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ROOT CAUSE ANALYSIS OF THE INCREASE IN NUMBER OF APPLICATIONS BEFORE THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA AND THE EUROPEAN COURT ON HUMAN RIGHTS

Annex 2 to 2nd Progress Report

REPORT ON A ROOT CAUSE ANALYSIS OF THE INCREASE IN NUMBER OF APPLICATIONS BEFORE THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA AND THE EUROPEAN COURT ON HUMAN RIGHTS WITH RECOMMENDATIONS

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I. INTRODUCTION

This report was prepared within the project "Enhancing Educational Activities and Improvement of Organizational Capacities of the Judicial Academy", funded by the European Union, and managed by the Ministry of Finance of the Republic of Serbia - Department for Contracting and Financing of EU Funded Programs (CFCU) in Serbia and implemented by the British Council in consortium with the International Foundation of Administration and Public Policies of Spain (FIIAPP), Alternative Consulting and AlterFact. The analysis was conducted in November 2016.

This analysis was conducted under Component 1: *Ensuring easier access to the case law of the European Court for Human Rights for the target groups with the aim at improvement and unification of the case law among Serbian courts as well as its harmonisation with the EU standards*

- Activity 1.3: *Conduct a root cause analysis of the increase in number of applications against the Republic of Serbia before the CC and ECtHR with recommendations to address key issues. The root cause analysis implies preparation of the assessment outlining potential issues for discussion and further action based on the analysis of the cases before the CC and ECtHR*.

Having in mind the fact that a constitutional appeal is a general domestic remedy for violations of human rights and fundamental freedoms, the purpose of this activity is:

- to thoroughly access reasons behind a steady increase of constitutional appeals and application to the ECtHR from Serbia.

- to tackle the issue of significant number of pending cases before the CC (see the EC Screening Report for Serbia, MD 45/14 of 15.05.14 page 7).

- to review whether the increase of the constitutional appeal might be related to a change of laws.

In the preparation of this report following legislation, reports and other materials were used:

- The Constitution of the Republic of Serbia (The Official Gazette of RS, No. 98/2006); (hereinafter: CRS)

- The Law on the Constitutional Court of the Republic of Serbia (The Official Gazette of the RS, No. 109/2007, 99/2011, 18/2013 – Decision of the CC, 103/2015, 40/2015- other law); (hereinafter: LCC)

- The Law on the Organization of Courts (The Official Gazette of the RS", No. 116/2008, 104/2009, 101/2010, 31/2011 – other law, 78/2011 – other law, 101/2011, 101/2013, 106/2015, 40/2015 – other law, 13/2016) (hereinafter: LOC)

- The Law on the Protection of the Right to a Trial within a Reasonable Time (The Official Gazette of RS, No. 40/2015); (hereinafter LPRT)

- The Report of the Activities of the Constitutional Court of the Republic of Serbia in 2015; http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2015.pdf (21 November 2106)

- Country Profile (factsheets) on the Court's case-law and pending cases in relation to Republic of Serbia, by July 2016; http://www.echr.coe.int/Documents/CP_Serbia_ENG.pdf (21

November 2016);

- The statistical Report of the European Court of Human Rights (1959-2015) – Republic of Serbia http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956587550_pointer (21 November 2016);

-The Venice Commission's Opinion on the Draft Amendments and Additions to the Law on the CC of Serbia adopted at its 89th Plenary Session (16-17 December, 2011 – CDL-AD(2011)050cor-e) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)050cor-e

- Permanent Training Program of the Judicial Academy for 2016; http://www.pars.rs/sekcija/78/stalna-obuka.php (21 November 2016)

- The Report on the Current State of Judiciary made by the Anti-Corruption Council of the Government of the Republic of Serbia, as of 22 March 2016; (http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/izvestaji/REPORT%20ON%20THE%20CURRENT%20STATE%20IN%20THE%20JUDICIARY.pdf), (21 November 2016)

- The press release from the Conference on the "Harmonization of the Judicial case law – regional experiences, from 20 November 2015; http://www.paragraf.rs/dnevne-vesti/201115/201115-vest2.html from 20 November 2015 (22 November 2016)

- The interviews with key stakeholders: the Director of the Judicial Academy, the Secretary of the CC, the Deputy Agent of the Republic of Serbia before the ECtHR, the Project Manager of the Council of Europe in Belgrade and the judges of the Supreme Court of Cassation, the Higher Court in Belgrade, the Court of Appeal in Belgrade, the Administrative Court and the First Basic Court in Belgrade as well as with the President of the Serbian Bar Association.

I.1. METHODOLOGY

The assessment was based on combination of the different kinds of sources that were at disposal for the analysis. It should be noted that some of the reports from the introduction are not in direct connection to the matter of the assessment as much as they were valuable in getting the picture on how much is understood the role of the CC in general and in particular to the protection of human rights and freedoms. The research papers in the footnotes were used either to support certain views or to reveal possible shortcomings. The interviews that were conducted with different interlocutors – judges and other respective representatives of public bodies helped in the assessment in so far, as they showed the views on the functioning of the Serbian system of protection of human rights and freedoms as well as the level of the acceptance of the new constitutional circumstances that occurred after the enactment CRS from 2006 by the establishment of the constitutional appeal in the legal order of the Republic of Serbia.

The translations of legislation, reports or press releases from Serbian into English were taken either from the respective official sites or were made by the expert and cannot be considered as completely accurate.

In the core of the assessment were the Reports on the activities of the CC of the Republic of Serbia from different periods. In spite of the fact that almost all of them were analysed and occasionally mentioned in the assessment, in the introduction is mentioned the Report from 2015, because in many aspects it summarized problems that the CC has been facing since

the enactment of the CRS from 2006. The Reports of the CC are thorough and concise and they were a good guide in showing the flow of the cases, problems encountered by them as well as a general approach of the CC in dealing with constitutional matters.

I.2. LEGAL FRAMEWORK

Starting point of the assessment was a review of the legal framework in relation to the position of the CC, the constitutional appeal, organization of the courts and legal position of international treaties in the Republic of Serbia.

The **Article 166** of the CRS provides that:

> "*The Constitutional Court is an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms.*"

The Article 170 of CRS prescribes that:

> "*A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organizations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution when other legal remedies have been exhausted or are not prescribed."*

In 2007, the National Assembly adopted the LCC which in the chapter 8 prescribes the constitutional appeal procedure.

The **Article 83** of the LCC provides that:

> „*A constitutional appeal may be filed against individual acts or actions of state authorities or organisations vested with public authority that violate or deny human and minority rights and freedoms guaranteed by the Constitution, when other legal remedies have been exhausted or are not prescribed or where the right to their judicial protection has been excluded by law.*"

The difference between the CRS provision and the LCC provision on the scope of the constitutional appeal could be observed in the part of the LCC in which was added "*where the right to their legal protection has been excluded by law*". Furthermore, the same LCC foresaw the right to lodge the constitutional appeal if the legal remedies have not been exhausted in the case when the right to a trial within reasonable time has been violated. By the enforcement of the Amendments to LOC the jurisdiction of the CC in this matter was changed and by the enactment of *LPRT*[1], the (exclusive) jurisdiction of the CC is abolished. As of 2016 the ordinary courts decide on the cases related to the right to a trial within a reasonable time.

