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17
HUMAN RIGHTS IN SERBIA 2011
LEGAL PROVISIONS AND PRACTICE COMPARED TO
INTERNATIONAL HUMAN RIGHTS STANDARDS

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AI – Amnesty International
AEAD – Act on the Election of Assembly Deputies
ANCP – Act on Non-Contentious Procedure
ANEM – Association of Independent Electronic Media
Answers to the EC – Answers of the Government of the Republic of Serbia to Questionnaire the EC Questionnaire
Anti-Violence Act – Act on Preventing Violence and Unbecoming Behaviour at Sports Events
APV – Autonomous Province of Vojvodina
BIA – Security Information Agency
BNV – Bosniak National Council
BiH – Bosnia and Herzegovina
CeSID – Centre for Free and Democratic Elections
CC – Criminal Code of Serbia
CCA – Constitutional Court Act
CCS – Constitutional Court of Serbia
CESCR – Committee for Economic, Social and Cultural Rights
CoE – Council of Europe
Constitution of Serbia – Constitution of the Republic of Serbia
CPA – Civil Procedure Act
CPT – CoE Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CPC – Criminal Procedure Code
CSCE – Conference for Security and Cooperation in Europe
DEVD – Decision on the Election of AP Vojvodina Assembly Deputies
doc. UN – UN document
DS – Democratic Party
DSS – Democratic Party of Serbia

ECmHR – European Commission of Human Rights

ECHR/ECtHR – European Court of Human Rights

ESC – European Social Charter (Revised)

EU – European Union

EULEX – European Union Rule of Law Mission

European Court – European Court of Human Rights

EC – European Community

FA – Family Act

FNRJ – Federal People’s Republic of Yugoslavia

FRY – Federal Republic of Yugoslavia

GDP – Gross Domestic Product

GLIC – Gay Lesbian Information Centre

GRECO – The Group of States against Corruption

GSA – Gay Straight Alliance

HJC – High Judicial Council

HLC – Humanitarian Law Center

HRW – Human Rights Watch

ICCCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

Hague Tribunal/ICTY – International Criminal Tribunal for the Former Yugoslavia

ILO – International Labour Organisation

IJAS/NUNS – Independent Journalists’ Association of Serbia

IMF – International Monetary Fund

JAS/UNS – Journalists’ Association of Serbia

JNA – Yugoslav People’s Army

KLA – Kosovo Liberation Army

LA – Labour Act

LDP – Liberal Democratic Party

LEA – Local Elections Act

LGBT – Lesbian Gay Bisexual Transgender
Abbreviations

LSV – League of Social-Democrats of Vojvodina
MIA – Ministry of Internal Affairs
NATO – North Atlantic Treaty Organization
new CPC – new Criminal Procedure Code
new CPA – new Civil Procedure Act
NGO – Non-governmental organisation
NPM – National Preventive Mechanism
ODIHR – Office for Democratic Institutions and Human Rights
OSCE – Organisation for Security and Cooperation in Europe
PSEA – Penal Sanctions Enforcement Act
RATEL – Republican Telecommunications Agency
REC – Republican Electoral Commission
RBA – Republican Broadcasting Agency
RS – Republic of Serbia
RTS – Radio Television of Serbia
RZZO – Republican Health Insurance Bureau
SAI – State Audit Institution
Serbia – Republic of Serbia
Serbia As A Safe – Serbia As A Safe Third Country: A Wrong Presumption, Third Country Hungarian Helsinki Committee, 2011
SFRY – Socialist Federal Republic of Yugoslavia
Sl. glasnik – Official Gazette of the Republic of Serbia
Sl. list – Official Gazette (of the FRY and later, SaM)
SNS – Serbian Progressive Party
SPS – Socialist Party of Serbia
SPC – State Prosecutors Council
SRS – Serbian Radical Party
UN – United Nations
UNHCR – United Nations High Commissioner for Refugees
UNMIK – United Nations Interim Administration Mission in Kosovo
Venice Commission – European Commission for Democracy through Law of the Council of Europe
VBA – Military Security Agency
VOA – Military Intelligence Agency
YUCOM – Lawyers Committee for Human Rights
Preface

The Belgrade Centre for Human Rights has been publishing its synthetic and comprehensive report on the state of human rights in the country since 1998. The purpose of this Report is to present and review the constitutional and legal provisions related to human rights in Serbia. The Report analyses the degree to which the national legislation is in conformity with the most important international (universal and European) standards, i.e. all the treaties Serbia has ratified to date.

The first part of the Report analyses and elaborates in detail the legal provisions related to human rights. It analyses the constitutional provisions, the most relevant laws and specific by-laws that may impact on the full enjoyment of human rights. The relevant provisions in the national laws are compared with Articles in the UN Covenants and Conventions adopted under UN auspices and the European Convention on Human Rights and interpretations provided by the UN Committees and the European Court of Human Rights in their case law.

The second part of the Report covers specific thematic wholes covering a number of human rights relevant to these themes. It provides an overview of information on events and actions affecting the state of human rights in the country and highlights the problems and difficulties Serbia’s citizens encounter in exercising their human rights. It also notes the state’s failure to implement strategies and plans geared at promoting human rights and implementation of laws, instances of discrimination, the status of specific categories of the population, which are in a more unfavourable position than the majority, and many other circumstances affecting the full enjoyment of human rights and having simultaneously strong political implications and effects on the state of human rights in the country.

Apart from continuously and systematically monitoring the legislative activities and analysing the compliance of the national law with international standards, the BCHR’s associates have also systematically monitored the media and reports of international and local NGOs and focused on the data indicating grave violations of specific rights. The Report does not offer final assessments; rather, it presents data published by the media and in human rights reports.

The publication of this Report was supported by the Royal Netherlands Embassy in Belgrade. We take this opportunity to thank it for supporting our efforts to contribute to the improvement of human rights reporting.

Introduction

Serbia focused on several crucial issues in 2011, primarily the obstacles standing in its way of gaining the status of EU candidate, addressing the Kosovo issue and dampening the effects of the global economic crisis, which have threatened to drastically affect the national economy and bring the country to the brink of economic collapse.

The state was in 2011 still governed by the coalition that won the 2008 elections under the slogan “Both Europe and Kosovo”, a policy that has occasionally forced the authorities to draw quite contradictory moves. Furthermore, this so-called “pro-European coalition” is composed of parties that differ in programme and have quite different histories. The largest party in the ruling coalition, the Democratic Party (DS), headed by Boris Tadić, who is also the President of Serbia, had been one of the main forces that had opposed the regime of Slobodan Milošević and his Socialist Party of Serbia (SPS), which had brought Serbia into conflict with the other republics of the former Socialist Federal Republic of Yugoslavia (SFRY) in the 1990s. Milošević was finally defeated at the September 2000 elections and stepped down after the protests on 5 October that year that broke out after he and his allies refused to admit election defeat.

The ensuing political developments, presented in BCHR’s prior annual reports\(^1\), led to the rapprochement of the Democratic Party and the Socialist Party of Serbia: the two even signed a kind of agreement of reconciliation. The representatives of the SPS in the government that ran Serbia in 2011 were in charge of several important portfolios, including internal affairs – Interior Minister Ivica Dačić (SPS), even became the first Deputy Prime Minister. On the other hand, the Constitution of the Republic of Serbia adopted in 2006 as a compromise between the so-called “pro-European” forces and the political parties in the former government of Vojislav Koštunica, remained in force in 2011. Koštunica’s Democratic Party of Serbia (DSS), which has always been a deeply nationalist and Euro-sceptical party, became openly Europhobic in 2011 and advocated the view that Serbia should abandon all ambitions to become a member of the EU, since, in its opinion and that of its nationalist allies, EU accession would be detrimental to Serbia and its interests. In the view of these parties, Serbia should declare political neutrality, which would imply not only a general refusal to move towards the West and establish closer relations with Russia, but also oppose all European integration attempts.

Torn between essentially contradictory ambitions summed up in the slogan “Both Europe and Kosovo”, which it has persistently presented as complementary,\(^1\) See BCHR’s Annual Reports for 2000 to 2010.
Human Rights in Serbia 2011

the popularity of the current Government inevitably started fading, because it was obviously incapable of satisfying all its supporters and simultaneously making the painful cuts to address the burning social and economic issues.

Serbia has been set a number of requirements by the EU agencies and the leading EU member-states which it needs to fulfil if it is to make headway in EU accession. The handover of the two last fugitive indictees to the International Criminal Tribunal for the Former Yugoslavia (ICTY), who were believed to have been hiding in Serbia, had been one of the chief prerequisites. The authorities had earlier attempted to avoid arresting the two men and even claimed that they were not in the territory of Serbia. ICTY war crimes indictee General Ratko Mladić, the former commander of the Bosnian Serb Army, was found and apprehended on 26 May 2011; two months later, the authorities also arrested the last war crimes fugitive, former President of the Republic of Serb Krajina Goran Hadžić. Both were transferred to The Hague after the proceedings set out in Serbian law were completed. Their trials are to begin in 2012. Mladić’s arrest provoked demonstrations by the members of rightist parties and nationalist organisations that resulted in casualties and material damage in Belgrade. Hadžić’s arrest, on the other hand, provoked hardly any reactions given that no myths presenting him as a hero and warrior had been built around him.

The Serbian authorities believed that they had eliminated the main obstacle to the EU candidacy status by transferring the two fugitives to the ICTY, which was due to complete its work in the near future. It, however, transpired that the other key element of Serbia’s foreign policy – the aspiration to maintain full sovereignty over Kosovo – was becoming an additional hindrance. As underlined in BCHR’s prior reports, the Preamble to the 2006 Constitution of the Republic of Serbia includes a solemn vow of all state authorities not to reconcile themselves with the loss of Kosovo and Metohija, to persist in treating it as an autonomous province which is still an integral part of Serbia and not to recognise any acts to the contrary. The Kosovo Assembly, however, declared Kosovo’s independence in 2008 and, by the end of 2011, it was recognised by 85 states, including all EU members save Slovakia, Greece, Cyprus, Romania and Spain.

These circumstances gave rise to an additional requirement for the EU candidacy status, which obviously came as a surprise to the Serbian Government. Although Serbia has not been expected to recognise Kosovo’s independence, the statements by a number of EU officials indicated that it was expected to regulate its relations with the de facto authorities in Priština to ensure that they do not jeopardise the relations in the region and to allow for the resolution of the numerous issues which have to be addressed by the Serbian state authorities together with the Kosovo institutions established in the meantime and dominated by the Albanians, who account for the majority population in Kosovo.

The situation became tense after the Kosovo authorities, whom Serbia does not recognise, tried to establish control over all of Kosovo, including the administrative border crossings between Serbia and northern Kosovo that is mostly populated
by Serbs. The Serbs in that area sharply opposed these attempts and erected numerous barricades blocking the crossings at Jarije and Brnjak. They thus confronted not only the representatives of the state of Kosovo, which they do not recognise, but also the authorities of international organisations that have been fulfilling specific duties in Kosovo in accordance with international agreements, notably, the UN peacekeepers KFOR and EULEX. An entity, entrusted with specific political and judicial tasks in Kosovo. The erection of the barricades (some of which were built in the territory of Central Serbia, outside of Kosovo) was accompanied by clashes and the use of weapons, which resulted in the wounding of a number of people, including KFOR troops.

The erection of the barricades and the incidents that occurred in late July 2011 led to higher tensions in all three camps. On the one hand, representatives of some of the most influential EU members, primarily Germany, some of whose soldiers were wounded in the incidents, clearly set conditions for Serbia’s candidacy, demanding of it to rapidly and efficiently allow for the freedom of movement across all of Kosovo and to abolish the so-called parallel institutions, which claim to operate as an integral part of the Republic of Serbia. They were established after elections held under the rules applying to all of Serbia and funded from the Serbian budget. On the other hand, the attempts by official Serbia to calm relations with Kosovo and resolve the issues regarding all Serbs living in Kosovo, not only those in the north, met with the resistance of the bodies, organisations and other forces of Kosovo Serbs grouped in the north, who believed that Serbia was letting the Kosovo Albanians assume full control over them and was thus gradually starting to recognise Kosovo as an independent state. The matters were complicated also by the fact that three of the four municipalities established as part of the state of Serbia were headed by representatives of parties in opposition to the Serbian government and its EU accession policy. The erection of the barricades and similar demonstrations in north Kosovo irresistibly invoked memories of the so-called “log revolution”, when the Serbs living in Croatia and opposing its pro-independence efforts laid logs across the roads and blocked them in this former Yugoslav republic in the early 1990s.

There was another reason why the attitude of the Belgrade authorities towards the developments was hesitant. Namely, Kosovo has always been one of the most neuralgic political issues for Serbs. Its loss has been perceived as a major historical defeat, especially because of the many historical and cultural monuments located in Kosovo since the Middle Ages, when it was in the centre of the Serbian state. Numerous influential institutions in Serbia, above all the Serbian Orthodox Church, perceive any admission that Serbia lost Kosovo as amounting to high treason. All parties of the Right and many “patriotic” associations invoke this argument, the most aggressive of which proclaim their feelings on Kosovo even in their very names, such as, for instance, the association “1389” (the year of the Kosovo battle which the Serbs lost to the Ottoman Turks). This is why the requirements regarding Kosovo were interpreted as new obstacles to Serbia’s EU accession after it had ful-
filled the ones on cooperation with the ICTY. Demands to change Serbia’s foreign policy and sway it away from EU integration and towards other allies, primarily Russia, were heard again.

After some hesitation, the Serbian Government ultimately decided to step up indirect and informal contacts with the Priština authorities to resolve the issues not related to Kosovo’s status. The officials explained that they needed to address the problems the Serbs living in Kosovo were experiencing, particularly the Serbs living in one of the many enclaves in southern Kosovo, who cannot join forces and counter the Kosovo de facto authorities or even resolve some of the fundamental existential issues. Statistics indicate that more Serbs are living in south than in north Kosovo. There are political forces, even parties, in south Kosovo, which have agreed to work in the unrecognised Kosovo state bodies in order to improve the living conditions of the ethnic Serbs.

Talks between the delegations of Serbia (not at the ministerial level) and the Kosovo de-facto Government were launched in early 2011 on problems, which do not regard the status of Kosovo and cannot be perceived as tacit recognition of the Kosovo state. The talks were, however, slow and were halted by the developments in late July, which prompted the European Council to put off its decision on awarding Serbia the status of EU candidate, despite all the endeavours and even the European Commission’s recommendation. The decision was perceived in Serbia as a major foreign policy setback and again reinforced those opposing the EU. The DSS was the most consistent in such resistance, and even decided to leave the European People’s Party, an international organisation of right-of-centre European political parties. Some of the leading EU officials and politicians of EU member-states, including e.g. German Chancellor Angela Merkel, who was the most explicit in exacting Serbia to regulate its relations with the Kosovo Albanians, belong to this group. Despite the break-offs and difficulties, the Serbian Government and the Kosovo representatives continued their “technical” talks and reached agreement on some specific issues causing least political controversy.

Despite predictions to the contrary, the coalition Government formed after the 2008 elections survived all the upheavals with only one reshuffle (in March 2011) and was very likely to be the first government since the democratic changes in 2000 that would serve a full mandate. Serbia, however, still faces a number of other major challenges.

The economic crisis in the country deepened not only due to the global economic crisis, but also because, as it transpired, many economic moves drawn after 2000, particularly after the assassination of Prime Minister Zoran Đinđić in 2003, were wrong and improvident. The one most often mentioned is the failure of the privatisation, which is generally believed to have been rash and rife with corruption. A large number of once successful companies were sold under extremely favourable conditions – even without tenders or auctions, to dubious partners who had no interest in continuing production and merely wished to get hold of the real estate and facilities for next to nothing. Many of the privatised companies have thus gone bankrupt, leav-
ing behind masses of jobless people and citizens who had lost their acquired rights to social protection and entitlements. Serbia now has one of the highest unemployment rates in the world. One-third of its population is living below the poverty line.

Widespread and systematic corruption is generally perceived as one of the greatest problems the Serbian state and society face. In various, both national and international, surveys of perceptions of corruption Serbia ranks among the most corrupt states. The impression is that endeavours to eliminate or at least reduce it to an acceptable level are insincere, inconsistent and doomed to fail for a number of reasons. For example, the government set up its Anti-Corruption Council back in 2000, but has paradoxically never fully acknowledged it or its findings; quite the opposite, the Council and its members have very often been accused of incompetence or bias by some government members. The Council’s reports are rarely picked up by the media and senior state officials hardly ever pay heed to them. The nominally much stronger Anti-Corruption Agency, that was later established as an independent regulatory authority and awarded much greater powers than the Council, also faced difficulties in its work in 2011.²

Preoccupation with making ends meet has led to huge dissatisfaction and become one of the main political issues, which began to overshadow all others and affect the conduct and public discourse of the political parties. The fact that social dissatisfaction has not reflected on political life in the usual way and that it has led to the strengthening of the nationalist right gives rise to concern. The trade unions are still weak, disunited and inefficient and do not enjoy the trust of the workers. Even the ones aiming to transform themselves into political parties are opting for nationalist slogans rather than focusing on unemployment and the fate of the employees. Serbia’s political stage is thus becoming increasingly asymmetrical; it is almost entirely filled with right-of-centre and extreme right forces, the vast majority of which are flirting with nationalism. This, in turn, leads further and further away from confrontation with the past and to the suppression of all attempts to establish guilt and liability for war crimes, as reflected by the persistent denial of the ICTY’s results, its judgments and by the difficulties in organising regional cooperation to punish the perpetrators and re-examine the war events.

The cancellation of the Pride Parade, which was to have been held in Belgrade on 2 October 2011, was one of the starkest examples of the authorities giving in to the prejudice and aggressiveness of the professedly patriotic organisations. The Pride Parade was held for the first time in 2010, albeit with great difficulties (see BCHR’s Report 2010). The Parade participants were then confined to a very small venue and had to be protected by strong police forces, while their opponents wreaked havoc across Belgrade. The 2011 Pride Parade was expected to encounter the same kind of resistance, possibly even more widespread and systematic, according to the schemes of the homophobic groups. The authorities gave in and prohibited the Parade.³

² See II.2.
³ See II. I.4.10.3.
No headway was made in preventing extremist organisations from working in 2011. The Constitutional Court did not rule on any of the prosecutors’ initiatives to ban such organisations by the end of the year.

So-called paticracy is a phenomenon that has been undermining the work of the Serbian authorities. Namely, all the coalition governments in Serbia since 2004 have been based on agreements in which the ruling parties divided the spheres of interest, popularly dubbed “feuds”, amongst themselves. The principle that applied in the government of Zoran Đinđić, under which the senior team managing a specific portfolio would comprise a minister from one party and assistant ministers, state secretaries, and heads of directorates from other coalition parties or independent experts, was replaced by entrusting all the senior and managerial posts in one ministry to one party. This is why most, if not all, ministries are now run by people from the political parties the specific ministries “belong to”. They appear to account for their performance only to their party leaderships. The state officials are thus generally not considered independent from the party leaderships that appointed them and many have proven incompetent. Even when one of them causes a scandal or commits a crime, he/she can be replaced only by a member of the same party. The same model is applied to appointing party members to the management boards of public companies. The parties reneged on their pre-election promises that experts in the relevant fields would be appointed to the management boards: quite the opposite, they have been appointing figures whom they owe favours to, who are loyal to them or from whom they expect favours in the future.

Particracy has gradually led the man in the street to believe that political parties are not here to protect the interests of the citizens, social strata or groups, that being a politician is a profession *per se*, and that the parties and politicians have only one objective: to come to power and stay in power and that this is why none of them have genuine political programmes and merely pander to the public’s mood hoping to win enough votes and be part of government. Given the slight, if any, differences between the political parties’ programmes, even if they are clearly articulated (which has not always been the case), the voters usually choose who they will cast their ballots for by applying other standards (the personality of the party leader being one of them), which is why the politicians and parties need not engage in serious political debate and their discourse boils down to slogans and stereotypes. Furthermore, given the difficulties of forming a coalition government that will be made up of a lesser number of parties and that the similarities between the party programmes allow the parties to enter a wide variety of coalitions, the voters are not sure what they are actually voting for, because the party they vote for can easily abandon its election programme and promises if that is the price it has to pay to joining the winning coalition. Disappointment in politics and the entire political class has resulted in increasing apathy. More and more people are prone to abstention, which may adversely affect the formation of a government and the consistency of its policies.
Summary

1. Fulfilment of the Recommendations of International Monitoring Bodies

The Human Rights Committee and the Committee on the Elimination of Racial Discrimination reviewed in March 2011 Serbia’s reports submitted in accordance with its obligation to submit periodic reports to UN committees. Although the state is under the obligation to notify the public at large of its reports and, in particular, of the recommendations issued by the Committees after reviewing them, Serbia still does not practice publishing the reports.

Serbia is under the obligation to submit reports to the following UN committees in the coming years: the Committee against Torture in November 2012, the Committee on the Rights of the Child in March 2013, when it is also to submit reports on the implementation of two Optional Protocols to the Convention on the Rights of the Child (on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the Committee on the Elimination of All Forms of Discrimination in January 2014 and to the Human Rights Committee in April 2015. Serbia has been late in submitting its reports to the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights (due in 2010) and the Committee on the Rights of Persons with Disabilities. The draft report on the implementation of the Convention on the Rights of Persons with Disabilities has been prepared and posted on the website of the Human and Minority Rights Directorate.

