiciary, to choose a specific concept among those applied in European countries.

In view of such assumptions, frequently “promoted” by the politicians, we may conclude that the latter think that too much attention is paid to the need for the judiciary to be independent. On the other hand, they seem to believe that these same judges are insufficiently accountable and efficient, that they are unpredictable (due to inconsistent case-law) and illegitimate (since they are not elected by the citizens and “isolated” within their own guild). Meanwhile and in opposition to the above statements, it may be inferred that the political powers, (legislative and executive) while not being in the position to really intervene and “repair” such “overly independent” and “alienated” judicial branch, intend to introduce “reforms” and perhaps even constitutional changes in order to finally remedy the problems they are convinced to exist in the judiciary.

1. **The principal problems in the judiciary**

As opposed to the problems with the judiciary, as formulated above, the Judges’ Association is of the opinion that there are three principal problems with the functioning of the judicial branch: insufficient (institutional and actual) independence of the judiciary, deficient training of judges (especially permanent training) uneven caseload at the level of different courts, but also between judges.

All the remaining problems in the Serbian judiciary, including slowness, backlog of old cases and inconsistent case-law stem from the aforementioned three. Therefore it is necessary to deal with these three main issues. After the conditions for greater independence, better training and a more equitable caseload allocation are created, the effectiveness, predictability and access to the court system will be improved, which, in turn, will increase the citizens’ trust in the judiciary.

The essentially identical position stems from Opinion 17(2017) of the Consultative Council of European Judges of the CoE (hereinafter: “CCJE”) on the evaluation of judge’s work, the quality of justice and respect for judicial independence: *“The Consultative Council of European Judges (CCJE) has paid constant attention to two fundamental matters. First, the protection of judicial independence[[9]](#footnote-10) and secondly, ways of maintaining and improving the quality and efficiency of judicial systems.[[10]](#footnote-11)“* (Paragraph 1.). This Opinion sublimates all the relevant documents pertaining to the evaluation of judges’ work: *This Opinion has been prepared on the basis of previous CCJE Opinions and the Magna Carta of Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation (*[*CM/Rec(2010)12*](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)*) of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter Recommendation (CM/Rec(2010)12). It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002), the General Report[[11]](#footnote-12) of the International Association of Judges (IAJ) (2006) (hereafter IAJ General Report), the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter Kyiv Recommendations), and the Report of 2012-2013 of the European Network of Councils for the Judiciary (ENCJ) on minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary (hereafter ENCJ Report). The Opinion takes account of the member states’ replies to the questionnaire on the individual evaluation and assessment of functioning judges and of a preparatory report drawn up by the expert appointed by the CCJE, Ms. Anne SANDERS (Germany)“[[12]](#footnote-13).*

* 1. **Insufficient independence**

The insufficient independence of judges and courts is evident in the daily workings of the courts and judges, which are defenseless against the mostly unfounded populist and demagogic attacks by politicians and insufficiently independent and professional media, manipulated by these same politicians. However, the insufficient independence of the courts and judges also exists at the normative level.

The concepts enshrined in the Constitution have cemented the influence of both the legislative and executive branch on the judiciary. Undue political influence on the courts is made possible, inter alia, by the constitutional provisions concerning the powers of the National Assembly to elect first-term judges, as well as to elect the presidents of the courts and all members of the HJC, which, in turn, elect judges for a permanent term. It’s also enabled by the fact that the members of the HJC are “ex officio” the current politicians – representatives of the legislative and executive branch (the Chairman of the Judiciary Committee of the National Assembly and the Minister of Justice)[[13]](#footnote-14).

Furthermore, the insufficient independence of the courts at the constitutional level has also been made possible by the existence of the so-called “trial” term of three years for first-term judges, in the absence of constitutional reasons for the termination of the judge’s office and for the dismissal of judges, as well as in the lack of material guarantees for judges and courts, which are the foundation and guarantee of judicial independence[[14]](#footnote-15).

Amendments to the Constitution are, in this regard, necessary, provided that the right conditions are met. In the Report on Judicial Independence CDL-AD (2010)004 dated 16/03/2010, the Venice Commission said in paragraph 82 that standards should be respected by states in order to ensure internal and external judicial independence, with the following standard topping the list: “The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability.”

However, independence may not be gained by merely a constitutional proclamation, as evidenced by the fact that, while the Constitution guarantees them the permanence of judicial office, only 52% of judges in Serbia believe they are truly independent. The judges are convinced that their independence could be better ensured in the existing legal framework if only the requisite political will existed. The legal concepts governing the status of judges and the functioning of courts are intruding deeply in the independence of courts and judges. Court presidents are vested with too much power, even the conditions for their retirement are different (if they fulfil the criteria for old-age retirement, they remain in office until the end of their term), the Justice Minister is empowered with adopting the Rules of Court Procedure, as well as to set out the framework criteria for the necessary number of staff and decide about the procedure of recruiting court trainees. The involvement of the executive branch in the Managing Board of the Judicial Academy (JA) is especially problematic, as well as its direct institutional and practical influence on the JA. In order to remedy such a situation in terms of boosting judicial independence, it is not necessary to wait for amendments. The Rules of Court Procedure, a very important document for the workings of the judiciary, could be adopted by the Supreme Court of Cassation (i.e. the President of that Court) subject to prior opinion of all judges of that court, instead of having it adopted by the Justice Minister (as it is currently the case). Furthermore, the current tasks of the President of the Court could be carried out by a collective body, which would include the President, as well as the judges elected by their peers in the court, etc. *“Experience nonetheless shows that in many countries, the best institutional concepts cannot work without the good will of those accountable for their implementation and enforcement. The fulfilment of the existing standards is therefore at least as important as setting new ones.“*[[15]](#footnote-16)

* 1. **Insufficient competence**

Competence is the necessary requirement for judicial office and, in addition to integrity of judges, it is one of the main criteria for someone to become a judge. The Judges’ Association shares to the position of CCJE that: “*The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality.”[[16]](#footnote-17)* Judges perform a very important function, which needs them to be competent and to have integrity. The Judges’ Association shares the position of CCJE from Opinion number 17(2014), paragraph 4, that: *Judges perform indispensable duties in each democratic society that respects the rule of law[[17]](#footnote-18).* *Judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution[[18]](#footnote-19) and decide cases in a timely manner and independently and must be bound only by the law. They must give cogent reasons for their decisions[[19]](#footnote-20) and must write in a clear and comprehensible manner[[20]](#footnote-21). Moreover, all binding decisions of judges must also be enforced effectively[[21]](#footnote-22). Judicial independence does not mean that judges are not accountable for their work. The CCJE has laid emphasis on maintaining and improving the quality and efficiency of judicial systems in the interest of all citizens[[22]](#footnote-23). Where it exists, the individual evaluation of judges should aim at improving the judiciary while ensuring the highest quality possible. That exercise must be done in the interest of the public as a whole.[[23]](#footnote-24)).*

Hence, it does no harm to reiterate that competence is one of the main preconditions for the proper discharge of judicial office. Only those judges whose competence is accompanied by integrity may command the two-fold trust necessary in societies ruled by law: the trust of judges in themselves, in the meaningfulness of their work, on one hand, and the trust of citizens in the impartiality of judges and the equity of court decisions, on the other hand.

Competence will be further elaborated on below, in the part concerning the reasons against addressing the issue of competence by failing to differentiate between competence and the training received on the Judicial Academy and through “raising” the latter to the level of constitutional category and prescribing the aforementioned training at the JA as a prerequisite for judge’s election.

* 1. **Uneven caseload for judges and between courts**

The problem of uneven caseload between judges, as well as between different courts, reflects unevenly on the citizens’ access to justice, meaning that, depending on the work burden of a particular court or judge, the dispute will be finished in a different time period. Timely access to justice requires the trial, including the enforcement of the court decision, to be finished in a reasonable and predictable time period. For that to happen, however, the state needs to ensure the proper conditions, as emphasized by the European Court for Human Rights (hereinafter: “ECHR”) in the decision in Zimmermann v. Switzerland[[24]](#footnote-25) and other related decisions, as well as a series of international recommendations and opinions. The excessive burden on judges with too many cases results in plummeting quality of trials, since the judges are required to be efficient in the sense of adjudicating as many cases as possible in the shortest possible term. Requests to adjudicate cases, instead of solving problems are justified by the fact that the ECHR, in the judgments against Serbia, primarily establishes violations of the right to trial in a reasonable time.

Of the 153 cases in which it ruled on the substance, the ECHR found in 136 of them that rights were violated, whereas it established in the same number of cases the existence of a violation of the right to trial in reasonable time and of the right to fair trial – in 28 cases each – which constitutes 18% of all the decisions passed. The fact that in 50 cases (1/3), a problem was found to exist with the enforcement of court decisions, especially in so-called repetitive cases, is the responsibility of the state, since the courts had already passed a final verdict in these cases. Therefore, the claim that inefficiency is one of the main problems of the Serbian judiciary is simply inaccurate and deliberately overblown. The problem clearly lies in something else – in the quality of legal protection, namely the professionalism of judges and the conditions they work on. So, the described structure of the identified violations clearly demonstrates that the quality of justice, rather than speed, is the main thing that needs to be improved in the Serbian justice system.

The problem of an uneven caseload became increasingly evident as of 2010, with the beginning of the application of the Law on the Seats and Regions of Courts and Public Prosecutors Offices[[25]](#footnote-26) that drastically reduced (from 138 to 34) the number of basic (hitherto municipal) courts. On 01/01/2014 started the implementation of the new Law on the Seats and Regions of Courts and Public Prosecutors Offices[[26]](#footnote-27), which increased the number of basic courts to 66, along with another 29 court units, as well as of the amended Law on the Organization of Courts[[27]](#footnote-28) that “divided” the second-instance competence in criminal matters between appellate courts and higher courts. On 01/10/2013, the Code of Criminal Procedure[[28]](#footnote-29) started to be implemented, which has seen the transfer of almost 40.000 investigative cases to the public prosecutor’s office. In spite of the aforementioned amendments, which have reduced the uneven case load to a certain extent, especially in criminal matters, the problem remains. The uneven caseload is still much greater than before 2010.

Of the 26 higher courts in Serbia, at the end of 2016, the following number of cases remained, per one judge:

* First-instance civil cases 187 cases, but that number in Belgrade is 244, in Novi Sad 340, in Zaječar 430, Nis 462, Vranje 1076, Kruševac 1218, while in 17 courts that number is below 50;
* First-instance criminal matters 24 cases, but that number in in Niš is 38, Novi Sad 41 and in Belgrade 68;
* In appellate civil matters 276 cases, but that number in in Novi Sad is 658, Niš 799, Belgrade 976, Kragujevac 976; while in 15 courts that is a double-digit number.

Of the 66 basic courts, at the end of 2016, the following number of cases remained per one judge:

* In civil cases 289, but that number in Belgrade, in the First Basic Court is 560, while in the Third Basic Court it is 531, in Sjenica 409, Niš 437, Lebane 444, Kuršumlija 588, Kragujevac 862, while in 15 courts the number is between 100 and 200 cases per judge, and in 13 courts that is a double-digit number;
* In criminal matters 97 cases, but that number in Pirot is 200, Prijepolje 210, Obrenovac and Despotovac 227 each and in Lazarevac 317.

An uneven caseload also exists in the 16 commercial courts. At the end of 2016, there remained 379 cases in average per judge, with that number in Belgrade being 637, Kragujevac 503 and Novi Sad 457.

This uneven burden is the consequence of the inadequate court network, inadequate jurisdiction of the courts and the insufficient number of judges in certain towns. It should be borne in mind that the “distribution” of judges depends on the judicial and administrative power – the HJC – and that the network of courts and their jurisdiction are subject to legal provisions and hence in the responsibility of the legislative and executive branches.

1. **The questionable proposals for certain constitutional concepts for the judiciary**

Here we want to point out, as the Network said in the text in question, to “the key issues for judicial independence, namely to certain concepts that are proposed in that document as potential amendments to the Constitution. The latter did not so far address some of these matters. However, some of these concepts, considered by the Judges’ Association as threatening for the judiciary, are already mentioned in the National Strategy for the Reform of the Judiciary[[29]](#footnote-30) (hereinafter: “the National Strategy”), the Action Plan for Implementing the National Strategy for the Reform of the Judiciary[[30]](#footnote-31) (hereinafter: “AP”), and the [Action Plan for Chapter 23](https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023%20Third%20draft%20-%20final1.pdf)[[31]](#footnote-32) (hereinafter: AP 23). We remind that the professional associations of judges and prosecutors [did not participate](http://www.paragraf.rs/dnevne-vesti/120313/120313-vest1.html) in the drafting of the National Strategy for the Reform of the Judiciary, since their requests for establishing the responsibility for rule of law violations in the re-election and its review, were not accepted. They also requested elections to be held for the members of the HJC and SPC from the ranks of judges and prosecutors, which was denied.

