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Subject: Note of Bar Association of Serbia Regards Draft Constitutional Amendments on the Judiciary in Republic of Serbia – Current State of the Case Law Harmonisation Concept

1. The Bar Association of Serbia, as an autonomous and independent organization of lawyers, has as its mission not only to ensure independence of the legal profession, but it almost naturally and logically necessarily seeks to establish the Republic of Serbia as a state based on the rule of law in which the judicial power is independent. We regretfully emphasize that it was not officially involved in the work on the drafting of the texts of the constitutional amendments that are related to the judiciary, on which the Venice Commission also declared itself in its opinions. Hereby, the Bar Association of Serbia wishes to point to the Venice Commission to very important aspects of the future constitutional amendments in the Republic of Serbia, which, for still unknown reasons, have been removed from the agenda. More precisely, the Bar Association of Serbia wishes to point out to the Venice Commission, which should produce an urgent opinion on the latest text of the constitutional amendments (*infra* No. 15),[1] to the actual state of functioning of the judiciary in Serbia on the level of the case law harmonization, bearing in mind that this problem, which was accentuated in 2018, is no longer being mentioned. What is more, it seems that neither the Venice Commission nor the relevant bodies of the EU have sufficient information about the actual state.

I.

2. Almost all the countries of the former Eastern Block, including the post-Yugoslav states, still follow in the footsteps of the heritage of the socialist law in the form of authority – most often, but not exclusively – of supreme courts to determine abstract legal views.[2] In other words, to communicate their legal view on a particular legal issue thereby bypassing the ruling in concrete cases. Legal views are either formally completely non-binding (it is claimed that they are only

[1] https://www.venice.coe.int/webforms/events/?id=3232 (accessed on 12 November 2021).
[2] On the issue of origin of such concept, compare only *Kischel*, Rechtsvergleichung. C.H. Beck, München (2015), § 7 Rn. 50 a. E.: „Tatsächlich gehörte die Befugnis oberster Gerichte, neben konkreten Einzelfallentscheidungen auch abstrakt-generelle Beschlüsse zu fassen und so die nachgeordneten Gerichte zu lenken, schon zu den typischen Kennzeichnen des sozialistischen Rechts".

„recommendations"), or are partially binding with respect to the court that determines a legal view. We are talking about the concept that has been investigated in detail in comparative literature, and there is almost a consensus that the subject under discussion is the concept that is strongly marked by the socialist legal tradition: it is an example of authoritarian legal discourse, reminiscence of the principle of unity of powers and inquisitorial paternalism.[3] Consequently, we are talking about all the features that are fundamentally contrary to the understanding of the judiciary in a state governed by the rule of law based on the separation of powers and independence of judges.

3. The Venice Commission, in its numerous opinions, including those that were referring to Serbia, emphasized unacceptability of such a concept. It was emphasized that it is contrary both to the separation of powers, and to the independence of judges, whereby the issue of the effect of legal views (binding on the courts or just a recommendation) was not central. Without doubt one can say that it is a constant „practice" of the Venice Commission.[4]

II.

4. Already in the first opinion of the Venice Commission related to Serbia, in 2008, it was emphasized that the authorizations of the Supreme Court of Cassation to take legal views out-of-trial are not acceptable, because „a court may not deliver any decisions outside its jurisdiction".

> 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. The same comment applies to the following sentence: "reviews application of law and other regulations and the work of courts".[5]

Likewise, the Venice Commission deemed that taking legal views outside concrete proceedings may have the significance of violation of the independence of judges.

> Court departments and sessions of all judges are useful, as they are to provide coherent jurisprudence and consistent decisions. It should, however, be clarified if the system applies to the handling of individual cases (lawsuits) or if the sessions, for example the joint session of departments (Article 40) or the session of all judges (Article 41) are of a general nature and are supposed to make recommendations or binding decisions. If the latter applies, this might be considered contrary to the independence of judges.[6]

5. The Serbian Government, as the sponsor of the Law, did not adopt the remarks, and the National Assembly, in 2008, enacted the Law on Organisation of Courts, which provides for the concept of legal views out-of-trial, to wit not only as the authority of the Supreme Court of Cassation, but also expressly of the Commercial Appellate Court, and indirectly of any court as well.