In relation to the judicial power, **the Article 142** of CRS foresees that

> *"Judicial power shall be unique on the territory of the Republic of Serbia. Courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts."*

The Article 143 of CRS foresees that

[1] The Law on the Protection of the Right to a Trial within a Reasonable time (The Official Gazette of the RS, No. 40/15 - Law is valid as of January 1, 2016,)

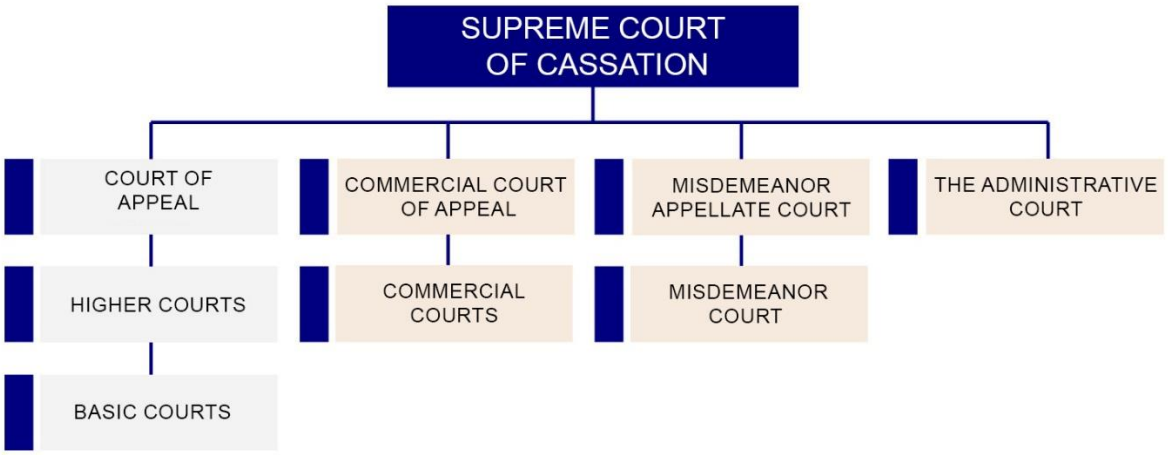
"Judicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction.

Establishing, organization, jurisdiction, system and structure of courts shall be regulated by the law.

Provisional courts, courts-martial or special courts may not be established.

The Supreme Court of Cassation shall be the Supreme Court in the Republic of Serbia. The seat of the Supreme Court of Cassation shall be in Belgrade."

According to LOC the courts of general jurisdiction are the Supreme Court of Cassation, Appellate Courts, Higher Courts and Basic Courts. The courts of specialized jurisdiction are the Administrative Court, Commercial Courts, Commercial Appellate Court, Misdemeanor Court and Misdemeanor Appellate Court. The scheme of the organization of the Courts in the Republic of Serbia[2] is as following:



As to the international treaties**, the Article 16** of the CRS provides that:

"Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.

Ratified international treaties must be in accordance with the Constitution."

The Republic of Serbia became a member state of the Council of Europe in 2003 and in 2004 it signed and ratified the Convention for the Protection of Human Rights and Fundamental Freedoms with its Protocols Nos. 1, 4, 6, 7 and 's12.

I.3. THE OVERVIEW OF THE REPORT ON THE ACTIVITIES OF THE CC IN 2015

Since the establishment of the constitutional appeal in the constitutional order of the Republic of Serbia up to the end of 2015, the CC received in total 57,141 constitutional appeals and decided in total on 44,580 constitutional appeals.

The influx of cases has been in continuous increase. The highest number of the constitutional appeals was received in 2013 and it counted 11,654 cases. In 2015, the total number of received constitutional appeals was 8,810 cases.

[2] Organigram taken from the website of the Supreme Court of Cassation

The CC started the year of 2015 with a backlog of 14,247 cases. Total number of constitutional appeals in 2015 was 23,057. In 2015, the CC decided on 10,501 constitutional appeals as following:

- 1,164 constitutional appeals were accepted;
- 467 constitutional appeals were refused;
- 8,657 constitutional appeals were rejected as inadmissible or obviously ill manifested;
- 36 constitutional appeals were suspended,
- 177 constitutional appeals were decided on "the other way".

In 2016, the CC entered with 12,556 pending cases.

According to the Report, the highest number of the constitutional appeals decided in merits related to the field of civil law (987 adopted and 309 refused constitutional appeals). On the second place are the constitutional appeals deriving from the administrative disputes (141 adopted and 103 refused) and the last one referred to the criminal law (35 adopted and 54 refused).

The highest number of the adopted constitutional appeals refers to the violation of the constitutional right to a trial within a reasonable time (543 cases) and the constitutional right to a fair trial (544). The reasonable number of the adopted constitutional appeals (90) refers to the violation of the principle of the equal protection of rights before courts and other state bodies which implies the issue of the (un)uniformity of the case-law.

I.4. THE OVERVIEW OF THE COUNTRY PROFILE (FACTSHEETS) FOR THE REPUBLIC OF SERBIA

The overview of the factsheets in relation to the pending applications before the European Court of Human Rights against the Republic Serbia shows that on July 1, 2016 there were 1,555 pending cases in total.

The factsheets further show that in 2014 were decided 11,490 cases from which 11,427 were declared inadmissible while by the judgment were decided 63 applications. In 2015, from 2,612 applications 2,491 were declared as inadmissible and 121 applications were decided by the judgment. From January, up to July 2016, 778 applications were decided – 728 as inadmissible and 50 of them by the judgment.

The highest number of the applications in 2014[3] related to the case of *Vučković and Others v. Serbia*[4] which concerned the payment of allowances to all reservists who had served in the Yugoslav Army during the North Atlantic Treaty Organization's intervention in Serbia between March and June 1999. The ECtHR found that it could not consider the merits of the applicants' appeal under the European Convention on Human Rights since the applicants failed to exhaust national remedies meaning that the Serbian courts had not been given an opportunity to fulfil their fundamental role in the Convention protection system. This judgment led to the inadmissibility of a large number of cases of the same factual and legal state (more than 7,000 of them).

Since the ratification of the European Convention into internal legal order of Serbia, the Statistics[5] (up to 2015) show that ECtHR delivered 132 judgments in relation to the Republic of Serbia from which 117 of them have at least one violation. The highest number of judgments refers to the violation of the right to property - 51 judgments, 41 to non-enforcement, 24 to

[3] Information obtained by Ms Nataša Plavšić, Deputy Agent of the RS before ECtHR
[4] Vučković and Others v. Serbia (Application nos. 17153/11, … and 17443/11), Judgment of the ECtHR 25 March 2014
[5] http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf

length of the proceedings, 25 to right to a fair trial, 17 to right to an effective remedy, 12 to the right for private and family life, etc.

I.5. THE OVERVIEW OF THE PERMANENT TRAINING PROGRAM OF THE JUDICIAL ACADEMY OF THE REPUBLIC OF SERBIA

The Permanent Training Program of the Judicial Academy for 2016 has a detailed program of training and education both for judges and prosecutors in relation to civil, criminal, administrative and misdemeanor law.

As to the training in the field of protection of human rights, the Program foresees it in the part of permanent training on the European Convention on Human Rights.

The aim of this module is "*the improvement and better implementation of the acquired knowledge in order to raise the efficiency and quality of trials, as well as prevention of delays, lengthy proceedings and inconsistent judicial case-law in the domestic legislation*."

The training is organized as one day seminars and it is foreseen also for court advisors of the Supreme Court of Cassation. The topics are the standards developed under certain articles of the European Convention on Human Rights. The training is provided through lectures with presentations, workshops, practical examples, discussion, Q&A and evaluation.

I.6. THE OVERVIEW OF DIFFERENT REPORTS IN RELATION TO THE STATE OF JUDICIARY IN THE REPUBLIC OF SERBIA

1. Report by the Commission Staff Working document for Serbia from 2016[6],

The part 5.23, concerning the Chapter 23: *Judiciary and fundamental rights* shows that there were 1.1 million pending cases. Confirming the fact that the overall clearance rate in 2015 was 98%, the Report expresses that overall length of the proceedings and the recorded backlog of old cases still remain a serious concern. As to the issue of the quality of justice, it is noted that

> "*Some steps, such as regular meetings between courts of same instances, were taken to standardise court practice. However, poor quality legislation continues to lead to contradictory rulings. The Supreme Court of Cassation worked more closely with all four courts of appeal, but there is still no effective mechanism for this. Judges need access to a consolidated database of key court decisions*."