Serbia submitted the Universal Periodic Review every UN member submits to the Human Rights Council in 2008. It accepted 24 recommendations and is to report on their fulfilment to the Human Rights Council in 2013, when its second Universal Periodic Review is due.

Serbia submitted its first report on the implementation of the Revised European Social Charter in November 2011, in accordance with the obligation envisaged under the European protection system. Given that the report review procedure is an extremely complex one, there was clearly no time for the Committee of Ministers to complete in 2011 its report with recommendations to Serbia on how to improve its economic and social rights.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Republic of Serbia for the third time in February 2011. It held meetings with various state authorities and civil soci-
ety organisations and visited a number of establishments in which persons deprived of liberty are held. The report on the visit was not published by the end of 2011.4

2. Confrontation with the Past – Transitional Justice

Serbia in 2011 finally arrested and transferred to the ICTY Detention Unit Ratko Mladić, the former commander of the Bosnian Serb Army Main Staff, and Goran Hadžić, the erstwhile Prime Minister of the self-proclaimed Serb Autonomous Region of Slavonia, Baranja and Western Srem and President of the self-proclaimed Republic of Serb Krajina, whereby it made the last two fugitives accused of war crimes in Bosnia and Croatia respectively available to this court.

Mladić’s and Hadžić’s arrests were the chief events in 2011 in terms of confrontation with the past, i.e. establishing facts regarding the crimes committed during the wars in the former SFRY and the criminal prosecution of those who had committed them. All other major events not only failed to contribute to establishing responsibility for the crimes and punishing their perpetrators, but revived the conflicts between the governments in the region and endangered cooperation between their judicial authorities as well. The criminal prosecution of war crime indictees in Serbia has been significantly undermined by the setback in its relations with Croatia and Bosnia-Herzegovina. Cooperation with the judiciary authorities of the neighbouring countries is crucial given that the crimes tried in Serbia had as a rule been committed outside its territory and numerous witnesses are beyond the reach of the Serbian judiciary.

No positive trends were noted in media reports on topics related to transitional justice. Only a few outlets insist on establishing responsibility for the crimes committed in the former SFRY and report on this topic responsibly and impartially. The others usually cover the issue only if there is news regarding trials for crimes in which the Serbs were victims. Unfortunately, the national print media, and even less so the TV stations, devote scant attention to the war crimes trials in Belgrade. Trials before the ICTY are not sufficiently covered by the media either.5

3. National Human Rights Guarantees – Legal Remedies

Serbia’s positive regulations partly allow for the application of the European Court of Human Rights case law because the procedural laws provide for the filing of a motion for the protection of legality in the event it is established by a decision of the Constitutional Court that the final judgment or a decision rendered during the proceedings preceding its rendering is not in compliance with the Constitution, generally recognised rules of international law and ratified international treaties.

4 More in I.1.
5 More in II.10.
The law also provides for a retrial of a case in which a final decision has been rendered upon the motion of a party in the event it acquires the opportunity to invoke an ECtHR judgment establishing a human rights violation and which may result in the adoption of a decision more favourable for that party or in the event the Constitutional Court reviewed a constitutional appeal and found that the appellant’s human right or freedom enshrined in the Constitution was violated in a trial before a regular court and which may result in the adoption of a decision more favourable for the appellant.

The issue of enforcing the decisions of the UN treaty bodies has, however, remained unresolved because the law does not list these decisions as grounds for a retrial or for submitting extraordinary legal remedies.6

4. Serbia before the European Court of Human Rights

The number of applications against the Republic of Serbia filed with the European Court of Human Rights (ECtHR) continued growing in 2011 as well. Serbia ranked seventh by the number of applications against it; it is preceded by Russia, Turkey, Ukraine, Romania, Italy and Poland, all of which have much bigger populations than Serbia. The ECtHR has to date rendered 61 judgments in cases against Serbia (finding it in violation of at least one provision of the ECHR in 54 cases); twelve of these judgments were delivered in 2011. Serbia’s Agent before the ECtHR reached settlement agreements in 77 cases in 2011. A total of 297,500 EUR were paid to compensate the applicants for non-pecuniary damages. Most of the applications against Serbia concern overly long proceedings and the non-enforcement of the final judgments rendered by the domestic courts.7

5. Ratification of International Human Rights Treaties

The National Assembly of the Republic of Serbia ratified a small number of international human rights treaties in 2011. Among the multilateral treaties ratified in 2011 regarding human rights to a greater or lesser extent are the UN Convention for the Protection of All Persons from Enforced Disappearance, the UN Convention on the Reduction of Statelessness and the Third Additional Protocol to the European Convention on Extradition.

6. Protection of Human Rights before the Constitutional Court of Serbia

The fact that the Constitutional Court has continued referring to ECtHR case law in its decisions on constitutional appeals in 2011 is encouraging, given that

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6 More in I.2.
7 More in II.9.
the principle of subsidiarity departs from the presumption that the protection of human rights is primarily the duty of the state and that the role of the ECtHR is corrective in nature. The Constitutional Court, however, faces a serious backlog of constitutional appeals, nearly half of which allege violations of the right to a fair trial (40% of the 9000 cases pending before the Constitutional Court in late 2011 regarded overly long proceedings). The Constitutional Court still has jurisdiction over cases claiming violations of this right although the Venice Commission recommended that jurisdiction over them be transferred to ordinary courts to reduce the backlog. Furthermore, under the 2011 amendments to the Act on the Constitutional Court, the Constitutional Court will no longer be able to annul court judgments like it used to. A human rights violation may be remedied only by the submission of an extraordinary legal remedy in criminal or civil proceedings before regular courts. This solution, too, does not heed the recommendation of the Venice Commission, which is of the view that the Constitutional Court should have the power to overturn court judgments.

The amendments to the Act on the Constitutional Court commendably established a mechanism for compensation of damages caused by human rights violations. They abolished the procedure before the Damages Commission and gave the Constitutional Court the power to rule on a submitted compensation claim and award redress in its decision to uphold a constitutional appeal in the event such a claim is submitted. The amendment under which the Court shall review cases in Small and Large Judicial Panels rather than only in plenary sessions is also expected to contribute to its efficiency.8

7. Judicial Reform

The numerous omissions and violations of the procedures and deadlines in 2011 continued drawing the attention of the media, experts and international institutions to the judicial reform in 2011 as well. In its Report, the European Commission criticised the judicial reform and noted that Serbia had to invest further efforts to achieve European standards in this field. The permanent members of the High Judicial Council (HJC) and the State Prosecutors Council (SPC) were elected in March 2011. The Judges’ Association of Serbia disputed the credibility of the elections because 837 non-reappointed judges had been excluded from the election process, while the misdemeanour judges had been allowed to vote although the Constitutional Court had not yet ruled on the constitutionality of the provision allowing the misdemeanour judges to vote.

Furthermore, the Venice Commission’s suggestions on legal recourse available to the non-reappointed judges went unheeded. The amendments to the laws on judges and public prosecutors adopted in late 2010 entitle the non-appointed

8 More in I.2.3 and I.4.6.2

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judges and prosecutors to file objections against the decisions on the termination of
their offices with the HJC or SPC in their permanent composition, but not with the
Constitutional Court, as the law initially envisaged. The criteria applied in review-
ing the performance of the judges remained unchanged despite numerous criticisms.
Only the standards laid down in the 2009 Decision on Criteria and Standards, which
boil down to merely quantitative criteria, are applied in the reviews of the judges’
performance. The hearings of the non-reappointed judges took much longer than
initially envisaged and were not completed by September 2011. The terms of office
of several HJC members were terminated or are disputable.

The new court network is inadequate and has failed to resolve the problems
related to the inefficiency and the uneven burdens on the judges. The courts closed
the year with a large number of cases pending enforcement. According to data pre-
sented in October 2011 of the 3,276,299 unresolved cases, 2,830,826 were pending
because the rendered judgments had not been enforced. Courts with special jurisdic-
tion had a total caseload of 970,570 cases, out of which they had resolved 427,228
cases. The basic courts across Serbia in May had a caseload of over 906,000 cases.9

8. New Procedural Laws

A number of laws were passed in 2011 that are to ensure the fuller realisation
of the right to a fair trial and the alignment of the practice of the national courts
and other state authorities with the ECtHR case law and international standards.
The most important new procedural laws in this respect are: the Criminal Procedure
Code, the Civil Procedure Act and the Enforcement and Security Act. Two other
laws affecting the rights of citizens and procedural regulations were also adopted in

The new Criminal Procedure Code (CPC), adopted on 26 September 2011,
will come into force on 15 January 2013, but will be applied in war crimes and
organised crime proceedings as of 15 January 2012. The most important novelty
the new CPC brings is the change of the court’s role in proving and establishing the
truth, i.e. the introduction of the so-called prosecutorial investigation model, under
which the prosecutor is charged with collecting the evidence while the court will
present evidence upon the motion of the parties and will be entitled to intervene
only exceptionally and subsidiarily. Although the CPC is not in force yet, there are
justified apprehensions that the prosecution offices currently lack the capacities to
successfully assume their new roles. Particularly given that such a radical change
does not require only that the prosecutors possess knowledge, but also necessitates
in the means to conduct the investigations and in the cooperation with the police,
courts and lawyers. Another question that arises regards ensuring the equality of
arms given that the prosecutors clearly have greater capacities for conducting in-

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9 More in II.1.2. and I.4.6.
vestigations than the defendants. Apart from the existing procedural obligation of
the appellate court to render final judgments in cases referred to it on appeal for the
second time, the novelties introduced by the new CPC—plea bargain, preparatory
hearings and greater powers of individual judges— are also expected to simplify and
shorten criminal proceedings.

Practice has shown that the courts’ inefficiency had largely been caused by
specific provisions in the valid Civil Procedure Act (CPA), wherefore a new CPA,
to apply as of 1 February 2012, was adopted in 2011. The following novelties in it
are expected to speed up civil proceedings: the court is obligated to set a timeframe
within which civil proceedings must be completed in accordance with the principle
of trial within a reasonable time; civil cases shall as a rule be heard by individual
judges and exceptionally by judicial panels; and, courts are now allowed to render
a judgment without holding the main hearing. The duration of second-instance pro-
ceedings is rationalised by the institute of second-instance interim judgments, the
restriction of substantive violations of the civil procedure provisions the second-
instance court is obliged to keep an eye on ex officio, the filing of an appeal through
an alternative motion for review proceedings and the more efficient court expertise
and document and submission delivery procedures.

The following provisions in the new CPA, however, provoked much criti-
cism: a litigant must be represented by a lawyer; a party planning to sue the state is
placed in an unequal position because it must first propose a peaceful settlement of
the dispute; the provisions on the protection of collective rights and interests jeop-
ardising the freedom of expression by allowing the court to prohibit associations or
other organisations from publicly alleging that a person has been jeopardising col-
clective rights and interests if that person was found not guilty of this offence by the
courts, and even allowing such persons to seek compensation.

The new Enforcement and Security Act, which came into force in September
2011, aims to address the unjustifiably long enforcement proceedings and relieve
the courts of the burden of duties which do not constitute adjudication in the stricter
sense of the word and which the new Act entrusts also to private enforcers. The
provisions on private enforcers shall come into effect on May 2012. 10

9. National Preventive Mechanism

The decision to entrust the duties of the National Preventive Mechanism
(NPM) to the Protector of Citizens was rendered in July 2011. The Protector of
Citizens of the Republic of Serbia is to cooperate with the Ombudsman of the Au-
tonomous Province of Vojvodina and associations the statutes of which define as
their objective the improvement and protection of human rights and freedoms. The
Deputy Protector of Citizens charged with the rights of persons deprived of liberty

10 More in II.1.1.
undertook a number of activities in the latter half of 2011 to establish this mechanism which is to become operational in 2012. Civil society organisations that will cooperate with the Protector of Citizens will be selected through a public competition and the NPM’s plan is to visit over 80 institutions in which persons deprived of liberty are held. Civil society organisations are explicitly mentioned in the law and involved in the NPM activities, which is commendable, although it remains to be seen in 2012 whether this mechanism will yield results, whether there will be enough funds to ensure its unhampered work and whether the state authorities will heed its recommendations.\textsuperscript{11}

10. Serbian Government Strategy to Reduce the Overcrowdedness of the Penitentiaries in the 2010–2015 Period

The Government in 2011 began implementing its Strategy to Reduce the Overcrowdedness of the Penitentiaries in the 2010–2015 Period. Although the Penal Sanctions Enforcement Directorate of the Ministry of Justice has done a lot to improve the status of persons deprived of liberty in the past few years, it is still grappling with the challenging problems regarding lack of space and funding. The increase in the capacities of the penitentiaries must be accompanied by greater resort to alternative sanctions and a better organisation of release on bail, involving the introduction of supervision programmes and support to the provisionally released convicts to prevent recidivism, given that repeat offenders account for most of the inmates in Serbian prisons. Programmes of support to former convicts (helping them find a place to live, a job, continue their education, et al) also have to be introduced. A new building in the Padinska Skela penitentiary, which can accommodate up to 450 inmates, was opened in November 2011. The new facility will relieve the overcrowdedness in the other Serbian prisons to an extent, but the conditions in them are still so dire that they can be qualified as inhuman and degrading punishment, which is prohibited both under international standards and Serbia’s laws.\textsuperscript{12}


The Security Intelligence Agency, the Military Security Agency and the Military Intelligence Agency have extremely broad powers. They mostly regard the agencies’ right to collect data on citizens, particularly with respect to organised crime and possible terrorist activities. Although the laws governing these agencies oblige the agents and their supervisors to preserve the confidentiality of the information they obtain, they do not lay down precise rules with respect to their powers

\textsuperscript{11} More in I.4.3.1.
\textsuperscript{12} More in I.4.3.
to collect data or the instances in which these agencies are entitled to apply special operational measures or means for the secret collection of data.

Several laws affect the protection of the rights to privacy and inviolability of correspondence. For instance, although the Classified Information Act mostly governs the right of free access to information, it also limits the citizens’ access to specific documents and provides for the secret collection of data. Although it was adopted two years ago, it has not been enforced because the Government of Serbia and public authorities failed to enact the relevant by-laws that have to be in place if this law is to be implemented. Therefore, the classification of information as confidential is still fully at the discretion of the authorities holding it.

The protection of privacy is directly affected by abideance with the Personal Data Protection Act, the enforcement of which has been entrusted to the Free Access to Information of Public Importance and Personal Data Protection Commissioner. In cooperation with the EU Commission experts, the Commissioner drafted the National Personal Data Protection Implementation Strategy with the aim of aligning the national legislation with the EU standards. The Government endorsed the Strategy with minor changes in 2010, but failed to adopt an Action Plan for its implementation. Although this topic ranked high on the public agenda thanks to the Commissioner’s activities, citizens for the most part appear not to be fully aware of their rights to personal data protection.

The Electronic Communications Act is also important from the viewpoint of human rights protection. This law governs the confidentiality of electronic communication, the lawfulness of intercepting and keeping data, oversight over the implementation of this law and penalties for violating it. The provision obliging the operator to retain electronic communication data for the purposes of an investigation or criminal proceedings or the disclosure of a crime or for the purpose of protecting national and public security is disputable. The Constitutional Court still had not ruled on the constitutionality of the provisions on lawful data interception and retention although the Protector of Citizens and the Free Access to Information of Public Importance and Personal Data Protection Commissioner initiated a review of the constitutionality of specific provisions in the Electronic Communications Act and the Act on the Military Security Agency and the Military Intelligence Agency over a year ago.

The constitutionality of the interception of electronic communications and retention of electronic communication data again arose in 2011 when a public debate was launched on the Draft Rulebook on the Technical Requirements for the Equipment and Software for the Lawful Interception of Electronic Communications and Retention of Data on Electronic Communications entitling security agencies to intercept and retain data on electronic communications (phone records) without a court decision, which is very dangerous and seriously infringes on privacy. The Rulebook was not adopted by the end of the year at the insistence of the Free Ac-
cess to Information of Public Importance and Personal Data Protection Commissi-
13. 2011 Pride Parade

Although the organisers of the Belgrade Pride Parade duly reported the event
for 2 October 2011 and held a meeting with the Minister of the Interior, Ivica Dačić,
who promised that the police would do everything they could to provide sufficient
protection to the Parade participants, the event was ultimately prohibited because,
according to media reports, the police had received information that anti-Parade un-
rests were being prepared in Belgrade. The National Security Council held a session
and recommended that all public assemblies on 1 and 2 October be prohibited.

By adopting the Decision prohibiting the Pride Parade, the Republic of Serbia
violated the right of citizens to the freedom of peaceful assembly because it banned
the holding of the Pride Parade without a legitimate reason necessary in a democratic
society and failed to fulfil its positive obligation to protect the participants from third
parties, members of extremist organisations. Pursuant to Article 54 of the Constitution
and Article 11 of the ECHR, it can never be necessary to prohibit a peaceful assembly,
the participants of which are absolutely non-violent, because of threats of violence by
others. Furthermore, there are well-founded reasons for believing that the state au-
thorities failed to protect the freedom of assembly of the Pride Parade organisers. The
BCHR has also filed an application with the ECtHR regarding this case.14

13. Interpretation of the Freedom of Association

The Constitution of the Republic of Serbia prohibits the founding and ac-
tivities of secret and paramilitary associations. It also allows for prohibiting asso-
ciations the activities of which are directed at the violent change the constitutional
order, violation of guaranteed human and minority rights or incitement to racial,
ethnic or religious hatred. The decision to ban an association may be reached only
by the Constitutional Court. Specific laws govern the establishment of associations
and political parties and prohibit association aimed at committing discrimination,
i.e. actions of organisations or groups geared at violating the rights and freedoms
guaranteed by the Constitution, rules of international law or national laws or at
inciting national, racial, religious and other hatred, dissent or intolerance. The Na-
tional Assembly in 2009 adopted the Act Prohibiting Events of Neo-Nazi or Fascist
Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia and a
procedure for prohibiting specific extremist organisations was launched before the
Constitutional Court of Serbia.

13 More in I.4.7.
14 More in I.4.10.3 and II.4.1.
At its session in June 2011, the Constitutional Court rendered a decision in which it found that the organisation National Formation was a secret association, the activities of which were prohibited *ex constitutione*. National Formation is defined in its Statute as an alliance of racially aware nationalists. Given that this organisation is not registered in the relevant register of associations and that the Act on the Constitutional Court lays down deletion from the relevant register as the legal effect of a Constitutional Court decision prohibiting a political party or an association of citizens, the Constitutional Court had in addition to its decision prohibiting the association and the promotion of its ideas and goals prohibited this organisation from registering in the relevant register and ordered all the state authorities and organisations to take measures within their remits to enforce its decision. This is the first extremist organisation the Constitutional Court prohibited although it does not fulfil the formal requirements for being an association of citizens. The Constitutional Court established that the lack of formal requirements was the consequence of its founders’ conscious intention to keep the activists and their activities beyond the grasp of the public, i.e. that they act as a secret organisation.

This decision by the Constitutional Court is extremely important in view of the fact that the Constitutional Court declared in March 2011 that it did not have jurisdiction to rule on a motion by the then Acting Republican Public Prosecutor to prohibit 14 fan sub-groups whose activities are directed at violating guaranteed human and minority rights and inciting racial, national and religious hatred. During the review of the motion, the opinion prevailed that the Constitutional Court had jurisdiction only to prohibit registered associations and that the prohibition and criminal prosecution of informal, extremist fan groups were governed by the Criminal Code. Had this view of the Constitutional Court become embedded in its case law, it would have undoubtedly left room for numerous abuses. This is why the decision on the prohibition of the informal organisation National Formation constitutes an important precedent. The Constitutional Court is reviewing a motion for the prohibition of the registered extremist association Fatherland Movement Obraz, while the review of the motion for the prohibition of the association 1389 has been suspended.\(^\text{15}\)

14. Work of Political Parties and Financing of Political Activities

The adoption of the Act on the Financing of Political Activities was definitely a step in the right direction, given that most reports, particularly the EC Report, note that the anti-corruption test will be the most difficult Serbia will face on its way to EU accession and that political parties are mentioned alongside public procurement and the work of public companies as the main generators of corruption. The Act is expected to ensure greater transparency of the financing and work of political parties by the enforcement of anti-corruption measures. The new Act distinguishes be-
between the money used for funding the regular (everyday) work of the parties and for
funding their election campaigns and envisages stricter oversight of party finances.
It also regulates in detail the funding of political entities from public sources (budg-
et funds allocated for funding political activities) and private sources (membership
fees, donations, property-based revenues, inheritance, legacies, loans from banks
and other financial organisations in Serbia). The new law, however, does not set the
maximum amount of funds a party may spend during an election campaign. The
late adoption of the Act practically relieved the parties from the obligation to submit
annual financial reports for the previous year. Furthermore, some of the provisions
in the Act are vague and may give the parties room to avoid oversight.16

15. Oversight of Public Authorities – Independent Regulatory
Institutions

The status of independent regulatory institutions is not satisfactory yet, al-
though it may be concluded that 2011 saw a change in the attitude of the legislative
and executive authorities towards the independent regulatory authorities, primarily
with respect to the provision of the material prerequisites they need for their work,
such as the additional and even permanent office space they had lacked, although
all independent institutions, save the Protector of Citizens, were still understaffed in
2011. At the very beginning of 2011, the National Assembly adopted a Decision de-
leting an impugned provision in the National Assembly Rules of Procedure allow-
ing the parliament to launch a procedure to establish the accountability of an official
of an independent regulatory authority in the event the Assembly did not endorse its
report after reviewing it.