These are the following questionable proposals: to determine precisely the types of undue influence on the judiciary (Article 149 of the Constitution); to weaken the principle of irremovability of judges (Article 150 of the Constitution), allegedly in order to achieve greater efficiency of the justice system; to narrow down the immunity of judges (Article 151), although it is already quite narrow in the functional sense; to prescribe the participation of the President in the procedure of appointing judges; to introduce case-law as a source of law in the Republic of Serbia (Articles 142, paragraph 2 and 145, paragraph 2); to equalize the notion of competence of judges as a necessary prerequisite for judicial office with one of the possible types of training (through the Judicial Academy) and the evaluation of judge’s work, as a manner of assessing the competence of judges, as well as to raise the Judicial Academy and the evaluation of judges to the constitutional level.

As to the HJC (apart from the proposals to remove the representatives of the executive and the legislative branch from membership in the HJC and to cease electing a member from the ranks of judges from the territory of autonomous provinces, which proposals the Judges’ Association supports), disputed are the proposals to completely change the HJC concept, in terms of further changes to the composition of the HJC by proposing that the President of the HJC should not be a judge and that HJC should include, apart from law professors, *“renown jurists possessing recognized knowledge and experience in the area of organization, functioning and reform of the judiciary, which would be elected by the National Assembly at the proposal of competent parliamentary judiciary committee, as it is the case with the judges of the Constitutional Court”)*, to reduce the number of HJC members (from 11 to 10); to have the HJC function differently (“the golden vote” of the President of the HJC); to shorten the term of office of HJC members from five to four years; to narrow down the jurisdiction of the HJC and to have the Constitutional Court decide about the remedies lodged against all decisions of the HJC on the status of judges.

Also contentious are the proposed concepts to narrow down the immunity of judges, which is already tightly connected to the discharge of judicial office; on abandoning the principle of adjudication by a panel of judges (collegiality), namely pushing out the lay jurors from the trial (and, alternatively, the introduction of the jury instead of lay jurors, or replacing lay jurors with trainee judges, namely those attending the initial training in the Judicial Academy).

Finally, what is also contentious is the absence of proposals on certain important issues that deserve to be included in the Constitution (the content of judicial power, the material guarantees for independence, the reasons for termination of judicial office), which remain undeservedly outside of the scope of constitutional concepts.

**The Judges’ Association stresses that, in its proposals for potential constitutional concepts tabled to the Ministry of Justice on 30/06/2017, it presented a series of proposals that are completely different from the ones cited above, especially regarding the HJC, proposals it still stands by to this day.**

1. **On specific contentious issues**
	1. **To precisely determine the types of undue influence on the courts (Article 149 of the Constitution)**

The Judges’ Association is of the opinion that there is no problem whatsoever with the overly extensive interpretation of the present provision of Article 149, paragraph 2 of the Constitution, which prescribes that any influence on the judge in performing his/her judicial duties shall be prohibited.

The Judges’ Association is not aware of a single case where the legislator or the executive branch were prevented, by such constitutional provisions, from passing a law or bylaw or taking other steps from their area of competence that would pertain to the judiciary (permitted influence), namely where they were undermined by such constitutional provisions. On the contrary, the Constitutional Court established several times that certain laws and other legal acts concerning the judiciary were unconstitutional, stressing that the legislative and executive branch participated in the adoption of such acts.

If, however, the legislative and executive branch have been blocked in their attempt to do something (which would constitute undue influence on the judiciary), then the goal of Article 149, paragraph 2 of the Constitution would have been achieved and shown its meaningfulness. Therefore:

**The Judges’ Association proposes the constitutional prohibition of any influence on the judge in performing his/her function, contained in the provision of Article 149, paragraph 2 of the Constitution, to remain unchanged.**

* 1. **Weakening the principle of irremovability of judges (Article 150 of the Constitution)**
		1. The irremovability of judges as a guarantee of judicial independence

Irremovability is one of the guarantees of judicial independence and it may not compensate for the poor performance of the legislative and executive branch, based on which the courts network and the jurisdiction of courts are defined.

As opposed to the correct understanding that the main problems in the judiciary are insufficient independence, inadequate training of judges and the uneven caseload for judges and between different courts, the executive and judicial and administrative powers, as well as the authors of the said text, believe that the principal issues in the judiciary, apart from the excessive requests for independence, lie in poor efficiency and inconsistent case-law (case-law will be analyzed below).

Although the citizens rightfully expect the courts to become more efficient, the government, by excessively and unnecessarily[[32]](#footnote-33) insisting on speeding up the proceedings and adjudicating as many cases as possible in the shortest possible time[[33]](#footnote-34), measures taken in past have sacrificed the quality of trials for the sake of achieving a semblance of efficiency. Such attempts result in unwanted outcomes – violations of the rights of citizens to a fair trial[[34]](#footnote-35), since these measures, paradoxically, lead to longer trials, an increase in the backlog of old cases in first-instance and second-instance courts, plummeting quality of judgments and, consequently, the dissatisfaction of citizens with the justice system.

* + 1. The misconception of raising the “efficiency of the courts” to the level of the highest priority

The requirement of efficiency at all costs, even at the cost of weakening the principle of irremovability, as one of the elements of judicial independence, is not based on a realistic understanding of the reasons for the aforementioned backlog. Therefore, it may lead to the unacceptable conclusion that, due to the provisions of Article 150[[35]](#footnote-36) *“Our Constitution has a much more rigid approach to the possibility of movability of judges than it is prescribed by EU standards* and that *“it has consequences at several levels, the most important of which is the impossibility to meaningfully influence, through the mobility of judges on improving the courts network and thus improve the access of citizens to justice, although the latter should precisely be the priority“[[36]](#footnote-37)*.

In accordance with the Recommendation of the Committee of Ministers of the Council of Europe Rec.2010(12) to member states about judges: independence, efficiency and responsibilities, *“The authorities responsible for the organization and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges’ independence and impartiality”* (paragraph 32); *“Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently”* (paragraph 33); *“A sufficient number of judges and appropriately qualified support staff should be allocated to the courts”* (paragraph 35).

In its Opinion number 17(2014), paragraph 5, the CCJE says that: *“judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice[[37]](#footnote-38), such as a lack of financial resources [[38]](#footnote-39), problems concerning the initial and in-service training of judges [[39]](#footnote-40) and the unsatisfactory elements regarding the organization of the judiciary and also the possible civil and criminal liability of judges [[40]](#footnote-41).“*

The European standards for the judiciary are merely the minimum that each state should integrate in its legal system. In a country such as the Republic of Serbia, which must boost its judicial independence as the main prerequisite for judicial impartiality and the right of the citizens to a fair trial, no constitutional guarantee of independence can do no harm and that includes the provision on irremovability.

Furthermore, it is evident that the irremovability of judges does not undermine the efficiency of the justice system. As in the case of medical treatment, where one must first recognize the type of ailment and only then apply the appropriate medicine, in the justice system too the causes of the problems must first be identified in order to proceed with finding the proper applicable solutions.

On the other hand, access to justice, which would allegedly be improved by doing away with the principle of irremovability of judges, must be viewed from multiple aspects: the physical (geographic), legal and time aspect, of which only a few will be mentioned here. Not a single one of these aspects has been achieved so far by the measures introduced and such situation is unlikely to change, although the Serbian justice system has been “in reforms” since 2000.

* + 1. About the causes of the lack of efficiency of the courts

The hitherto courts network, which included 138 municipal courts[[41]](#footnote-42) was completely changed in 2010, as it has already been mentioned, by the formation of 34 basic courts with 98 court units. The new courts network was allegedly also set up in order to speed up the procedures and to make the system cheaper[[42]](#footnote-43). However, in reality, such a new setup “introduced”, both in the geographic and financial sense, as well as time wise, an uneven access to justice, i.e. it placed the citizens in an uneven position in terms of access to justice. Although it seemed logical, until a meaningful analysis of the situation and the effects of the potential changes is made, to return the courts network to its previous state, it was finally changed as of 01/01/2014, as it was already mentioned, with the introduction of another 32 basic courts and with the reduction of the number of court units to 29. This has only partially removed the disruptions that emerged after the system that existed for decades was hastily changed.

The efficiency of the court system and the access of citizens to justice is also affected by the many legal amendments. Instead of the Labor Law from 2001[[43]](#footnote-44), a new Law was adopted in 2005, which was, in turn, amended five times[[44]](#footnote-45). The Law on Companies[[45]](#footnote-46) from 2004 was amended in 2011, and a new Law[[46]](#footnote-47) was adopted that same year, which new Law was, in turn amended the same year and subsequently two more times; the Law on the Market of Securities and Other Financial Instruments[[47]](#footnote-48) from 2002 was amended as many as six times by 2006, when the new Law was passed[[48]](#footnote-49), which was replaced in 2011 by the Law on the Capital Market[[49]](#footnote-50) which, in turn, was amended in 2015 and 2016, while the Law on the Takeover of Joint Stock Companies[[50]](#footnote-51) was passed in 2006, only to be amended in 2009, 2011 and 2016.

The Law on Privatization[[51]](#footnote-52) from 2001 was amended another 9 times and the new Law was passed[[52]](#footnote-53) in 2014, only to be amended twice in 2015 and a third time in 2016; the Law on the Privatization Agency[[53]](#footnote-54) from 2001 was amended in 2004, 2010, 2014 and 2015 and ceased to be effective on 01/02/2016 with the coming into force of the Law on the Amendments to the Law on the Law on Privatization[[54]](#footnote-55); The Law on the Shareholders Fund[[55]](#footnote-56) from 1998 was replaced by a new Law in 2001[[56]](#footnote-57), was amended in 2005, only to be scrapped on 15/05/2010 pursuant to Article 16, item 1 of the Law on the Privatization Agency; The Law on the Business Registers[[57]](#footnote-58) from 2004 was amended in 2009 and 2011, respectively, the same year which saw the adoption of the Law on the Procedure of Registration in the Business Registers Agency[[58]](#footnote-59), which was amended in 2014.

The Law on Bankruptcy Proceedings[[59]](#footnote-60) from 2004 was amended in 2005 and replaced by the Bankruptcy Law[[60]](#footnote-61) in 2009, which was, in turn, subsequently changed three times; The Law on Rehabilitation, Bankruptcy and Liquidation of Banks[[61]](#footnote-62), which was changed six times in 11 years (since 1990) and was replaced by the Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies[[62]](#footnote-63) from 2005, which was, in turn, amended twice and a new Law[[63]](#footnote-64) in February in 2015.

The problematic and often uncoordinated amendments to procedural laws had a negative impact on the course of court proceedings.

The Law on Civil Procedure from 2004[[64]](#footnote-65) was amended three times, while the current Law[[65]](#footnote-66) adopted in 2011 was also changed three times already. The Law on Enforcement Procedure[[66]](#footnote-67) from 2000 was amended as early as the same year and then again the next; the new Law[[67]](#footnote-68) was adopted in 2004, only to be replaced to the Law on Enforcement and Security[[68]](#footnote-69) from 2011, which was, in turn, replaced by a different law[[69]](#footnote-70) and subsequently amended another three times; the current Law on Enforcement and Security[[70]](#footnote-71) was amended as early as in 2016.

The Penal Code[[71]](#footnote-72) from 2005 was amended the same year, as well as twice in 2009, and once in 2012, 2013 and 2014. The Criminal Procedure Code [[72]](#footnote-73) from 2001 was amended as many as nine times by 2010; the next Criminal Procedure Code[[73]](#footnote-74) from 2006, though it was never implemented, was amended in 2007 and 2008, while the current Criminal Procedure Code[[74]](#footnote-75) adopted in 2011 has already been amended five times – the first time was even before it started to be applied, the same year when it was adopted, followed by amendments in 2012 and on two occasions in 2013 and once in 2014.

The same situation exists with laws pertaining to the status and organization of the justice system: The Law on the High Judiciary Council[[75]](#footnote-76) from 2001 was amended five times, while the Current Law on the High Judiciary Council[[76]](#footnote-77) from 2008 – three times; the previous Law on the Organization of Courts[[77]](#footnote-78) from 2001 was amended six times, and the current one, from 2008, ten times[[78]](#footnote-79); the previous Law on Judges[[79]](#footnote-80) from 2001 was changed 11 times in eight years, while the existing Law on Judges[[80]](#footnote-81) from 2008 as many as 15 times in less than nine years.