Also, it is noted that:

> *"The Judicial Academy is the institution responsible for initial and continuous training of the judiciary. Further reform of the Academy is needed to improve its professional, financial and administrative capacity so it can become a proper independent and compulsory point of entry to the judicial profession. A quality review mechanism to evaluate the effectiveness of judicial training had yet to be established."*

[6] http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_serbia.pdf (22 November, 2016)

2. The Report of the Current State in Judiciary made by the Anti-Corruption Council of the Government of the Republic of Serbia[7]

This report gave a thorough overview of the state in judiciary by reviewing the territorial, functional and material accessibility to justice as well as the issue of the independence of judges and prosecutors. The latter contains a part "*2.4. THE CC*" in which the following statement was given:

> *"The Constitution does not state precisely enough whether THE CC is an autonomous and independent body that protects constitutionality and legality, as well as human and minority rights and freedoms. Jurisdiction is well defined and widely set, but the accessibility to justice expected from this Court is absolutely insufficient."*

This statement was supplemented by the view:

> *"However, a far more serious problem than inefficiency is the Court's lack of autonomy and its dependency upon authorities. The Constitution explicitly envisages the Court's autonomy and independence, however, the way judges are elected into office does not secure either autonomy or independence, because ten judges are elected by the Assembly and President of the Republic. As we are still a party-state it is clear that these ten judges are elected by the ruling parties, i.e. the ruling authority. Only five judges are elected by the Supreme Court of Cassation upon HJC's and SPC's proposal, which mirrors direct dependency of THE CC judges' positions on the authorities".*

In supporting this view, the Council presented concrete cases which, by its opinion, lacked the independence in THE CC's decision making.

3. Press release from the Conference on the "Harmonization of the judicial case law – the experiences from the region"[8]

From this press release it was observed that the then Serbian Minister of Justice remarked how one of main problems of the Serbian judiciary is "*non-uniformed judicial practice which is caused by the inflation of regulations, inconsistency of the legal norms and moving away from the authority of judicial power".*

However, the then minister also said that it was not in compliance with the law that THE CC may annul decisions of any court in Serbia on the basis of the constitutional appeal, because that court is not in the system of judicial power. He explicitly said that

> *"this conflict of jurisdictions deeply violates the principle of independence and impartiality of the judicial power and may be only solved by the amendments of the Constitution by which it would be expressively defined the proceedings of THE CC, which presents the fourth judicial instance and it is not in the system of judicial power."*

I.7. THE HIGHLIGHTS FROM THE MEETINGS HELD WITH KEYSTAKE HOLDERS

For the purposes of the assessment on reasons for an increasing number of the constitutional appeals before THE CC, several meetings were held in order to identify possible causes. The interlocutors were the judges from different courts and court jurisdictions as it is mentioned in the Introduction of this report, Director of the Judicial Academy, Deputy Agent before the

[7] http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/izvestaji/REPORT%20ON%20THE%20CURRENT%20STATE%20IN%20THE%20JUDICIARY.pdf

[8] http://www.paragraf.rs/dnevne-vesti/201115/201115-vest2.html from 20 November 2015 (22 November 2016)

ECtHR on behalf of Serbia, the Project Manager of CoE in the Republic of Serbia, the President of the Serbian Bar Association Serbia and the Secretary of the CC.

When asked the judges, what could be the reasons for a high number of constitutional appeals before the CC, they expressed the opinion that there is tendency in Serbia to use all legal remedies available in order to "receive justice". This means that there is so called "*collective mentality*" of population which tends to disputes and tends to solve them before courts up to final instances. A poor trust into judiciary, tolerable judicial fees and free access to the CC are considered also as reasons which contribute to this tendency.

On the question, how much is Serbian judiciary acquainted with standards of European Convention on Human Rights and whether ECtHR case-law is accepted and applied, the different answers were acquired. The most information is received from the Supreme Court of Cassation which is fully aware of the importance of following the ECtHR standards and their implementation and which actively works on collecting information on the judgments of lower courts throughout Serbia from which it can be seen the application of those standards. The respective interlocutors are of the opinion that judiciary does not experience European Convention as a "foreign legislation", i.e. law that is imported and that is considered to be outside of the domestic legal order. Nevertheless, the process of acknowledgment is slow due to existence of technical obstacles, such as lack of the access to relevant data bases, language obstacles, as well as insufficient flow of information within judiciary. It was said that the most of the first instance courts in Serbia do not have the access to internet.

Among different issues related to the acknowledgment of the ECtHR standards, the harmonization of judicial case law and a trial within a reasonable time were highlighted. Since both of these issues are the matters in which the European Court of Human Rights and the CC delivered a number of the judgments or decisions, they are recognized as the priorities and problems of utmost concern. As regards the right to a trial within a reasonable time, the new LPRT places the proceedings and adjudication on the respective courts. Since the CC is not any more competent for such cases which, by their opinion, contributed to decrease of overall influx of constitutional appeals, it has on another side, increased the number of cases before the ordinary courts.

In relation to the role and position of the CC in protection of human rights and freedoms, an overall view was that the CC sometimes acts like a fourth or fifth instance court and interferes in judicial matters, i.e. application of substantive law. It's been said that the CC should "defend human rights and decide on constitutionality of laws and other regulations". In relation to the harmonization of case law, the agreement among the courts of appeal has been reached in order to meet and discuss the disputable legal issues. If a common opinion is not reached, the Supreme Court of Cassation is informed on it and involved in the exchange of legal opinions.

The Director of the Judicial Academy gave a thorough overview on the ongoing activities both in relation to the regular activities of the Academy as well as of desired project goals. On the question of the involvement of the CC in the activities of the Judicial Academy, he gave information that the Agreement on Cooperation was signed with the aim to introduce judges and prosecutors with activities and functions of the CC as well as with its case law.

The Director also informed that the database which will be prepared within the project will encompass and cross both the ECHR and the CC case law. In relation to the reasons for a high number of constitutional appeals, he emphasized that various cases may derive from one case producing thus lengthy proceedings and multiplication of the cases and accordingly could be a matter of the protection of human rights. In relation to the violations of the right to a trial within a reasonable time, Director is of the opinion that sometimes there is no understanding on the true substance of the respective right which is, actually, to receive a judgment in time. This means that for the party at stake, it is much more important to receive the judgment in time than to be compensated for the violation of his or her right to a trial within reasonable time. The compensation without follow up of finalization of the case could not be deemed as protected right to a trial within reasonable time.

The meeting with the Deputy Agent before ECtHR was of high importance due to her previous long experience at the CC as a counsellor. She gave information on reasons of decrease of pending cases against the Republic of Serbia which in 2014 counted over 11,000 cases. After ECtHR's judgment in the case *Vučković and Others v. Serbia*, all the cases of the same nature were stricken out of the list. Another large number of cases were stricken out because of friendly settlement due to longstanding consistent ECtHR case law. She highlighted that constitutional appeal was recognized by the ECtHR as an effective legal remedy which should be exhausted before the application to ECtHR. In that regard, the increased number of the constitutional appeals is connected to the issue of the obligatory exhaustion of the available legal remedies. Speaking about the harmonization of the case-law and the role of the CC in that regard, she noted that the judgment of the ECtHR in the case *Cupara v. Serbia*[9] declared the constitutional appeal as an effective legal remedy in Serbia in relation to this issue. Also, she expressed the concern on the latest decision in the case *Savić and Others v. Serbia*[10] against the Republic of Serbia by which the ECtHR established violation of the right to a fair trial for the low compensation provided by THE CC in its proceedings. More specifically, the ECtHR found that the sums awarded to the applicants by THE CC due to excessively lengthy proceedings could not be considered sufficient and therefore did not amount to appropriate redress for the violations suffered. She was of the opinion that there was an oversight of the general economic situation in Serbia by the ECtHR when adjusting the compensation to its standards and not to the economic standards of the state.