Although they did take steps to improve the material and financial conditions
the independent regulatory authorities worked in, the Government and parliament,
however, continued ignoring their decisions and recommendations. On the other
hand, the independent institutions were more or less successful in formulating, im-
plementing and publicly advocating public policies and values entrusted to them
by the law in the year behind us. The following institutions stood out in 2011 by
the implementation and emancipation of their missions: the Access to Information
of Public Importance and Personal Data Protection Commissioner, the Protector of
Citizens, and the most recently established regulatory authority, the Commissioner
for Protection of Equality. Notwithstanding the Commissioner’s relatively modest
human resources, she managed to promote this independent authority by reviewing
a large number of cases and frequently alerting the public to instances of discrimi-
nation.

The Free Access to Information of Public Importance and Personal Data Pro-
tection Commissioner’s activities have increased public awareness of the importance

of the right to personal data protection, as evidenced by the increase in complaints about such violations. The Protector of Citizens also received a greater number of complaints than the previous year. In 2011, the Protector of Citizens was accredited with A status by the UN International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights for the 2010–2015 period.

The Anti-Corruption Agency seems to have failed to make much headway in publicly promoting its mission, which may be ascribed to the public’s erroneous perception of the Agency’s role and its expectations that it would do everything the judiciary was unable to, although the law does not accord it such powers. The Anti-Corruption Agency in 2011 coordinated the work on the design of the new law on the financing of political entities.\(^\text{17}\)

### 16. Status of the Media

The Government of the Republic of Serbia in 2011 adopted the Strategy for the Development of the Public Information System until 2016 (the Media Strategy). The key novelty in the Strategy is the prohibition of state ownership over media, which paves the way for privatising the state-owned media. On the other hand, the Strategy envisages an increase in the number of public service broadcasters from two to eight. This provision met with criticism of the media associations. The status of media, however, remained unsatisfactory. The media in Serbia are not in a precarious situation only because of the economic crisis, but also because their rights are jeopardised both by their owners and the state. In its Report on Pressures on and Control of Media in Serbia, the Anti-Corruption Council noted the numerous problems journalists and media associations face with regard to media ownership and the state authorities’ pressures on the media.

Non-transparency of media ownership is not the only problem media face. Their status is further exacerbated by bad privatisation decisions. Journalists are poorly paid on average. Media also mention loss of autonomy and strong pressures on media workers as their chief problems. Press and media associations reported a large number of physical and verbal attacks on journalists in 2011 as well. They warn that only a few such cases have been prosecuted to date and that the protection of journalists is very feeble.

Media were, on the other hand, found in violation of the professional code of conduct in 2011 as well. They most often violated the prohibition of discrimination, regulations protecting minors from pornographic and other inappropriate content, the protection of privacy and the presumption of innocence. The Republican Broadcasting Agency intervened several times against violations of professional standards and media laws.\(^\text{18}\)

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17 More in II.2.
18 More in II.6.
17. Roma – Most Vulnerable Ethnic Group

The implementation of the measures laid down in the Strategy for the Improvement of the Status of Roma continued in 2011 but the improvement of the living conditions of this national minority has not been uniform. There was visible headway in some areas, above all education and health, but hardly any tangible progress was achieved in the fields of housing and employment.

The negative connotations of the Roma issue were publicly voiced mostly in the context of the threats to reintroduce the Schengen visa regime on Serbia’s nationals. In order to cut the number of asylum seekers from Serbia, the Serbian Government imposed stricter border control measures which verged on discrimination in practice. The Ministry for Human and Minority Rights, Public Administration and Local Self-Government in late 2011 began drafting a new three-year Action Plan for the Implementation of the Strategy in the 2012–2014 period. Some headway was made with respect to the lack of personal documents. The new Permanent and Temporary Residence Act allows persons not registered at an address to register their residence and thus provides people living in informal settlements and the homeless with the opportunity to obtain IDs and thus exercise a number of welfare rights. However, the subsequent birth register entry procedure is inadequate for a specific category of people, the regulations are not in accordance with the Constitution, which is why the NGOs focusing on this problem filed an initiative with the Constitutional Court to review the constitutionality and legality of the Birth, Death and Marriage Registries Act.

Roma have the greatest difficulty exercising their rights to health, housing and education and undoubtedly account for the most vulnerable part of the population. For instance, the mortality rate of Roma infants and children under five, although halved, is still the double the average mortality rate of this age group in Serbia. Amendments to the regulations allowing Roma without registered residence and even “legally invisible” people the right to health cards have proven effective. Nonetheless, many Roma still do not have access to health care. Although the number of Roma children enrolled in primary school has been rising, the number of those who complete primary school is still quite modest. Roma pupils are still segregated in school.

Housing is still one of the key problems of Roma, particularly those internally displaced from Kosovo. The year 2011 saw a large number of evictions of Roma living in illegal settlements. Civil society organisations responded to these events by drafting a Platform for the Realisation of the Right to Adequate Housing and recommendations regarding all future evictions.

The year 2011, unfortunately, did not pass without ethnically motivated attacks targeting Roma. A large number of attacks on Roma and their homes in some Serbian towns occurred.19

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19 More in II.3.
18. Migrations (Refugees, IDPs, Asylum Seekers and Returnees under Readmission Agreements)

Serbia has taken part in the implementation of readmission agreements for nearly a decade. Under the bilateral readmission agreements and the Agreement with the EU, Serbia is under the obligation to admit into its territory people residing without authorisation in other countries. Apart from its nationals, Serbia assumed the obligation to admit nationals of other former SFRY republics and nationals of third countries under specific conditions. Readmission, however, does not only entail Serbia’s obligations to the other signatory states, but also a series of activities the state must take to ensure the full integration of the returnees. The problems this category of Serbia’s population faces call for a serious approach and coordinated activities of all relevant state authorities, given that successful integration will lead to lesser secondary migration.²⁰

19. Protection and Exercise of Economic and Social Rights

The exercise and protection of economic and social rights has been plaguing both the citizens and human rights organisations the most, since these rights are prerequisite for exercising many other rights. Like in other countries, the global economic crisis hit a large share of Serbia’s population. Unemployment was high in 2011 and, according to the Statistical Office of the Republic of Serbia, rose to 23.7% in late November. Furthermore, the working age population accounted for 67.6% of Serbia’s total population in 2011 and was lower than in any of the new EU member states.

A large number of people were working in the grey economy and many of them were not entitled even to basic health care. Employers have increasingly been defaulting on their obligations to pay the workers’ pension insurance and other contributions. Young, unqualified, uneducated and inexperienced workers and those over 40 years of age are the most vulnerable categories in the labour market. Efforts by the labour inspectors to combat grey economy have not been efficient.

The situation is not any better with respect to health and safety at work. The Serbian Occupational Safety and Health Act complies with the ratified ILO Conventions and the main Directive 89/391/EEC. The Serbian Government also adopted the Occupational Safety and Health Strategy for the 2009–2012 Period. Although the Strategy envisages, inter alia, raising the professional capacities of the inspectorates, there is still much to be done to enforce the law and its standards in practice.

Although the number of trade unions in Serbia is estimated at around 22,000, they enjoy the trust of only 15% of the citizens, while three times as many either do

not trust them very much or at all. A draft of the Strike Act was publicly presented in 2011. The preparation of this law was not transparent, a comprehensive debate on it was not held and it was withdrawn from the parliamentary procedure after vehement criticisms of its provisions by both the experts and the trade unions.

Available data on social inclusion and poverty indicators show that the housing conditions and quality of housing of socially vulnerable people are inadequate. The Republic of Serbia’s housing fund is insufficient, outdated and poorly maintained. The Roma living in illegal and unhygienic settlements are in a particularly precarious situation. The key problem lies in the absence of a national housing policy. Refugees and IDPs are not any better off, particularly when one bears in mind that the collective centers that are being closed down are still the only homes to the most vulnerable, the elderly, chronically ill people and people with disabilities.

Education is another field that has not undergone reform for years. The state’s attitude towards this probably most important area for the future of entire society is best illustrated by the fact that the Republic of Serbia allocates the least in Europe for education, only 4.6% of its GDP per annum. The percent earmarked for welfare transfers, standing at 1.4%, is also the lowest in the region.21

20. Restitution of Property and Compensation

The long-awaited Property Restitution and Compensation Act was finally adopted in the last quarter of 2011. The provision of full certainty in property relations in Serbia is prerequisite for the participation of Serbian capital in the EU’s open market. The Act provides for the restitution of property to Serbian natural persons who had owned the property at the time it was seized and their legal heirs (be they in the possession of the property or not). Legal persons, with the exception of endowments, are not entitled to restitution, while foreign nationals are entitled to restitution under reciprocal terms.

Persons, who had fought within the occupying forces in the territory of the Republic of Serbia in WWII and their heirs, are not entitled to restitution. This provision caused displeasure amongst the citizens of Serbia, mostly persons belonging to national minorities and foreign nationals, who claim that it reaffirms the principle of collective responsibility because it applies also to persons who were mobilised under duress as well as to persons who had not committed war crimes. The ambiguities in this provision were merely partly clarified by the Rehabilitation Act which specifies in greater detail who is not entitled to rehabilitation and restitution.

The Act explicitly prohibits the restitution of property to deceased victims of the Holocaust without legal heirs and sets out that the disposal of such property shall be governed by a separate law. This is the logical consequence of the fact that such property simply does not have living title-holders and that the general restitution rules thus cannot apply to it.

21 More in I.4.17.
The Act gives precedence to restitution in kind and lays down that compensation shall be offered only when restitution in kind is impossible. It provides for the restitution of property to an owner whose property is held by a private person and requires of the holder and the owner to establish a lease agreement at the going market rate, and if that is impossible, the owner shall be granted compensation. This provision prevents unfair treatment of conscientious holders and owners of the property, ensures legal certainty, economic rationality and equal respect for the rights of all citizens and prevents the reversal of the effects of privatisation.

The Act lays down a separate restitution/compensation procedure, which is conducted before the Restitution Agency. An Agency decision may be appealed in administrative proceedings, while a second-instance administrative decision may be challenged in an administrative dispute, which shall be urgent.

This Act appears to satisfy the requirements regarding the prohibition of discrimination, apart from a few exceptions. In addition, the restitution procedure guarantees the right to a legal remedy but it, however, remains to be seen to what extent the system is actually based on the principle of economic rationality. At first glance, it seems that the state will have difficulties fulfilling all its obligations, but it remains to be seen how the law will be applied in practice and what arrangements the Republic of Serbia will be able to conclude with international financial institutions given that restitution in Serbia will simply be impossible without their support.22

22 See more in I.4.12.3.
I
LEGAL PROVISIONS RELATED TO
HUMAN RIGHTS

1. Human Rights in the Legal System of Serbia

1.1. Introduction

This Report on Human Rights in Serbia analyses the Constitution and laws of the Republic of Serbia with respect to the civil and political rights guaranteed by international treaties binding on Serbia, in particular the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Protocols, the Revised European Social Charter (ESC) and standards established by the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights (ECtHR). Where relevant, the report also reviews Serbia’s legislation with respect to standards established by the specific International Labour Organisation (ILO) treaties and other international treaties dealing with specific human rights, such as the UN Convention against Torture, the UN Convention on the Rights of Persons with Disabilities, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Elimination of All Forms of Racial Discrimination.

The Report deals with the entire Serbian legislation relevant to each of the rights reviewed, going beyond the actual text of the law to include judicial interpretation where it exists. The following elements are used to evaluate the conformity of the legislation with international standards:

- Whether a particular right is guaranteed;
- If so, how it is formulated in national legislation and to what extent the formulation differs from that contained in the international human rights instruments;
- Whether the right is defined in national legislation and whether its interpretation by the state authorities carries the same meaning and scope as the international human rights instruments;
Whether the restrictions on rights envisaged by Serbian law are in accordance with the restrictions allowed by international standards; and,

Whether national legislation provides effective legal remedies the protection of a right.

The 2011 Report reviews legislation that was in force in 2011 but also comments laws that are adopted this year and will come into force in 2012. The Report reviews whether internationally guaranteed human rights are protected by the Constitution and laws of the Republic of Serbia and to what extent.

1.2. Constitution of Serbia and Human Rights

The Constitution of Serbia, adopted in 2006 contains a broad catalogue of human rights but some human rights provisions are deficient or ambiguous. The Constitution, however, leaves room for correcting some shortcomings in provisions on human rights in practice. Under Article 18 (3), provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions supervising their implementation. This implies that the views of the e.g. ECtHR or UN Human Rights Committee must be taken into account when interpreting human rights provisions. It may be presumed that an interpretation taking into account views of international human rights protection bodies (which is the obligation of those interpreting these provisions under the Constitution) will be to the benefit of promoting human rights.

Under the Constitution of Serbia, the generally accepted rules of international law and ratified international treaties shall be an integral part of the national legal system and applied directly (Art. 16 (2)). In addition, Article 18 prescribes the direct application of human and minority rights guaranteed by the generally accepted rules of international law and ratified international treaties.

The Constitution, however, includes a disputable provision that places international treaties above laws but below the Constitution in the hierarchy of legislation as it stipulates the compliance of the ratified international treaties with the Constitution (Art. 16 (2) and Art. 194 (4)). Therefore, international treaties that had previously been in force can now not be applied unless they are in accordance with the new Constitution. A state cannot withdraw from the obligations it had accepted

23 Sl. glasnik RS, 83/06.
under an international treaty by amending national legislation, even the Constitution. The question therefore arises of what the practical effects will be if a ratified international treaty actually is not in accordance with the Constitution. As per international treaties Serbia is yet to accede to, they cannot be ratified unless they are in compliance with the Constitution.

It should be noted, however, that the Constitution stipulates the compliance of only “ratified international treaties” with the Constitution, but does not set these conditions for generally accepted rules of international law, which it explicitly qualifies as part of Serbia’s legal order.

1.3. International Human Rights Treaties and Serbia

Serbia is bound by all universal international human rights treaties which used to bind the state union of Serbia and Montenegro (SCG), the Federal Republic of Yugoslavia (FRY) and the Socialist Federal Republic of Yugoslavia (SFRY).26


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26 In the view of the Human Rights Committee, all states that emerged from the former Yugoslavia would in any case be bound by the ICCPR since, “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the ICCPR”. See paragraph 4, General Comment No. 26 on continuity of obligations under the ICCPR, Committee on Human Rights, UN doc. CCPR/C/21/Rev.1/Add.8, 8 December 1997. The Federal Republic of Yugoslavia deposited notification of succession of the former SFRY on 26 April 2001 and continued membership in international treaties. The Republic of Serbia, as the legal successor of the State Union of Serbia and Montenegro, did the same pursuant to a Decision of the National Assembly of the Republic of Serbia of 5 June 2006.
age\textsuperscript{27} and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.\textsuperscript{28} (See Appendix I).

Although international treaties are part of the national legislation under the Constitution of the Republic of Serbia, state bodies and courts in Serbia have, however, paid little attention to international human rights guarantees. It has, however, been observed that judges have in the recent years begun to invoke ECHR provisions in the reasoning of their judgments.

The nationals of Serbia are entitled to file individual complaints to all the UN Committees charged with monitoring the implementation of human rights conventions and considering such submissions with the exception of the Committee on Economic, Social and Cultural Rights given that Serbia has not ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{29} Serbia has also failed to accept the right to the submission of collective complaints to the European Committee of Social Rights under the Revised European Social Charter.

The Human Rights Committee and the Committee on the Elimination of Racial Discrimination reviewed in March 2011 Serbia’s reports submitted in accordance with its obligation to submit periodic reports to UN committees. Although the state is under the obligation to notify the public at large of its reports and, in particular, of the recommendations issued by the Committees after reviewing them, the state authorities have not fully satisfied this obligation and merely published them on the Human and Minority Rights Directorate website.\textsuperscript{30} Serbia is under the obli-

\textsuperscript{27} Sl. glasnik RS (Međunarodni ugovori), 1/10.
\textsuperscript{28} Sl. glasnik RS (Međunarodni ugovori), 12/10.
\textsuperscript{29} The FRY recognised the competence of the Committee against Torture to receive and consider individual communications and communications by states parties under Articles 22 and 21, respectively, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. SaM ratified the Optional Protocol to the Convention against Torture, establishing an efficient system of monitoring prison and detention units, in December 2005. On 22 June 2001, the FRY ratified both the Optional Protocol to the International Covenant on Civil and Political Rights – thereby making it possible for individuals to submit communications to the Human Rights Committee – and the Second Optional Protocol to the Convention abolishing the death penalty. On 7 June 2001, the FRY made the declaration recognising the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual and collective complaints alleging violations of the rights guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination. The FRY in 2002 ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women whereby it accepted the Committee’s competence to monitor the implementation of the Convention, receive and review communications submitted by or on behalf of individuals or groups of individuals regarding violations of rights guaranteed by the Convention. The Optional Protocol to the Convention on the Rights of Persons with Disabilities, allowing for submission of individual applications to the Committee for the Rights of Persons with Disabilities, was also ratified in 2009.

\textsuperscript{30} Only some of these reports have been posted on the website www.ljudskaprava.gov.rs.
gation to submit reports to the following UN committees in the coming years: the Committee against Torture in November 2012, the Committee on the Rights of the Child in March 2013, when it is also to submit reports on the implementation of two Optional Protocols to the Convention on the Rights of the Child (on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the Committee on the Elimination of All Forms of Discrimination in January 2014 and to the Human Rights Committee in April 2015. Serbia has been late in submitting its reports to the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights (due in 2010) and the Committee on the Rights of Persons with Disabilities. The draft report on the implementation of the Convention on the Rights of Persons with Disabilities, has been prepared and posted on the website of the Human and Minority Rights Directorate.

There is another monitoring mechanism in the UN system applied by the Human Rights Council – the universal periodic review, under which every UN member state shall submit reports to the Human Rights Council every four years. Serbia submitted its universal periodic review in December 2008, accepted 24 recommendations and is due to notify the Human Rights Council of the fulfilment of these recommendations in 2013, when it submits its second universal periodic review.

**European Conventions.** – On 26 December 2003, SaM ratified the ECHR and the 14 Protocols thereto. Several reservations to the Convention were initially entered. Some were withdrawn in the meantime. Reservations on Articles 5 and 6 of the ECHR, regarding the obligation to ensure the public character of administrative dispute hearings and the proceedings under the Misdemeanour Act, were withdrawn in May 2011 after the adoption of the new Act on Administrative Disputes31 and the enforcement of provisions on misdemeanour courts in line with European standards as of January 2010.32

The Framework Convention for the Protection of National Minorities was ratified back in 1998 by the then FRY.33 The SaM Parliament on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.34 The Assembly of Serbia and Montenegro ratified the European Charter for Regional and Minority Languages.35 Serbia ratified the Revised European Social Charter,36 the CoE Convention on Action against Trafficking in Human Beings37 and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Ter-

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31 Sl. glasnik RS, 111/09.
32 See Article 88 of the Act on Organisation of Courts, Sl. glasnik RS, 116/08.
33 Sl. list SRJ (Međunarodni ugovori), 6/98.
34 Sl. list SCG (Međunarodni ugovori), 9/03.
35 Sl. list SCG (Međunarodni ugovori), 18/05.
36 Sl. glasnik RS, 42/09.
37 Sl. glasnik RS, 19/09.

Conventions adopted in 2011. – Among the multilateral treaties ratified in 2011 regarding human rights to a greater or lesser extent are UN Convention for the Protection of All Persons from Enforced Disappearance, UN Convention on the Reduction of Statelessness and Third Additional Protocol to the European Convention on Extradition.

2. Right to an Effective Legal Remedy for Human Rights Violations

Article 2 (3), ICCPR:
3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 13, ECHR

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

2.1. Ordinary Legal Remedies

International instruments oblige states to ensure the protection of human rights within their national legal systems to allow for the realisation of all rights enshrined in international human rights treaties in proceedings before domestic courts and prevent resort to international mechanisms, i.e. initiation of reviews of individ-
ual complaints by UN committees or of applications against states by the European Court of Human Rights (ECtHR).

Article 22 of the Constitution of Serbia lays down that everyone shall have the right to judicial protection in case any of their human or minority rights guaranteed by the Constitution have been violated or denied and the right to the elimination of the consequences of such a violation. It also provides everyone the right to seek protection of their human rights and freedoms before international human rights protection bodies. Under international standards, states shall provide both effective remedies and the right to compensation\textsuperscript{42} or some specific legal remedies.\textsuperscript{43} Article 35 of the Constitution guarantees the right to rehabilitation and compensation of damages to persons unlawfully or groundlessly deprived of liberty, detained or convicted for a punishable offence and compensation to persons who had suffered material or non-material damages inflicted on them by the unlawful or inappropriate work of the state authorities, while Article 36 guarantees everyone the right to file an appeal or apply another legal remedy against any decisions on their rights. Apart from the Constitution, several other laws also envisage the rights to reparations, rehabilitation and compensation of damages.

Furthermore, the Constitution introduces the institute of constitutional appeal in Serbia’s legal system. These provisions allow the Constitutional Court to always have the final say on individual human rights violations.

The CPC allows for initiating criminal proceedings regarding specific crimes by private citizens, whereas the proceedings related to other criminal offences prosecuted \textit{ex officio} may be launched only by the public prosecutor. In the latter case, only if the public prosecutor establishes no grounds for criminal prosecution may the injured party undertake prosecution (Art. 61, valid CPC and Art. 52, new CPC)); this provision may and in practice does lead to situations in which the injured parties are deprived of the right to launch criminal proceedings due to the negligence or ill-will of the public prosecutor.