6. On the occasion of revision of this Law in 2013, the Venice Commission was consulted again. In its opinion, the same remarks were emphasized again, this time in much more detail and with more arguments.

> During the meetings in Belgrade, the Venice Commission's delegation was told 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

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[3] See e. g., *Kühn*, The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts, Croatian Yearbook of European Law and Policy 2/2 (2006), 19–26; *Kühn*, The Judiciary in Central and Eastern Europe. Martinus Nijhoff Publishers, Leiden–Boston (2011), 218 f.; *Galič*, The Inconsistency of Case Law and the Right to a Fair Trial, in: *Uzelac/Van Rhee* (eds), Revisiting Procedural Human Rights. Fundamentals of Civil Procedure and the Changing Face of Civil Justice. Intersentia, Cambridge (2017), 40 f.; *Zobec/Letnar Černič*, The Remains of the Authoritarian Mentality within the Slovene Judiciary, in: *Bobek* (ed), Central European Judges Under the European Influence: The Transformative Power of the EU Revisited. Hart Publishing, Oxford (2015), 141 ff.; *Uzelac*, Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost [Uniform Application of Law in Croatian Civil Procedure: Tradition and Modernity], in: *Barbić* (ed), Novine u parničnom procesnom pravu. Hrvatska akademija znanosti i umjetnosti, [Novelties in civil procedural law. Croatian Academy of Sciences and Arts], Zagreb (2019), 114 ff. On survival of Socialist Legal Tradition in general see *Uzelac*, Survival of the Third Tradition? Supreme Court Law Review 49 (2010), 377 ff.

[4] See CDL-AD(2010)004, §§ 68 ff., as well as CDL-PI(2015)001, 58 ff., both with further references.

[5] CDL-AD(2008)007, § 109.

[6] CDL-AD(2008)007, § 112.

courts). In addition, it should be regarded as an interpretation of the law, not as an instruction.

Nevertheless, the Venice Commission has criticised 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.

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.

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.[7]

7. The remarks of the Venice Commission had been partially adopted only seemingly, so that the concept has essentially survived. Namely, the provision was really deleted according to which the activity of the Supreme Court of Cassation out-of-trial is to determine general legal views. However, instead of it, the Supreme Court of Cassation got a rather undefined duty to „ensure uniform judicial application of the law and equality of parties to proceedings" out-of-trial.[8] Also, the provision has survived according to which sessions of the department of the Supreme Court of Cassation determine legal views out-of-trial, which are then binding on all the panels of the departments in future cases.[9] In addition, the other provisions remained intact according to which sessions of the departments of all the other courts, as well as judicial sittings of all the judges, „deliberate on legal issues",[10] or according to which departments of appellate courts „also deliberate on issues important for the work of district courts".[11] The statement of reasons of the Government for the amendment to the Law on Organisation of Courts was contradictory to that extent, since it was pointed out that the authority of the Supreme Court of Cassation to determine general legal views is in contravention of the Constitution.[12] Namely, if something like that is in contravention of the Constitution, then any other form of legal views out-of-trial is also unconstitutional.

8. The Supreme Court of Cassation accepted the new jurisdiction out-of-trial in the form of „ensuring uniform judicial application of the law", in such a way that the President of the Supreme Court of Cassation, in 2014, issued the „Plan of activities of the Supreme Court of Cassation for the purpose of harmonization of case law". It stipulates the obligations of courts to either themselves determine legal views out-of-trial (e.g. the Commercial Appellate Court), or to notify the Supreme

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[7] CDL-AD(2013)005, §§ 104–107.

[8] New Art. 31 of Law on Organisation of Courts. One could ask how it is possible to harmonise case law in abstract manner by non-binding legal opinions delivered out-of-trial. Therefore, such concept is qualified as "oxymoron" in doctrine, see *Galič* (fn. 2), 40.

[9] Art. 43 of Law on Organisation of Courts.