The meeting with the Project Manager of CoE showed that some decisions of the ECtHR, such as the case *Maresti v. Croatia* on the application of principle *ne bis in idem* refer in the same scope to the legal situation in Serbia. Also, the representative gave information on the different activities that are taken by CoE in raising the rule of law in Serbia.

The president of the Serbian Bar Association has repeated previously expressed opinion that citizens tended to use all available legal remedies to finish their cases. On the question of the role of the CC in the protection of human rights, he claimed how the CC in several of its decisions acted like the court of appeal. He also thought that a huge backlog of the constitutional appeals distracted the CC from his basic and most important role – the review of the constitutionality of legislation. He has agreed that the CC contributed to the harmonization of the judicial practice by continuous annulment of substantially different judgments, but again, in doing so, it sometimes went beyond its competences and entered judicial sphere.

In relation to judicial backlog, he thought that a rush to reduce the quantity of the pending cases severely endangers the quality of the judgments. The political messages placing the solvation of backlog being more important than quality are causing deep damage for image and reputation of judiciary. There is opinion that judges do not apply ECtHR standards sufficiently and that there is modest knowledge on them. They also do not manage the best in the new criminal procedural law which changed from the inquisitorial to adversarial one. He thought that there is a need for continuation and even upgrading the existing training in the Judicial Academy on the issues of conventional standards. He was of the opinion that judges needed training by simulation of cases without theoretical lectures.

On the meeting with the Secretary of the CC it was emphasized that around 92-93% out of 10,000 cases which arrive to the CC constitutes constitutional appeals. He pointed out that the large number of constitutional appeals should be explained by the high quality of the CC's decisions. More specifically, the CC's decisions are well reasoned and founded due to the specific methods of the CC's deliberation. The most common grounds which lead to upholding constitutional appeals are the following: lack of substantive legal reasoning, arbitrary

[9] Cupara v. Serbia (Application No. 34683/08) Judgment of ECtHR 12 July 2016
[10] Savić and Others v. Serbia (Applications no. 22080/09…1906/15); Judgment of ECtHR 5 April 2016

application of law, unequal treatment, right to access to the court or right to an impartial court. These aspects show how the quality of judgments in general is disputed.

He also gave information on a new group of constitutional appeals which are filed due to insufficient amount of compensation which was awarded by ordinary courts to injured parties. Approximately, the CC awards twice higher compensation than ordinary courts. The Secretary further pointed that it is particularly interesting that in the case *Savić and Others v. Serbia*, the ECtHR found that even the compensation which was awarded by the CC (in the specific case of violation of the right to a trial within a reasonable time) was insufficient.

When speaking about methods of deliberation, he drew the line of difference between the deliberation by the Supreme Court of Cassation and CC's decisions and rulings. While the judgments of the Supreme Court are adopted by majority votes, the CC decisions are adopted unanimously, what gives them added value.

In relation to two major problems of the Serbian judiciary, the trial within reasonable time and harmonisation of the case-law, he is of the opinion that implementation of the new LPRT of the Republic of Serbia gave rise to decrease of the number of constitutional appeals which are to be submitted to the CC and that harmonization of the case law should be achieved rather through legal amendments than by adoption of the opinions of the Supreme Court of Cassation. On the question of activities of the courts as authorized proposers for review of legislation or activating the *exceptio illegalis* he observed that although these mechanisms are available, so far, they were rarely used.

II. THE ASSESSMENT OF REASONS FOR INCREASE OF THE CONSTITUTIONAL APPEALS

II.1 GENERAL INDICATORS

In the legal order of Serbia, the constitutional justice has been existing since 1963 when the first (socialist) Constitutional Court was established by the Constitution of the Socialist Republic of Serbia. In more than fifty years long tradition, THE CC of the Republic of Serbia was competent for the review of the constitutionality and legality of legislation, however, with different scope.

The CRS from 2006 declared the CC as autonomous and independent state body empowering it with very wide and complex jurisdiction.[11] It can be freely said that the Serbian CC belongs to the group of courts with widest range of the constitutional competences. However, the Constitution from 2006 is the first Serbian Constitution which empowered the CC for protection of human rights and freedoms establishing the constitutional appeal as the remedy for the protection of human rights. The introduction of the constitutional appeal in the legal order of the Republic of Serbia was welcomed and greeted as accomplishment of the Serbian Constitution from 2006.[12]

[11] This view was confirmed in the Venice Commission's Opinion on the Draft Amendments and Additions to the Law on the CC of Serbia adopted at its 89th Plenary Session (16-17 December, 2011 – CDL-AD(2011)050cor-e): "The Venice Commission's Delegation learned that another reason for the overburdening of the CC is the unusually wide jurisdiction of the CC provided for by Article 167 of the Constitution, which even includes the compliance of general acts of political parties, trade unions, civic associations (sic!) and collective agreements with the Constitution and the law. In addition, the competence of conflicts of jurisdiction of the CC even covers conflicts between provincial bodies and local self-government units. The Commission strongly recommends that these powers of the CC be reduced by amending Article 167 of the Constitution."

[12] Bosa Nenadić, Ustavna žalba kao pravno sredstvo za zaštitu ljudskih prava i osnovnih sloboda u Republici Srbiji, http://mojustav.rs/wp-content/uploads/2013/03/Bosa-Nenadicpredsednica-ustavnog-suda-RS-Ustavna-zalba.pdf

The scope of the constitutional appeal is rather wide. It is full constitutional appeal which, next to individual acts of the state and public bodies, can be lodged against their actions as well. In the introduction, it was observed that the scope of the constitutional appeal given in the LCC is wider than the scope in the CRS. Meanwhile, the (direct) jurisdiction in relation to the right to a trial within a reasonable time fell out due to the enactment of the Amendments to LOC and subsequently due to the enactment of LPRT. These Laws contributed to the decrease of influx of the constitutional appeals and the impact assessment is yet to be seen.

Very soon after establishment of the constitutional appeal in the legal order of the Republic of Serbia, ECtHR declared the Serbian constitutional appeal as an effective remedy as of 2008, which implied the requirement of its previous exhaustion as a domestic legal remedy before filing the application to ECtHR. Namely, in the case *Vinčić and Others v. Serbia*[13] the ECtHR found

> *"that a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced as of 7 August 2008, that being the date when the CC's first decisions on the merits of the said appeals had been published in the respondent State's Official Gazette (see paragraph 33 above; see also, mutatis mutandis, Pikić v. Croatia, no. 16552/02, §§ 24, 25 and 29, 18 January 2005)."* (par. 51 of the Judgment).

Ever since, the increase of the constitutional appeals before the CC is evident.

The recognition of the constitutional appeal as an effective remedy in the domestic legal order should be regarded as one of the indicators for the high number of the constitutional appeals since the constitutional appeal proceedings has to be exhausted before the filing the application to the ECtHR.

The Report of the Activities of the CC for 2011 noted that the Court in 2011 dealt with 14,009 cases from which 12,533 were constitutional appeals. In relation to 2010, the increase of the constitutional appeals was 44,52%.

Although the CC considered this increase as an expression of a trust of citizens in the CC, the persistent uptrend showed the shortcomings in legislative framework of the Court which jeopardized its normal functioning. One of the major problems lied down in the fact that all (15) judges of the Court were obliged to take part in deciding on each constitutional appeal.