2.2. Implementation of Decisions Rendered by International Bodies

After reviewing periodic reports, UN committees adopt concluding observations and recommendations for the state, which are to ensure the full implementation of the relevant international treaties. Some of these recommendations are general in character and indicate the deficiencies in the domestic law or the conduct of the state authorities and require their harmonisation with international standards. Such deficiencies are also highlighted in decisions rendered by treaty bodies reviewing individual communications, but they also require of the states to take individual

\textsuperscript{42} Convention against Torture (Arts. 14 and 16) and Convention on the Elimination of All Forms of Racial Discrimination (Art. 6).

\textsuperscript{43} For example, Article 39 of the Convention on the Rights of the Child obliges states to take all appropriate measures to promote the recovery and social reintegration of a child victim.
measures regarding breaches of the complainants’ rights. Under procedures before UN treaty bodies, a state found in violation of an individual’s right(s) enshrined in a Convention is under the obligation to notify the relevant UN committee of the measures it has taken to implement its views within a period ranging between three and six months. This requirement is based on the fact that all universal international human rights treaties include provisions under which the states parties assume the obligation to guarantee the existence of effective legal remedies for all violations of rights enshrined in these treaties.

The recommendations UN committees have issued in cases against Serbia or after reviewing its periodic reports are similar and mostly boil down to the following obligations, to:

- Amend the national legislation so as to oblige the state authorities to conduct effective investigations without delay;
- Implement the laws in force;
- Implement systemic measures to prevent the recurrence of violations and adopt strategies and action plans;
- Conduct/quickly conclude proceedings against persons accused of committing the established human rights violations and punish those found guilty;
- Provide reparations for the violation of the rights, including fair and adequate compensation;
- Take special measures to protect and improve the status of vulnerable categories of the population;
- Ensure the application of effective legal remedies;
- Notify the committees on steps undertaken to comply with the Committee views in the concluding observations or decisions;
- Publish the decisions or concluding observations;
- Exemption from criminal prosecution
- Reimburse the complainants for the expenses they incurred in paying the fines and court expenses;
- Make available the decisions or concluding observations to the public at large.

The judgments of the European Court of Human Rights (ECtHR) carry greater weight and impose greater obligations on States Parties to the ECHR, which undertake to bring their legislation and jurisprudence into compliance with the ECtHR case law when they ratify the ECHR. The state is clearly under the obligation to create a legal framework for fulfilling the recommendations of UN committees and the ECtHR judgments because the role of international bodies as a corrective fac-

44 More on ECtHR judgments in cases against Serbia in II.9.
tor and guide for the national authorities must be acknowledged in the state’s main procedural laws. This concept has already been recognised by the Civil Procedure Act (CPA),\textsuperscript{45} under which a party may file a motion for a retrial before the national court in the event the ECtHR rendered a judgment against Serbia on an identical or similar legal issue after the national court had rendered its final decision (Art. 422 (1.10)). The same solution is in the new Civil Procedure Act (CPA) adopted this year.\textsuperscript{46} The valid Criminal Procedure Code\textsuperscript{47} does not allow retrials or the submission of motions for the protection of legality pursuant to a decision by an international body, and merely instructs that the provisions in this Chapter\textsuperscript{48} shall apply accordingly to a motion for the amendment of a final court judgment due to a violation of a right of a person convicted in criminal proceedings, as established by the Constitutional Court or an international court in accordance with a ratified international treaty, where the violation had affected the rendering of a lawful and proper judgment (Art. 414). Therefore, a party may file both a motion for a retrial and a motion for the protection of legality. This Article mentions a “court”, wherefore it leaves the recommendations of UN committees outside the scope of these provisions.

The Administrative Disputes Act (ADA)\textsuperscript{49} allows for the submission of motions for a retrial “in the event a view in a subsequent judgment of the European Court of Human Rights on the same matter may affect the lawfulness of the concluded proceedings” (Art. 56 (7)). The authors of ADA, therefore, opted for a more restrictive approach present also in the CPA, allowing for a retrial only in the event the ECtHR rendered a judgment on the matter, but not if a decision on it was rendered by another international body.

The non-implementation of decisions rendered by some international bodies (the ECtHR, the Committee against Torture, the Human Rights Committee) corroborates the necessity of amending numerous (not only procedural) laws in order to ensure the effective and full implementation of the decisions rendered by international bodies. The new codes governing criminal and civil proceedings adopted in 2011 have not made the necessary improvements with respect to the implementation of the decisions of the UN committees.

The new Criminal Procedure Code (new CPC)\textsuperscript{50} provides for the submission of a motion for the protection of legality in the event it is established by a decision

\begin{itemize}
\item \textsuperscript{45} \emph{Sl. glasnik RS}, 125/04 and 111/09.
\item \textsuperscript{46} \emph{Sl. glasnik RS}, 72/11. To be enforced as of 1, February 2012.
\item \textsuperscript{47} \emph{Sl. list SRJ}, 70/01 and 68/02 and \emph{Sl. glasnik RS}, 58/04, 85/05, 115/05, 85/05, 49/07, 20/09, 72/09 and 76/10.
\item \textsuperscript{48} Chapter XXV governing extraordinary legal remedies.
\item \textsuperscript{49} \emph{Sl. glasnik RS}, 111/2009.
\item \textsuperscript{50} \emph{Sl. glasnik}, 72/11 (to be enforced as of 15 January 2013; exceptionally, its provisions shall apply as of 15 January 2012 in organised and war crime proceedings before special organised and war crime court departments).
\end{itemize}
of the Constitutional Court that the final judgment or a decision rendered during the proceedings preceding its rendering is not in compliance with the Constitution, generally recognised rules of international law and ratified international treaties, or in the event a human right or freedom of the convict or another participant in the proceedings enshrined in the Constitution or the ECHR and Protocols thereto had been violated or denied as established in a Constitutional Court decision or an E CtHR judgment (Art. 485 (2 and 3). A motion for the protection of legality may be filed on these grounds within three months from the day the person received the Constitutional Court decision or ECtHR judgment. Under the new CPC, a motion for the protection of legality may be lodged by the Republican Public Prosecutor, the defendant or his defence counsel. The motions are reviewed by the Supreme Court of Cassation (Art. 486 (1)) which may overturn the first-instance judgment or the decision on an ordinary legal remedy and refer the case back to the court for a retrial or itself modify the impugned judgment or decision (Art. 492 (1 (1 and 2)).

The new Civil Procedure Act (new CPA) allows for a retrial of a case in which a final decision has been rendered upon the motion of a party in the event it acquires the opportunity to invoke an ECtHR judgment establishing a human rights violation and which may result in the adoption of a decision more favourable for that party (Art. 426 (11)), i.e. in the event the Constitutional Court reviewing a constitutional appeal established a breach or denial of a human or minority right or freedom enshrined in the Constitution during civil proceedings and this may result in the adoption of a decision more favourable for the party (Art. 426 (12)).

The new laws only envisage ECtHR judgments as grounds for reviews of domestic court judgments, but not decisions of UN treaty bodies, although Serbia has mostly failed to fully fulfil the recommendations by UN committees, which have repeatedly called on it to establish mechanisms ensuring their implementation. The enforcement of ECtHR judgments has not been devoid of difficulties or shortcomings either.

Exemption from criminal prosecution has not proven efficient, because there must be will on the part of the prosecution office to apply an extraordinary legal remedy, which is rare in practice. Furthermore, the court deciding on the merits needs to accept jurisdiction although the law does not oblige it to directly enforce UN committee decisions. Investigations into cases in which the UN committees found a breach of a right and called on the state to investigate and punish those responsible for the violation are hardly ever conducted. Problems have also been encountered with respect to the obligation to compensate damages, given that damages are paid with significant delays and that the possibility of concluding an agreement on compensation depends exclusively on the political will and ability of the civil sector to exert pressures on the state authorities to conclude them. Furthermore, in most cases, the amounts of the awarded damages do not reflect the gravity of the breaches of their rights.51

51 There are various modalities for the compensation of damages: the compensation is sometimes paid pursuant to an agreement with the Republican Attorney General and at other times pursuant to an agreement with the Justice Ministry.
2.3. Constitutional Appeal

2.3.1. Right to File a Constitutional Appeal

The Constitution of Serbia introduced the constitutional appeal in Serbia’s legal order. A constitutional appeal may be filed against individual enactments or actions by state bodies or organisations exercising public authority and violating or denying human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or do not exist (Art. 170). The Act on the Constitutional Court also allows for the filing of a constitutional appeal in the event the appellant’s right to a fair trial is violated or in the event the law excludes the right to the judicial protection of his/her human and minority rights and freedoms (Art. 82). This provision provides for the filing of a constitutional appeal after the exhaustion of all other effective legal remedies and thus for centralised decisions on human rights violations, with the Constitutional Court as the final instance the appellants must turn to before they complain to international bodies.

Article 170 of the Constitution does not mention protection of rights guaranteed under international treaties by constitutional appeal; this is in contravention of Article 18 (2) of the Constitution, under which the Constitution shall guarantee and directly apply human and minority rights enshrined in international law. The Constitutional Court eliminated it by a systemic interpretation of Article 170 in conjunction with Article 18 of the Constitution, confirming that the rights incorporated in the constitutional and legal system by international treaties have the same rank as constitutional rights and enjoy the protection of the Constitutional Court. The corpus of human rights enjoying constitutional and legal protection has thus been expanded to include other specific, above all economic and social rights, not guaranteed in the text of the Constitution.

All natural or legal domestic or foreign persons who are holders of the constitutionally guaranteed human rights and freedoms have the active legitimation to file a constitutional appeal. A constitutional appeal is not an *actio popularis*, and it

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52 Although neither Article 170 of the Constitution nor Article 82 of the Act on the Constitutional Court explicitly require that the legal remedy, which must be exhausted before a constitutional appeal is filed, must be effective, this criterion is well established in ECtHR’s case-law, which is also relevant to national legislation. The Constitutional Court adopted a position on when legal remedies in administrative, misdemeanour and judicial proceedings may be deemed exhausted. The position is available at http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Ставови_Уставног_суда_у_поступку_испитивања_и_одлучивања.doc.


54 See the Constitutional Court position on active legitimation regarding the filing of constitutional appeals, available in Serbian at http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Ставови_Уставног_суда_у_поступку_испитивања_и_одлучивања.doc. Under Article 85 (1) of the ACCA a constitutional appeal must include the appellant’s personal identification.
needs to be noted that the potential appellant must have personally been the victim of a breach of a constitutionally guaranteed human right or freedom. Other persons (natural persons, state authorities or organisations charged with the monitoring and realisation of human rights) may file a constitutional appeal on behalf of a person whose right or freedom was violated only with his or her written consent. The Constitutional Court has not yet taken a position on whether indirect or potential victims of human rights violations are entitled to file a constitutional appeal.

A constitutional appeal must be filed within 30 days from the day of receipt of the individual enactment or performance of the action violating or denying a constitutionally guaranteed right or freedom (Article 84 (1), Act on the Constitutional Court). In the event an appellant has failed to file the constitutional appeal within the set deadline for justified reasons, the Constitutional Court shall allow _restitutio in integrum_ if the appellant applies for _restitutio in integrum_ at the same time it files the constitutional appeal, within 15 days from the day the justified reasons ended (Article 84 (2)). A person may not apply for _restitutio in integrum_ in the event more than three months have elapsed since the expiry of the deadline (Article 84 (3)). In the event the constitutional appeal regards the failure to undertake appropriate action, the deadline shall be set in each individual case, depending on the conduct of the defaulting authority and the conduct of the appellant.

The Constitutional Court has broad powers in the event it upholds the constitutional appeal. They are defined in Article 89 (2) of the Act on the Constitutional Court and include the annulment of an individual enactment, the prohibition of the further performance of an action, an order to perform a specific action and an order to reverse the harmful consequences within a specified deadline. In the event an individual enactment or action violates or denies the rights of more than one person and only one or some of them filed a constitutional appeal, the Constitutional Court decision shall apply to all persons in the same legal situation (Article 87, ACC).

Both the valid and the new CPCs provide for the submission of a motion for the protection of legality in the event the Constitutional Court finds that the rights of a convict had been violated during the criminal proceedings and that the breach affected the rendering of a lawful and proper judgment or that a human right or freedom guaranteed by the Constitution of a convict or another participant in the proceedings had been violated or denied. The valid and the new Civil Procedure Acts include similar solutions.55

In its reviews of appeals against excessively long trials, the Constitutional Court plays a preventive role as it may order a review of the case or its completion number which is discriminatory. The Constitutional Court issued a position interpreting this provision whereby it eliminated this type of discrimination. See the Constitutional Court ruling IUz–106/09 adopted at the session held on 18 March 2010, dismissing the initiative to launch the proceedings for the constitutional review of Article 85 (1) of the Constitutional Court Act filed by the Belgrade Centre for Human Rights and the organisation Praxis, available at http://www.praxis.org.rs/index.php?option=com_docman&task=doc_view&gid=175.

55 More in I.2.2.
within the shortest possible period.\textsuperscript{56} In its hitherto practice, however, the Constitutional Court had not set the courts it has referred cases back to any deadlines by which they are to take specific actions or complete the cases.

A constitutional appeal cannot be filed against human rights violations caused by general statutes (laws, decrees et al) even if they \textit{per se} directly violate the human rights enshrined in the Constitution. Such statutes can be contested only by motions for the review of their constitutionality or legality, which the Constitutional Court needs not uphold (Art. 168, Constitution). The Constitution introduces the possibility of abstract control of constitutionality initiated by a motion for the review of the constitutionality of a law before it comes into effect; such an initiative must be launched by at least one third of the national deputies (Art. 169). These various procedures for abstractly controlling the constitutionality of legal statutes cannot \textit{per se} be considered effective legal remedies for specific and individual human rights violations. However, the constitutionality of a general enactment during the constitutional appeal review proceedings may be reviewed only if there is reasonable doubt about the constitutionality of the general enactment on the basis of which the disputed individual enactment was adopted. In such cases, the Constitutional Court will stay its review of the constitutional appeal and launch proceedings to review the constitutionality and legality of the general enactment.\textsuperscript{57}

\subsection*{2.3.2. Effectiveness of Constitutional Appeals}

The ECtHR emphasised that the constitutional appeal should be considered an effective remedy as of 7 August 2008, that being the date when the Constitutional Court’s first decisions on the merits of the appeals had been published.

Original Act on the Constitutional Court states that a Constitutional Court decision upholding a constitutional appeal shall constitute legal grounds for the submission of a compensation claim in order to reach an agreement on the amount of damages, which shall be submitted to the Damages Commission. In the event the Damages Commission fails to respond to the claim within 30 days or fails to reach agreement with the claimant on the amount of compensation, the claimant, who had filed the constitutional appeal, shall exercise this right by filing a damage claim with the competent court. This practically means that an applicant has to initiate three different procedures to claim compensation – lodge a constitutional appeal with the Constitutional Court of Serbia, launch a procedure before the Damages Commission and initiate civil proceedings before a regular court. The latter entails

\textsuperscript{56} See the Constitutional Court position on the reversal of the negative effects and compensation of damages in the constitutional appeal review proceedings available at http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Ставови_Уставног_суда_у_поступку_испитивања_и_одлучивања.doc.

\textsuperscript{57} See the Constitutional Court position on the review of the constitutionality of a general enactment in the constitutional appeal review proceedings, available at http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Ставови_Уставног_суда_у_поступку_испитивања_и_одлучивања.doc.
a first-instance proceeding before a Basic or Higher Court, a second-instance proceeding before an Appellate Court and, finally, a proceeding before the Supreme Court of Cassation.

Since this provision unjustifiably prolonged the proceedings because the parties were referred back to the regular courts, the amendments to the Act on the Constitutional Court adopted in late December 2011 abolished the procedure before the Damages Commission and gave the Constitutional Court the power to rule on a submitted compensation claim and award redress in its decision to uphold a constitutional appeal.

Although the amendment increases the effectiveness of constitutional appeals and the protection of human rights, there is the risk of it having adverse effects on appellants unaware that they need to file clear and corroborated claims and seek specific amounts of compensation in their initial submissions to the Court.

The effectiveness of the constitutional appeal as a legal remedy regarding the compensation of material damages in proceedings initiated over the non-enforcement of final domestic court judgments on claims for the compensation of “compulsory paid leave” incomes was brought into question by the judgment rendered by the ECtHR in the case of Milunović and Čekrlić v. Serbia. The ECtHR concluded that the procedure for compensating material damages in such cases could not be considered effective because the Constitutional Court had not ordered the state to pay the sums awarded in the final decisions and merely urged the competent court to enforce the judgments as soon as possible.

In the case of Vidaković v. Serbia, the ECtHR considered whether the amount awarded by the Damages Commission may have amounted to a violation of the Convention. The ECtHR stated that awarding amounts lower than those awarded by the ECtHR appeared not to render a legal remedy ineffective i.e. amount to a violation of the Convention per se. In this case, the ECtHR took into account also the time it took to pay the damages, which was in general shorter in the national system than would have been the case if the matter had fallen to be decided by the ECtHR, and the effectiveness of the Constitutional Court’s decision upholding the constitutional appeal with respect to speeding up the court proceedings. In its decision on the admissibility of the Vidaković case it thus quoted its case law under which awarding lower amounts of damages than those awarded by the ECtHR does not in principle amount to a violation of the Convention provided that they are not unrea-

58 Sl. glasnik RS, 99/11.
59 See Article 33 (3) of the Act Amending the Act on the Constitutional Court and Article 89 (3) of the Act on the Constitutional Court.
60 See the ECtHR judgment in the case of Milunović and Čekrlić v. Serbia, ECHR, App. Nos. 3716/09 and 38051/09. In paragraph 58, the ECtHR stated that “(T)o be effective, a remedy must be capable of remedying directly the impugned state of affairs.”
sonable. The ECtHR stated that whether the amount awarded could be regarded as reasonable, however, was to be assessed in the light of all the circumstances of the case. These include not merely the duration of the proceedings in the specific case but the value of the award judged in the light of the standard of living in the state and the fact that under the national system compensation will in general be awarded and paid more promptly than would be the case if the matter fell to be decided by the Court under Article 41 of the Convention. The ECtHR ultimately dismissed the application because the applicant had lost the status of victim.

In *Vinčić and Others v. Serbia*, the ECtHR in December 2009 took the view that given the power of the Constitutional Court and its case-law and the competence of the Damages Commission, “the Court is of the opinion that a constitutional appeal should, in principle, be considered as an effective domestic remedy”. This means that this legal remedy will hereinafter have to be exhausted before filing an application with the ECtHR. Applicants are, of course, still free to claim that this legal remedy had not proven effective in their case, but will nevertheless have to prove that this was indeed the case every single time.

The fact that the Constitutional Court has continued referring to ECtHR case law in its decisions on constitutional appeals in 2011 is encouraging. In the Jovanović case, for example, it established a violation of the right to a trial within reasonable time due to the inactivity of the court i.e. its failure to render a decision on an appeal for two years although the case in question was not a complex one. Similarly, in the Minsa case, which also regarded overly long proceedings, the Constitutional Court assessed as unacceptable that a year and seven months had passed from the day the lawsuit was filed until it was served upon the opposing party to respond. In the Sabo case, the Court emphasised that the appellant had contributed to the protraction of the proceedings and ultimately their unreasonable duration. In the Janković case, the Constitutional Court elaborated on the equality of arms of the parties to the proceedings and the right to reasoned court decisions. In late 2011, the Constitutional Court upheld the constitutional appeal filed by the organisers of the 2009 Pride Parade and found violations of the freedom of assembly and right to a legal remedy.

This case law of the Constitutional Court is extremely significant given that the principle of subsidiarity entails that the protection of human rights is primarily the duty of the state parties and that the role of the ECtHR is corrective in nature,
i.e. that it should be perceived as an ultimate mechanism monitoring the fulfilment of the commitments assumed by the ratification of the ECHR.

The Act Amending the Act on the Constitutional Court introduces a series of novel provisions aimed at improving the efficiency of the Court. The Act Amending the Act on the Constitutional Court, however, reduces the Constitutional Court’s powers when it finds a violation of human rights and freedoms. Furthermore, the legislators missed the opportunity to improve the provisions that contributed to its backlog. Namely, under the amendments, the Constitutional Court will not have the power to annul a court judgment like it used to. A human rights violation may be remedied only by the submission of an extraordinary legal remedy in criminal or civil proceedings. In its review of the Act Amending the Act on the Constitutional Court, the Venice Commission stated that the establishment of the possibility of a full constitutional appeal before the Constitutional Court was highly recommended from a human right’s perspective and that, if the Constitutional Court was not allowed review judgements of the ordinary courts, there would be more applications to the European Court of Human Rights. The Venice Commission also emphasised that the powers of and the respect for the Constitutional Court were undermined if it did not have the power to annul a prior judgment. Interestingly, the legislators did not elaborate why the powers of the Constitutional Court were reduced in this manner in their explanation of the reasons for the adoption of the amendments.

The Constitutional Court has also retained the power under Article 82 (2) of the Act on the Constitutional Court to rule in cases of violations of the right to a trial within reasonable time although 40% of the 9000 cases pending before it in late 2011 regarded overly long trials. It remains unclear why the Constitutional Court retained this competence in view of the Venice Commission recommendation to transfer the jurisdiction to deal with cases of excessive length of procedures to the Supreme Court of Cassation, which would help reduce the backlog of the Constitutional Court and provide an effective acceleratory remedy and that the Constitutional Court President indicated as much.