[10] Art. 36 § 1 of Law on Organisation of Courts; also see Art. 26 § 2 of the same Law, which expressly provides for that the Commercial Appellate Court determines legal views out-of-trial. *N.B.*: The Commercial Appellate Court is just the second-instance court, and against its decisions, under certain conditions, a legal remedy is allowable on which the Supreme Court of Cassation is to decide.

[11] Art. 36 § 2 of the Law on Organisation of Courts.

[12] See Proposal of Amendments of Law on Organisation of Courts, 3947-13 (2013), 12; http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/3947-13.pdf (accessed on 12 November 2021).

Court of Cassation about disputable legal issues, to analyze them in the form of a report, so that the department of the Supreme Court of Cassation can declare itself on them. Such an obligation has been envisaged even for the first-instance courts.[13]

9. An unnamed Working Group of the Ministry of Justice produced the Draft constitutional amendments in 2018, in which it had been stipulated that the Constitution shall regulate the function of the supreme instance. According to that idea, the relevant provision of the Constitution should have read: „The Supreme Court of Serbia shall ensure uniform application of the law by courts".[14] However, in the statement of reasons that was published, this amendment was not explained with a single word.[15]

10. The Venice Commission adopted the opinion on the specified text. In it, it again accentuated the problem of jurisdiction of the supreme court out-of-trial.

> According to European standards, it is important that consistency in the case law be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts [fn. 18: Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 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."]. As the Venice Commission has stated in its previous opinion, "[T]he 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." [fn. 19: Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005), paragraph 105][16]

Based on the above said, the Venice Commission expressly suggested that the provision on the function of the supreme instance is to be supplemented, so that it is made clear that it ensures harmonized case law through decisions in concrete cases.

> In light of what was said above for Amendment V, the Venice Commission would like to suggest that the following (italicised and bold) wording be added to the second paragraph of this Amendment: "The Supreme Court of Serbia shall ensure uniform application of the law by the courts through its case law."[17]

11. The same unnamed Working Group of the Ministry of Justice had accepted the suggestions of the Venice Commission, since the new Draft that followed stipulated: „The Supreme Court shall ensure uniform application of the law by courts through case law".

12. In the opinion that followed thereafter, the Venice Commission expressed satisfaction with what had been done.[18]

13. Nevertheless, the course that had been roughly drafted has been abandoned. The official procedure of amending the Constitution was initiated in 2021,[19] and the Committee on Constitutional and Legislative Issues of the National Assembly formed a working group to produce an act to amend the Constitution. Within less than three months, the working group finalized its task, and the Committee on Constitutional and Legislative Issues defined the text amending the Constitution on that basis.[20] It no longer contains the provision on the function of the supreme instance, but it only stipulates – same as up to now, but with the changed name of the court: „The highest court in the Republic of Serbia shall be the Supreme Court".[21]

14. In the opinion of the Venice Commission on this text, everything said in 2018 is no longer mentioned. The Venice Commission did not comment on the departure from the previously

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[13] See Plan of Activities of Supreme Court of Cassation for Case Law Unification of 1 April 2014, No. I Su-7 24/2014, https://www.vk.sud.rs/sites/default/files/attachments/PlanAktivnostiVrhovnogKasacionogSuda.pdf (accessed on 12 November 2021).

[14] English version: CDL-REF(2018)015.

[15] See in English Explanation of Draft Amendments to the Constitutional Provisions on the Judiciary, https://www.mpravde.gov.rs/files/Ministry%20of%20Justice%E2%80%99s%20Working%20Version%20of%20the%20Draft%20Amendments%20to%20the%20Constitution%20(with%20explanation%20and%20references)%201.pdf (accessed on 12 November 2021).

[16] CDL-AD(2018)011, § 34.

[17] CDL-AD(2018)011, § 56.

[18] CDL-AD(2018)023, § 19.

[19] Official Gazette of Republic of Serbia, No. 58/2021.

[20] English version: CDL-REF(2021)075.

[21] Amendment V.

contemplated concept according to which, actually, the Constitution would expressly prohibit determining of legal views out-of-trial.[22]

15. The Committee on Constitutional and Legislative Issues of the National Assembly, after the opinion of the Venice Commission, defined a new text of the act to amend the Constitution, and it was, in a letter of the Speaker of the National Assembly, dated 26 October this year, forwarded to the Venice Commission with the request for an urgent opinion. The Venice Commission announced that it would be made in the course of November, and that it will be the subject matter of discussion at the plenary session to be held on 10 and 11 December this year.[23] In that text, the issue of jurisdiction of the Supreme Court still remained unregulated.