One does not need to be an expert to understand that such a dynamic of introducing amendments to laws, which laws are mostly already not entirely satisfactory or mutually aligned, as well as the frequent “wandering” in relation to different legislative concepts, all undermine the quality and efficiency of trials, the quality and consistency of judgments, legal certainty, access to justice and confidence of the citizens in the justice system.

The legislative and executive branch should make a strategic decision that a systemic, carefully planned, harmonized and applicable approach to long-term problem solving in the judiciary is necessary. In addition to the requirement for laws to be aligned with the Constitution and international standards, laws must be logical, have clear goals and provide for clear rules, be equal for everyone and essentially to allow for the system to be reviewed and improved. In order to have an applicable and functional judicial system, it is best to reflect on all the necessary and possible amendments at the same time and in a comprehensive manner. Due to the importance of comprehensiveness and systemic changes, all the planned solutions require a careful analysis of potential consequences and applicability, as well as a precise, synchronized and transparent elaboration and implementation in stages. This will enable the laws to be applied in the planned time, without subsequent amendments and delays; this will also allow the newly introduced concepts to yield the desired results. The goals of the reform may be achieved with enabling a system where the judiciary is given the conditions to genuinely perform its duties in an independent way, which, in turn, is a prerequisite for impartial and fair trial. Such conditions are provided not only by removing external political influence by the executive and legislative branch, but also by having the judiciary avoiding to transmit these influences on the courts – it should rather be a bulwark against such undue influence. Every shortcut and insincerity in this procedure may render the reforms meaningless; in such a case, it will merely be a semblance of a reform and it will ultimately lead to a “decay” of good ideas. The achievement of the initial goals will be made impossible.

Not wanting to undermine the role and responsibility of judges, we must stress that the reforms process primarily depends on having the relevant applicable laws in place (that the legislator adopts at the proposal of the executive), which regulate the courts network, the jurisdiction of courts and procedural rules. Therefore, an *ad hoc* measure of moving the judges may not, in that respect, bring about long-term results in terms of efficiency of the system and access to justice. On the contrary, that measure would most definitely mean reducing the level of judicial independence guarantees and open the room for further attempts to undermine it and therefore undermine the rights of citizens to a fair trial.

Therefore:

**The Judges’ Association proposes to retain the constitutional measures on the irremovability of judges contained in Article 150 of the Constitution, as well as to amend them as follows:**

**If court or major part of the jurisdiction of the court to which the judge has been appointed is repealed, the judge may, as an exception, without his/her consent, be permanently moved only to the court of the same type and level.**

* 1. **Involvement of the President of the Republic in the appointment procedure for judges**

The Judges’ Association hereby reminds that the constitutional amendments are being carried out, inter alia, due to insufficient independence guarantees. Namely, the Constitution allows for political influence on the judiciary, enabled by the powers (as provided for in the Constitution) of the National Assembly, as the legislative branch, to elect first-term judges, court presidents and all HJC members, which, in turn, elect all judges for a permanent term.

The Judges’ Association is aware of the practice of certain European countries with a longstanding democratic tradition, where a representative of the authorities (the Minister of Justice or President of the Republic) appoints judges at the proposal of other bodies. Such a practice, along with the democratic tradition of these countries, does not have a major impact on the actual independence of the judicial branch, although in theory it is not entirely compliant with the principle of separation of powers and judicial independence.

However, in view of the historical experience and the practice in the Republic of Serbia, it is likely that, if such a concept was embraced, judicial independence would come under threat.

The concept under which the HJC would elect judges, as it is already prescribed by the Constitution, which concept is otherwise fully in accordance with the principle of separation of powers and independence of the judicial branch, is the optimum solution for Serbia and should not be abandoned. Therefore:

**The Judges’ Association believes that the Constitution should not provide for the involvement of the President of the Republic in the procedure of appointment of judges and therefore remains at its proposal for the High Judiciary Council to elect all judges.**

* 1. **Introduction of case-law as the source of law in the Republic of Serbia (Articles 142, paragraph 2 and 145, paragraph 2)**
		1. On case-law in general

Case-law is the totality of aligned and consistent legal positions expressed by the courts of a country in their decisions. Consistent court decisions allow for equality of every citizen before the Law, the predictability of court decisions and hence legal security.

As opposed to Anglo-Saxon countries, which have a common law system, based on precedents (court decisions), Serbia belongs to the European, so-called continental system, which was developed for more than two thousand years on the foundations of Roman Law. The European legal system is centered on written law, which contains the general principles and institutes, based on which, depending on the facts of each particular case, legal conclusions are drawn and the judgment is delivered. In both system (including, therefore, common law), there are problems with an inefficient and expensive structure and inconsistent court decisions.

In the Republic of Serbia, the legal positions accepted in case-law are not binding and formally speaking case-law is not a source of law. But, since judges most often accept and embrace case-law, court decisions, especially those issued by the highest courts, are *de facto* an informal source of Law.

* + 1. On court decisions in so-called transition countries

Starting from the year 2000, the Serbian judiciary has been in a state of “reforms” and the laws have been changing frequently, incessantly and inconsistently[[81]](#footnote-82). Drastic changes to procedural laws have a particularly harmful effect on legal certainty and security.

The principle of material truth, both in criminal and civil procedure, has been abandoned and the procedure was “handed over” to the parties, abruptly and contrary to the existing system. That results in having different outcomes in similar or identical situations – the party that is more astute (meaning that it is able to pay lawyers, expert witnesses, detectives, irrespective of whether it is in the “right” or not) is in the better position of “winning”. Moreover, depending on the claim formulation by the attorney of the parties as to the violation of the procedure, which are not controlled anymore by the court ex officio, the court that decides about the appeal in generic situations adopts different decisions (upholds or repeals the decision of lower instance).

The influence and consequence of frequent and inconsistent amendments on the court system of a state has been commented by the ECHR[[82]](#footnote-83) several times when:

* Concludes that *“while amendments may reflect the development of the legal environment, frequent changes result in inconsistent case-law and contribute to a general lack of legal security (which is a violation of the Convention per se);*
* Calls on the relevant states *“to avoid too frequent changes and to consider carefully all legal and financial consequences of the changes before introducing them; and*
* Warns that *the excessive number of new laws and guidelines will not ensure actual and effective protection, since only effective enforcement of the law can provide such protection*. “
	+ 1. The Court in Strasbourg on the inconsistency of court decisions

While there is no doubt that the courts (this phenomenon exists in the courts of all countries) deliver different decisions in seemingly identical factual and legal situations, this must not always mean that the Law has been violated. On the other hand, it is understandable that governments seek to resolve this problem.

The ECHR has also voiced its opinion about the subject, including in the decision against Serbia[[83]](#footnote-84), when it said that:

*“54. (ii)* ***The possibility of conflicting court decisions is an inherent trait of any judicial system[[84]](#footnote-85)*** *which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court.* ***That, in itself, cannot be considered contrary to the Convention*** *(see Santos Pinto v. Portugal, number*[*39005/04*](https://hudoc.echr.coe.int/eng#{"appno":["39005/04"]})*, § 41, 20 May 2008, and Tudor v. Romania, cited above number*[*21911/03*](https://hudoc.echr.coe.int/eng#{"appno":["21911/03"]})*, § 29, 24 March 2009);*

*(iii)* ***The criteria*** *that guide the Court’s assessment of the conditions* ***in which conflicting decisions*** *of different domestic courts ruling at last instance are* ***in breach*** *of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in*

*1)* ***Establishing whether “profound and long-standing differences” exist*** *in the case-law of the domestic courts,*

*2)* ***Whether the domestic law provides for machinery for overcoming*** *these inconsistencies, and*

*3)* ***Whether that machinery has been applied****, and*

*4) If appropriate, to what* ***effect*** *(Iordan Iordanov and Others v. Bulgaria, number* [*23530/02*](https://hudoc.echr.coe.int/eng#{"appno":["23530/02"]})*, cited above § 49-50, 2 July 2009; Beian v. Romania (number 1), number* [*30658/05*](https://hudoc.echr.coe.int/eng#{"appno":["30658/05"]})*, cited above § 34-40, ECHR 2007‑V (extracts); Ştefan and Ştef v. Romania, nos.* [*24428/03*](https://hudoc.echr.coe.int/eng#{"appno":["24428/03"]}) *and* [*26977/03*](https://hudoc.echr.coe.int/eng#{"appno":["26977/03"]})*, § 33-36, 27 January 2009; Schwarzkopf and Taussik v. the Czech Republic (dec.), cited above number* [*42162/02*](https://hudoc.echr.coe.int/eng#{"appno":["42162/02"]})*, 2 December 2008; Tudor and Tudor, cited above, § 31; Ştefănică and Others v. Romania, number*[*38155/02*](https://hudoc.echr.coe.int/eng#{"appno":["38155/02"]})*, cited above § 36).*

*Such an assessment must also be based on the principle of legal security. That principles guarantees stability in legal situations and contributes to greater confidence of the public in the courts.*

*However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, since Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.*

*Court decisions and case-law should therefore not be set in stone forever. The Law, to the extent to which it is possible, leads and shapes social relations and, where appropriate, contributes to their development. The judges, which administer the Law, have the duty to do it in the proper way and, in the process, to interpret it in a dynamic way.”*

* + 1. The approach of the Serbian authorities to harmonizing court decisions

As opposed to the aforementioned position of the ECHR, the executive branch in Serbia, just like the said Network, has been advocating for several years now for a completely different approach to addressing the issue of inconsistent court decisions. The executive clearly believes that certain partial solutions may help building a shortcut towards establishing an optimum balance in the legal system.

The court system is a complex structure consisting of mutually connected and synchronized parts and therefore hasty interventions in it should be avoided. Four main indicators must be taken into account: the number of cases that are to be adjudicated, the time of adjudication, the quality of adjudication and the resources available to the system for such a purpose (laws, judges with their assistants and staff, equipment, the courts and the associated budget and the organization of regions and jurisdiction of the courts). If one of these indicators is to be addressed without the proper safeguards, the rest will be disrupted.

However, that very approach was reflected both in the National Strategy and the AP, which provide for the establishment of the Certification Commission[[85]](#footnote-86), and in AP 23, which says that the normative framework regulating the issues of the mandatory nature of case-law will be analyzed and changed appropriately (1.3.9.1.).

The Judges’ Association calls for caution and avoidance of hasty conclusions that the undisputed inconsistency of court decisions that exists may be dealt with by a seemingly simple shift towards a completely different legal system (common law), which is contrary to the historical, educational and legal tradition harbored by Serbia, both during its medieval statehood and its modern, two-century long sovereignty. Hasty and flawed solutions are quick to produce damage that the best court proceeding is then unable to rectify for decades to come.

* + 1. European standards and opinions of the Venice Commission on the intended way to harmonize court decisions in Serbia

The aforementioned, seemingly simple solutions open the path to a series of serious problems. They are not only contrary to the legal system and tradition of Serbia[[86]](#footnote-87), but they would also undermine the internal independence of judges. In practice, there have been situations with disciplinary proceedings instituted against judges reluctant to change their decision, since they disagreed with the view of their peers. This led to a debate within the courts and the phenomenon was cited in official documents, as a threat to judicial independence[[87]](#footnote-88).