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67 More on the amendments to this Act in I.4.6.2.
69 These data were communicated to the representatives of the Venice Commission during their visit to Belgrade on 29 November 2011. See the Venice Commission Opinion on Draft Amendments and Additions to the Law on the Constitutional Court of Serbia, available at http://www.venice.coe.int/docs/2011/CDL-AD(2011)050-e.pdf.
3. Restrictions and Derogation

Article 4, ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A future communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 15, ECHR:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para. 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

3.1. Restrictions of Human Rights

The Constitution prescribes that guaranteed human and minority rights may be restricted only if such restrictions are allowed by the Constitution but only to the extent necessary in a democratic society to fulfil the purpose for which such restriction is permitted. When imposing restrictions on human and minority rights and interpreting these restrictions, all state agencies, courts in particular, are obliged to take into account the essence of the right subject to restriction, the importance of the purpose of restriction, the nature and scope of the restriction, the relationship between the restriction and its purpose, as well as to take into account whether there is a way to fulfil this purpose by a lesser restriction of the right, while the restrictions should never infringe the essence of the guaranteed right (Art. 20), but the Constitution does not explicitly state that the aim of the restriction must be
legitimate. This shortcoming can be partly overcome by a general interpretation clause in Article 18, under which “(P)rovisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation”. Given the ECtHR’s case law, a legitimate aim would have to be prerequisite for the acceptability of restricting human rights.

Pursuant to Article 18 (2) of the Constitution, the manner of exercising certain freedoms and human rights may be prescribed by law – when so explicitly envisaged by the Constitution and when necessary to ensure the exercise of a specific right owing to its nature.

In the first case, the Constitution admits that certain rights cannot be exercised directly and that the Constitution itself can explicitly indicate when the exercise of those rights shall be regulated by law. This does not necessarily imply restriction of rights, although the fact that the Constitution leaves it to laws to elaborate how specific rights are exercised allows for limiting the scope of the enjoyment of such rights.

In the second case, however, the Constitution does not explicitly state which rights may or may not be exercised directly and leaves that assessment to the legislature. This may create potential for abuse and the restriction of directly exercisable rights by laws.

The Constitution explicitly prescribes that a law regulating the realisation of a specific right may not infringe the substance of that right.

Article 20 of the Constitution clearly defines the principle of proportionality, as well as the standards which courts in particular must adhere to when interpreting restrictions of human and minority rights. The Constitution strictly lays down the principle of proportionality. Standards for evaluating proportionality are in keeping with the jurisprudence of the European Court of Human Rights.

The Constitution does not explicitly prohibit restrictions of human and minority rights guaranteed by the generally accepted rules of international law, international treaties as well as laws and other regulations in force, but comprises only a general provision prescribing that the achieved level of human and minority rights may not be reduced.

72 In its Opinion on the Constitution of Serbia, the Venice Commission commented Article 20 of the Constitution related to restrictions of human and minority rights (paragraphs 28–30 of the Opinion). Apart from criticising this provision for not requiring the existence of a legitimate aim for the restrictions to be allowed, the Commission also opined that the excessively complicated drafting of these Articles risked leading to many issues of interpretation. See European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007.

International human rights protection documents (such as the ECHR) allow for restrictions necessary in a democratic society to, *inter alia*, protect public morals. It seems the two requirements have been merged in the new Constitution, resulting in a new concept “morals of a democratic society”.

3.2. Derogation of Human Rights

The Constitution allows for derogations from human and minority rights guaranteed under the Constitution but only to the extent necessary (material condition). Upon the declaration of a state of war or state of emergency (formal condition) (Art. 202 (1)). The wording used is milder than the one in the ECHR, which allows for derogation only in “to the extent strictly required by the exigencies of the situation”. It remains unclear why some other rights were left out of the list of non-derogable rights (Art. 202 (4)).

The existence of a public danger threatening the survival of a state or its citizens is prerequisite for the declaration of a state of emergency under the Constitution (Art. 200 (1)). Therefore, this prerequisite also has to be fulfilled for derogations from human rights in accordance with the Constitution, though only with respect to states of emergency and not in case a state of war is declared. A state of war or emergency shall be declared by the National Assembly. In the event the National Assembly is unable to convene, a decision to declare a state of war or emergency shall be taken jointly by the President of the Republic, the National Assembly Speaker and the Prime Minister and the National Assembly shall verify all the prescribed measures (Articles 201 and 200).

Derogation measures shall be temporary in character and shall cease to be in effect when the state of emergency or war ends (Art. 202 (3)).

The Constitution lists the rights that may never be derogated from (Art. 202 (4)). The list of these rights is in keeping with the ICCPR and the ECHR.

4. Individual Rights

4.1. Prohibition of Discrimination

Article 2 (1), ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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Article 26, ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 14, ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1, Protocol No. 12 to the ECHR:

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in para. 1.

4.1.1. General

Discrimination is prohibited by many international treaties ratified by Serbia – by both UN Covenants (the ICCPR and ICESCR), the ECHR and Protocol 12 thereto, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, ILO Convention No. 111 concerning Discrimination (Employment and Occupation)\(^{75}\) and the UNESCO Convention against Discrimination in Education.\(^{76}\)

Article 21 of the Constitution of the Republic of Serbia prohibits any “direct or indirect discrimination on any grounds”, which means that the Constitution provides for the prohibition of discrimination on grounds that are not expressly enumerated as well. Although the Constitution envisages affirmative action to achieve the equality of groups who have long been exposed to discrimination, it does not limit the enforcement of affirmative action measures only until the goals they were undertaken for are achieved. Such a restriction is a necessary criterion for assessing the proportionality of these measures.

Discrimination is a criminal offence under the Criminal Code\(^{77}\) (Arts. 128, 317 and 387). Whoever denies or restricts the rights of man and citizen guaranteed by the Constitution, laws or other legislation or general enactments or ratified international treaties to another on grounds of their nationality or ethnicity, race or religion or lack of such affiliation or on grounds of a different political or other belief,

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\(^{75}\) Sl. list FNRJ (Dodatak), 3/61.

\(^{76}\) Sl. list SFRJ (Dodatak), 4/64.

\(^{77}\) Sl. glasnik RS, 85/05, 88/05, 107/05, 72/09 and 111/09.
sex, language, education, social status, social origin, property or another personal feature, or grants another privileges or benefits on grounds of such a difference shall be punished by maximum three years’ imprisonment. Article 387 of the Criminal Code prohibits and incriminates racial and other discrimination and lays down sanctions for promoting and inciting hate, violence and discrimination (paragraph 4) and for public threats to commit crimes against individuals or groups on grounds of their personal features (paragraph 5). Paragraphs 2 and 3 of this Article incriminate the dissemination of racial supremacy ideas and the propagation of racial hatred and incitement to racial discrimination, as well as the persecution of organisations and individuals advocating the equality of man.

Many other laws also include anti-discriminatory provisions e.g. the Act on Churches and Religious Communities78 (Art. 2), the Labour Act79 (Arts. 18–23), the Employment and Unemployment Insurance Act80 (Art. 8), the Act on the Basis of the Education System,81 the Health Protection Act,82 etc.

### 4.1.2. Anti-Discrimination Act

The Anti-Discrimination Act83 is a general anti-discrimination law which leaves room for special regulation of specific areas where discrimination occurs the most frequently.

The Act prohibits direct and indirect discrimination, disrespect of the principle of equality in rights and duties, associating to commit discrimination, hate speech, harassment and degrading treatment. It also prohibits liability of persons reporting discrimination, which is a novel form of protection accorded to victims and persons reporting discrimination. Discrimination on more than one grounds, repetitive or continuous discrimination shall constitute aggravated forms of the offence. Affirmative action measures do not constitute discrimination (Art. 14).

The Act lists specific forms of discrimination to ensure that the most frequent forms of discrimination are recognised and that their victims are provided protection: the conduct of public authorities (Art. 15), at work and with respect to work (Art. 16), the provision and use of public services (Art. 17), the education system (Art. 19), religion (Art. 18), sex (Art. 20), sexual orientation (Art. 21), age (Arts. 22 and 23), nationality (Art. 24), trade union or political affiliation (Art. 25), disability (Art. 26), and health (Art. 27). The Act leaves room for its application to situations which were not explicitly listed (Art. 4). Such enumeration of specific forms of discrimination meets the standards of effective protection against discrimination.

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78 Sl. glasnik RS, 36/06.
79 Sl. glasnik RS, 24/05, 61/05 and 54/09.
80 Sl. glasnik RS, 36/09 and 88/10.
81 Sl. glasnik RS, 72/09 and 52/11.
82 Sl. glasnik RS, 107/05, 88/10, 99/10 and 57/11.
83 Sl. glasnik RS, 22/09.
because it sets out clear guidelines and leaves no room for doubt about whether its provisions may be applied in particular situations.

The Act establishes the Commissioner for the Protection of Equality as an autonomous state authority independent in discharging the duties established by the law (Art. 1 (2)), elected by the National Assembly at the proposal of its Committee for Constitutional Issues. The funds needed for the work of the Commissioner’s service, the amount of which shall be proposed by the Commissioner, are provided from the Serbian state budget. The Commissioner submits reports on the protection of equality to the National Assembly of the Republic of Serbia, and is also charged with public information related issues and the protection of civil rights.

People, who have been discriminated against, may seek protection in two ways.

One entails the submission of a complaint to the Commissioner for the Protection of Equality. The Commissioner is charged with receiving complaints by citizens who believe they were victims of discriminatory conduct and acting on them unless the same matter is reviewed by a court or a final decision on the matter has already been rendered by a court (Article 36 (1)). The Commissioner shall not act on a complaint in the event s/he believes it is obviously unfounded, in the event the same matter had already been reviewed by the Commissioner and no new evidence has been presented, and in the event s/he is of the view that action on it would be meaningless due to the length of time that passed since the commission of the violation (Article 36 (2)). The Commissioner shall render an opinion on whether a right was violated and, in the event s/he finds that it was, s/he shall issue a recommendation on how to eliminate the violation. In the event the person whom the recommendation regards does not act on the recommendation even after a warning, the Commissioner is entitled to notify the public of his/her failure to act. Before taking any procedural actions, the Commissioner shall first propose reconciliation to the parties.

A person who has been discriminated against may also institute judicial proceedings. Cases of discrimination may be reviewed either by the court of general jurisdiction over the territory in which the defendant resides or is headquartered or by the court within whose territorial jurisdiction the plaintiff resides or is headquartered (Art. 42), which represents an exception to the rules of civil procedure and facilitates the victims’ access to protection. A lawsuit may be filed by the injured party, the Commissioner or a human rights organisation. If only one person was subject to discrimination, a lawsuit may be filed by the Commissioner or a human rights organisation only with the consent of the injured party.

According to the Anti-Discrimination Act (Art. 46), a lawsuit may be filed by a person who knowingly exposed himself to discriminatory conduct in order to directly verify the application of rules prohibiting discrimination in a concrete situation (“situational testing”). The person who intends to make use of this opportunity must notify the Commissioner of his/her intention, unless the circumstances prevent him/her from doing so.
The plaintiff may demand: prohibition of the commission of an action that may amount to discrimination; prohibition of the further commission of such an action; a court decision establishing that the defendant acted in a discriminatory manner; commission of an action eliminating the effects of discrimination; compensation of pecuniary and non-pecuniary damages and the publication of specific court judgments (Art. 43). The plaintiff may require a provisional measure during or after the proceedings to eliminate the danger of violence or major irreparable damage. For a court to approve such a measure, the plaintiff must prove probable that such a measure is necessary to eliminate the danger of violence or major irreparable damage (Art. 44). In the event the plaintiff proves probable that the defendant committed an act of discrimination, the burden of proof shall rest on the defendant (Art. 45). This provision, which also deviates from the civil procedure regulations inasmuch as it transfers the burden of proof from the plaintiff to the defendant, aims at facilitating the status of the victim. The exception also applies to the Act on the Prevention of Discrimination against Persons with Disabilities.

4.1.3. Special Protection of Vulnerable Categories in Serbian Law

4.1.3.1. Prevention of Discrimination against Persons with Disabilities. – The Act on the Prevention of Discrimination against Persons with Disabilities inter alia obliges state bodies to provide persons with disabilities access to public services and facilities and prohibits discrimination in specific areas, such as employment, health and education (Arts. 11–31). It includes provisions obliging state and local self-government bodies to undertake special measures to encourage equality of persons with disabilities (Arts. 32–38) and entitles persons with disabilities to sue the competent institutions that have failed to introduce such measures (although the Act defines these measures only in the most general terms).

The plaintiffs are entitled to ask the court to prohibit an act that may result in discrimination, to prohibit the further commission or repetition of an act of discrimination, to order the defendant to take action to eliminate the effects of discriminatory treatment, to establish that the defendant treated the plaintiff in a discriminatory manner and to order the compensation of pecuniary and non-pecuniary damages (Arts. 42 and 43).

Article 26 of the Anti-Discrimination Act lays down the principle of respect for the equal rights and freedoms of persons with disabilities in the political, economic, cultural and other aspects of public, professional, private and family life and provides judicial protection to persons with disabilities whose equality has been violated, which the Act on the Prevention of Discrimination of Persons with Disabilities does not envisage.

4.1.3.2. Persons with Psychological and Intellectual Disabilities. – The Council of Europe Committee of Ministers Recommendation R(99)4 on principles

84 Sl. glasnik RS, 33/06.
85 More about the protection of persons with disabilities see in II.4.3.
concerning the legal protection of incapable adults introduces specific principles to be applied to enable persons with intellectual and psychological disabilities to take decisions about their lives. The principles aim at reducing the arbitrariness of the courts in proceedings in which such persons’ legal capacity is being restricted, ensuring respect for their wishes and interests, limiting the restrictions only to the necessary ones, introducing degrees of legal capacity, ensuring detailed assessments of each specific case, temporal limitations of the restrictions and periodic reviews of the decisions.

In Serbia, deprivation of legal capacity is governed by Chapter V (Arts. 146-150) of the Family Act. Adults shall be fully deprived of legal capacity in the event they are “incapable of sound reasoning due to an illness or psycho-physical developmental difficulties and are thus incapable of looking after themselves and protecting their rights and interests”. The status of such adults equals that of younger minors (under 14 years of age). The status of adults partially deprived of their legal capacity equals that of older minors (between 14 and 18 years of age) and the court shall specify which legal transactions such adults may engage in independently. A person shall be partially deprived of his/her legal capacity “in the event s/he is directly endangering his/her rights and interests or the rights and interests of others by his/her actions due to his/her illness or psycho-physical developmental difficulties”. A person shall regain his/her legal capacity upon the termination of the reasons that prompted the removal of legal capacity, which is extremely unfavourable given that persons fully deprived of legal capacity, particularly those suffering from intellectual disabilities, may be suffering from conditions which cannot be changed. This legal provision leads to the permanent and irrevocable deprivation of a whole group of people of their legal capacity.

A motion for depriving a person of legal capacity and filed by the custodial authority or a family member shall be reviewed ex officio by the court in accordance with Arts. 31–44 of the Act on the Non-Contentious Procedure. The hearing shall be attended by the custodial authority, the person in question, his/her guardian or temporary representative and the submitter of the motion. The court may also hear the person whose legal capacity is at issue, other participants in the proceedings and all other persons who may provide relevant information. A person to be deprived of legal capacity must be examined by two relevant medical specialists, who shall render their findings and opinions about his/her mental state and ability to reason.

The deprivation of legal capacity entails the full or partial deprivation of the rights to vote and be elected, because the Constitution of Serbia lays down that only adults with legal capacity may exercise their active and passive voting rights (Art. 52 (1)). Given that the law states that the status of a person partially deprived

86 A detailed overview of the international standards and national law governing the deprivation of legal capacity is available in Kosana Beker’s “I Have the Right to Decide” (Pravo da donesem odluku), 2010, Initiative for Inclusion Veliki mali, available in Serbian at http://www.velikimali.org/doc/Publikacija.pdf.
of legal capacity equals that of an older minor, persons partially deprived of legal capacity are consequently not allowed to vote and be elected. This restriction is in contravention of Article 12 of the Convention on the Rights of Persons with Disabilities, as well as in contravention of Article 29 of that Convention, guaranteeing persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. It is also not in compliance with the ECtHR case law\textsuperscript{87} or the view of the CoE Commissioner for Human Rights who emphasizes that persons with disabilities must not be denied the right to vote.\textsuperscript{88}

4.1.3.3. Gender Equality. – Article 20 of the Anti-Discrimination Act prohibits discrimination based on sex or sex change. Violence, exploitation, expression of hatred, humiliation, blackmail and harassment on grounds of sex are also prohibited, as are public advocacy, condoning or compliance with prejudice, customs and other patterns of social behaviour based on gender hierarchy or domination including stereotyped gender roles.

Serbia adopted a Gender Equality Act\textsuperscript{89} which defines the prohibition of discrimination on grounds of sex and the equal right of both sexes in the fields of employment, social and health protection, family relations, political and public life, education, culture, sports and judicial protection. The Act commendably states that public authorities must lead an active policy of equal opportunities in order to prevent discrimination (Art. 3). The Act obliges employers to keep records and documents on staff gender breakdown (Art. 12), plan measures for mitigating or eliminating gender under-representation and report on procedures undertaken to rectify the situation (Art. 13).

The Labour Act, too, prohibits putting a job-seeker or worker in a less favourable situation because of his or her gender. This Act comprises anti-discrimination norms generally prohibiting the discrimination of employed persons and job-seekers, specifies the most frequent cases of discrimination at work and envisages affirmative action measures. A job-seeker or employee may launch proceedings for the compensation of damages in the specified cases of discrimination in accordance

\textsuperscript{87} In its judgment in the case of \textit{Alajos Kiss v. Hungary}, ECHR, App. No. 38832/06 (2010) the ECtHR took the view that the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship amounted to a violation of the ECHR. The ECtHR noted that the “treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny” (see paragraph 44 of the judgment).


\textsuperscript{89} Sl. glasnik RS, 104/09.
with the law (Article 23, LA). The Labour Act anti-discrimination provisions were passed within the process of aligning Serbian law with the EU *acquis*. They also incorporate the provisions envisaged by the 1968 ILO Convention No. 111 concerning discrimination (employment and occupation).

4.1.3.4. Special Protection of Women from Discrimination. – On the basis of the Constitution and international obligations, including certain obligations stemming from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Declaration and the Platform for Action, ratified by Serbia, the state is under the obligation to abolish all forms of discrimination against women.

Serbia ratified the ILO Convention No. 183 on Maternity Protection under which states are to adopt measures supporting parenting, above all provisions ensuring that the financial remuneration during maternity leave suffices to preserve the health of the woman and her child, payment of the full wages during pregnancy leave, adopt appropriate measures eliminating the risk of maternity being a source of labour-related discrimination and laying on the employer the burden of proving that the grounds for dismissal have nothing to do with the worker’s pregnancy, delivery or nursing, etc.

The Labour Act also includes provisions protecting employed women during pregnancy. A pregnant employee may not perform jobs, which the competent authority established as injurious to her health or that of her child, particularly jobs entailing heavy lifting, harmful radiation or exposure to high temperatures (Article 89).

The Act on the Prevention of Harassment at Work prohibits abuse at work, referred to in professional literature as mobbing. The provisions of the Act also apply to sexual harassment (Article 3). The main feature mobbing, sexual harassment and discrimination have in common is that they all violate dignity at work (violation of the rights of a person). As opposed to discrimination and sexual harassment, mobbing entails psychological abuse, whereas sexual harassment constitutes the violation of dignity in the sphere of sexual life and discrimination constitutes a violation of dignity due to inborn or acquired traits not relevant to job performance. By including sexual harassment in the law on mobbing, the legislator has provided employed women with the opportunity to invoke the protective norms in the Act in

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90 *Sl. list SFRJ (Međunarodni ugovori)*, 11/81.
91 Documents adopted at the Fourth World Conference on Women in 1996. The then Federal Republic of Yugoslavia was not a member of the UN at the time. In 2002 however, all international obligations made in that period were accepted, including the Beijing Declaration and the Platform for Action, by a statement of the then Serbia and Montenegro Minister of Internal Affairs.
92 *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
93 Women on pregnancy leave currently receive 65% of their monthly wages in Serbia, while women on pregnancy leave in Belgrade receive their full wages (65% is paid by the Health Insurance Fund and the remaining 35% is covered from the City of Belgrade budget).
94 *Sl. glasnik RS*, 36/10.
case of sexual harassment and obtain faster and more efficient protection than that provided by the Labour Act.95

The Act on the Election of Assembly Deputies96 improves the status of women. Under the Act, one out of every four candidates on the list must belong to the less represented gender on the list i.e. the election list must comprise at least 30% of the candidates of the less represented gender altogether. A list not fulfilling these requirements will be considered deficient and will be rejected by the Republican Election Commission if the nominator does not eliminate the shortcomings. There are, however, no mechanisms ensuring the equal representation of women at the leading political posts in the government, ministries, diplomatic and consular missions, etc.