III.

16. The Bar Association of Serbia, as an institution that represents all the lawyers in Serbia, and which is in addition to that an unavoidable factor of the Serbian judiciary, is expressing fear that the specified approach in terms of omission of the definition of the constitutional role of the Supreme Court may give rise to far-reaching consequences, bearing in mind the actual state of the Serbian model of „harmonization of case law out-of-trial". That state is already now deeply unconstitutional, because the fundamental principles of a state based on the rule of law in the form of the separation of powers and independence of judges are threatened.

17. Harmonization of case law out-of-trial in Serbia has taken on inconceivable proportions in the European context: not only that the Supreme Court of Cassation determines various views out-of-trial, to wit in a certain number of cases without giving any statement of reasons,[24] but it also confirms views out-of-trial that are determined at joint sittings of appellate courts that function as a delegate system. According to the actual statement of reasons, some legal views have been delivered at the request of the ministry,[25] and in one case it was stated that a privately owned company made the initiative.[26] The cause for some legal views is expressly „identified wrong judicial practice of courts", which clearly points to the exercising of supervision over judges. In one resolution of the Civil Department of the Supreme Court of Cassation it is stated:

> Upon collection and examination of lower instance case law in the matter of application of [...] it was noticed that some higher courts when setting aside judgments are instructing first instance courts to apply rules of non-contentious procedure, **instead of enforcement procedure** [bolded in original]. Civil Department of SCC has thus decided, notwithstanding explicit provisions of Code of Enforcement Procedure, in this manner as well, to point out to lower-level courts' noticed erroneous practice [...].[27]

Besides, appellate courts also determine legal views.[28] On the other hand, in some decisions of appellate courts it is expressly emphasized that legal views of the Supreme Court of Cassation,

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[22] Compare CDL-AD(2021)032.

[23] https://www.venice.coe.int/webforms/events/?id=3232 (accessed on 12 November 2021).

[24] See e.g., Legal Opinion of Civil Department of Supreme Court of Cassation of 11 March 2014, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2015, 309; Legal Resolution of Civil Department of Supreme Court of Cassation of 23 June 2015, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2015, 318; Legal Opinion of Civil Department of Supreme Court of Cassation of 8 December 2015, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2016, 266; Legal Resolution of Civil Department of Supreme Court of Cassation of 18 September 2015, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2016, 266; Legal Opinion of Civil Department of Supreme Court of Cassation of 10 November 2015, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2016, 277.

[25] Legal Opinion of Civil Department of Supreme Court of Cassation of 25 March 2011, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2011, 74; see also Legal Opinion of Criminal Department of Supreme Court of Serbia of 25 November 2008, Bilten Vrhovnog suda Srbije [Bulletin of Supreme Court of Serbia] 2008, 57.

[26] Legal Opinion of Civil Department of Supreme Court of Cassation of 18 June 2015, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2016, 316: "upon initiative of Swisslion [*scil.* private owned company]."

[27] Resolution of Civil Department of Supreme Court of Cassation of 13 September 2010, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 2010, 93; similar wording in Resolution of Civil Department of Supreme Court of Cassation of 4 October 2010 also, Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 2010, 119.

[28] See e.g., Legal Opinion of Civil Department of Appellate Court Belgrade of 5 March 2018, Bilten Apelacionog suda u Beogradu [Bulletin of Appellate Court Belgrade] 10 (2018), 66; Legal Opinions of Criminal Department of

taken out-of-trial, are absolutely binding, although it is impossible to find a constitutional or legal basis for something like that. Thus the Appellate Court in Novi Sad in a judgment, in 2019, emphasized:

> this court [*scil.* Appellate Court Novi Sad] is in obligation to apply cited resolution regarding unification of case law as one of the elements of right to a fair trial and as long as it is unchanged cannot depart from it.[29]