Furthermore, European standards precisely point to the need not to restrict the discretion of judges. Hence, in Recommendation CM/Rec (2010)12 of the CoE Committee of Ministers to member countries from 17/11/2010:

*„5. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.*

***Chapter III – Internal independence***

*22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organization should not undermine individual independence.*

*23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law. “*

With regards to the situation in Serbia, the Venice Commission commented three times in the last 15 years on the issue of mandatory case-law in relation to the Law on Courts in Serbia and its opinion was negative each time. In the opinion from 24/06/2002, in the Law on Courts, experts Natalie Fricero, Professor of the Faculty of Law in Nice and Giacomo Oberto, Judge from Turin, said they were strongly opposed to such a system of imposed interpretation: “*The Supreme Court should ensure the uniformity of application of the Law rather through the convincingness of the reasoning of the decision, than by the force of some kind of arrêts de règlement, which were rejected by Western European societies two centuries ago.*” In Opinion number 467/2007 from 19/03/2008, on the Draft Law on Judges and the Draft Law on Courts, the Commission said: *“Article 31 states that "The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts". It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction.”* (Paragraph 109)

In Opinion 202/2012 dated 11/03/2013 on the Draft Amendments to Laws on the Judiciary of Serbia, in paragraphs 103-108, the Venice Commission commented on the changes in Article 31 of the Law on Courts, prescribing *that the Supreme Court of Cassation “determines general legal views in order to ensure uniform application of law by courts; gives opinions on draft laws and other regulations governing issues of relevance for the judicial branch”,* saying it was explained to it that *“this task was introduced in order to unify the case law, as there are many cases before the European Court of Human Rights on the equal access to justice. It was said that these legal opinions were only mandatory for the judges of the Supreme Court of Cassation (not for lower courts). In addition, it should be regarded as an interpretation of the law, not as an instruction”. “105 Nevertheless, the Venice Commission has criticized this method, because it gives the Supreme Court of Cassation a general “rule-making” power, which can conflict with the separation of powers. The exchange of views between judges of different instances, which is provided for in the draft (the new paragraph 3 of Article 24) is as such good and could therefore be recommended. However, when it is combined with Article 31, it becomes less clear. The need to unify practice should in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.*

*106. It is not clear whether the Supreme Court adopts general views outside the specific case or while exercising its competence as a court of cassation. In case of the former, this approach will conflict with the principle of the independence of the judiciary. The argument that “general legal views” are adopted with the aim of remedying the most common errors of the judicial system, which due to some reason do not end up at the level of the highest court, seems flawed. It also fails to explain why it is impossible to remedy such errors in appeal or cassation proceedings.*

*107. The rationale behind such an approach is also questionable in the light of the argument that such “general views” would prevent future applications to the European Court of Human Rights, which already faces a considerable number of cases related to the equal access to justice. If decisions of the lower courts and/or courts of appeal may end up in front of the European Court of Human Rights, then it may be reasonable to allow similar appeals to reach the Supreme Court of Cassation (or the Constitutional Court) thus allowing the Supreme Court of Cassation (or the Constitutional Court) to establish a precedent within the context of the specific case.*

*108. The Venice Commission’s comments in its previous opinion are therefore still valid: “Article 31 states that "The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts". It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction.”*

In terms of the concept pertaining to the Certification Commission, it should be added that such body would constitute a “quasi-court”, under the undue influence of the executive branch through the appointment of associated members (professors, attorneys), while the “judges” of that “court of the courts”, as opposed to judges that have delivered and signed a decision, would not be held accountable for their decisions and would be vested with enormous and unacceptable power over the judges: they would issue orders to them, direct them as to how to adjudicate and that would stifle any discretion and free opinion of the judges. Furthermore, imposing the mandatory nature of case-law in some other way, including the constitutional prescription of case-law as a source of law, would undermine the internal independence of judges and increase their inertia (which is not only a characteristic of judges in Serbia), as well as stereotype trials, discourage judges from passing decisions based on their convictions and generally undermine the fairness of trial and produce the same effect on the confidence of citizens in the judiciary, as an indispensable ingredient of the rule of law in every democratic society. The report of the Venice Commission on the independence of the judiciary CDL-AD (2010)004 from 16/03/2010 speaks precisely about such consequences for the internal independence of the judiciary, which would be caused if the Constitution of Serbia, as a continental law country, is amended so as to prescribe that case-law has become o mandatory source of law.

*„68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that “judges are subject only to the law”. This principle protects judges first of all against undue external influence. It is, however, also applicable within the judiciary. A hierarchical organization of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.*

*69. The basic considerations are clearly set forth by the CCJE:
 „64. The fundamental point is that a judge is in the performance of his functions no one’s employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.
 The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognized that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. “Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law” (Recommendation R(94)12, Principle I(2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the latter case).*

*70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.*

*71. The Venice Commission has always upheld the principle of the independence of each individual judge: al judge: “Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them." (CDL-INF(1997)6 at 6).*

*72. “Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialized Courts (art. 50.1) the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.” (CDL-INF(2000)5 under the heading “Establishment of a strictly hierarchical system of courts”).*

*73. “Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an “internal” aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the “internal” independence of the judiciary. The best protection for judicial independence, both “internal” and “external”, can be assured by a High Judicial Council, as it is recognized by the main international documents on the subject of judicial independence.” (CDL(2007)003 at 61).*

*To sum up,* ***the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is in disharmony with the subordination of the judges in their decision making.”***

* + 1. Proposal of the Judges’ Association in relation to the harmonization of court decisions

The harmonization of court decisions is a lengthy process, which requires solutions that are in harmony with the European-continental legal system and tradition, embraced by Serbia. It is important to understand that case-law is not to be imposed, since that would undermine the internal judicial independence. Case-law should be embraced; the establishment of consistent case-law is a process that should include not only judges, but also other social players. Judges should hold joint sessions of the highest courts, make court decisions accessible and well-classified, invest steady efforts to develop their knowledge and skills and understanding of the wider social developments, clearly argument and explain their decisions, carefully develop a balance between the need for consistent case-law, on one hand, and the delivery of a fair judgment, even if such judgment deviates from case-law, on the other hand.

The legislative and executive branch and the state authorities managing the court system (the Ministry of Justice, the Ministry of Finance, the HJC), each within their own mandate, must provide solutions that are appropriate and in accordance with our (European continental) legal system and tradition, good and mutually harmonized laws, a stable legal system and other conditions in which the judges can pay the required attention to their respective cases. When the judges are provided with the proper working conditions, which means easy access to computers and the Internet, to a database of regulations and case-law, the assistance of court assistants and other staff, a reasonable caseload without excessive mutual disparities, they will be in the position to deliver decisions that will be carefully reasoned and consistent.

Therefore:

**The Judges’ Association proposes that the constitutional provisions about sources of law, contained in Article 142, paragraph 2 of the Constitution, are not amended by a provision adding case-law to the existing mandatory sources of law.**

* 1. **The equalization of the notions of the competence of judges as the prerequisite for office and the possible ways to increase competence**
		1. The competence of judges and its purpose

The goal every society based on the rule of law strives for is to have experts with integrity for judges, which will permanently maintain and improve their knowledge and skills by undergoing quality training that will be thorough and diversified, especially in relation to adjudication skills, since competence and professionalism are an important prerequisite for independence. Moreover, the quality of legal protection, including efficiency, is best improved by raising the level of competence of judges and by enhancing the skills required for judicial office.

It is clear that Serbia too needs to have judges “coming” into the judiciary with guaranteed competence and integrity. This matter is directly related to the initial training of jurists, which is a tool helping the formation of judges that will be *“capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness“[[88]](#footnote-89).*

In European countries there is no uniform system of training for judges and prosecutors. Apart from the mentoring system, which has always been applied in Serbia and which still exists in Germany or Austria, there is the training system within the academy, typical of France, Portugal or Spain; in these systems, it is possible to become a judge without having graduated from the Academy. Furthermore, there are systems, such as the ones in the Netherlands or Italy, combining thematic seminars in judicial centers with the mentoring system. *“There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to**particular features of the different**judicial systems, but in some respects do not seem to be inevitable or necessary.**Some countries offer lengthy formal training in specialized establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily**on**a lengthy professional experience, commonly as advocates.**Between these possibilities, there is a whole range of countries where training is to varying degrees organized and compulsory”.[[89]](#footnote-90)* All these methods and systems of training are equally functional and applicable, depending on the tradition and economic strength of each and every state.

In any case, training should be provided by an “*independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programs meet the requirements of openness, competence and impartiality inherent in judicial office”*[[90]](#footnote-91)*,* whereas training must be administered by renowned quality lecturers in an interactive manner. Judges should possess comprehensive and thorough knowledge outside of the realm of applicable law, encompassing all the relevant social domains; judges should possess and improve skills necessary for working in courtrooms (such as debating skills, listening skills, running the procedure, etc.) and personal qualities (self-confidence, politeness, composure, communication skills, conflict resolution skills, competence and willingness to make decisions, to effectively organize their work, to assist in matters of wider significance to the court and the judiciary, meticulousness).

Such training of judges makes it possible for the judiciary to protect itself from undue influence and is a guarantee of judicial independence and impartiality and the prerequisite for confidence in and the respect for the judiciary and for the judiciary itself to be worthy of respect and confidence.

* + 1. Training in Serbia

The Judges’ Association has always believed that the competence of judges is the starting point for the reform of the judiciary and therefore it has sought solutions that would enhance such competence. For that reason, as early as in 2001, the Judges’ Association, jointly with the Government of the Republic of Serbia, established the Judicial Centre. The then Constitution (or the actual one) have never been an obstacle for the existence of the Judicial Centre or the Judicial Academy, or for the initial and permanent training. The Judges’ Association, however, has never believed that graduating from these institutions automatically means that such a judge possesses the requisite proficiency. It has always been clear that they were only one of the paths and tool to improve the competence of judges.

As the successor of the Judicial Centre, the Judicial Academy (hereinafter: “the Academy”) started its activities on 01/01/2010, although it was only in 2015 that it received the approval of the HJC and SPC for its initial training program. The Academy was established with the purpose of contributing to the professionalism, independence, impartiality and efficiency of judges and prosecutors and their activity[[91]](#footnote-92), but that goal was realized only partially, in terms of initial training. The permanent training of judges was mainly reduced to getting to know the newly adopted laws and certain aspects of European law.

Nonetheless, the Academy was tasked with providing training in each individual case, where a judge should need, based on performance evaluation, professional development in a certain area or activity, when a judge is assigned to matters differing from his usual area of competence, as well as in other cases where there exists a need or interest by the concerned judge. The Academy has simply failed to deliver on that expectation. The training of court personnel has actually been insufficient and there has simply been no training whatsoever for assistant judges and assistant public prosecutors. The capacities of the Academy remain insufficient and its criteria for the election of its commissions, mentors and lecturers are not reliable enough in order for that institution to become the only “gateway” to the judiciary.

From the very beginning of its activities, the Judicial Academy faced a problem arising from the insufficiently well-conceived status of initial training. Under the Law on Judges and the Law on the Public Prosecutor’s Office, as well as the Law on the Judicial Academy, the HJC and the SPC had to give the priority, in the procedure of proposing the candidates for judges or public prosecutors, to candidates that graduated from the Judicial Academy. These laws had “forgotten” about almost 2000 assistant judges and prosecutors at the time, who joined the judiciary before 2010 and who had legitimate expectations, since there were not enough vacancies to accommodate these aspiring judges and public prosecutors, that they would have the right to apply for the positions of judge or deputy public prosecutor after they had passed the bar examination and worked for years in the judiciary. The Constitutional Court declared the provisions of the aforementioned laws unconstitutional on 06/02/2014[[92]](#footnote-93), having found they were violating the principle of equality of citizens in the same legal situation, restricting the constitutionally prescribed jurisdiction of the HJC and SPC, as well as *“concepts according to which persons that have not completed initial training on the Judicial Academy are by that fact essentially eliminated from the circle of candidates for first-term judges in a certain type of courts and first-time deputy public prosecutors in a certain type of public prosecutors’, are constitutionally and legally unacceptable. This is particularly true having in mind that the students of the Academy, during their initial training, primarily discharge the duties of assistant judges and assistant public prosecutors, just like assistant judges and assistant public prosecutors that are not the “beneficiaries” of such training.”[[93]](#footnote-94)*

Therefore, after eight years of existence of the Judicial Academy, Serbia still lacks systemic and functional training courses for judges, implemented by renowned and respected magistrates and academics, which training would include comprehensive and interactive programs that would always be available and predictable, so that the judges may choose and plan their training time at least a year in advance. For that it would be necessary for the entity conducting the training to be independent from the executive and legislative branch[[94]](#footnote-95), the responsibility and supervision of the training to be vested with the judiciary, where the association of judges may also play a major role[[95]](#footnote-96).

Meanwhile, the training method is not of paramount importance, particularly regarding initial training; it may involve a mentoring system, which, just like in Austria for example, is the most current and feasible mode for Serbia, but it may also be a combined system like in the Netherlands or in Italy, which requires certain investments. Finally, training on the Academy, which is the most expensive and the most difficult to implement, is still new for Serbia and requires time to be functional. As for initial training, *“In view of the diversity of the systems for training judges in Europe, the CCJE recommends:*

1. *That all appointees**to**judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure,*
2. *That training programs more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by**the trainers and judges themselves,*
3. *That these theoretical and practical programs should not be limited to techniques in the**purely**legal fields**but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology,**foreign languages, social sciences and alternative dispute resolution (ADR),*
4. *That the training should be pluralist in order**to guarantee and strengthen the open-mindedness of the judge,*
5. *That, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.*

*29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and**reciprocal**understanding between judges and other**professions.*

*30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges’ backgrounds, it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers’ practices, companies, etc.)“[[96]](#footnote-97).*

The working group for making the analysis of the amendments to the constitutional framework[[97]](#footnote-98) on the judiciary in the Republic of Serbia says the following about the Academy, in item 6: *“Regarding the prescription of the Judicial Academy as the mandatory condition for the election of first-term judges and public prosecutors, this working group supports the position taken by the Working Group for Reforming and Developing the Judicial Academy, according to which the Judicial Academy should not become a constitutional category. Prescribing the Judicial Academy as a mandatory condition for the election of first-term judges and public prosecutors may be set as a strategic goal that is feasible after a thorough reform of the Academy’s concept.”*

The politicians in Serbia, helped by the all-too-conventional practice by EU bureaucrats and their insufficient understanding of our domestic circumstances, persist with a particular zeal in their intent to make the still feeble Academy the only or at least the dominant manner of appointing young trainees for judges. Such zeal seems to justify the concerns of judges that the Academy might become a hidden, but effective channel of political influence on the courts, which the government wants to establish, because it will have to give up the right to elect judges after the constitutional reforms. In this way, by picking the students of the Academy, in an insufficiently controlled and transparent procedure, the government influences in advance the choice of future judges. Therefore, it comes as no surprise that 65% of judges believe that the Academy should not be the main gateway for judicial office and that it is wrong to vest the graduates of the Academy with such a privilege. Furthermore, even more judges, as many as 83%, are in favor of free and equal access to judicial office for everyone[[98]](#footnote-99).