The amendments on the LCC were invoked with the aim to reduce the backlog as well as to contribute to the efficiency of the court's functioning. The main legal instruments for these aims were introduction of the inadmissibility criteria and formation of the councils which would facilitate decision making process. The introduction of these instruments was greeted by the Venice Commission in its Opinion.[14]

The introduction of the inadmissibility criteria for the examination of the constitutional appeals in the proceedings has revealed another (still) existing indicator for the large number of the constitutional appeals before the CC.

The number of inadmissible constitutional appeals in 2015 was 8,657 implying both substantive and procedural inadmissibility. This number may justify the opinion that there is a **general tendency to use all available remedies in search for justice**. But, even more, the rate of 82,45% of rejected constitutional appeals in relation to the number of cases decided in merits (1,631 or 15,54%) shows that **constitutional appeal is not yet identified as a special remedy for protection of human and minority rights and freedoms but as one more legal remedy in the legal order that might be used in the access to justice**. This statement supports the opinion of the CC expressed in the Report on the Activities of the CC from 2015 where it was noted that legislative procedural amendments undertaken for acceleration of the

[13] Vinčić and Others v. Serbia (Application nos. 44698/06, … and 45249/07 - Judgment from December 1, 2009)
[14] Ibid [11]

trials reflected in considering the constitutional appeal as the third instance remedy. In a larger context, this proves the fact that there is still moderate level of the knowledge on the essence of the human rights protection by the constitutional appeal and its different scope of protection.

The afore mentioned legislative amendments aimed for the acceleration of the trials tell that the Republic of Serbia struggles with high number of pending cases and at the same time lengthy proceedings. Serbian judiciary has been trying to solve this problem and the clearance rate for judicial cases in 2015 was almost 100%.[15] In that regard it is natural to expect that **a reasonable number of solved cases will be further challenged before the CC for violation of human and minority rights and freedoms**. This fact occurs as the third indicator for a large number of constitutional appeals.

Another dimension of the problem of Serbian judiciary are lengthy proceedings. This problem particularly affected the functioning of the CC and caused continuous increase of the constitutional appeals. Namely, until 2014[16], **the constitutional appeal was the only legal remedy in the legal order of the Republic of Serbia which could be used for reviewing whether the right to trial within reasonable time was violated**. This further means that the CC was the only body which decided on this issue. From the Reports on the Activities of the CC it is remarked that a reasonable percentage of the accepted constitutional appeals referred to the violations of the respective right.

The quality of judgments, i.e. reasoning of judgments seems to be also the indicator for the high number of constitutional appeals. The concern of some interlocutors on this issue overlaps with a number of the CC decisions in relation to violation of the right to fair trial due to lack of substantive legal reasoning, arbitrariness, legal certainty etc. If the Serbian judiciary is, indeed, under pressure to comply with the requests for the accurate finalization of the cases, the result of such pressure will inevitably reflect on the quality. It is greeted to have heard that the Manual on the structure and essential elements of reasoning is one of the activities of this Project as it will contribute to better regulation of this problem.

A factor which for sure indicates a high number of the constitutional appeals is a **free access to the CC**. This indicator implies that filing of the constitutional appeal is not preconditioned neither by court fees nor by the professional legal aid assistance. Although this reason is on the track of the universal policy throughout constitutional justice in Europe that protection of human rights must not be limited by financial obstacles, in the country with a low degree of trust in judiciary, next to other reasons, it may be “a trigger” for filing the constitutional appeal.

Another reason for filing the constitutional appeals could be **the power of the CC to decide on the request of the complainant for compensation of pecuniary and non-pecuniary damages**, where such request has been made, however, only in the case when the constitutional appeal is adopted.[17] A belief that there is an additional way to be compensated for the denial of justice in a broader sense might be an impetus for the constitutional appeal.

The possibility of the complainant to ask for compensation forms an additional request for the CC to be aware of in the final determination of the case. It should be reviewed whether such request is necessary when the CC has a variety of the legal means at disposal when deciding on violation of the human rights (it may annul the individual act, prohibit the continuation of

[15] Staff Commission report, Chapter 23

[16] By the enactment of the Amendment on the Law on the Organization of the Courts as of 2013

[17] The Article 89.3 of LCC: In a decision upholding a constitutional appeal, the Constitutional Court shall also decide on the request of the complainant for compensation of pecuniary and non-pecuniary damages, where such request has been made. In doing so, the Constitutional Court shall, once the request has been granted, determine in its decision the body under obligation to pay pecuniary or non-pecuniary damages and set a four months’ time-frame from the date the decision has been served to the body, within which this body may voluntarily pay the damages. The enforcement proceedings for pecuniary or non-pecuniary damages may be initiated only if the pecuniary or non-pecuniary damages have not been voluntarily paid within the time-frame of four months from the date the decision was served.

such actions or order taking other measures or actions that eliminate the harmful consequences of the violation or denial of guaranteed rights and freedoms and determine the manner of just satisfaction for the propounder) and within these means can decide itself on the compensation and not though be bound by the request.

The quality of legislation affects firstly, the number of judicial cases and subsequently of the constitutional appeals. In its Reports, the CC continuously emphasizes that state of legislation in the Republic of Serbia calls on concern. Judiciary as well the president of the Bar Association advised also to this problem.

The Republic of Serbia is in the process of rather large legislative activities which are the result of the negotiations with the EU on the accession. The harmonization of legislation with *acquis communitaire* is given the highest priority. In the Rules of Procedure of the National Assembly of the Republic of Serbia[18] the laws which are the subject of harmonization have the priority and may be proceeded under the urgent legislative procedure. Only in 2015 there were 231 laws and other acts proposed and to be decided under urgent procedure.[19] Such situation may have an impact on the legal certainty due to shortcomings (such as legal gaps or structural inconsistencies which were not anticipated and reviewed in certain time frame and further lead to disputes if the law does not correspond to the requirements of the rule of law). The legislation which doe not comply to the demands of the rule of law, complicates the interpretation and subsequently affects the consistency of the judicial case law and possibly causes lengthy proceedings.

Last but not least, as an indicator of the high number of the constitutional appeals before the CC could be considered the level of **citizens' trust in the judiciary**. The reports of the CC regularly claim that low trust in the judiciary affects the number of the constitutional appeals before the CC which is recognized in the public as true guardian of the constitutional rights. The low trust in the judiciary may be confirmed out of "*The public opinion survey on the perception of chapters 23 and 24 carried out in the framework of the Beta news agency "Argus - all seeing eye media observing chapters 23-24"* which was conducted by Ipsos Strategic Marketing.[20] Between 83% of Serbian citizens think that Serbian judiciary is not efficient, independent and impartial, while 72% of Serbian citizens think that Serbian judiciary is not professional.

Such a high percentage of distrust presupposes the search for an institution that can be trusted and it was found in the institution of the CC.

II.1.1. SUMMARY

General indicators for the continuous increase of the constitutional appeals before the CC are:

1. ECtHR's declaration of the constitutional appeal as an effective domestic remedy for protection of human rights and freedoms which should be exhausted before filing an application to ECtHR.