18. Moreover, without any legal basis, a system has been established according to which lower court judges put questions to higher-instance courts, including to the Supreme Court of Cassation, and sessions of departments of such courts then answer them in the form of a legal view. Thereby, it is obvious from the published materials that judges of lower courts in a great number of cases put questions that are to do with concrete pending cases, and the parties to those cases are not informed about it at all. That system should not be mistaken for the legally regulated concept of resolution of a disputable legal issue by the Supreme Court of Cassation, since it implies full transparency and ensuring to the parties their right to be heard, as an inalienable component of the right to a fair trial.[30] As an illustrative example of what an informal resolution of a disputable issue of a pending criminal case looks like, with the note that, in criminal matters, the official resolution of a disputable legal issue does not actually exist, an example of explication of the Criminal Department of the Supreme Court of Cassation of 2013 may serve the purpose:

> QUESTION: Recognition was requested of a foreign court decision concerning the person who had been convicted for the criminal offence of smuggling of migrants referred to in Article 418 paragraph 4 in conjunction with paragraph 1 of the Criminal Code of the Republic of Macedonia, and in the description of facts of the offence it says that the specified person had been illegally transferring migrants across the state border from the Republic of Macedonia into the Republic of Greece (from the Republic of Serbia into the Republic of Macedonia, the entry of migrants had been legal). Is it possible to recognize a foreign court decision, or are there, in the specified actions, elements of the criminal offence referred to in Article 350 of the Criminal Code?
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> ANSWER: In the described factual situation, there is no criminal offence.[31]

Although, for some time, the Supreme Court of Cassation has not disclosed its answers to the questions of lower-instance courts, one cannot say that its departments were passive. To use an example, the Criminal Department of the Supreme Court of Cassation, in the course of one year (2013–2014), answered to over 200 questions.[32] The Commercial Appellate Court is most up-to-date in this respect, because it regularly publishes answers on annual basis, to wit sometimes in great numbers.[33] At any rate, it seems that, in the Serbian judiciary, the opinion of the Venice Commission is still unknown, according to which

> [s]eeking instructions in individual cases from higher instance judges, who would be deciding the appeal, deprives the parties from an independent review of their judgment, thereby violating their right of access to the courts (Article 6 ECHR and of Article 2 Protocol

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Appellate Court Novi Sad of 10 April 2018, Bilten Apelacionog suda u Novom Sadu [Bulletin of Appellate Court Novi Sad] 9 (2018), 177; Legal Opinion of Commercial Appellate Court of 25 December 2019, retrievable at official case law database (hereinafter "case law database"), https://www.sudskapraksa.sud.rs (accessed on 12 November 2021); Four Legal Opinions of Civil Department of Appellate Court Novi Sad, Bilten Apelacionog suda u Novom Sadu [Bulletin of Appellate Court Novi Sad] 7 (2016), 31 (remark: all four opinions are without of reasoning, i.e., decree style of non-adjucative judicial law-making).

[29] Appellate Court Novi Sad, Judgement of 3 October 2019, No. Gž 3282/19, case law database (accessed on 12 November 2021); see also, by the same token, Appellate Court Novi Sad, Judgement of 21 November 2013, No. Gž 3938/13, case law database (accessed on 12 November 2021). *N.B.*: cited second instance judgements were rendered in civil litigation, which means that against them legal remedy upon Supreme Court of Cassation decides is in general admissible, especially if there is need to ensure harmonisation of law, i.e., typical leave to appeal concept; see Art. 404 Code of Civil Procedure. Such position suggests that courts in Serbia don't realize proper judicial law-making and the role of supreme instance. Present Serbian concept of civil procedure is designed to enable unbound adjudication with mechanism that provides classical vertical harmonisation of the case law. However, understanding of judiciary by virtues of socialist law tradition fails to comprehend such simple truth.

[30] See Art. 180–185 of Code of Civil Procedure; see also Decision of Supreme Court of Cassation of 16 September 2021, No. Spp 2/21: application for preliminary ruling is inadmissible if one of parties had no opportunity to state her opinion on respective legal issue; https://www.vk.sud.rs/sr-lat/spp-22021 (accessed on 12 November 2021).

[31] Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2015, 287.