* + 1. The Judges’ Association on the need for putting an equality sign between graduation from the Academy and the competence of judges and raising the former to the level of constitutional principle

The Constitution is the highest law of a state, which contains the general rules about the social order, the method of government and the limits to power, consisting of the fundamental freedoms and rights of individuals and the entity. Therefore, the Constitution should not contain rules of implementational character. After all, the Report of the Venice Commission on the independence of the judiciary CDL-AD 2010(004) from 16/03/2010 says: *“22. The Venice Commission strongly supports this approach. The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts”****[[99]](#footnote-100).***

The appointment of capable experts with integrity is a goal that needs be enshrined in the Constitution. Paths or means/methods to reaching this goal may be many. The state should opt for some of these paths sincerely guided by European rule of law standards, on one hand and its own tradition and capacities, on the other, while bearing in mind that such path must be functional and applicable in the shortest possible time.

Therefore, for the already mentioned reasons, it would be wrong to put an equality sign between the competences of newly elected or already elected judges with one of the possible modalities of training. In the same way, it would be wrong for the evaluation of a judges’ competence to be based solely on an institution that is yet to be stabilized and reinforced by actual and applicable guarantees of independence, in order to be able to encourage and strengthen the competence and integrity of judges. In the case of Serbia, whose society is constantly undergoing change and going back to square one over and over, with insufficient capacities, which logically undermines the court system, we should retain the exiting methods and gradually develop new ones, a process which has not until now encountered any obstacles from the part of the Constitution.

After all, even in states that have had judicial academies for a long time now, these academies are not enshrined in their respective constitutions. On the contrary, constitutional prescription for only one path and method would represent a hurdle for the arrival in the judiciary of competent judges with integrity.

Therefore,

**The Judges’ Association believes that methods and means that encourage and strengthen the competence and integrity of judges should not be part of the Constitution and proposes the following:**

* **The Constitution should provide for competence and integrity to be the main criteria for judicial office.**
* **The constitutional provision on the election of judges (Article 147) should be amended by the following provision:*****“The High Judicial Council elects a judge based on his integrity and competence developed in the court or a different independent institution, in the manner, a procedure and under the condition regulated by the Law, which provide for the independence of judges and courts and access to judicial office to everyone under the same conditions.***
	1. **Making individual evaluation of judges a constitutional category**

Amid longstanding violations of the guarantees of judicial independence and the plummeting confidence of the citizens in the judiciary, the Judges’ Association has been constantly advocating for the evaluation of the performance of judges[[100]](#footnote-101), believing that the **purpose** of evaluation is creating legal security based on quality law, through establishing the conditions for efficient judicial work – meaning delivering quality decisions – in a reasonable time, after having fairly considered all the aspects of a case[[101]](#footnote-102), which would reinstate and reinforce the confidence of the citizens in the work of judges and courts.

However, when reflecting about evaluation, it should be borne in mind that individual evaluation is not considered indispensable in European justice systems. Countries where there is no individual evaluation (such as Denmark, England and Wales, Finland, Ireland, the Netherlands, Sweden and, to a certain extent, Spain) appraise the performance of the judicial system as a whole[[102]](#footnote-103). Moreover, the CCJE stops short of recommending, but merely leaves it to the discretion of the states if they will formally evaluate the performance of judges: “*Two key requirements of any judicial system must be to produce justice of the highest quality and proper accountability in a democratic society. Some form of evaluation of judges is necessary to meet these requirements. The fundamental question is whether such evaluation must be of a “formal” character. The CCJE encourages all member states to consider this question. The answer each member state gives will be in accordance with its judicial system, traditions and culture. If a member state decides that these two key requirements can be met by means other than formal evaluation of individual judges, it could decide not to have such a formal evaluation. If it concludes these requirements cannot be met by other means, the CCJE recommends the adoption of a more formal system of individual evaluation of judges as discussed below”.*[[103]](#footnote-104) Stopping short of insisting on the introduction of formal evaluation, *“The CCJE encourages all member states to use informal evaluation procedures that help improving the skills of judges and thereby the overall quality of the judiciary. Such means of informal evaluation include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review (paragraph 25).”[[104]](#footnote-105)*

In Opinion number 17(2014) dealing with the evaluation of the work of judges and their independence and which is not accidentally entitled: On the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence, the CCJE gives primacy to the independence of judges over evaluation: *“The main rule for each individual evaluation of judges must be that such evaluation reflects the complete respect for judicial independence[[105]](#footnote-106). When an individual evaluation has consequences for a judge’s promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges[[106]](#footnote-107), including the presidents of courts“ (paragraph 6.).*

The Report of the European Network of Judicial Councils (hereinafter: ENCJ) makes a difference between countries using “formal” and “informal” evaluation “*8.... The systems are essentially the following:*

*Formal*

*9. In the case of formal evaluation systems, the purpose of the evaluation, the criteria used, the composition of the evaluation body, the evaluation procedure and its potential consequences are clearly set before any valuation is performed. If the evaluation is carried out in a formal way, the rights and obligations of the evaluated judge and of the evaluated body are regulated by the Law or bylaws.*

*Informal*

*10. Informal evaluation does not use formalized assessments or criteria. There are mainly no direct consequences for the judge that is evaluated. Informal evaluation may be performed in the form of an interview, which would give the opportunity to the evaluated judge to address the problems, show his/her capabilities and harmonize his career goals[[107]](#footnote-108). Informal collection of information about the judge that is the candidate for promotion[[108]](#footnote-109) may also be considered as informal evaluation.“[[109]](#footnote-110)*

The direct goals realized with the evaluation of judges’ work are:

* Effective management of the court system in order to achieve quality justice, by creating quality personnel, a merit-based promotion system for judges, improving the overall capacity of all judges as a whole and also individually, through adequate training, specialization and motivation of each judge, by making optimal use of the skills of each judge within the court system by adequate task planning at the annual level, by appointing the necessary number of judges and monitoring the efficiency and the caseload of judges and courts;
* Setting the status of judges and their professional “movements” – vertical (elections and promotions) and horizontal (by assigning judges within the given court);
* Establishing a system of personal accountability of judges in their job and tasks, while protecting at the same time their independence, since any attempt to call judges to account in relation to their work threatens their independence.

*“The ‘quality’ of justice should not be understood as a synonym for mere "productivity" of the judicial system”[[110]](#footnote-111). CCJE warns that insufficient financing and budget funds may result in excessive reference to “productivity” by the justice system in individual evaluation of judges. Therefore, CCJE reiterates that all the general principles and standards of the Council of Europe on the funding and management of courts place a duty on states to make financial resources available that match the needs of the different judicial systems[[111]](#footnote-112). CCJE believes that quality and not only quantity of the judge’s decision must be at the core of individual evaluation. In Opinion 11 (2008), CCJE addressed the importance of high quality judgments. In order to assess the quality of a judge’s decision, the evaluators should focus on the methodology that the judge is using in his/her work in general, before evaluating the meritum of specific decisions[[112]](#footnote-113). The latter must be determined solely in appellate proceedings. The evaluators must take into account all the aspects of successful adjudication and particularly legal knowledge, communication skills, hard work, efficiency and integrity. Therefore, the CCJE stresses that neither the number of appeals nor their rate of success necessarily reflects on the quality of the decisions subject to appeal[[113]](#footnote-114), unless the number of successful appeals and the modalities of such adjudications clearly show that the judge lacks the requisite knowledge of laws and procedures. It was noticed that the Kyiv Recommendation[[114]](#footnote-115) and the ENCJ Report[[115]](#footnote-116) have come to the same position“[[116]](#footnote-117).*

In any case, even in the countries that have opted for a formal system of evaluation of judges’ work, the CCJE clearly states that *“…the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation*.”*[[117]](#footnote-118)* Just like with the dilemma whether to put an equality sign between the competence of judges and their manner of training, the same applies to evaluation. The Constitution is the highest law of a state, which contains the most general principles and it should not contain implementation norms. The Constitution has, after all, never been an obstacle to the evaluation of judges’ work, which is prescribed by the Law on Judges.

As in the case of the proposal to prescribe in the Constitution that case-law shall be a source of Law, the same applies here: the goal society is striving for is to have capable experts with integrity. Evaluation of competence is just a tool and tools can be many.

Therefore,

**The Judges’ Association proposes that the Constitution should not contain standards about the evaluation of judges’ work.**

* 1. **Remedy against all decisions of the HJC on the status of judges before the Constitutional Court**

Opinion number 3(2003) of the CCJE On the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality: *the arrangements regarding disciplinary proceedings in each country should be such as to allow* ***an appeal*** *from the initial disciplinary body (whether that is itself an authority, tribunal or court)* ***to a court*** (paragraph 77v).

Opinion number 10(2007) of the CCJE on the Council for the Judiciary at the service of society:

 *“A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion Number 3 (2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body”* (paragraph 63.), *The Judiciary Council is vested with a mandate in the area of ethics; it may also be addressed by citizens involved in a trial before the court, with their complaints. In order to avoid conflict of interest, disciplinary proceedings in first-instance, when they are not dealt with by the disciplinary court, should be adjudicated by the disciplinary commission, consisting of judges elected by their peers that are not members of the Judiciary Council, with the possibility of* ***appeal to a higher court****[[118]](#footnote-119)“(*paragraph 63.).

**The Judges’ Association believes it is a higher guarantee of independence and therefore it is necessary for appeals against all decisions pertaining to the status of judges to be dealt with by the court.**

**The mandate of the Constitutional Court to deliver a decision on the appeal of a judge against the final decision on his/her dismissal from office would not be touched by such a concept.**

* 1. **Leaving certain important matters outside of the Constitution**
		1. Defining the content of judicial power

The need to define the content of judicial power as enshrined in the Constitution is particularly important in light of the fact that the last decade has been marked by various attempts to “extract” certain matters related to key human rights from the jurisdiction of courts and thereby from judicial power and entrust such matters to other state authorities, which do not enjoy any guarantees in terms of independence and impartiality. Changes in the justice system in the last couple of years (establishing the Business Registers Agency instead of the commercial register, the cadastral property records instead of the land registry, the introduction of public notaries and enforcement officers) have “extracted” from the courts a great deal of affairs formerly dealt with by the latter, vesting non-judicial institutions and the Ministry of Justice (or departments subordinated to it) with the power to deal with such affairs, thereby increasing the influence of the executive on the judiciary.

Stripping the courts of their jurisdiction was carried out with the explanation that it will relieve the justice system from the burden of affairs that are not typically judicial, which will give judges more time to focus on purely judicial work. However, there has never been an analysis to respond to the question what are these tasks that are “typically not judicial” (namely, where is the border between the judicial branch and the remaining two branches of power), how many judges are there in the system that discharge such tasks and what would be the pros and cons for the state and the citizens if these affairs would be kept in the jurisdiction of courts, as opposed to them being entrusted to different generic professions.

The Law on Enforcement and Security (LES) from 2011 introduced a new judicial function – enforcement officer, vested with the authority to carry out, in alternation with the courts, enforcement and security procedures. It is a natural person appointed by the Justice Minister to carry out, as an official person, enforcement from the jurisdiction of the court.[[119]](#footnote-120) The enforcement officer is also vested by Law to appoint his (temporary) deputy. The legislators explained the introduction of enforcement officers with the need to shorten the enforcement procedure, reduce the number of enforceable cases and to reduce the burden on the courts. The mandate of the enforcement officer, appointed by the Minister to carry out part of the mandate of the courts in the interest of the public, under the Law on Enforcement and Security, to be allowed to vest a third party with the said mandate of the court by his/her decision is intolerable in principle, since it undermines the independence of the judicial branch and opens the door to serious abuse. Transferring public powers to enforcement officers has also resulted in less revenue from court fees and increased the expenditures of the citizens in relation to fees and costs of enforcement officers. Abandoning the two-instance system/concept (the possibility of lodging an appeal) has undermined the right to fair trial, which must exist in the enforcement procedure too, caused uncertainty in the enforcement procedure, since the councils, which were set up in 36 basic courts in order to adjudicate in procedures on complaints, started to adjudicate differently in cases with the same facts, placing the citizens in an uneven position before the court in the process. Therefore, the current Law on Enforcement[[120]](#footnote-121) has reinstated the appeal in the enforcement procedure.