4.1.3.5. LGBT Persons. – The normative framework for the protection of the equality of the LGBT population is satisfactory for the most part, but the enforcement of the provisions in the valid anti-discrimination laws, strategies and by-laws is inconsistent.97 The greatest shortcoming of the legal framework protecting the non-heterosexual population in Serbia is that the Serbian material criminal law does not incriminate “hate crimes”. The introduction of this offence would contribute to the efficient prosecution of those suspected of violence and other crimes against LGBT persons and facilitate their stricter punishment.98

4.1.3.6. Position of Transgender Persons. – Article 20 of the Anti-Discrimination Act prohibits discrimination on grounds of sex change. This Article is not, however, accompanied by adequate provisions ensuring the equal treatment of people who have undergone a sex change. The 2011 amendments to two laws have rectified this shortcoming to an extent: the amendments to the Health Protection Act and the Health Insurance Act99 expand the rights to the mandatory health insurance to include sex change for medical reasons and stipulate the obligation under which at least 65% of the costs of sex change shall be covered from the mandatory health insurance. Transgender persons, however, still encounter difficulties when they attempt to have their new situation legally recognised after the sex change (to obtain new documents, with their new name and their post-operation gender, et al).100

The Public Administration and Local Self-Government Ministry recommended that these persons initiate proceedings for establishing the content of the registers

95 The Labour Act also comprises provisions prohibiting sexual harassment, but court proceedings on such cases have been inefficient and long and courts have to date heard only a few sexual harassment at work cases.
96 Sl. glasnik RS, 35/00, 57/03, 72/03, 75/03, 18/04, 101/05, 85/05, 104/09 and 36/11.
97 More on the status of the LGBT population under II.4.1.
99 Sl. glasnik RS, 57/11.
100 In the case of Christine Goodwin v. the United Kingdom, ECHR, App. No. 28957/95 (2002) the ECtHR found the UK in breach of Article 8 of the ECHR because it did not enable the legal recognition of the applicant’s change of sex. See para. 93.
before the competent non-contentious courts, but the state authorities have not been applying a uniform practice with respect to entering the changes in the registers, which has resulted in the legal uncertainty and the further victimisation of people who have undergone a sex change.101

4.2. **Right to Life**

**Article 6, ICCPR:**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

**Article 1, Second Optional Protocol to the ICCPR:**

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

**Article 2, ECHR:**

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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101 The Belgrade municipality Savski venac, for instance, has mostly allowed for a “corrigendum” of an applicant’s gender in the birth and other official registers provided s/he submits the required medical documentation. These corrections are, however, impossible, if, e.g. the person who underwent a sex change had been married and/or had a child before the sex change, because the consequences the “corrigendum” may have on the legal family relations are unforeseeable. Most other municipalities do not allow the making of such changes. There is no uniform practice in Serbia with regard to this issue. For instance, in one city, the person who underwent a sex change had the changes in the register made by initiating non-contentious proceedings in court; in another town, one such case was decided on by the court and another by an administrative authority; in a third town, the application to change the data in the register was dismissed as unlawful i.e. legally unregulated. See the Protector of Citizens’ report *LGBT Population in Serbia*, p. 17, available in Serbian at http://www.ombudsman.rs/index.php/lang-sr_YUV/izvestaji/posebni-izvestaji/2107-2012-01-12-14-02-53.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Protocol No. 6 to the ECHR:
Article 1
The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2
A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3
No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Protocol No. 13 to the ECHR:
Article 1
The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2
No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3
No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

4.2.1. General

The right to life is guaranteed by all main international and regional human rights instruments applicable in Serbia. This right should not be interpreted narrowly.102 State bodies and authorities have the positive obligation to adopt and undertake all measures leading to the effective assurance and exercise of the right to life, both in terms of procedural obligations, efficient investigations into the circumstances of killings, and taking all reasonable steps to protect the persons under their jurisdiction from a risk they knew existed.103 International documents do not allow

102 General Comment No. 6, para. 1.
derogations of the right to life (Art. 4 ICCPR and Art. 15 ECHR). The ECHR envisages the following exception: deaths resulting from lawful acts of war.

The Constitution prescribes that human life is inviolable (Art. 24 (1)) and prohibits capital punishment (para. 2). The Constitution also prohibits measures derogating from the right to life during a state or war or emergency (Art. 202).

Offences against the right to life are defined in the Criminal Code, and are prosecuted by the state prosecutor ex officio. Those are above all offences against life or body (Arts. 113–127), crimes against humanity and other human rights protected by international law such as genocide (Art. 370), crimes against humanity (Art. 371), war crime against the civilian population (Art. 372), illegal killing or wounding of enemy combatants (Art. 378) and incitement to a war of aggression (Art. 386).

The ECtHR clearly stated in its judgments that Article 2 of the ECHR extended in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The Criminal Code incriminates endangering the safety of people in Article 138, under which anyone who threatens to attack the life and body of another shall be sentenced to between three months and five years of imprisonment. Article 194 of the Criminal Code incriminates domestic violence.

The right to life may be jeopardised by the state’s inadequate concern for the population’s health which is why states have an obligation to take active measures to prevent malnutrition, promote medical care and other social welfare activities aimed at reducing the mortality rate and extending life expectancy. The new Constitution of Serbia provides special protection to families, mothers, single parents and children (Art. 66 (1)) and prescribes that health care of children, pregnant women, mothers on maternity leave, single parents of children under 7 and the elderly shall be provided from public revenues unless it is provided in some other manner in accordance with the law (Art. 68 (2)).

The state also has a positive obligation to provide effective protection of human health and lives. Chapter XXIII of the Criminal Code incriminates offences against human health (Arts. 246-259). Article 259 lays down penalties for the qualified forms of the listed crimes against human health resulting in grave physical injuries, grave effects on human health or death, but lays down that such grave forms of the crimes shall warrant only between two and twelve years’ imprisonment.
Criminal Code also comprises groups of crimes which may pose a risk to human lives, such as crimes against general safety, traffic safety, environment, etc.

The CC defines as punishable incitement to suicide and assisting a person to commit suicide, which carry a prison sentence ranging between 3 months and 10 years. The CC (Art. 117) does not decriminalise euthanasia (even passive); it defines it as a separate crime, milder than murder.

The Constitution of Serbia explicitly prohibits cloning of human beings (Art. 24 (3)). The CC envisages the crime of “illegal medical experiments and testing of medications” and specifies that “whoever performs cloning of humans or conducts experiments with that goal shall be sentenced to imprisonment ranging from three months to five years” (Art. 252 (2)).

4.2.2. Arbitrary Deprivation of Life

The ICCPR and ECHR oblige states to protect the lives of people from arbitrary i.e. intentional deprivation of life and to take special measures to prevent arbitrary killing by state security forces. However, use of force by the police in self-defence, when it is absolutely necessary, during arrest or preventing escape or quelling a riot or insurrection cannot be considered intentional or arbitrary deprivation of life (even if ends in death), as long as it fulfils the criteria of absolute necessity i.e. proportionality. According to Human Rights Committee and ECtHR case law, unintentional killing by state forces may constitute a violation of the right to life if the use of force at the time of murder was unjustified or inconsistent with the procedure prescribed by national legislation. The Committee requires that state legislation must strictly control and limit the circumstances in which a person may be deprived of his life by state agents. However, in view of the fact that national legislation itself may be arbitrary and provide excessive powers to state agents, the Committee found that even situations in which the domestic law criteria were fulfilled constituted violations of the right to life.

The Act on Police prescribes that law enforcement officers may use force “only if they cannot otherwise accomplish the law enforcement purpose; in such instances, force may be applied with restraint and commensurate with the danger threatening legally protected assets and property, i.e. with the gravity of the act they are preventing or subduing” (Art. 84 (2)). Police may use firearms only when they
cannot accomplish their tasks by the application of other means of coercion and only if the use of firearms is absolutely necessary to achieve one of the goals listed in Article 100. It is crucial that the police meet the “strict proportionality test” when they use firearms.115

4.2.3. Abortion

Neither the ICCPR nor the ECHR define the beginning of life.116 ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of protection of human dignity, but not the status of an individual enjoying protection under Article 2 of the ECHR.

Abortion is regulated by the Act on Abortion in Medical Facilities.117 Under the Act, abortion may be performed only at the request of the woman118 and with her written consent. A simple request by the pregnant woman is sufficient up to the tenth week (Art. 6) and in exceptional circumstances listed in the law thereafter, even after the twentieth week of pregnancy.

The CC (Art. 120) incriminates illegal termination of pregnancy or abortion committed, initiated or assisted in contravention of regulations.

4.2.4. Protection of Life of Detainees and Prisoners

A state has a special obligation to take all necessary and available measures to protect the lives of all persons deprived of liberty or serving a jail sentence. Failure to provide medical assistance, withholding of food, torture or failure to prevent the suicide of persons deprived of their liberty or inadequate investigation in case of their death may constitute a violation of the right to life.119

116 The word “everyone” in Article 2 ECHR allows interpretations that the life of the foetus is also protected, but the European Commission of Human Rights determined that no intention of State Parties to the Convention to protect the right to life of the foetus could be established from the context of Article 2 (see X. v. United Kingdom, ECmHR, App. No. 8416/78 (1980)). The ECtHR also found in the case Vo v. France, ECtHR, App. No. 53924/00 (2004), that the issue of when life begins was within the jurisdiction of the states as there is no consensus in Europe on the scientific and legal definition of the beginning of life. This was repeated in the case Evans v. United Kingdom, ECHR, App. No. 6339/05 (2007) and in the case A., B. and C. v. Ireland, ECHR, App. No. 25579/05 (2010).
117 Sl. glasnik RS, 16/95 and 101/05.
118 Under the Constitution of Serbia, everyone shall have the freedom to decide whether to have children or not and the state shall encourage parents to have children and help them therefor (Art. 63).
119 See Keenan v. United Kingdom, ECmHR, App. No. 27229/95 (1999); Angelova v. Bulgaria, ECHR, App. No. 38361/97 (2002); Tahirin Acar v. Turkey, ECHR, App. No. 26307/9 (2004); Dermit Barbato v. Uruguay, Communication No. 84/81, para. 9.2.
In that respect, the Constitution of Serbia prescribes that persons deprived of liberty must be treated humanely and that their dignity of person shall be respected and prohibits any violence against or extortion of statements from persons deprived of liberty (Art. 28). The Penal Sanctions Enforcement Act lays down the conditions in which coercion may be applied against convicts (Arts. 128–132). Convicts are entitled to the same degree of health protection as free health insurants (Art. 101).

4.3. Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

Article 7, ICCPR:
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

Article 3, ECHR:
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

4.3.1. General

In addition to the obligation to prohibit torture in accordance with Article 7 of the ICCPR and Article 3 of the ECHR, Serbia is also bound by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Convention against Torture). By ratifying the Convention, the former SFRY also recognised the competence of the Committee against Torture to receive and consider communications from state parties (Art. 21 (1)) and from or on behalf of individuals (Art. 22 (1)). In December 2005, SaM ratified the Optional Protocol to the Convention against Torture, which established a system of supervising places where persons deprived of liberty are or may be and it came into force on June 2006. Under the Protocol, each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment – the national preventive mechanism (Art. 3).

The decision to entrust the duties of the National Preventive Mechanism (NPM) to the Protector of Citizens was rendered with considerable delay, in July

120 See I.4.3.
121 Sl. glasnik RS, 85/05, 72/09 and 31/11.
123 Sl. list SCG (Međunarodni ugovori), 16/05.
2011. The Protector of Citizens of the Republic of Serbia is to cooperate with the Ombudsman of the Autonomous Province of Vojvodina and associations the statutes of which define as their objective the improvement and protection of human rights and freedoms. The Deputy Protector of Citizens charged with the rights of persons deprived of liberty undertook a number of activities in the latter half of 2011 to establish this mechanism which is to become operational in 2012. The NPM was officially presented to the public at a conference in December 2011.¹²⁴ Civil society organisations that will cooperate with the Protector of Citizens will be selected through a public competition and the NPM’s plan is to visit over 80 institutions in which persons deprived of liberty are held. Civil society organisations are explicitly mentioned in the law and involved in the NPM activities, which is commendable, although it remains to be seen in 2012 whether this mechanism will yield results, whether there will be enough funds to ensure its unhampered work and whether the state authorities will heed its recommendations.

Serbia is obliged by the ECHR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Statute of the International Criminal Court, which defines crimes against humanity and war crimes as comprising also torture and inhuman treatment (Arts. 7 and 8).¹²⁵

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Republic of Serbia for the third time in February 2011. It held meetings with various state authorities and civil society organisations and visited a number of establishments in which persons deprived of liberty are held.¹²⁶ The report on the visit was not published by the end of 2011.

The Constitution of the Republic of Serbia explicitly prohibits torture (Art. 25), provides special guarantees of the prohibition of torture during criminal proceedings and other cases of deprivation of liberty (Art. 28) and prohibits the abolition or derogation of the prohibition of torture even during a state of war or emergency (Art. 202 (4)). The Constitution guarantees the right to effective court protection in the event of violation of the right to inviolability of physical and psychological integrity, and the right to reverse the consequences of such violations, which also implies the right to compensation in cases of torture or similar treatment, notwithstanding who had inflicted the ill-treatment (Art. 22). The right of a person deprived of liberty to be examined by a doctor of his/her own choice is the only right not enshrined in the Constitution, although the CPT is of the view that this right, alongside the other two enshrined in Article 22 of the Constitution, is one of the fundamental safeguards against the ill-treatment of detained persons.¹²⁷ The CPC, however, guarantees the right of a person deprived of liberty to be examined

¹²⁵ Sl. list SRJ (Međunarodni ugovori), 5/01.
by a doctor of his or her own choice at his or her request and, if such a doctor is not available, by a doctor chosen by the authority that deprived the person of liberty i.e. the investigating judge (Art. 5 (3.3)). This right is not guaranteed by the Act on Police, under which a person may be deprived of liberty without a written order of a court or an authority conducting administrative proceedings.

The Constitution affords persons deprived of liberty with the right to notify a person of their own choosing that they were deprived of liberty without delay and to have a counsel of their own choice present at their questioning (Art. 27 (2) and Art. 29 (1)).

4.3.2. Prohibition of Torture under Serbia's Law

4.3.2.1. Criminal Law. – The Convention against Torture binds states to criminalise acts of torture, attempts to commit torture and any other act by any person, which constitutes complicity in an act of torture, and to prescribe appropriate penalties commensurate to the gravity of the offence (Art. 4).

Article 137 of the Criminal Code incriminates ill-treatment and torture. Definition of torture resembles the one in the Convention against Torture,128 but significantly differs from it on one point. As opposed to the Convention against Torture, under which torture is committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, the Criminal Code does not insist on any links between such acts and public officials. Therefore, any person can be charged with this crime, even if s/he committed it independently of any act or failure to act of a public official. Torture committed by a public official warrants a stricter penalty (eight-year imprisonment is the maximum penalty). The Criminal Code also incriminates torture by the crime of extortion of a confession or statement (Art. 136) and unlawful deprivation of liberty (Article 132), although these offences are incriminated in some other Articles of the Criminal Code as well.

The Criminal Procedure Code includes provisions on the respect for the personality of a suspect and the indictee. The valid CPC will be enforced in regular criminal proceedings in 2012 as well. The new Criminal Procedure Code that was adopted in 2011 will come into force on 15 January 2013, with the exception of war crime and organised crime proceedings, to which it will apply as of 15 January 2012.

128 The 1984 Convention against Torture defines torture in the following manner: “(F)or the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions”, Sl. list SRJ (Međunarodni ugovori), 9/91.
Any violence against a person deprived of liberty or whose liberty has been restricted is prohibited and punishable, as is any extortion of a confession or another statement from the indictee or another person taking part in the proceedings (Art. 12, Art. 9 new CPC). The CPC prohibits resort to force, threats, deceit, promises, coercion, attrition or other methods aimed at obtaining a statement or a confession which may be used as evidence against the accused or for the achievement of any other goals.

The Criminal Procedure Code prescribes that court decisions may not be based on evidence when the content of or manner in which it was collected was in contravention of the provisions of the Constitution or a ratified international treaty, or expressly prohibited by the CPC or another law (Art. 18). The new Criminal Procedure Code expands this provision by adding to it “generally recognised rules of international law”. It also introduces an exception from the prohibition of the use of evidence obtained as a result of torture in Article 15 of the Convention against Torture. Article 16 (1) of the new CPC states that such evidence may be used “in proceedings in connection with the obtaining of such evidence”.

The CPC contains special provisions on respect for the personality of detainees. Article 148 prohibits offending the personality and dignity of a detainee during detention and prescribes the application of only such restrictions against the detainee which are necessary to prevent his or her escape and to ensure the unhindered conduct of criminal proceedings (Art. 148, Art. 217 (1 and 2) new CPC). The detainee may be visited by his/her attorney, close relations and at the request of the detainee, a doctor and other persons, or diplomatic and consular representatives with the consent of the judge. A detainee may correspond with persons outside the prison under the supervision of the judge unless such correspondence would be detrimental to the proceedings (Art. 150, Art. 220 new CPC).

4.3.2.2. Enforcement of Penal Sanctions. – Under the Penal Sanctions Enforcement Act (PSEA), a penal sanction shall be enforced in a manner guaranteeing the respect of the dignity of the person it is enforced against; the PSEA prescribes explicit prohibition and punishment of treatment by which a person against whom the sanction is enforced is subjected to any form of torture, abuse, humiliation or experiments, as well as punishment of disproportionate use of force in the enforcement of the sanction (Art. 6). The Act envisages the prohibition of discrimination of prisoners and entitles them to protection of their fundamental rights guaranteed by the Constitution, ratified international documents, generally accepted rules of international law and this Act (italics added, Arts. 7 and 8).

The Regulation on Measures for Maintaining Order and Security in Penitentiaries does not explicitly prohibit maltreatment, limiting itself to a provision which requires that the human dignity of the prisoners be respected and their state

129 Sl. glasnik RS, 85/05, 72/09 and 31/11.
130 Sl. glasnik RS, 105/06.
of health be taken into consideration during the application of measures for maintaining order and security (Art. 7 (1)). The Regulation stipulates a medical check-up of a prisoner subjected to coercive measures (which shall be carried out one more time within the following 24 hours). A report on use of coercion shall be submitted to the prison warden (Art. 12 (2)).

4.3.3. Use of Force by Police

Art. 12 (2) of the Act on Police\textsuperscript{131} obliges the police to “prohibit torture and inhuman and degrading treatment” in the discharge of police duties. Art. 13 (2) stipulates that the police shall act professionally, responsibly and humanely and respect the human dignity, reputation and honour of all persons and their other rights and freedoms in the performance of their duties. Under Art. 31 (5), “the authorised officer shall in the exercise of police powers act in accordance with the law and other regulations and respect standards set in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the European Code of Police Ethics and other international documents relating to the police”.

Means of coercion may be used only if the law enforcement task cannot be accomplished otherwise. In such cases, they have to be applied with due restraint and be commensurate to the danger threatening a legally protected good and value, i.e. the gravity of the crime being prevented or suppressed (Art. 84 (2)). A report on every use of means of coercion shall be submitted to the superior police officer (immediate supervisor) within a maximum of 24 hours from the time the means of coercion were used (Art. 86). In the event the officer used firearms or the means of coercion caused grave bodily injuries or death or in the event the means of coercion were applied against more than three persons, the police director or chief of the regional police directorate, in which the officer who used the means of coercion works, shall establish a commission of minimum three police staff that shall review the circumstances in which the means of coercion were used, make a record of the review and render its opinion on whether the means of coercion were used lawfully and professionally (Art. 25, Regulation on the Technical Features and Manner of Use of Means of Coercion\textsuperscript{132}).

The Internal Control Sector, which oversees the lawfulness of police work, “particularly with regard to the respect and protection of human rights during the fulfilment of police tasks and exercise of police powers”, was established pursuant to Art. 172 (1) of the Act on Police. The complaints procedure also allows for oversight of police work. The complaints procedure is regulated in greater detail in the Complaints Procedure Regulation.\textsuperscript{133} Everyone shall be entitled to file a complaint to the

\textsuperscript{131} Sl. glasnik RS, 101/05.
\textsuperscript{132} Sl. glasnik RS, 19/07 and 112/08.
\textsuperscript{133} Sl. glasnik RS, 54/06.
Ministry against a police officer if s/he believes the officer violated his or her rights or freedoms by unlawful or improper action. Complaint must first be reviewed by the head of the unit in which the implicated officer is employed, or by a person authorised by the head of unit. In the event the complainant disagrees with the views of the head of unit or the complaint gives rise to suspicion that a crime prosecuted *ex officio* was committed, the whole case file shall be forwarded to the Ministry Commission. Commission comprises three members (the Head of the Internal Control Sector or a person authorised by him/her, a representative of the police authorised by the Minister and a civilian representative nominated by professional associations and NGOs and appointed and dismissed by the Minister According to the Regulation, the civilian representative in the commission has fewer powers than the other two members with respect to accessing documents and the opportunity to talk to persons who may have information of relevance to the complaints procedure (Art. 11 of the Regulation). Furthermore, this member is appointed and dismissed by the Minister of the Interior.

The Code of Police Ethics,\(^{134}\) prescribes that that no Ministry employee is allowed to order, commit, incite or tolerate torture or other brutal or inhuman treatment degrading the personality of a person (Art. 34) and obliges a police officer who witnessed one of the proscribed actions to report them to his superior, Internal Control Sector and external civilian control bodies.

### 4.3.3.1. Penal Policy and Case Law.

The definition of torture in the Criminal Code does not follow the definition of torture in the Convention against Torture to the letter. The definition in Article 137 lacks an important element – that the crime is linked to an action of a public official and only lays down a stricter penalty in the event the torture was perpetrated by a public official. In result, public officials are very rarely accused of the crime in Article 137 of the Criminal Code; as a rule, they are charged with incurring grave physical injuries (Art. 121) or light physical injuries (Art. 122) in conjunction with the crime of abuse of office (Art. 359).\(^{135}\)

According to a case law survey conducted by the BCHR in 2011, most of the people accused of ill-treatment or torture were not public officials or had not acted with the consent of or on orders from public officials.\(^{136}\)

As far as the penal policy is concerned, the fact is that courts can pronounce very mild penalties for grave forms of torture, i.e. the penalties for torture are not proportionate to the gravity of the crime, as the CPT noted in its report after visiting Serbia.\(^{137}\) The Criminal Code has been amended and now lays down stricter penal-

\(^{134}\) *Sl. glasnik RS*, 92/06.