[18] The Rules of Procedure of the National Assembly of RS, Article 167: „A law can be done under urgent procedure: .....for the reasons of fulfilment of the international obligations and harmonisation of legislation with the regulation of European Union." http://www.parlament.gov.rs/narodna-skupstina-/vazna-dokumenta/poslovnik-(precisceni-tekst)/ceo-poslovnik-(precisceni-tekst).1423.html (26 November 2016)

[19] http://www.parlament.gov.rs/upload/documents/statistics/cir/Akti-2015.pdf (26 November 2016)

[20] http://www.euractiv.rs/pregovori-sa-eu/7030-predstavljanje-istraivanja-o-percepciji-poglavlja-23-i-24.html and http://www.mediafreedom.rs/wp-content/uploads/2014/03/Percepcija_sadrzaja_poglavlja_23_i_24_pregovora_za_pristup_Srbije_EU.pdf (22 November 2016)

2. Identification of the constitutional appeal as the regular legal remedy as a result of both low level of knowledge on the scope of the constitutional appeal and of legislative amendments on LOC which influenced in "redirection" of the cases to the CC.
3. Constitutional appeal was until 2014 the only legal remedy for examination of the right to a trial within reasonable time. Approximately ¼ of the total influx of constitutional appeals until 2015 accounted to the examination of the violation of the respective right.
4. General tendency of population to use all available remedies in search for justice.
5. The annual clearance rate of the solved cases by judiciary is reflected in the influx of constitutional appeals.
6. Quality of judicial decisions may generate the influx of the constitutional appeals.
7. Constitutional appeal is free of charge and its submission is not conditioned by the use of professional legal aid.
8. Constitutional appeal enables the filing the request for compensation of damages which is preconditioned by the establishment of the violation.
9. Quality of legislation could be a trigger for judicial proceedings and constitutional appeals.
10. Constitutional appeal is the "last resort" of seeking a justice as a consequence of the low citizens' trust in judiciary.

II.2. SPECIFIC INDICATOR

II.2.1. The relationship between the CC and judiciary

The relationship between the CC and judiciary in broader sense affects the number of the constitutional appeals before the CC. The mutual recognition and acceptance on the specific roles of both parties contributes to the promotion of the rule of law and development of the trust of the citizens in the democratic institutions within the legal order of the Republic of Serbia.

The judicial power that follows, accepts, promotes and applies the constitutional standards and ECtHR standards during its proceedings achieves two aims – *it raises its own reputation and the citizens' trust and it discourages further "seek for justice" before the CC*.

The meetings with different judges showed, however, that judiciary has been questioning the role of THE CC in relation to the protection of human rights and freedoms. It was almost unanimous opinion that THE CC in many cases acted as an instance court. In the reasoning of such view, it was used rather abstract argument that THE CC should defend human rights and not decide on substantive legal issues.

The disagreement with the scope of the constitutional appeal and the CC's examination of judicial decisions accordingly was a matter of the Plenary Session of the Supreme Court of Cassation already in 2009. Namely, from the Communication of the Plenary Session of the Supreme Court of Cassation delivered on September 9, 2012[21] it was observed that the Plenary Session of the Supreme Court of Cassation in 2009 expressed the opinion how THE CC's conduct of annulling the judgments of the courts was against the Articles 143 and 145 of the Constitution which foresee that the courts judgments may be re-examined only by courts in the prescribed procedure.

This disagreement reached its peak in 2011 by the enactment of the Law on the Amendments and Additions to the LCC which excluded the judgments of the courts from the Court's

[21] The Communication of the Plenary Session of the Supreme Court of Cassation, Sept, 3 2012, http://www.vk.sud.rs/sr-lat/caop%C5%A1tenje-op%C5%A1te-sednice-vrhovnog-kasacionog-suda-03092012 (23 November 2016)

jurisdiction. The exclusion was actually prescribed on the basis of the initiative of the Civil Law Department of the Supreme Court of Cassation and High Judicial Council. After the exclusion was enacted, the Supreme Court of Cassation expressed the opinion that this exclusion was considered as right alignment with the Constitution.

In reality this meant that as of 2011 the CC was suddenly deprived of the power to annul the court's judgments for violation of human right in the proceedings instituted by the constitutional appeal as it did until 2011

The reaction of the CC on this legal change was institution of the constitutional review *ex officio* which resulted in the abolishment of that provision due to its unconstitutionality.[22] In the literature[23] this decision was regarded as "culmination of the latent conflict that "has simmered" between ordinary judiciary and the CC since the enactment of the Law on THE CC from 2007". In short, the CC stated that the exemption of judicial decisions of the possibility to be annulled violates the constitutional principle of general and equal submission of the public authority acts to the constitutional control in equal manner, i.e. it violates the requirement of the equal legal effect of the CC's decisions.

This so called "latent" conflict between the CC and the Supreme Court of Cassation is not an exclusivity or particularity of Serbian legal and constitutional reality. The "tense" relationship of constitutional courts and ordinary courts has been recognized also in the countries of western democracy which have the constitutional appeal as a special remedy for the protection of human rights and freedoms[24] In the core of this relationship is the question of instance control or supervision of the ordinary courts' judgments.

The attitude of the judiciary toward the competence of the CC to annul the judicial decisions can be seen as a "*lack of a habit*" to be "*controlled*" outside of the judicial power. But it seems more to be a result of still insufficient knowledge of the specific methods[25] of the CC used in examination of possible violations of the human rights and freedoms and, in general, its throughout Europe accepted role in the protection of human rights. Next to it, it seems that it is not yet enough understood that the CC is the ultimate control in the scheme of the protection of human rights in Serbia before jurisdiction of ECtHR while the judiciary's role is prevention of violations.

Reluctance of the judiciary toward the CC's jurisdiction and its approach in the examination and observance of the judicial decisions created the attitude that the CC's decisions are not yet seen as promotion of human rights and freedoms but mainly are understood as decisions which should be executed as such. Although the access to the CC's case law is available as well as the courts have links to it, the reference to the decisions of the CC is not yet sufficiently reaffirmed. It is noted that concern of the domestic courts for alignment with standards of human rights protection is more focused on application of ECtHR case-law and much less to the CC's case law. This approach as much as welcome and necessary should be reviewed and supported by the CC's views when suitable as to accomplish the coherence in the system of the protection of human rights.

[22] The Decision of the CC No. IUz-97/2012 from December 20, 2012

[23] See, Maja Nastić "Odnos Ustavnog suda i redovnih sudova – Komentar Odluke Ustavnog suda" http://www.prafak.ni.ac.rs/files/zbornik/65-LAT/majanastic--LAT65.pdf (22 November 2016)

[24] Garlicki, Lech, Constitutional Courts Versus Supreme Courts (January 2007). International Journal of Constitutional Law, Vol. 5, Issue 1, pp. 44-68, 2007. Available at SSRN https://ssrn.com/abstract=1145490or http://dx.doi.org/10.1093/icon/mol044

[25] The secretary of the CC explained and advised on the legislation on the proceedings used before the CC. The scrutiny of each case before the CC takes a long road before final decision is achieved. The CC has several filters before the case could be examined in merits.

The focus of judiciary on the afore mentioned issue suppresses the important accomplishments of the CC in the field of protection of human rights. Just to mention, the persistent and consistent Court's case law in annulment of the decisions in relation to different judicial case-law was recognized by the ECtHR by declaration of the constitutional appeal as an effective legal remedy in that regard.[26] Such approach of the CC further furnished the self-regulation of the courts of appeal in overcoming the problems of inconsistent judicial case-law, which by the words of judges, contributed to active flow of ideas, problems and solutions. Moreover, in comparison to a number of the CC decisions on violation of the right to equal protection due to inconsistent judicial case law reasonably reduced in 2015 on 90 decisions in relation to 2014 when it counted 400 decisions.[27]The case law of the CC as to the right to a trial within a reasonable time enabled its smooth legal transfer to the ordinary courts as it established crucial formal and substantive points for a proper conduct of the proceedings.