The citizens have already complained against the practice of enforcement officers concerning the manner in which they carry out enforcement, as well as over the increased costs of procedure, particularly in view of the increasing poverty. Furthermore, statistical analysis[[121]](#footnote-122) have shown that a total of 2,239,927 cases remained open at the end of 2014, of which 1,893,157 enforceable cases. However, according to data for 2014, in which enforcement procedures were carried out by both the courts and enforcement officers, 197 enforcement officers completed 167,000 enforceable cases. The enforcement officers were vested with the authority to collect financial claims, which are the quickest and easiest to enforce and they were also allowed, as opposed to the courts, to have access to data of the Republic Pension and Disability Fund and particularly to the citizens’ identification number, which facilitates considerably attempts to find the executive debtor and carrying out the actual enforcement. In the same period, slightly less enforcement judges (195) completed 326,000 enforceable cases, twice as much as the enforcement officers. It should be borne in mind that the judges were carrying out all types of enforcement, which are complex (handing over a child in family dispute-related enforcement, sale of property, etc.) and require time due to the need to take a series of actions in several stages. Nonetheless, at the time of the adoption of the current Law on Enforcement and Security[[122]](#footnote-123), the legislator estimated it was more reasonable to invest, not in the capacity of the courts, but in the enforcement system that is de facto managed and supervised not by the judicial branch, but by the executive branch.

The Law on Public Notaries[[123]](#footnote-124) has introduced yet another new, for modern Serbia, legal profession – public notaries, also aimed at relieving the courts from the excessive burden of tasks the legislator branded as “atypically judicial” (certification of legal transactions, affairs related to the safeguarding of money, rectification of securities and other cases, as well as other tasks entrusted by the court). The Law on Public Notaries vested the Justice Minister, inter alia, to determine the number of public notary positions and seats of public notaries, to determine their tariffs, decide about the examination for public notaries, who will be in the examination commission, to select public notaries and to supervise their work and their Chamber, to be the second-instance authority in disciplinary proceedings, as well as to dismiss public notaries.[[124]](#footnote-125) The motives of the legislator are unclear as to the fact that he omitted to prescribe the obligation of the public notary to pay part of the fee for services rendered to the State, since public notaries were entrusted the certification services the fees for which used to be paid in the state budget (collection of court fees).[[125]](#footnote-126) It is undisputable that several European countries have public notaries or similar occupations, which are also appointed, along with judges, by the justice minister. In Serbia, however, the concept according to which the Justice Minister would select and dismiss judges and prosecutors would clearly not be a good one and therefore caution is required in relation to similar professions related to the judiciary.

The Law on Court Expert Witnesses has prescribed “re-election” for court expert witnesses too, which lost that capacity if the Justice Minister did not to reappoint them by 08/07/2011.

The aforementioned arrangements have practically enabled the Ministry of Justice to control and determine, on its own, who will become a lay judge, court expert witness, enforcement officer and public notary and how they will work.

The issue of defining the content of judicial power is also relevant for delimitating the jurisdiction of courts, as the sole holders of judicial power, as well as the Constitutional Court, which, under the Constitution, is not a holder of judicial power.

Article 143, paragraph 1 of the Constitution, stipulates that “Judicial power in Serbia shall belong to courts of general and special jurisdiction”, Article 98 says that the National Assembly shall be the holder of legislative and constitutional power, Article 122 that the holder of executive power is the Government. The content of legislative and executive power is defined by the Constitution by prescribing the jurisdiction of its holders, the National Assembly in Article 99 and the Government in Article 123. On the other hand, the Constitution stops short of defining the content of judicial power, since it does not provide for the jurisdiction of courts, as holders of judicial power, nor does it define such power in any other way.

Therefore,

**The Judges’ Association proposes the content of judicial power to be potentially also defined in the following way:**

**The judicial power settles disputes about a right that ensures the rule of law.**

* + 1. Additional guarantees of judicial independence – reasons for termination of judicial office and material guarantees
1. Just like it is necessary, for the sake of judicial independence, to regulate the proper way to be elected/appointed to judicial office, the manner of termination of office is also one of the guarantees of judicial independence. It is therefore necessary for the Constitution to regulate the conditions for the termination of office and the reasons for dismissing a judge. It must be borne in mind that *“An unfavorable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard. These conclusions must follow a proper procedure and be based on reliable evidence (paragraphs 29, 44).”*[[126]](#footnote-127)

In the Report of the Venice Commission on judicial independence CDL-AD 2010(004) dated 16/03/2010, the Commission relied upon:

*„44. Recommendation (94) 12 provides that judges’ remuneration should be guaranteed by law (Principle I.2b.ii) and “commensurate with the dignity of their profession and burden of responsibilities” (Principle III.1.b). The Charter, supported by the CCJE, extends this principle to guaranteed sickness pay and retirement pension.*

*45. The CCJE adds in Opinion Number 1:
 „62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.”* Therefore,

*„46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded.”*

Therefore,

**The Judges’ Association proposes that the Constitution should amend the guarantees of judicial independence** by prescribing the following:

***Judicial office shall be permanent.***

***The judge’s office shall cease at his/her request or when he/she will have fulfilled the criteria for old-age retirement as prescribed by the Law.***

***The judge may not be relieved of office against his/her own will, save in the case of an unconditional sentence for a criminal offence to a prison term of no less than six months or for a punishable offence incapacitating him/her for judicial office, when he/she discharges his duty incompetently and without due diligence or in the case of permanent loss of working capacity for judicial office.***

***The judge has the right to a salary and pension in accordance with the dignity and responsibility of judicial office.***

***The pension may not be less than the last salary of the judge.***

***The salary and pension of the judge may not be reduced.***

* 1. **Proposals for the remaining contested concepts**

Summing up the proposals tabled by the Network, the Judges’ Association views as contested the proposed concepts that primarily concern the HJC, both in terms of the total change of the composition of the HJC (by excluding the President of the highest court from HJC membership, the President of the HJC from the ranks of non-judge members, proposals for the members of the HJC, with the exception of law professors, to include *“renown jurists possessing recognized knowledge and experience in the area of organization, functioning and reform of the judiciary, which would be elected by the National Assembly at the proposal of competent parliamentary judiciary committee, as it is the case with the judges of the Constitutional Court”)* and in terms of reducing the number of HJC members (from 11 to 10 members), the functioning of the HJC (“golden vote” of the President of the HJC); shorter term of office of the members of the HJC (four instead of five years); narrowing down the mandate of the HJC.

Furthermore, the Network has also proposed the already functional immunity of judges to be “narrowed down”, abandoning the concept of collegial adjudication (adjudication by a panel of judges), namely pushing out lay judges from the trial (and alternatively, instead of lay judges, the introduction of a jury or replacing lay judges by trainee judges, namely those attending the initial training at the Judicial Academy).

These issues are very important. The matter of the HJC is particularly complex and extremely important for judicial independence. However, the format of the written contribution does not allow for these issues to be elaborated on at the same time. After all, these issues have not been tabled for discussion on the second round table scheduled for 07/09/2017.

1. **Proposal of the Judges’ Association for further discussion**

The Judges’ Association, just like the other participants of the round table, proposed on the first round table held on 21/07/2017 and hereby reiterates that proposal, that each of the aforementioned contested issues, especially related to the HJC, as well perhaps other relevant issues, be paid particular attention and be subject to a separate discussion.

In view not only of the different positions on the aforementioned matters that are regulated by the Constitution, but also the considerable social impact of the open issues that are yet to be regulated by the Constitution and divergent views about them,

The Judges’ Association of Serbia:

* Finds that each of these specific issues warrants a separate debate;
* Just like the other professional associations and the majority of non-governmental associations, proposed in its memo 45/17 from 30/06/2017, delivered to the Ministry of Justice the same day, to abandon the possibility to respect the deadlines set in the AP for the adoption of the amendments to the Constitution by the end of 2017 and to provide for realistic deadlines, in order to have a genuinely thorough and comprehensive public debate.
* Particularly emphasizes that the dialogue must include all key institutions and organizations, while informing and involving the citizens in that process, both through civil society organizations and their political representatives, stressing that the invitation of the Ministry of Justice to such round tables about specific professional matters must not be the only framework for dialogue, nor should it be used for creating a semblance of a comprehensive public debate;
* Proposes that a public debate be organized successively about each of the aforementioned issues individually and in different formats (round tables, thematic TV programs);
* Proposes to invite to each of these debates the representatives of the competent bodies of the National Assembly, the HJC, the SPC, the Commission for the Reform of the Judiciary and its Working Group for the Analysis of the Constitutional Framework for the Judiciary, Courts and Prosecutors’ Offices, experts for constitutional law and the law on courts and especially constitutional law professors, professional associations of judges and prosecutors, the Bar Association, as well as other interested professional and citizens’ associations.