\(^{135}\) More on crimes the commission of which can be qualified as ill-treatment or torture in the *Report 2010*, I.4.3.2.

\(^{136}\) More in *Prohibition of Ill-Treatment and Rights of Persons Deprived of Their Liberty in Serbia*, BCHR, pp. 21–25.

ties for specific crimes, but the sanctions for extortion of confessions (Art. 136) and ill-treatment and torture (Art. 137) have remained unchanged.

Ill-treatment warrants maximum one-year imprisonment; if this crime was committed by a public official, s/he shall be convicted to between three months and three years in jail. Torture warrants between six months and five years of imprisonment; if this crime was committed by a public official, s/he shall be convicted to between one and eight years in jail.

The simple form of the crime of extortion of a confession or statement warrants between three months and five years of imprisonment and the qualified form warrants between two and ten years of imprisonment. Infliction of a grave bodily injury warrants between six months and five years of imprisonment. The perpetrator is sentenced to between one and eight years in jail in the event the injury impaired the health of the person and put his or her life at risk or destroyed or permanently or substantially impaired or weakened a vital body part or organ or resulted in permanent incapacity to work, permanently or gravely impaired his or her health or maimed him or her. In the event the grave physical injury resulted in the death of the victim, the perpetrator shall be punished to between two and twelve years in jail. The abuse of post that led to the grave violation of another person’s rights warrants imprisonment lasting between six months and five years. Therefore, if an act of torture is qualified as the crime of grave bodily injury in conjunction with the crime of abuse of post, which is the least favourable qualification for the perpetrator, the perpetrator can be sentenced to maximum 13 years in jail.

4.4. Prohibition of Slavery and Forced Labour

Article 8, ICCPR:

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
   (b) Para. 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:
   (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
   (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;
   (iii) Any service exacted in cases of emergency or calamity threatening the life or well being of the community;
   (iv) Any work or service that forms part of normal civil obligations.
Article 4, ECHR:
1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term ‘forced or compulsory labour’ shall not include:
   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   (d) any work or service which forms part of normal civic obligations.

Article 1, Protocol No. 4 to the ECHR:
No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

4.4.1. General

With regard to the prohibition of slavery and forced labour, Serbia is bound both by the ICCPR and many other international treaties on prohibition of slavery and other forms of servitude. Keeping someone enslaved has recently become a topical issue, since it occurs massively in the form of trafficking in human beings.

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138 The Slavery Convention (Sl. novine Kraljevine Jugoslovije, 234/29), ILO Convention No. 29 Concerning Forced Labour (Sl. novine Kraljevine Jugoslovije, 297/32), Convention on the Suppression of Trade in Adult Women (Sl. list FNRJ, 41/50), Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others (Sl. list FNRJ, 2/51), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Sl. list FNRJ (Dodatak), 7/58), International Covenant on Economic, Social and Cultural Rights (Sl. list SFRJ, 7/71), Convention on the Elimination of All Forms of Discrimination against Women (Sl. list SFRJ (Međunarodni ugovori), 11/81), Convention on the High Seas (Sl. list SFRJ (Dodatak), 1/86), Convention against Transnational Organized Crime and additional protocols (Sl. list SRJ (Međunarodni ugovori), 6/01), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Sl. list SRJ (Međunarodni ugovori), 7/02 and 18/05), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sl. list SRJ (Međunarodni ugovori), 7/02, ILO Convention No. 105 Regarding the Abolition of Forced Labour (Sl. list SRJ (Međunarodni ugovori), 13/02), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Sl. list SRJ (Međunarodni ugovori), 13/02), the ILO Convention No. 182 on the Worst Forms of Child Labour (Sl. list SRJ (Međunarodni ugovori), 2/03), the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Sl. Glasnik RS (Međunarodni ugovori), 19/09), CoE Convention on Action against Trafficking in Human Beings (Sl. Glasnik RS (Međunarodni ugovori), 19/09), The CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Sl. Glasnik RS (Međunarodni ugovori), 01/10), Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Sl. Glasnik RS (Međunarodni ugovori), 12/10).
Contemporary international standards on combating human trafficking are incorporated in the United Nations Convention against Transnational Organized Crime and its two Protocols.\textsuperscript{139}

The Serbian Constitution explicitly prohibits slavery, keeping persons in conditions akin to slavery and all forms of trafficking in persons (Art. 26 (1 and 2)). This explicit ban on human trafficking by the highest state legislation is a significant step forward in the protection of fundamental human rights and freedoms.

4.4.2. Trafficking in Human Beings and Human Organs and Smuggling of Humans

Significant headway was made in adopting regulations on combating trafficking in human beings over the previous years. The positive trend continued in 2011 as the National Assembly adopted a new Welfare Act,\textsuperscript{140} and the new Criminal Procedure Code.\textsuperscript{141} Both statutes comprise provisions regarding the status of victims of human trafficking. The CPC commendably entitles an injured party to file a compensation claim during the criminal proceedings (Art. 50 (1)). Expectations are that thanks to this new solution, under which the court is under the obligation to review the compensation claim during the criminal proceedings, instead of referring the victims to realise their rights in civil proceedings like in the past, the victims will finally be awarded adequate redress for the violations of their human rights and be relieved of the obligation to file separate compensation claims in civil proceedings.\textsuperscript{142} Furthermore, apart from the existing fundamental protection measures, the new CPC introduces the institute of a particularly vulnerable witness (Art. 103) whose questioning and confrontation with the defendant will be conducted under special rules (Art. 104). As far as social care is concerned, the new Welfare Act for the first time defines victims of human trafficking as a separate category of beneficiaries (Art. 41) and thus provides them with access to adequate services.

The Criminal Code incriminates trafficking in human beings in Article 388. The simple form of the crime warrants between three and twelve years of imprisonment. A human trafficker will be sentenced to minimum five years’ imprisonment if s/he committed the crime against a minor or (para 3) or resulted in grave physical injuries (para 4), while a minimum 10-year prison sentence will be rendered in case the human trafficking was committed by an organised crime group (para 7). The victim’s consent to exploitation is irrelevant.


\textsuperscript{140} Sl. glasnik RS, 24 /11.

\textsuperscript{141} Sl. glasnik RS, 72/11.

\textsuperscript{142} Victims of human trafficking are usually referred to seek compensation before civil courts.
Under the Criminal Code, whoever knew or could have known that a person was a victim of human trafficking and used her position or enabled another to use her position for the purpose of exploitation shall be punished by imprisonment ranging from six months to five years (Art. 388 (8)), while perpetrators who knew or could have known that the victim was a minor will be punished by imprisonment ranging from one to eight years (Art. 388 (9)). Article 389 of the Criminal Code incriminates trafficking in minors for adoption purposes, but paragraph 1 of this Article specifies that this crime is perpetrated against minors under 16 years of age. This may lead to legal uncertainty in case the victims are between 16 and 18 years of age, wherefore this provision deviates from the international standard under which everyone under 18 is a child. The penalty for procurement of prostitution ranges from six months and five years’ imprisonment and a fine (Art. 184).

The Government of Serbia adopted the Strategy to Combat Trafficking in Human Beings\textsuperscript{143} and the National Action Plan for the 2009-2011 Period,\textsuperscript{144} but the national action plan for the post-2011 period was not adopted by the end of the year.

Under the Aliens Act\textsuperscript{145} a victim of trans-border human trafficking shall be granted temporary residence even if s/he does not submit specific evidence in the event her/his residence is in the interest of criminal proceedings for the crime of human trafficking (Art. 28). It, however, remains unclear whether this provision applies also to victims in cases in which no criminal proceedings have been initiated or in the event the victim is unable or unwilling to take part in them.

Serbia’s legislation does not comprise provisions regulating the safe return of a victim of trans-border human trafficking to his/her country of origin or specifying who would be charged with the task.

Relevant international organisations have noted the headway Serbia made with respect to the content of the regulations in their reports but underlined that the implementation of the law was a challenge to the effective suppression of trafficking in humans and protection of the victims in Serbia.\textsuperscript{146}

The Criminal Code lists the removal of a body organ as one of the purposes of the crime of human trafficking (Art. 388 (1)). The Transplantation of Organs Act\textsuperscript{147} incriminates coercing a person to consent to donate his or her or another person’s organ for transplantation while s/he is alive or upon death and the extraction of his/her organs (the offender will be sentenced to between two and ten years of imprisonment) (Art. 78). The same sentence shall be pronounced against a person donating or offering to donate his or her or another person’s organ for transplanta-

\textsuperscript{143} Sl. glasnik RS, 111/06.
\textsuperscript{144} Sl. glasnik RS, 35/09.
\textsuperscript{145} Sl. glasnik RS, 97/08.
\textsuperscript{146} See more in II.4.4.
\textsuperscript{147} Sl. glasnik RS, 72/09.
tion for a fee and against a person soliciting, transporting, transferring, handing over, selling, purchasing organs, mediating in the sale of organs or mediating in any other manner in the transplantation of organs or participating in an organ transplantation procedure which is the subject of a commercial transaction (Art. 79). This sentence also awaits a person found to have transplanted the organ or participated in the transplantation of an organ to a person, who had not consented to organ transplantation in writing, a person who had extracted an organ from a deceased person i.e. participated in extracting an organ from a deceased person whose brain death had not been diagnosed and declared, a person who had extracted an organ or participated in the procedure of extracting an organ from a person who had prohibited organ donation upon death while s/he was alive (Art. 80).

Under the Criminal Code, whoever enables another to illegally cross the Serbian border or illegally sojourn or transit through Serbia with the intention of obtaining benefit for oneself or another shall be punished by imprisonment ranging between six months and five years. In the event the life or health of the person whose crossing is enabled was endangered, the smuggler will be punished by imprisonment ranging from one to ten years. In the event the crime was committed by an organised crime group, the smuggler shall be punished by between three and twelve years of imprisonment. The law, however, does not envisage adequate protection of the smuggled people’s rights – inhuman or degrading treatment and exploitation of the smuggled migrants do not constitute a qualified form of the crime – whereby the law deviates from the standard set in Protocol 2 (Art. 6 (3)).

The CC does not hold migrants criminally responsible for becoming victims of human smuggling, for possession of forged travel and identification documents for the purpose of smuggling or for staying in the given state without fulfilling the legal residence requirements, whereby the Code departs from the standard set in Protocol 2 (Art. 5).

4.4.3. Forced Labour

Forced or compulsory labour encompasses every work done under threat or punishment. According to Article 6 (1) of the ICESCR, persons who do not work may be deprived of material compensation for work, but they must not be forced to work, meaning that there is the right, but not the obligation to work.

The Constitution explicitly bans forced labour in Article 26 (3)). This article expands the protection of rights set by international standards by envisaging that sexual or economic exploitation of vulnerable persons shall be deemed forced labour.

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148 Article 2 (2) of the Convention No. 29 of the ILO, has defined forced labour as “any labour or service required from a person under threat of punishment and for which this person did not volunteer” (see also Van der Mussele v. Belgium, ECmHR, App. No. 8919/80 (1983); Siliadin v. France, ECHR, App. No. 73316/01 (2005)).
Article 26 (4) of the Constitution lists which forms of labour shall not be deemed forced labour; this provision is compatible with Article 8 (3c) of the ICCPR.

ICCPR prescribes that prohibition of forced or compulsory labour cannot be interpreted as prohibition of execution of forced labour sanctions pronounced by the competent court. Under Article 181 of the CPC, an inmate may perform specific jobs in the prison compound, but only on a voluntary basis and at his or her own request and shall for that work receive financial remuneration set by the prison warden.

The relevant provisions on convict labour in the national legislation have in that respect been harmonised with international standards. In the provisions on work obligation of convicts, the PSEA (Arts. 86–100) emphasises the rehabilitation element of work performed by convicts.\(^{149}\)

The Act on Defence\(^{150}\) prescribes the work obligation of citizens during a state of war and a state of emergency (Art. 50 (1)). Under the Act, the work obligation cannot be imposed on persons listed in the Act as particularly vulnerable, such as the parent of a child under 15 years of age whose spouse is performing military service, a woman during pregnancy, childbirth and maternity, a person unfit for work (Art. 55 (3)), which is in keeping with international standards. However, the Act on Defence does not prescribe the duration of the work obligation of individuals.

The ICCPR does not absolutely prohibit derogation of Article 8 (3). In keeping with this is Article 26 (4) of the Constitution, which specifies situations that shall not be considered forced labour, including labour or service of military staff and labour or services during a state of war or emergency in accordance with measures set during the declaration of war or state of emergency, but its authors failed to limit the duration of the work obligation. This Act should be harmonised with the ILO Convention No. 29 on Forced Labour, which in its Article 12 (1) describes the maximum period of 60 days over a 12-month period as time during which a person can be obliged to perform compulsory labour.\(^{151}\)

Furthermore, Article 55 (1) of the Defence Act lays down that all citizens with a working capacity and over 15 years of age shall be subject to the work obligation. The provision is not in keeping with Article 11 (2) of the ILO Convention No. 29 Concerning Forced Labour, under which only persons over 18 and under 45 years of age may be called upon for forced or compulsory labour.

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149 In the case of De Wilde, Ooms, Versyp v. Belgium, ECHR, App. Nos. 2832/66, 2835/66 and 2899/66 (1971) the European Court of Human Rights ruled that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR.

150 Sl. glasnik RS, 116/07, 88/09 and 104/09.

151 In para. 2 of that Article, the Convention indirectly indicates that labour defined in Article 1 shall be considered as an exception from the prohibition of forced labour, since it prescribes that each worker shall be issued a certificate on the period during which s/he was subjected to compulsory labour.
4.5. **Right to Liberty and Security of Person; Treatment of Persons Deprived of Their Liberty**

**Article 9, ICCPR:**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

**Article 5, ECHR:**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   
   (a) the lawful detention of a person after conviction by a competent court;

   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of para. 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

4.5.1. Prohibition of Arbitrary Arrest and Detention

The intent of the ICCPR Article 9 is to provide procedural guarantees against arbitrary arrest and detention. State parties have an obligation to define precisely when arrest is lawful, and to provide for judicial review to determine whether or not this is the case. The Human Rights Committee has interpreted the article as also guaranteeing the right to personal safety, under which states are obliged to take “reasonable and appropriate” measures to protect every individual from injury by others. The Constitution of Serbia guarantees all persons the right to personal liberty and security (Art. 27 (1)).

In addition to its immediate responsibility for the actions of its bodies, the state is also obliged to ensure that natural persons do not violate rights guaranteed by the ICCPR by their actions. With regard to the right to liberty and security of person, the state is obliged to prohibit and adequately investigate and punish every instance of illegal deprivation of liberty, including such deprivation perpetrated by persons who are obviously not state agents. In that respect, the Criminal Code comprises the criminal offences of unlawful deprivation of liberty (Art. 132), abduction (Art. 134) and trafficking in humans (Arts. 388 and 389).

The ICCPR requirement that arrest and detention be lawful and its prohibition of arbitrariness do not only relate to criminal proceedings but also to all cases in which a person’s freedom is restricted, e.g. due to mental illness, vagrancy, alcohol or drug addiction, and the like.

The Constitution of Serbia allows for the deprivation of liberty “only on the grounds and in a procedure stipulated by the law” (Art. 27 (1)).

The new Criminal Procedure Code adopted in 2011 introduces the prosecutorial investigation model. Article 43 charges the public prosecutors with conducting investigations and concluding plea agreements and agreements on testimony.

The CPC lays down that only a competent court may order detention only in cases prescribed by the law if the purpose of detention cannot be achieved by other means (Arts. 141–143). The decision on detention is taken by an investigating judge or a judicial panel (detention is ordered by the court under the new CPC as well), upon the questioning of the accused, unless it was impossible to serve the accused with the summons for questioning because the accused was inaccessible or had failed to report a change in address or if there is danger of delay. The decision on detention is served to the person concerned at the time of deprivation of liberty or within 12 hours from the moment of deprivation of liberty or appearance before

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the investigating judge. The detained person may appeal this decision. Appeal does not stay enforcement (Art. 143 (3)). The appeal must be reviewed within 48 hours. The duration of detention must be restricted to the shortest possible time.

The CPC allows the police and prosecutor to detain a suspect but only in exceptional cases (Art. 229). In accordance with the prosecutorial investigation model, the new CPC lays down that the decision on the detention of a suspect shall be taken by a public prosecutor, while the police may keep a suspect in custody only with the consent of the public prosecutor (Art. 294). The suspect against whom this measure is applied enjoys the full scope of rights belonging to defendants, especially the right to legal counsel. An Interior Ministry body or prosecutor must immediately or within maximum 2 hours issue and serve the decision on detention. Under Art. 294 of the new CPC, the decision on detention must be issued and served on the detained suspect “within a maximum of two hours from the moment the suspect was notified that he would be detained”. This provision may prove problematic unless the suspect is clearly told this at the time of arrest. Duration of detention is limited to 48 hours maximum from the moment a person is deprived of liberty i.e. responded to the summons. The detained person may lodge an appeal against the decision on detention. The new CPC limits the time within which a suspect may appeal against the decision on detention to six hours from the moment it is served (Art. 294 (3)). The appeal does not stay the enforcement of the decision on detention. The investigating judge, i.e. the preliminary proceedings judge under the new CPC, must rule on the appeal within 4 hours.

The chief guarantee afforded the suspects is that they must be questioned in the presence of their counsels. Under the CPC, the questioning of the suspect shall be delayed until his/her defence counsel arrives, eight hours at most. In the event the counsel fails to appear by then, the police shall immediately release the suspect or bring him/her before the competent judge. The new CPC also includes a provision prohibiting the questioning of a suspect in the absence of his counsel, but does not set the eight-hour limit after which the suspect will be released or brought before the competent judge (Arts. 289 and 294).

A person, who had failed to respond to a police summons to provide information, may be brought in by force only if the summons included a warning to that effect (Art. 226, CPC). Collecting information from one person may last four hours at most (Art. 226 (3)). Article 288 (3) of the new CPC lays down that collection of information may last longer than four hours with the consent of the person providing the information. If, in the course of collecting information, the police authority assesses that the summoned person may be considered a suspect, the authority is duty-bound to immediately notify him or her of the crime s/he is suspected of, the grounds of suspicion, the right to retain counsel and other rights granted suspects under the CPC (Art. 226 (8)). The new CPC gives a somewhat different definition of the rights of a person who has become a suspect. It states that the police are under the obligation to inform him/her immediately in a language s/he understands
about the charges against him/her, the nature and grounds of the charges, as well as that anything s/he says may be used as evidence in proceedings. The police are also under the obligation to instruct the suspect that s/he has the right to remain silent, not answer any questions, present his/her defence freely, admit or not admit his/her guilt and the right to retain a counsel who will attend his/her questioning (Art. 289 (2)).

Furthermore, under Article 294 (1) of the new CPC, the custody of a citizen who was initially summoned to provide information and whom the police subsequently decided to treat as a suspect is reckoned from the moment s/he responded to the summons. The problems arising in practice with respect to whether or not the time spent collecting information before the person acquired the status of suspect (maximum four hours) is reckoned within the 48-hour custody time limit, needs to be addressed through the provision of adequate training to the police and public prosecutors.

Under Article 53 of the Act on Police, a person disrupting or endangering public order may be detained if it is otherwise impossible to re-establish public order or eliminate the danger. Such detention shall last 24 hours at most. The detained person may appeal the detention order with the competent court.

One should not confuse summons to citizens to provide information under the CPC and the detention of persons under the Law on Police, given that bringing in and detaining citizens just to collect information from them constitutes a violation of their rights.154

The Act on Misdemeanours155 sets out that an accused may be detained by a court order in a misdemeanour procedure in the event his/her identity or permanent i.e. temporary residence cannot be established and there is reasonable suspicion s/he will abscond; s/he can avoid responsibility for a misdemeanour warranting imprisonment by leaving the country; s/he was caught in the commission of the misdemeanour and detention is required to prevent the further commission of the misdemeanour (Art. 166). The Act on Misdemeanours limits detention to 24 hours (Art. 167 (1)).156

4.5.1.1. Right to Be Informed of Reasons for Arrest and Charges – Para. 2 of the ICCPR Article 9 states that a person who is arrested shall be informed, at “the time of his arrest”, of the reasons for his arrest and “promptly” informed of the charges against him. Under Article 27 (2) of the Constitution, “All persons deprived

154 See the Protector of Citizens’ Recommendation 10999 of 1 June 2011, finding the police in violation of the rights of the people they brought in by force for the purpose of collecting information from them. The Recommendation is available in Serbian at the Protector of Citizens’ website http://www.ombudsman.rs/index.php/lang-sr?start=60.
155 Sl. glasnik RS, 101/05, 116/08 and 111/09.
156 More about some provisions on detention that are not in keeping with international standards see in Report 2010, I.4.5.1.1.
of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay”.

The provisions of the CPC are in accordance with international standards given that the accused i.e. suspect is entitled to be notified in detail and in a language s/he understands and promptly, at the first hearing at the latest, of the offence s/he is charged with, the nature of and grounds for the charges and evidence collected against him or her (Art. 4 (1.1)).