The weak point of the relationship of the CC and judiciary is the lack of judicial dialogue. It is mainly conducted over decisions. In spite of the fact that Serbian LCC provides that every court in the Republic of Serbia may initiate a procedure for assessing the constitutionality or legality of the act whose compliance with the Constitution is raised during a procedure, if it finds that the issue has grounds,[28] this possibility has been rarely practiced by judiciary. Moreover, as a cause of high number of judicial cases is often mentioned the poor legislation. Still, the judiciary is rarely requesting the constitutional review on the legislation, although according to LCC[29], judiciary is in the group of the "*authorized proposers*" who are entitled to start the constitutional proceedings for the review of legislation.

In conclusion, there is no institutionalized communication between the Supreme Court of Cassation and the CC except on conferences or round tables. In the circumstances of the changed role of the CC in the field of protection of human rights in Serbia, the direct dialogue between these two courts could reduce possible misunderstandings and upgrade the methods of interpretation in the light of constitutional values.

II.2.2. CONCLUSION

The disagreement of judiciary with the CC's competence for examination of judicial decisions as well as its objection that the CC acts like an instance court when deciding on the violation of human rights, does not differ very much from the views expressed in other European states with similar situation.

The habituation to each other takes time especially in transitional countries such as the Republic of Serbia. Nevertheless, the low degree of judicial confidence in the CC and bypassing of the CC standards and its statements could generate the increase of the constitutional appeals and do not in general contribute to legal certainty and uniform approach to the protection of human rights. The consistent and persistent follow up of the constitutional

[26] Cupara v. Serbia (Application no. 34683/08 Judgment 12 July 2016, §36).
[27] Report on the Activities of the CC in 2014, http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2014.pdf (2 December 2016)
[28] Article 63 of CRS: „If during a procedure before a court of general or special jurisdiction the issue of compliance of law or other general act with the Constitution, generally accepted rules of international law, ratified international agreements or law, is raised, the court shall, if it finds that the issue has grounds, adjourn the procedure and initiate a procedure for assessing the constitutionality or legality of that act before the CC ".
[29] Article 29 of CRS: Participants in procedures before the CC are the following: 1) state authorities, authorities of the autonomous provinces and local self-government entities, members of parliament, in procedures for assessing constitutionality and legality

standards and views expressed in the CC decisions in judicial decisions can prevent the influx as it discourages the "seekers for justice". The constitutional methods for judicial dialogue as well as institutionalization of different models of communication and cooperation between these two courts would not only reduce the possible disagreements or misunderstandings but also would raise the level of awareness of the proper administration of justice.

III. THE ASSESSMENT OF THE APPLICATION OF ECtHR STANDARDS BY THE CC AND BY JUDICIAL POWER

The analysis of a certain number of decisions of the CC from different periods shows that the CC, in spite of rather short experience in the field of individual human rights protection, has been developing into true constitutional guardian of human rights and freedoms in the Republic of Serbia.

The reference to the ECtHR standards and their modification or adjustment (mainly in relation to the Article 6 of the ECHR) to the respective constitutional rights has been remarked. In the case Ferizović v. Serbia[30], due to proper and accurate reaction of the CC a reasonable number of applications before ECtHR decreased as it was confirmed that the CC harmonised its approach to the respective issue. Moreover, the explicit reference to ECtHR in the decisions, as it was reaffirmed by the Secretary of the CC, has an educational dimension as it proves and demonstrates that constitutional standards respond to those one established by ECtHR.

While the reference and application of the standards of the ECtHR in the examination of constitutional appeals has been embraced to the large extent, the variability of the application of the ECtHR standards in the cases of the CC's normative control of the legislation may be attributed to the particularity of the issues at stake as well as to the different methods applied for the review. Nevertheless, from the Reports on the Activities of the CC has been noticed that the CC became aware of the importance of the applications of the ECtHR in the normative control issues and the follow up is in uptrend.

When speaking about the application of ECtHR standards by the judicial power, different conclusions were withdrawn. From the interviews, it was noted that basic courts have either limited or no access to the internet in their every day job. It is therefore to assume that the acquaintance with the ECtHR standards is reduced to the cases against the Republic of Serbia (since they are published in the Official Gazette of the Republic of Serbia). Although the latter imply valuable source of knowledge, it is not sufficient for comprehension of the ECtHR scheme of the protection of human rights. The situation by higher courts and courts of appeal seems to be more favorable but still insufficient. The departments for follow up of the case law take in consideration of the practice of ECtHR and the courts have been trying in complying with them in adjudication. Consideration of several decisions of the Court of Appeal case-law showed the way of application of ECtHR standards and by the reasoning it could be concluded that ECtHR standards served well in determination of specific rights, such as right to expression or right to home. However, it was also observed that sometimes judges recourse

[30] Ferizović v. Serbia (Application no. 65713/13) Judgment 26 November 2013: p.4.: "The *Court observes that the Constitutional Court of Serbia has recently fully harmonised its approach towards the non-enforcement of judgments against socially/State-owned companies undergoing restructuring with the Court's case-law (see §§ 12-17 above). 5. Since the first such Constitutional Court's decision was published in the Official Gazette on 4 October 2013, the Court considers a constitutional appeal to be an effective remedy within the meaning of Article 35 § 1 of the Convention for that last category of cases concerning the non-enforcement of judgments against socially/State-owned companies as of that date"*

to mechanical interpretation of ECHR through invoking the Convention while ignoring the ECtHR case law.

The Supreme Court of Cassation was in the course of collecting the decisions throughout the Republic of Serbia which referred to the ECtHR standards and seems to be keen in undertaking the measures to hamper the vulnerable part of Serbian judiciary – inconsistent judicial case law. These endeavors of the Supreme Court of Cassation were recognized by the ECtHR in the case *Stanković and Trajković v. Serbia*.[31]

In spite of the progress, the judges emphasized the lack of relevant data base which would be easily accessible and at disposal in dealing with different issues. The language barrier is also an obstacle for thorough application of standards if not translated. Last but not least, the rush to "catch-up" the norm, i.e. monthly rate of solved cases, disables judges in thorough analysis of the standards. However, in spite of the positive approach to application of ECtHR standards, there is a strong impression that the Serbian judiciary has been still more concerned and focused to follow up of the domestic case law and domestic interpretative methods. The relevance of the Supreme Court's legal opinions is rather high.

III.1. CONCLUSION

The application of ECtHR standards in the Serbian legal orders shows that so far, the CC has been the main body which actively applies and follows convention standards developed by ECtHR. The incorporation of those standards in the domestic legal order by judiciary is recognized as necessity and the concern exists. However, there are many objective obstacles which slow down this process. In that regard, it could not be said that there is systematic and regular follow-up of the standards as well as their application.

IV. THE ASSESSMENT OF THE PERMANENT TRAINING PROGRAM OF THE JUDICIAL ACADEMY

The Judicial Academy recognized the need of the continuous and thorough training and education of judiciary in the field of the protection of human rights. The courses are structured as one day seminars and executed in the different forms. The case law of the CC is merged in the ECtHR case law. However, there is no specific training on the constitutional law as such.

The concept of the constitutional law today abandons the definition of the constitution as being only a political act of the highest rank. The structural change in the understanding of the constitutional law has been happening with transformation of the CC from "negative" to "positive" legislator. In the literature it is evident how the „allocation" of the protection of human rights and freedoms by the CC in a number of post-socialist countries contributed to consolidation of the rule of law and higher degree of awareness for human rights.

There is no doubt that the CC's decisions produce deep impact on the respective legal order and inevitably become a source of law. In such circumstances bringing closer to judiciary the methods of decision making process as well as methods of interpretation used by the CC in solving would contribute to a higher level of cohesion of the legal order as well as to protection of human rights.

[31] Stanković and Trajković v. Serbia (Applications no. 37194/08 and 37260/08, judgment of 22 December 2015, p. 25)

On the track of the comprehension of ECHR as „living organism“, the same consideration of the constitution in domestic perspective would enable the judiciary to be the active factor of constitutional design of the Serbian legal order. All misunderstanding on the role of the CC would be diminished.