Dragana Boljević

President of the Judges’ Association of Serbia

1. According to information available on the website of the Ministry of Justice, the members of the ROLAN network are the Institute for Criminological and Sociological Research, the Serbian Association for Criminal Law Theory and Practice, the Europius Citizens’ Association and the Alumni Club of the Judicial Academy. [↑](#footnote-ref-2)
2. The publications of the Judges’ Association are posted at <http://sudije.rs/index.php/o-nama/164-publikacije/95-publikacije.html>. [↑](#footnote-ref-3)
3. The organization of the Justice System in the Republic of Serbia in the context of constitutional changes – An analysis of EU standards and proposal of possible amendments to the Constitution, accessed on 04/08/2017. [↑](#footnote-ref-4)
4. Ibid, page 6. [↑](#footnote-ref-5)
5. Ibid, page 7. [↑](#footnote-ref-6)
6. Ibid, page 6. [↑](#footnote-ref-7)
7. Ibid, page 6. [↑](#footnote-ref-8)
8. Ibid, page 2. [↑](#footnote-ref-9)
9. See the CCJE Opinion number 1(2001). [↑](#footnote-ref-10)
10. See CCJE Opinions number 3(2002), number 4(2003), number 6(2004), number 11(2008), number 14(2011). [↑](#footnote-ref-11)
11. The title of that report “How can the appointment and assessment (qualitative and quantitative) of judges be made consistent with the principle of judicial independence?“ See at <http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2006-conclusions-E.pdf> . [↑](#footnote-ref-12)
12. Opinion number 17(2014) CCJE, paragraph 7 (paragraph 3). [↑](#footnote-ref-13)
13. Opinion number 405/2006 on the Constitution of the Republic of Serbia CDL-AD(2007)004 from 19/03/2007 paragraphs 65 and 70. [↑](#footnote-ref-14)
14. Ibid, paragraphs 64 and 66. [↑](#footnote-ref-15)
15. Venice Commission Report on the Independence of Judicial Systems, Part I: Independence of Judges,CDL-AD(2010)004, Study number 494/2008 from 16/03/2010, paragraph 10. [↑](#footnote-ref-16)
16. Opinion number 17. CCJE on the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence, paragraph 1. [↑](#footnote-ref-17)
17. See Recommendations CM/Rec(2010)12, paragraphs 59 – 65. [↑](#footnote-ref-18)
18. See CCJE Magna Carta of Judges (2010), paragraph 15. [↑](#footnote-ref-19)
19. See CCJE Opinion number 11 (2008), paragraph 36. [↑](#footnote-ref-20)
20. See CCJE Opinion number 11 (2008), paragraph 32. [↑](#footnote-ref-21)
21. See CCJE Opinion number 13(2010), Conclusion А; CCJE Magna Carta of Judges (2010), paragraph 17. [↑](#footnote-ref-22)
22. See CCJE Opinions number 1(2001), number 3(2002), number 4(2003), number 6(2004) and number 11(2008). [↑](#footnote-ref-23)
23. Opinion number 17(2014) CCJE, paragraph 7. [↑](#footnote-ref-24)
24. Zimmermann and Steiner v. Switzerland, judgment in application 8737/79 from 13/07/1983. [↑](#footnote-ref-25)
25. The Law on Seats and Regions of Courts and Public Prosecutors’ Offices, *Official Gazette of the RS*, number 116/08. [↑](#footnote-ref-26)
26. The Law on Seats and Regions of Courts and Public Prosecutors’ Offices, *Official Gazette of the RS*, number 101/13. [↑](#footnote-ref-27)
27. Law on Amendments to the Law on the Organization of Courts, *Official Gazette of RS* number101/13. [↑](#footnote-ref-28)
28. Criminal Procedure Code, *Official Gazette of the RS,* number 72/11, 101/11, 121/12, 32/13, 45/13, 55/14. [↑](#footnote-ref-29)
29. The National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 57/13 from 03/07/2013. [↑](#footnote-ref-30)
30. Action Plan for the Implementation of the National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 71/13, 55/14, Conclusion on the Approval of the Revised Action Plan for the Implementation of the National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 106/16 from 29/12/2016. [↑](#footnote-ref-31)
31. The European Commission issued a positive opinion about [the last version of the Action Plan for Chapter 23](http://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php) on 25/09/2015 The Action Plan for Chapter 23 was adopted by the Government in its technical term after the elections, on the session held on 27/04/2016. The Plan has not been published in the Official Gazette. [↑](#footnote-ref-32)
32. See the part on the structure of the violations of rights in the decisions the ECHR adopted against Serbia, which shows that a violation of the right to fair trial was established in less than in 1/5 of the cases. [↑](#footnote-ref-33)
33. As opposed of such aberrant understanding of efficiency, the Recommendation of the Council of Ministers of the Council of Europe Rec. 2010(12) to member states on the independence, efficiency and responsibilities defines efficiency in the following manner: “Efficiency is the delivery of quality decisions within a reasonable time following fair consideration of the issues.” (Paragraph 31.). [↑](#footnote-ref-34)
34. In early May 2014, the President of the Supreme Court of Cassation first requested the other court presidents to take measures in order to reduce the backlog of cases (for preferential treatment i.e. skipping the queue, adjudicating and expediting cases where the procedure has been going on for longer than 5 years – for criminal cases and up to 10 years – for civil cases until 15/11/2014). Then, all the court presidents did the same in each specific case and ordered formally the judges to complete and expedite old cases by 15/11/2014. It was not only unlawful, but impossible and simply did not happen, and not only due to the protests of attorneys at law. Part of the judges understood the request for speed as the ultimate imperative and started to adjudicate cases hastily. It happens that, in order to speed up cases, especially old ones, the necessary evidence is not presented, in spite of the proposals of the parties. If the higher instance should repeal a decision, certain judges would merely transcribe (literally) their previous judgment. The court of second instance may repeal a decision only once and if, in the appellate procedure, they do not uphold the repeated decision of the court of first instance, they must open the debate in the appellate proceedings, which slows down their work, both in the given case and in other second-instance cases. Furthermore, for the sake of quicker adjudication, it happens that courts of second instance confirm the repeated first-instance decisions, although they had previously repealed an identical decision. Therefore, it was observed that the Constitutional Court has been increasingly acknowledging the fact that the court decisions, even those of the highest courts, have been violating the right to fair trial, including the right of the party to a reasoned court decision. [↑](#footnote-ref-35)
35. Article 150 of the Constitution prescribes that a judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated or transferred to another court only on his/her own consent (paragraph 1), and that in case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred to another court, in accordance with the Law (paragraph 2). [↑](#footnote-ref-36)
36. The said text, the ROLAN Network, page 27. [↑](#footnote-ref-37)
37. See CCJE Magna Carta of Judges (2010), paragraphs 3 and 4. [↑](#footnote-ref-38)
38. See CCJE Opinion number 2(2001), paragraph 2. [↑](#footnote-ref-39)
39. See CCJE Opinion number 4(2003), paragraphs 4, 8, 14 and 23-37. [↑](#footnote-ref-40)
40. See CCJE Opinion number 3(2002), paragraph 51. [↑](#footnote-ref-41)
41. The Law on Seats and Regions of Courts and Public Prosecutors Offices, *Official Gazette of the RS*, number 63/2001 and 42/2002. [↑](#footnote-ref-42)
42. Changes to the courts network were said to be carried out in order to speed up the proceedings and making the system cheaper, to crack down on the corruption chain (the defendant, the parties, the counsel, the policeman, the prosecutor, the judge), while adhering to “random judge principle” and even caseload for all courts and judges. It was announced that the cases will be randomly distributed to each judge in the basic court and that the judges, not the citizens, will be travelling to the courts, to reach the citizens. As to civil cases (litigation, probate proceedings, extrajudicial), the situation differed from court to court, since every court president was authorized to organize on his own the trials in the court units in the region of “his” court. Hence, in some courts, judges were “travelling” along with their staff to the court units, while in other courts, only some judges worked in court units (most often those that lived in the same units). [↑](#footnote-ref-43)
43. The Labour Law, *Official Gazette of the RS*, number 70/2001, 73/2001 [↑](#footnote-ref-44)
44. The Labour Law, *Official Gazette of the RS*, number 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 - decision of the Constitutional Court. [↑](#footnote-ref-45)
45. The Law on Companies, *Official Gazette of the RS,* number 125/2004 and 36/2011 - other law. [↑](#footnote-ref-46)
46. The Law on Companies, *Official Gazette of the RS*, number 36/2011, 99/2011, 83/2014, 5/2015. [↑](#footnote-ref-47)
47. Law on the Market of Securities and Other Financial Instruments, *Official Gazette of the FRY,* number 65/2002 and *Official Gazette of the RS,* number 57/2003, 55/2004, 45/2005, 101/2005 - other law, 85/2005 - other law and 46/2006 - other law. [↑](#footnote-ref-48)
48. Law on the Market of Securities and Other Financial Instruments, *Official Gazette of the RS,* number 47/2006. [↑](#footnote-ref-49)
49. Law on the Capital Market, *Official Gazette of the RS*, number 31/2011, 112/2015, 108/2016. [↑](#footnote-ref-50)
50. Law on the Takeover of Joint Stock Companies, *Official Gazette of the RS*, number 46/2006, 107/2009, 99/2011 108/2016. [↑](#footnote-ref-51)
51. Law on Privatization, *Official Gazette of the RS*, number 38/2001, 18/2003, 45/2005, 123/2007, 123/2007 - other law, 30/2010 - other law, 93/2012 and 119/2012, 51/2014, 52/2014 - decision of the Constitutional Court. [↑](#footnote-ref-52)
52. Law on Privatization, *Official Gazette of the RS,* number 83/2014, 46/2015, 112/2015, 20/2016 - original interpretation. [↑](#footnote-ref-53)
53. Law on the Privatization Agency, *Official Gazette of the RS*, number 38/2001, 135/2004, 30/2010, 115/2014 and 89/2015. [↑](#footnote-ref-54)
54. Law on Amendments to the Law on the Privatization Agency, *Official Gazette of the RS,* number 112/2015 [↑](#footnote-ref-55)
55. Law on the Shareholders Fund of the Republic of Serbia, *Official Gazette of the RS*, number 44/98. [↑](#footnote-ref-56)
56. Law on the Shareholders Fund, *Official Gazette of the RS*, number 38/2001 and 45/2005. [↑](#footnote-ref-57)
57. Law on the Business Registers Agency, *Official Gazette of the RS,* number 55/2004, 111/2009 and 99/2011. [↑](#footnote-ref-58)
58. Law on the Registration Procedure in the Business Registers Agency, *Official Gazette of the RS*, number 99/2011, 83/2014. [↑](#footnote-ref-59)
59. Law on Bankruptcy Procedure, *Official Gazette of the RS*, number 84/2004 and 85/2005 - other law. [↑](#footnote-ref-60)
60. Law on Bankruptcy, *Official Gazette of the RS*, number 104/2009, 99/2011 - other law and 71/2012 - decision of the Constitutional Court, 83/2014. [↑](#footnote-ref-61)
61. The Law on Rehabilitation, Bankruptcy and Liquidation of Banks, *Official Gazette of the SFRY*, number 84/89 and 63/90 *and Official Gazette of the FRY*, number 37/93, 26/95, 28/96, 44/99 and 53/2001. [↑](#footnote-ref-62)
62. Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies, *Official Gazette of the RS*, number 61/2005, 116/2008 and 91/2010. [↑](#footnote-ref-63)
63. Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies, *Official Gazette of the RS*, number 14/2015. [↑](#footnote-ref-64)
64. Law on Civil Procedure, *Official Gazette of the RS*, number 125/2004, 111/2009, 36/2011, 53/2013 - Decision of the Constitutional Court. [↑](#footnote-ref-65)
65. Law on Civil Procedure, *Official Gazette of the RS*, number 72/2011, 49/2013 - Decision of the Constitutional Court, 74/2013 - Decision of the Constitutional Court, 55/2014. [↑](#footnote-ref-66)
66. Law on Enforcement Procedure, *Official Gazette of the FRY*, number 28/2000, 73/2000 and 71/2001. [↑](#footnote-ref-67)
67. Law on Enforcement Procedure, *Official Gazette of the RS*, number 125/2004. [↑](#footnote-ref-68)
68. Law on Enforcement and Security, *Official Gazette of the RS*, number 31/2011, 99/2011 - other law, 109/2013 - decision of the Constitutional Court, 55/2014, 139/2014. [↑](#footnote-ref-69)
69. The provisions of articles 300 and 311 of the Law on Enforcement and Security have ceased to be effective on January 4, 2012, on the day when the Law on Amendments to the Law on the Business Register Agency, *Official Gazette of the RS*, number 99/2011. [↑](#footnote-ref-70)
70. Law on Enforcement and Security, *Official Gazette of the RS*, number 106/2015, 106/2016 - original interpretation. [↑](#footnote-ref-71)
71. Penal Code, *Official Gazette of the RS*, number 85/2005, 88/2005 - corrigendum, 107/2005 - corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014. [↑](#footnote-ref-72)
72. The Criminal Procedure Code, *Official Gazette of the FRY*, number 70/2001 and 68/2002 and *Official Gazette of the RS*, number 58/2004, 85/2005, 115/2005, 85/2005 - other law, 49/2007, 20/2009 - other law, 72/2009 and 76/2010. [↑](#footnote-ref-73)
73. The Criminal Procedure Code, *Official Gazette of the RS*, number 46/2006, 49/2007 and 122/2008. [↑](#footnote-ref-74)
74. The Criminal Procedure Code, *Official Gazette of the RS*, number 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, 55/2014. [↑](#footnote-ref-75)
75. Law on the High Judiciary Council, *Official Gazette of the RS*, number 63/2001, 42/2002, 39/2003, 41/2003 - corrigendum, 44/2004 and 61/2005. [↑](#footnote-ref-76)
76. Law on the High Judiciary Council, *Official Gazette of the RS*, number 116/2008, 101/2010, 88/2011, 106/2015. [↑](#footnote-ref-77)
77. The Law on the Organization of Courts, *Official Gazette of the RS*, number 63/2001, 42/2002, 27/2003, 29/2004, 101/2005, 46/2006 and 116/2008 - other law. [↑](#footnote-ref-78)
78. The Law on the Organization of Courts, *Official Gazette of the RS*, number 116/2008, 104/2009, 101/2010, 31/2011 - other law, 78/2011 - other law, 101/2011, 101/2013, 40/2015, 106/2015, 13/2016, 108/2016. [↑](#footnote-ref-79)
79. The Law on Judges, *Official Gazette of the RS*, number 63/2001, 42/2002, 17/2003 - decision of the Constitutional Court RS, 25/2003 - corrigendum of decision CCRS , 27/2003, 29/2004, 35/2004 - decision of the Constitutional Court, 44/2004, 61/2005, 101/2005, 46/2006 - other law and 21/2009 - decision of the Constitutional Court. [↑](#footnote-ref-80)
80. The Law on Judges, *Official Gazette of the RS*, number 116/2008, 58/2009 - decision of the Constitutional Court, 104/2009, 101/2010, 8/2012 - decision of the Constitutional Court, 121/2012, 124/2012 - decision of the Constitutional Court, 101/2013, 111/2014 - decision of the Constitutional Court, 117/2014, 40/2015, 63/2015 - decision of the Constitutional Court, 106/2015, 63/2016 - decision of the Constitutional Court, 47/2017. [↑](#footnote-ref-81)
81. See part 4.2 about the proposal to give up the irremovability of judges allegedly for the sake of greater efficiency. [↑](#footnote-ref-82)
82. Ramadi et. al. v. Albania (13/11/2007), Manuhsaqe Puto and others v. Albania (31/07/2012), Вјасу v. Romania (09/12/2009). [↑](#footnote-ref-83)
83. *Vučkovic and others v. Serbia*, *Chamber judgmnet from 28/08/2012; as well as of the Grand Chamber from 25/03/2014, which, in paragraph 89, acknowledges the finality in terms of the inadmissible petition due to inconsistent case-law.*  [↑](#footnote-ref-84)
84. The bold font in the cited excerpts of ECHR decisions is taken from the original text. [↑](#footnote-ref-85)
85. The National Strategy and the Action Plan provide for the introduction of a Certification Commission. Under the AP, the Certification Commission should consist of the President of the Case-Law Department of the Supreme Court of Cassation, four appellate courts, the Commercial Appellate and Administrative Court. The Commission would be assisted, albeit in undefined form for the time being, by law professors and attorneys at law. Its task would to be to identify court decisions that represent the “best practice” or “best case-law” in certain types of disputes and to have all other decisions in such cases delivered in accordance with the established case-law, namely to prevent decisions being issued from courts, which, in the opinion of the Certification Commission, diverge from case-law. This would provide for equal adjudication by the courts. Moreover, there are already proposals to have bylaws prescribe disciplinary accountability of judges whose decisions have, in the opinion of the Certification Commission, diverged from best case-law, if these judges refuse to change their position in their decisions. [↑](#footnote-ref-86)
86. Modern Serbian statehood was established in the XIX century. Serbia adopted its first constitution in 1835 (when only nine states in Europe had a written constitution) and its Civil Code from 1844 was the third civil code in Europe, after the French and the Austrian ones. [↑](#footnote-ref-87)
87. Report of the Ombudsman of the Republic of Serbia for 2013, page 3 and EC Progress Report for Serbia for 2014, page 70. [↑](#footnote-ref-88)
88. Opinion number 10(2007) of the CCJE on the Council for the Judiciary in the Service of Society, paragraph 68. [↑](#footnote-ref-89)
89. Opinion number 4(2003) of the CCJE on appropriate initial and in-service training for judges at national and European levels, paragraph 6. [↑](#footnote-ref-90)
90. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 57. [↑](#footnote-ref-91)
91. Law on the Judicial Academy, *Official Gazette of the RS*, number 104/2009, 32/2014 - Decision of the Constitutional Court, 106/2015, Article 3. [↑](#footnote-ref-92)
92. Decision of the Constitutional Court on the Unconstitutionality of the Provisions of Article 40, paragraphs 8, 9 and 11 of the Law on the Judicial Academy (*Official Gazette of the RS*, number 104/2009), was published in the *Official Gazette of the Republic of Serbia*, number 32/2014 from 20.03.2014. [↑](#footnote-ref-93)
93. *Ibid*. [↑](#footnote-ref-94)
94. CCJE Opinion number 4(2003), paragraph 13. [↑](#footnote-ref-95)
95. *Ibid, paragraph* 16. [↑](#footnote-ref-96)
96. *Ibid, paragraph*s 28 – 30. [↑](#footnote-ref-97)
97. The working group for the analysis of the amendments to the constitutional framework was established by the Commission for the Implementation of the National Strategy for the Reform of the Judiciary on 29/11/2013. The members of the working group were: Dragomir Milojević, Chairman of the working group and President of the Supreme Court of Cassation and HJC, Danilo Nikolić, PhD, Vice-Chairman of the working group, State Secretary in the Ministry of Justice and Public Administration; Snežana Andrejević, Judge of the Supreme Court of Cassation ; Đorđe Ostojić, Deputy Republic Public Prosecutor; Branko Stamenković, Special Prosecutor for High-Tech Crime, member of the SPC; Radovan Lazić, Chairman of the Managing Board of the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia; Dragana Boljević, Judge of the Appellate Court in Belgrade and President of the Judges’ Association Serbia; Prof. Vladan Petrov, PhD, Associate Professor of Constitutional Law and Associate Dean of the Faculty of Law of Belgrade; Prof. Darko Simović, PhD, Professor of Constitutional Law of the Criminalistic Police Academy in Belgrade; Prof. Irena Pajić, PhD, Professor of Constitutional Law of the Faculty of Law of Niš; and Prof. Slobodan Orlović, PhD, Associate Professor of Constitutional Law of the Faculty of Law of Novi Sad. [↑](#footnote-ref-98)
98. Survey on the views of judges about the situation of the courts and the judiciary in Serbia was published by the Judges’ Association and the Center for Free Elections and Democracy in the publication *Strengthening the Independence and Integrity of Judges in Serbia*, the Judges’ Association of Serbia, Belgrade 2017, page 9. [↑](#footnote-ref-99)
99. The bold font is taken from the original text. [↑](#footnote-ref-100)
100. The Judges’ Association published as early as back in 2007, after a two-year survey, the first and so far only book in Serbia [Evaluation of the Performance of Judges](http://www.sudije.rs/files/vrednovanje_rada_sudija_-_cirilica.pdf), which deals with the quantitative aspect of judges’ work and gives proposals to take further measures in studying this matter. [↑](#footnote-ref-101)
101. Efficiency is defined in the following way - see paragraph number 31. Recommendations CM/Rec (2010)12 from 17.11.2010. [↑](#footnote-ref-102)
102. See the Opinion of the European Commission on Democracy by Law (Venice Commission) number 528/2009 dated 15.6.2009 on the Draft Criteria and Standards for the Election of Judges and Court Presidents in Serbia. [↑](#footnote-ref-103)
103. CCJE Opinion number 17(2014), paragraph 23. [↑](#footnote-ref-104)
104. *Ibid, paragraph* 49.4. [↑](#footnote-ref-105)
105. See CCJE Opinion number 1(2001), especially paragraph 45, CCJE Opinion number 6(2004), paragraph 34. [↑](#footnote-ref-106)
106. See CCJE Opinion number 1(2001), paragraph 66, Recommendations CM/Rec(2010)12, paragraphs 22-25. [↑](#footnote-ref-107)
107. See, for example, the systems in Finland and the Netherlands. [↑](#footnote-ref-108)
108. As it is the case in the United Kingdom. [↑](#footnote-ref-109)
109. CCJE Opinion number 17(2014). [↑](#footnote-ref-110)
110. See CCJE Opinion number 6(2004), paragraph 42. [↑](#footnote-ref-111)
111. See Recommendations CM/Rec (2010)12, paragraph 32, and CCJE Opinion number 2(2001), paragraph 4. [↑](#footnote-ref-112)
112. See CCJE Opinion number 11(2008), paragraph 57. [↑](#footnote-ref-113)
113. See CCJE Opinion number 11(2008), paragraph 74, and CCJE Opinion number 6(2004), paragraph 36. [↑](#footnote-ref-114)
114. See Kyiv Recommendations (2010), paragraph 28. [↑](#footnote-ref-115)
115. See ENCJ Report 2012-2013, section 4.12. [↑](#footnote-ref-116)
116. CCJE Opinion number 17(2014), paragraph 35. [↑](#footnote-ref-117)
117. *Ibid, paragraph* 9. [↑](#footnote-ref-118)
118. See paragraph 71 of Opinion number 3(2003) CCJE. [↑](#footnote-ref-119)
119. Public opinion associates the high number of enforceable cases (unrealized enforcements) with the inefficiency of the courts, although the causes differ and are not only related to the courts. Had the statistical analyses been dealing with the causes, instead of focusing on the mere number of enforceable cases, different situations would have been identified: inactivity of the creditor, insolvency of the debtor (liquidation and bankruptcy of legal persons, the debtor does not possess property and the creditor uses his procedural right to retain the proposed enforcement means, although the account of the debtor has been blocked), specific statutory concepts, etc. In a great deal of cases, the courts have undertaken the enforcement measures prescribed by the Law, but the procedures cannot be completed for different reasons. Furthermore, the physical and technical infrastructure of the courts in Serbia are uneven and mostly inadequate; there are not enough judges and supporting and administrative staff, enforcement officers, vehicles; judges and their staff have insufficient training time left, in view of the constant changes of systemic laws in an extended period of time, etc. [↑](#footnote-ref-120)
120. Law on Enforcement and Security, *Official Gazette of the RS*, number 106/15 from 21/12/2015, implementation started as of 01/07/2016. [↑](#footnote-ref-121)
121. Supreme Court of Cassation, *Analysis of the work of courts of general and specific jurisdiction for 2014*: <http://www.vk.sud.rs/sites/default/files/attachments/ANALIZA%20rada%20sudova%20za%202014%20%20KONA%C4%8CNI_0_0.pdf> (03/09/2016). [↑](#footnote-ref-122)
122. Law on Enforcement and Security, *Official Gazette of the RS*, number 106/15 from 21/12/2015, implementation started as of 01/07/2016. [↑](#footnote-ref-123)
123. And Law on Public Notaries, *Official Gazette of the RS*, number 31/2011 from 09/05/2011, 85/2012, 19/2013, 55/2014, 93/2014, 121/2014, 6/2015, 106/2015, adopted on 05/05/2011. (implemented since 01/09/2012), the same day as the Law on Enforcement and Security, Legal Profession Act, Law on the Enforcement of Criminal Sanctions, among others, in the scope of the “package” of fifteen laws passed on that day. Interestingly, all of the fifteen laws were discussed within a single debate, which automatically prevented the MPs to review the draft laws and hence to prepare themselves appropriately for the debate that was also shortened due to the single debate format. [↑](#footnote-ref-124)
124. With the adoption of the Law on Public Notaries, the Justice Minister (who was the proposer of the Law), introduced the mandate for himself directly, or for the Ministry, to determine the number of public notary positions (Article 15), to decide who will be a public notary (article 2, paragraph 3) and to dismiss public notaries (Article 31, paragraph 2), to supervise the activities of public notaries (Article 13) and of the Chamber of Notaries (Article 132), to give his approval for the Statute of the Chamber of Notaries (Article 120, paragraph 3), to receive requests for taking the public notary examination (Article 144, paragraph 1) and pass final decisions establishing the fulfilment of conditions for taking the examination (Article 144, paragraph 2), to regulate the passing of the examination and the curriculum of the examination (Article 145), to set up an examination commission (Article 146) and keep records on the persons that have passed the examination (Article 148), to act as a second-instance authority for disciplinary offences and to determine the composition, work and decision-making of the commission (Article 158), to adopt the tariff of public notaries (Article 135) give his approval for the Statute of the Chamber of Notaries (Article 120, paragraph 3), to receive requests for taking the public notary examination (Article 144, paragraph 1) and pass final decisions establishing the fulfilment of conditions for taking the examination (Article 144, paragraph 2), to regulate the passing of the examination and the curriculum of the examination (Article 145), to set up an examination commission (Article 146) and keep records on the persons that have passed the examination (Article 148), to act as a second-instance authority for disciplinary offences and to determine the composition, work and decision-making of the commission (Article 158), to adopt the tariff of public notaries (Article 135) and determine the seats of public notaries (Article 180).