[32] See Bilten Vrhovnog kasacionog suda [Bulletin of Supreme Court of Cassation] 1/2015, 202–295.

[33] It seems that the record was set in 2017, when as many as 274 questions were answered, see Bilten sudske prakse privrednih sudova [Bulletin of case law of commercial courts] 3/2017.

7 ECHR in criminal cases). Such practice (including providing instructions) is not only inefficient (one level of jurisdiction is, de facto, removed), but it also violates human rights. **This practice, if persisted in, should be dealt with through disciplinary means against judges taking part in such practice.**[34]

19. Finally, although not a single law stipulates it, the bylaws stipulate that the department of case law has the authority to suspend delivery of a decision of a concrete adjudication panel, if it notices that, by the decision, it has been departed from the case law or legal views taken out-of-trial. Then the adjudication panel is sent remarks in writing and it is invited to reconsider its decision. If it stands by its decision, then a session of the department is scheduled which deliberates on it, and if the majority decides to stand by the legal view of the department, the adjudication panel is again invited to reconsider its decision. If even after that it stands by its view, then the sitting of all the judges of the court is convened.[35] Thereby the parties to the case do not have any knowledge about it, not even in case that their „lawful judge" (in German *gesetzlicher Richter*) has delivered one decision, but has, however, changed it after the pressure from other judges. There is no need to explain how such regulation, which is otherwise practiced,[36] and the High Judicial Council does not qualify it as a threat to the independence of judges,[37] constitutes a textbook example of violation of the Constitution in force according to which „a judge in exercising a judicial function shall be subject only to the Constitution and the law", or according to which „any influence on a judge in his/her exercising of the judicial function shall be prohibited".[38] Also, according to the jurisprudence of the European Court of Human Rights something like that would undoubtedly constitute violation of the right to a fair trial.[39] Namely, according to all the procedural laws in Serbia, a three-judge or a five-judge panel decides on legal remedies, and not a plenary sitting. This ultimately means that nobody has the right to suspend delivery of a decision of the adjudication panel of jurisdiction. Please note that, in 2013, the Croatian Government proposed to the local parliament something like that to adopt as a law, but it soon withdrew its own proposal, with the explanation that the experts of the European Commission deemed that, in such a way, the independence of judges is threatened.[40] It should also be emphasized that one case was recorded in Serbia in which the president of the appellate court submitted the request for disciplinary action against the members of the concrete panel who did not want to depart from its own view in favour

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[34] CDL-AD(2014)007, § 18 (bolded in original).

[35] See Art. 190–200 of Rules of Order of Courts, issued by Minister of Justice, Official Gazette of Republic of Serbia, Nos. 110/2009, 87; 70/2011, 31; 19/2012, 28; 89/2013, 7; 96/2015, 130; 104/2015, 50; 113/2015, 61; 39/2016, 44; 56/2016, 56; 77/2016, 57; 16/2018, 34; 78/2018, 161; 43/2019, 16; 93/2019, 275; Art. 41 Rules of Order of Supreme Court of Cassation, adopted by plenary session of Supreme Court of Cassation, Official Gazette of Republic of Serbia, Nos. 37/2010, 20; 51/2014, 6; 41/2016, 7; 62/2016, 25; 74/2018, 72.

[36] The daily press in Serbia also reported on this, and the Judges' Association of Serbia also informed the public about it; see „Politika", https://www.politika.rs/scc/clanak/287447/Ko-presuduje-sud-ili-sudija (accessed on 12 November 2021); Note from the Judges' Association of Serbia of 3 March 2014, No. 8/14; https://www.ombudsman.rs/attachments/3294_3odgovor%20zastitnik%20gradjana%20kragujevac.pdf

[37] The judges, who had been exposed to such pressure, lodged complaints to the High Judicial Council, but it rejected them, however, the statement of reasons for the decision was not disclosed in public; see Decision of High Judicial Council of 1 April 2014, No. 071-00-408/2014-01; https://vss.sud.rs/sites/default/files/attachments/SednicaVSS-01-04-2014-zakljucci.pdf (accessed on 12 November 2021). On the other hand, the European Commission precisely for this case states: „Some judges from higher and appellate courts were confronted with direct attempts to exert political influence over their daily activities without the High Judicial Council properly defending their independence", see *EC*, Serbia 2014 Progress Report, SWD(2014) 302 final, 40; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0302&from=EN (accessed on 12 November 2021).