The existing agreement between the Judicial Academy and the CC of the Republic of Serbia on cooperation seem to be an asset achieved by the Judicial Academy which should activate as soon as possible. Moreover, the Judicial Academy could be the „meeting point“ of the CC and judiciary in establishing the different forms of dialogue between them. Encouraging the judiciary to request the normative control or to question to constitutionality or legality of the norm that should be applied in the individual case should through trainings on the constitutional methods of examination would be welcome. The data base on the CC's decisions as well as of ECtHR which is one of the activities of this Project might be an initial communication channel of this dialogue.

Last but not least, duration of the courses on the European Convention on Human Rights raise the issue whether one day courses are sufficient for mastering and understanding the whole concept of the protection of human rights developed by the ECtHR? The trainings which are focused on the practical application of the conventional standards by courts as autonomous convention concepts can not be explained in one day courses. Moreover, they cannot be linked to domestic legislation and practice.

In that regard, the practical approach with simulation of the cases, moot courts and other kinds of learning methods should be applied in the training process and possibly combined with the modules on the criminal, administrative, civil and misdmeanour law. In such manner, the process of the europeanization of the human rights can start as it could reveal the differences in the approaches to certain legal institutes and contribute to the enrichment of the ECtHR standards.

IV.1. CONCLUSION

Judicial Academy has a thorough framework on the training on the European Convention on Human Rights. However, in the terms of non yet sufficient understanding of the scope of the ECtHR standars and the difficulties of judiciary in their application, the time limit on one day course seems to be not enough. It should review the possibility of strengthining the courses both in time and in substance. The exercizes on the methods for incorporation and adjustment to the standards in the every day adjudication as well as methods of interpretation of the standards on the present case could contribute to prevention of the mechanical interpretation as it was mentioned on the meetings.

Further on, there are good prerequisites to proceed with the development and realization of the cooperation with the CC. It can be also a meeting point of a dialogue between the CC and Supreme Court which dialogue could create the basis for further development of the Judicial Academy.

V. THE POSITION OF THE REPUBLIC OF SERBIA BEFORE THE ECtHR

In the preparation of the Project and defining the scope of the root cause analysis it was taken into aaccount that an enormous number of the applications against the Republic of Serbia was pending before the ECtHR. They counted more than 11,000 cases. Meanwhile, the statistics from 2016 showed that Serbia stands with 1,555 pending cases. The vast decrease of the cases is directly connected to the cases *Vučković and Others v. Serbia* and *Ferizović v. Serbia* as well as to friendly settlements due to consistent ECtHR case law in similar cases.

The standpoint of the Republic of Serbia in relation to the violations of ECHR tells that the domestic difficulties directly reflect on the pending cases. The violations of right to a fair trial and the right to property are the most frequent ones established by the ECtHR. Non-enforcement of judgments seems to be a particular problem of Serbian legal system which is also recognized in the negotiation process between Republic of Serbia and European Union within Chapter 23.

Although the number of violations established in 2015 do not call on „alert", the concern may not fall off. The issue of non-enforcement of judgmenst has been still pending. Also, from the conversation with the representatives of the Serbian Bar Association it stems that the quality of judgments is in high degree reduced and therefore disputable because of the obligation of judges to respond adequately on demands on reduction of pending cases. The problems might also occur in relation to the new LPRT which provided the limits on compensation of damage for violation of that right. These limits differ both from the CC's case law as well as from the ECtHR approach to this question. Another problem that is expressed during the meetings with respective interlocutors is that many pending cases create or produce new cases. Also, one of the opionion is that criminal courts by the rule do not decide on property issues during criminal proceedings although they are entitled to do it and thus could reduce proceedings. All of this may cause different legal consequences which may touch the issue of human rights protection.

VI. THE CONSTITUTIONAL COURT AND THE PUBLIC

Although this part is not directly connected to the subject of the assessment, it is considered in the light of the understanding the role of the CC in the scheme of the protection of human rights.

In the introduction, it was noted that Report of the Anti-Corruption Council and Press release from a conference, where the then minister of justice participated, were observed for the respective analysis.

The Anti-Corruption Council was very sharp in statements on the issue of autonomy and independence of the CC and claimed that the accessibility to justice which was expected from it was absolutely insufficient. Moreover, the Council claims that Serbia is still a party-state because ten judges are elected by the ruling parties, i.e. the ruling authority while only five judges are elected by the Supreme Court of Cassation upon HJC's and SPC's proposal. Such election procedure, by the Council's opinion mirrors direct dependency of the CC judges' positions on the authorities".

In the press release from a conference, the minister of justice, as a representative of the executive power, openly criticized power of the CC to annul the judicial decisions, claiming that it was against the Constitution since the CC was not a part of the judicial power. The relationship of the CC and judicial power he saw as conflict of jurisdictions which deeply violates the principle of independence and impartiality of the judicial power. In that regard he

called on the amendments of the Constitution which will precisely define the proceedings before the CC.

As much as these views touch different issues, in their essence they reflect the ignorance on the role of the CC, its position, functions and operating methods. This means that the CC of the Republic of Serbia is not only faced with a problem of a high number of the constitutional appeals but also with a problem of its presentation and acceptance in the Serbian society.

The intention of this part was not to criticize or argue with the expressed opinions, but to advise to the need to inform (or educate) the public on the essence of the constitutional justice. The role of judiciary in that regard is of enormous importance.

RECOMMENDATIONS

The number of constitutional appeals so far reflects the general situation of the Republic of Serbia in the period of transition. In order to contribute to the development of the rule of law in Serbia and reduce a low level of citizens' trust in judiciary, the cooperation of judiciary and the CC in protection of human rights is a prerequisite for not only decrease of the constitutional appeals, but also for the promotion of the reputation and trust in judiciary.

In that regard, it is recommended the following:

- The Judicial Academy should proceed in realization of the Agreement with the CC on cooperation in the way to include the CC in its trainings, activities and education;

- The Judicial Academy should examine the possibility to introduce the module on the constitutional law with the aim to bring closer to judiciary the constitutional methods of interpretation as well as to motivate judiciary to invoke their position of the authorized proposers in the proceedings of the constitutional review of legislation;

- The training courses on the European Convention on Human Rights should be supplemented by the decisions of the CC in order to habituate the judiciary to use them parallel in the reasoning of judgments. Use of the CC standards together with ECtHR standard could discourage further applications before the CC and the ECtHR.

- The training courses on the European Convention on Human Rights should be strengthened by raising the time of the training as well as by the emphasizing of its practical aspect. Also, it is recommended to review a possibility of combination of the standard modules with the one on the European Convention on Human Rights.

- The Judicial Academy should become a "meeting point" of dialogue between judiciary and the CC on different issues in relation to the protection of human rights.

- Further promotion and application of the ECtHR standards in the decisions;

- To continue and support the endeavors and activities of the Judicial Academy in relation to the promotion of the quality of judgments;

- To examine the possibility of equipping the judicial departments for case-law within all courts throughout Serbia with trained judges and court advisors for consistent application of constitutional and convention standards – the prerequisite of this recommendation is proper and continious training (thorough short term trainings both at the CC and ECtHR or organizing the trainings with the experts for ECtHR);

- To review the LCC in the part which enables the complainants to file the request on the compensation which becomes active in the case when the constitutional appeal is adopted and to analize whether such compensation could be subsumed under the CC's power to determine the way of the execution of its decision and not to be bound by the request.

- To review the provisions of LPRT in relation to limitation of the compensation for violation of the right to a trial within a reasonable time in the light of the ECtHR Judgment *Savić and Others v. Serbia*.

EUROPEAN UNION'S SUPPORT TO THE JUDICIAL ACADEMY

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This project is implemented by
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