 The Justice Minister has also wide powers over the enforcement officers. He appoints enforcement officers (Article 312, paragraphs 3 and 316) and deputy enforcement officers (Article 334), draws up the program of the examination for enforcement officers and the carrying out of the examination, as well as the composition and work of the examination commission (Article 314, paragraph 3), appoints the commission for the examination for enforcement officers (Article 313, paragraph 3), gives his approval for the acts of the Chamber regulating other activities incompatible with the tasks of the enforcement officer, and the content, submission and verification of data from the report on the assets of the enforcement officer (Article 314, paragraph 5), determines the number of enforcement officers (Article 315, paragraph 1), calls the open competition for enforcement officers (Article 315, paragraph 3), appoints the commission that carries out the competition (Article 315, paragraph 6), sets the general conditions for concluding an insurance contract and the lowest amount of insurance (Article 319, paragraph 1), gives his approval for the act of the Chamber on the requirements for the office and the necessary equipment (Article 319, paragraph 2), dismisses enforcement officers (Article 322), regulates in more detail the records of cases according to which the enforcement officers is acting (Article 328), adopts the tariff (Article 330), supervises the work of the enforcement officer (Article 346), appoints the members of the disciplinary commission (Article 354), proposes the initiation of disciplinary proceedings against enforcement officers (Article 355, paragraph 1), regulates the disciplinary proceedings (Article 355, paragraph 5). [↑](#footnote-ref-125)
125. It is only with the Amendments to the Law on Public Notaries, *Official Gazette of the RS*, number 121/2014 from 05/11/2014, adopted during the months-long protests of attorneys at law, that the legislator prescribed the duty of the public notary to pay 30% of the fees collected (without VAT) on a designated public revenue account, within 15 days of collection (Article 134, paragraph 6), whereas that amount will be allocated for the current expenditures of courts and improving the material condition of court employees, as well as for other expenditures and investments in courts, in accordance with the Law (Article 134, paragraph 6). It remains unclear on the basis of which calculations has that percentage been determined, but it provides at least some kind of budget revenue from the affairs that had previously been charged by the courts through court fees. [↑](#footnote-ref-126)
126. CCJE Opinion number 17(2014), paragraph 49.12. [↑](#footnote-ref-127)