[38] Art. 149 of Constitution of Serbia.

[39] Compare *ECtHR*, case of *Parlov-Tkalčić v. Croatia*, Judgment of 22 December 2009 – No. 24810/06, § 86: "However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified [citations omitted]."

[40] See Government's Amendments of 21 February 2013, No. PZ 217/2, 2; https://www.sabor.hr/sites/default/files/uploads/sabor/2018-12/amandmani_Vlade_RH_PZ_217.pdf (accessed on 12 November 2021).

of the majority of all the judges.[41] Although the request for disciplinary action was rejected, the above said is an indication of the self-reflection of judges, or of the judiciary. Instead of instituting disciplinary proceedings against those who exert pressure on judges to change their decisions,[42] the victims are exposed to the prosecution.

IV.

20. Although the Bar Association of Serbia deems that the present Law on Organisation of Courts is unconstitutional in the part that is related to the authority of various non-adjudicative bodies of courts to determine legal views,[43] and it will very quickly initiate the proceedings in that direction before the Constitutional Court, it is still very important that, at the moment in which the amendments to the Constitution are discussed – which should precisely strengthen the judicial independence – this issue is also made topical. The Venice Commission that is elaborating the opinion, and which has a particular weight in the Serbian discourse, both legal and political one, must be aware of the „state in the field", and because of that the Bar Association of Serbia is making it aware of the above said, and is asking it to take into account, when drafting and adopting the urgent opinion on the latest text of the constitutional amendments, the presented actual state of the judiciary in the Republic of Serbia related to the „harmonization of case law".

21. In this way, the Bar Association of Serbia wishes to contribute to the establishing of the judiciary in Serbia which will really be based on the principles of a state governed by the rule of law. The value of harmonized case law is certainly great, and it partially follows from the right to a fair trial, which is undisputable today. However, the mechanisms that will serve it must be in compliance with the fundamental principles of a state based on the rule of law, without which it ceases to be the state governed by the rule of law. Since the constraints of the socialist legal tradition are still strong, according to the opinion of the Bar Association of Serbia, a decisive cut on the level of the text of the Constitution is needed. Judges and courts exist in order to exercise judicial power, and not to issue recommendations and instructions, outside of exercising of judicial power, to other judges as to how they should adjudicate in future cases. Judges, and especially judges of the supreme instance, should exclusively adjudicate in concrete cases. Ensuring internal independence of judges is of cardinal importance to a state based on the rule of law. „The highest court in the Republic of Serbia is the Supreme Court, which shall ensure equal application of the law while exercising judicial power ".

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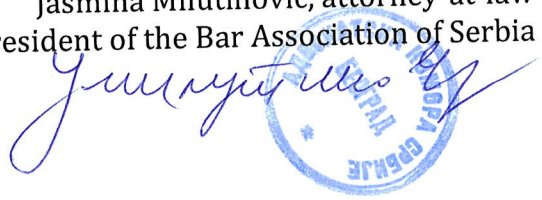
22. In the hope that the presented state of affairs will contribute to the formulation of the urgent opinion of the Venice Commission on the text of amendments to the Constitution of the Republic of Serbia related to the judiciary,

Jasmina Milutinović, attorney-at-law
President of the Bar Association of Serbia



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[41] See in English: *Protector of Citizens*, 2013 Annual Report, Belgrade (2014), 9; https://www.ombudsman.rs/attachments/article/5557/Annual%20Report%20of%20the%20Protector%20of%20Citizens.pdf (accessed on 12 November 2021). The text of the request for disciplinary action in Serbian is available at https://www.ombudsman.rs/attachments/3294_3odgovor%20zastitnik%20gradjana%20kragujevac.pdf (accessed on 12 November 2021).

[42] Compare

[43] The same applies, all the more so, to the provisions of the rule of procedure that inter alia, provide for suspension of delivery of decisions of the adjudication panel of jurisdiction.