Under the new CPC, a defendant is entitled to notified as soon as possible, and always before the first interrogation, in detail and in a language s/he understands, about the charges against him/her, the nature and grounds of the charges, and that anything s/he says may be used as evidence in proceedings (Art. 68 (1)).

A suspect must be given the opportunity to read the criminal report, the crime scene report, the findings and opinions of court experts and the motion for investigation immediately before the first hearing and at his/her own request (Art. 89 (3)). A person deprived of liberty may institute proceedings before the court, i.e. file an appeal with the court, which is duty bound to urgently rule on the lawfulness of the deprivation of liberty (Art. 5 (3.4)). The new CPC does not explicitly lay down this safeguard. However, given that it is enshrined in Article 27 (3) of the Constitution, that the decision to place someone into custody is taken by the court (Art. 212 (1)) and that a person detained by the public prosecutor is entitled to appeal detention with the court (Art. 294 (3)), it can be concluded that this provision satisfies the requirements in ICCPR and ECHR.

4.5.1.2. Right to Be Brought Promptly Before a Judge and to a Trial within a Reasonable Time. – Although it is hard to determine what “promptly” means, it would seem that this period should not exceed four days even in exceptional circumstances and should be much shorter in normal circumstances.157 Under international standards, a person must be brought before an independent and impartial authority (independent from the executive authorities and the prosecutors).

Under Serbian law, custody may be ordered by an investigating judge or a judicial panel, at the request of the prosecutor, wherefore it may be considered that the standard requiring that the decision be taken by a judge “or other officer authorised by law to exercise judicial power” has been met.158 The decision on detention is rendered by the court as well under the new CPC.

During the pre-trial proceedings, authorised police officers may deprive a person of liberty if there are reasons for ordering his or her custody, but neverthe-

less have the obligation to promptly bring this person before an investigating judge, save in extraordinary circumstances, when a police officer may retain in detention a person deprived of liberty or a suspect to collect information or interrogate him or her for a maximum of 48 hours from the hour the person was deprived of liberty i.e. responded to the summons (Arts. 227 (1) and 229 (1)). If more than eight hours have passed before the person was brought before the investigating judge, this delay must be explained to the judge and the investigating judge shall make an official record thereof. The record shall contain the statement of the person deprived of liberty about the time and place of arrest (Art. 227 (3)).

The new CPC also states that a person arrested without a court decision must be brought before the competent judge without delay, within 48 hours at most (Art. 69). In accordance with the prosecutorial investigation model, public prosecutors are now assuming the role of investigating judges and questioning the arrested persons, after the expiry of 24 hours from the moment they were notified of their right to call their counsel at the latest (Art. 293 (2)). The 48-hour deadline, although envisaged as an exception, has, to BCHR’s knowledge, been applied often. On the other hand, the CPC reiterates that holding a suspect in custody is an exceptional measure (Art. 294 (1)). Nevertheless, it is unlikely that this measure, although envisaged as an exceptional one, can last less given the eight-hour deadline within which the police must bring the arrested person before a public prosecutor, and the provision stipulating that such a person must be questioned after the expiry of 24 hours from the moment s/he was notified of his/her right to call his/her counsel at the latest. The role of the prosecution office has thus gained much greater significance under the new CPC because it must be capable of conducting a professional investigation and not violating the rights of the defendants, particularly since, as opposed to the valid CPC, the new CPC states that a preliminary proceedings judge shall be notified of the custody only in the event s/he has to rule on an appeal against the decision on detention (Art. 294 (3)). Therefore, if a person in custody does not appeal the decision on detention, the court will not be notified that the prosecution office or police are holding that individual in detention.

The Constitution prescribes that detention pending indictment may last for maximum three months on the basis of a decision by competent first instance court and that it may be extended by a decision of a superior court by another three months. The period starts running on the day of arrest and the suspect shall be released if charges have not been raised by the end of this period (Art. 31 (1)). The length of custody in regular proceedings is regulated in more detail by the CPC (Arts. 142 and 144), while the period of custody pending indictment in summary proceedings is limited to eight days, exceptionally to 30 days for crimes with elements of violence (Art. 436 (2)) without the possibility of extension, and after the indictment has been filed general rules apply. Under Article 498 (2) of the new CPC, detention may last 30 days at most prior to the submission of the motion to indict in summary proceedings, whilst the detention of a person suspected of a crime
punishable by minimum five years’ imprisonment may be extended by another 30
days at most.

A person taken into custody has the right to stand trial within a reasonable pe-
riod of time or otherwise be released. The duration of detention pending indictment
is limited in the following way: on the basis of a decision of an investigating judge
detention may last for a maximum of one month, and on the basis of a decision by
a judicial panel it may be extended another two months at most. A decision by an
immediately higher court (in cases of criminal offences carrying minimum 5 years
in prison) may extend this period for another three months at most. If no indictment
is issued by the expiry of these deadlines, the detained person shall be released (Art.
144 (4), CPC). The new CPC comprises a similar provision (Art. 215).

4.5.1.3. Right to Appeal to Court against Deprivation of Liberty. – This right
is envisaged in cases when a person has been ordered custody by a non-judicial
body.159 The Human Rights Committee took the stand that judicial control must be
provided immediately, not after the decision by the second-instance administrative
body.160

The Constitution of Serbia guarantees the rights of all persons deprived of
liberty to address the court, which is to urgently review the lawfulness of the depri-
vation of liberty and order his or her release if the person was unlawfully deprived
of liberty (Art. 27 (3)).

The Act on Non-Contentious Procedure (ANCP) 161 provides for committing
a person to a high security psychiatric institution. It is applied to persons whose
freedom of movement and communication with the outside world need to be re-
stricted due to the nature of their illness (Art. 45 (1)). A health institution that
admits for treatment a person without his/her consent or without a court decision
is under the obligation to notify the competent court thereof within the following
three days (Art. 46 (1), ANCP). This provision is in contravention of Article 29 of
the Constitution, under which a person deprived of liberty without a court decision
must be brought before the competent court within 48 hours from the moment of
deprivation of liberty. Under the ANCP, the court has as many as 30 days upon
receipt of the notice to rule on whether the person should be retained in the health
institution.162 This deadline is excessive, particularly in view of the fact that the
court has only 12 hours from the moment of detention to issue a decision on deten-
tion in criminal cases.

The courts may issue a decision ordering that a person against whom the pro-
cceedings are conducted for deprivation of civil capacity be placed in an appropriate


161 Sl. glasnik SRS, 25/82 and 48/88, Sl. glasnik RS, 46/95 and 18/05.

162 Article 50, ANCP.
medical institution temporarily but no longer than three months, if in the doctor’s opinion this would be necessary in order to determine his/her mental state, unless extended placement may adversely affect the person’s health (Art. 38 (3)). A complaint against such a court decision may be filed by the person against whom the proceedings are being conducted, as well as by his/her guardian or temporary representative within three days of receipt of a copy of the decision (Art. 39 (1 and 2)).

4.5.1.4. Right to Compensation for Unlawful Deprivation of Liberty. – A person unlawfully deprived of liberty has the right to rehabilitation, compensation of damages from the state, as well as other rights prescribed by law (Chapter XXIV, CPC). The right to compensation of damages and rehabilitation is explicitly guaranteed also by the new Constitution (Art. 35).

4.5.1.5. Right to Security of Person. – In addition to responsibility for persons who are deprived of liberty in any manner and thus within the immediate competence of the state bodies, the state is also obliged to protect persons at liberty whose security is under serious threat. In that respect, it needs to investigate the threats and undertake all measures required by the “objective need” i.e. “gravity of the case”.163 In keeping with this requirement, the CC includes the crime of endangerment of security (Art. 138).

4.5.2. Treatment of Persons Deprived of Their Liberty

Article 10, ICCPR:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

4.5.2.1. Humane Treatment and Respect for Dignity. – All restrictions that are not inherent in the very nature of the deprivation of liberty and of life in a restricted environment are prohibited. Article 10 of the ICCPR complements Article 7, which prohibits torture, cruel or inhuman or degrading treatment or punishment.164

Under the Constitution, persons deprived of liberty must be treated humanely and with respect of their dignity of person. Any violence against and extortion of statements are prohibited (Art. 28). In criminal proceedings, it is prohibited and punishable to “use violence against a person deprived of liberty and person whose

164 See I.4.3.
liberty has been restricted, as well as to extort a confession or another statement from the defendant or another person taking part in the proceedings” (Art. 5 (4), CPC). Article 9 of the new CPC also includes this prohibition, but defines prohibited acts more clearly as it bans any resort to “torture, inhumane and degrading treatment, force, threats, coercion, deception, medical procedures and other means affecting the free will or extorting a confession or another statement or action from a defendant or another participant in the proceedings”. It is prohibited to offend the person and dignity of the detained defendant.

In a separate section on court protection, the PSEA guarantees the prisoner the right to seek protection in an administrative dispute against a final decision limiting or violating his/her right. The complaint is adjudicated by the competent court within 15 days. The complaint has suspensive effect, with the exception of cases explicitly envisaged by the Act (Arts. 165 and 166).

4.5.2.2. Segregation of Accused and Convicted Persons, Juveniles and Adults.

– In its Article 10 (2), the ICCPR prescribes that accused persons must be segregated from convicted persons “save in exceptional circumstances”, while juveniles must always be separated from adults “and brought as speedily as possible for adjudication”.

The CPC lays down that convicts serving their prison sentences may not be placed in the same room with persons in custody (Art. 148 (3)). The PSEA lays down that accused persons shall be held in a special prison ward, organised as a closed ward, and separated from the convicts (Art. 237 (1)), which is in accordance with international standards. The PSEA, however, contains the general rule that accused and convicted persons are held “in the same conditions” unless otherwise prescribed by the CPC; this is not in accordance with Article 10 (2.a.) of the ICCPR, which states that accused persons “shall be subject to separate treatment appropriate to their status as unconvicted persons”.

4.6. Right to a Fair Trial

Article 14, ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 6, ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7, ECHR:
1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission that, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

Protocol No. 7 to the ECHR:

Article 2
1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3
When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4
1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

4.6.1. Judicial System

Serbia’s court network consists of courts of general jurisdiction and specialised courts. Courts of general jurisdiction comprise Basic, Higher and Appellate Courts and the Supreme Court of Cassation, as the highest court in the state. Specialised courts comprise Commercial Courts, the Commercial Appellate Court, Misdemeanour Courts, the Higher Misdemeanour Court and the Administrative Court (Art. 11, Act on Organisation of Courts).
In its capacity of a first-instance court, a Higher Court has the jurisdiction to try crimes warranting over 10 years’ imprisonment, crimes against the Army of Serbia, disclosure of a state secret, incitement to a violent change of the constitutional order, incitement to national, racial or religious hatred or intolerance, violation of territorial sovereignty, conspiracy to commit an anti-constitutional activity, damage to the reputation of the Republic of Serbia, a foreign state or an international organisation, money laundering, disclosure of an official secret, violations of the law by judges, public prosecutors and their deputies, endangering air traffic safety, manslaughter, rape, sexual intercourse with a helpless person, sexual intercourse by abuse of post, abduction, trafficking in minors for adoption purposes, violent conduct at a sports event and acceptance of bribes. Higher Courts also conduct criminal proceedings against juveniles, rule on petitions for the suspension of security measures or legal consequences of convictions for criminal offences within their jurisdiction and on requests for rehabilitation, the prohibition of the distribution of the press and dissemination of information by media outlets. Furthermore, Higher Courts conduct civil proceedings in the first instance in the event the value of the matter under dispute allows for an appeal on the points of law, rule in civil disputes involving establishing or disproving maternity or paternity, copyrights and related rights, the protection and use of inventions, models, samples, trademarks and indications of geographic origin (unless they fall within the jurisdiction of another court), disputes regarding the publication of a correction or a reply to information over a violation of the prohibition of hate speech, protection of the right to a private life, the failure to publish information and redress for publishing information.

Higher Courts review appeals of Basic Court decisions on measures ensuring the presence of the defendants in court, of decisions in civil disputes, of verdicts in small claims, enforcement and non-litigation disputes and also conduct proceedings related to the extradition of indicted and convicted persons, enforce criminal judgments of foreign courts, recognise and enforce foreign court and arbitration-related decisions not in the jurisdiction of other courts, rule on conflict of jurisdictions between Basic Courts within their territorial jurisdiction and perform other tasks set forth by the law.

Appellate Courts are second-instance courts ruling on appeals of: Higher Court decisions; Basic Court decisions in criminal proceedings unless the Higher Court has the jurisdiction to review appeals of such decisions; and, Basic Court decisions in civil proceedings unless the Higher Court has the jurisdiction to review appeals of such decisions. The Appellate Court shall also rule on conflict of jurisdictions of lower courts within its territorial jurisdiction in matters not within the jurisdiction of a Higher Court, on the transfer of jurisdictions of Basic and Higher Courts in the event they are prevented from or cannot act on a legal matter, and shall perform other tasks set forth by the law.

The Supreme Court of Cassation has contentious and non-contentious jurisdiction. Within its contentious jurisdiction, the Court shall rule on extraordinary legal remedies against decisions taken by Serbian courts and other matters envis-
aged by the law, on conflict of jurisdictions between courts unless such decisions are within the jurisdiction of another court, and on transfer of jurisdiction to another court to facilitate proceedings or for other important reasons. Within its non-contentious jurisdiction, the Court shall take legal positions to ensure uniform application of the law, review the application of the law and other regulations and the work of courts; appoint Constitutional Court judges, render opinions on the candidates for the post of Supreme Court of Cassation President and exercise other powers envisaged by the law.

Organised crime, war crime and high technology crime proceedings are conducted before special departments of the Belgrade Higher Court, while appeals of its decisions shall be reviewed by the Appellate Court in Belgrade.

4.6.2. Constitutional Judiciary

Under the Constitution, the judges of the Constitutional Court shall be appointed by representatives of all three branches of government, the President of the Republic (recognised as the executive in this context), the National Assembly and the Supreme Court of Cassation. The Constitutional Court shall have fifteen judges appointed to nine-year terms of office. The President of the Republic shall appoint five judges from a list of ten candidates nominated by the National Assembly; the National Assembly shall elect five judges from a list of ten candidates nominated by the President of the Republic. The remaining five judges shall be elected at a plenary session of the Supreme Court of Cassation from a list of candidates nominated jointly by the High Judicial Council and the State Prosecutors’ Council (Art. 172).

Judges shall be appointed from amongst “prominent lawyers” who are at least 40 years of age and have at least 15 years of experience in practicing the law (Art. 172 (5)). Under the Constitution, at least one judge appointed from each of the three lists of candidates must be from the territory of the autonomous provinces (Art. 172 (4)). The Constitution and the Constitutional Act\textsuperscript{165} failed to lay down clear and efficient rules on the appointment of the Constitutional Court judges or proper guarantees of the Court’s independence. The opportunity to rectify some of the constitutional inconsistencies in the Act on the Constitutional Court was unfortunately missed. The Act Amending the Act on the Constitutional Court Act\textsuperscript{166} adopted in 2010 failed to improve the procedure by which the judges of this Court are appointed.

A Constitutional Court judge shall be dismissed in the event s/he joined a political party, violated the prohibition of conflict of interests, permanently lost the ability to work, was convicted to a prison sentence or convicted for an offence rendering him or her unfit for discharging the duty of a Constitutional Court judge (Art. 15 (1), Act on the Constitutional Court). The Constitutional Court shall assess

\textsuperscript{165} Sl. glasnik RS, 109/07.
\textsuperscript{166} Sl. glasnik RS, 99/11.
whether any of these conditions have been fulfilled in a procedure initiated by the bodies authorised to nominate the Court judges or the Constitutional Court itself (Art. 15 (2 and 3)). A decision on the dismissal of a Constitutional Court judge shall be taken by the National Assembly, i.e. even when that judge had been appointed by another body authorised to nominate Constitutional Court judges. The Act prohibits the Constitutional Court judges from discharging “another public or professional function or job with the exception of professorship at a law college in the Republic of Serbia” (Art. 16 (1)).

The Act Amending the Act on the Constitutional Court introduced novel provisions which should help improve the Court’s efficiency. The Constitutional Court’s work had been slowed down by the obligation to render all its decisions in full composition. The amendments now allow it to render decisions also in Large and Small Judicial Panels. The Constitutional Court has two Large Judicial Panels, each comprising a chairperson and seven judges. Large Judicial Panels adopt their decisions unanimously; matters that do not receive unanimous support are referred for review to the plenary session of the Court. Small Judicial Panels, comprising three judges, are entrusted with rendering specific decisions and conclusions that are procedural in character. In the event a Small Judicial Panel is unable to reach agreement on a matter within its jurisdiction, the decision on it is taken by a Large Judicial Panel. The most important decisions, such as decisions on the merits in cases involving the assessment of constitutionality and legality, on the prohibition of political parties, trade unions, civil associations or religious communities and on violations of the Constitution by the President of Serbia, are still rendered by the Court in its full composition.

Regardless of these improvements, legal experts criticised the amendments, particularly the provision under which the salaries of all Constitutional Court judges shall be increased by 10 percent due to an increase in their workloads caused by each judicial vacancy in the Court. First of all, judicial salaries should not be governed by this Act, let alone increased because a judge has not been appointed, given that the vacancies must be filled forthwith to ensure that all citizens can exercise their right to full decision-making capacity.

4.6.3. Independence and Impartiality of Courts

Article 4 of the Constitution comprises provisions on the separation of powers and independence of the judiciary. The Act on Organisation of Courts\(^{167}\) includes a provision explicitly prohibiting any use of public office, media or any public appearance to affect the outcome of court proceedings or any other influence on the court (Art. 6).

4.6.3.1. Election/appointment of Judges. – The Constitution establishes two bodies charged with appointing judges and deputy public prosecutors, the High Ju-

\(^{167}\) Sl. glasnik RS, 116/08, 104/09, 101/10, 31/11, 78/11 and 101/11.
Judicial Council and the State Prosecutors’ Council. Judges shall be elected to their first three-year terms in office by the National Assembly at the proposal of the High Judicial Council, while their appointments on permanent tenure shall be made by the High Judicial Council (Art. 147, Constitution). The High Judicial Council has 11 members. They comprise the President of the Supreme Court of Cassation, the Justice Minister and the chair of the Assembly committee charged with the judiciary, who shall be members ex officio, and eight members elected by the National Assembly. The eight members shall comprise six judges with permanent tenures and two eminent legal professionals with at least 15 years of professional experience, a solicitor and a law school professor (Art. 153). With the exception of ex officio members, the other HJC members are appointed to five-year terms of office.

The Constitution retained the principle of permanent judicial tenure, but introduced the rule that judges shall first be elected on three-year tenures and shall thereupon be appointed to permanent judicial offices. The Constitutional Act on the Implementation of the Constitution provides for the general election/reappointment of all judges. The Act on Judges lays down that appointment to a permanent judicial office after three years of judgeship shall be made in accordance with a specific procedure in which every judge’s performance and qualities will be assessed, wherefore the first election to a three-year tenure actually amounts to a probationary period (Art. 52).

Given that the reform of the judiciary, particularly the judicial reappointment procedure provoked very sharp and well-founded criticisms, the Justice Ministry in December 2010 submitted and the National Assembly adopted amendments the Act on Judges, the Public Prosecution Act, the High Judicial Council Act, the State Prosecutors’ Council Act and the Act on Organisation of Courts. The authorities presented the amendments as a way to facilitate the review of the general reappointment procedure and eliminate the deficiencies regarding the transparency of the procedure and the effective legal protection the judges and prosecutors had been deprived of. The legal amendments allow for the nomination of candidates for the High Judicial Council and the State Prosecutors’ Council in their permanent compositions by the judges and prosecutors respectively to ensure their more direct involvement in the work of these two bodies; the candidates that win the most votes are then put forward and elected by the National Assembly.

These amendments annulled the reform with respect to the non-reappointed judges and prosecutors but also provided for reviewing the decisions on first-time

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168 Public Prosecutors are elected by the National Assembly at the proposal of the Government.
169 Sl. glasnik RS, 98/06.
170 See criticisms of this solution and views on how it undermines the permanence of judicial office in Report 2010, I.4.6.2.1.
171 Sl. glasnik RS, 101/10.
172 The members of the two bodies were to have been elected within a maximum of 60 days from the day the amendments came into effect.
judges and thus again raised the issue of the permanence of judicial office. According to the amendments judges and prosecutors have the possibility to file objections with the High Judicial Council in its permanent composition. Legal experts raised a legitimate question: whether it was justified to transform an appeal filed with the Constitutional Court into an objection to the High Judicial Council and State Prosecutors’ Council given that this violated the right to an effective legal remedy, the principle prohibiting the retroactive application of the law, as well as the *ne bis in idem* rule.  

In May 2011, the High Judicial Council adopted the Rules for the Enforcement of the Decision on Criteria and Standards for Assessing the Qualification, Competence and Worthiness and for the Procedure of Reviewing the Decisions of the High Judicial Council in its Initial Composition on the Termination of Judicial Offices. Under these Rules, objections against HJC decisions in its initial composition shall be reviewed by an HJC Commission comprised of three members (chairperson and two deputy chairmen). The review shall be open to the public, including the media. The review procedure may be monitored by representatives of the European Union, Council of Europe, OSCE, Judges’ Association of Serbia and representatives of other professional judicial associations. The petitioner is entitled to apprise himself/herself with the case file and the course of the review procedure and present his/her case orally to the HJC in its permanent composition, to adduce and dispute evidence, to seek the recusal of a Commission chairperson or member, as well as to seek the exclusion of the public from the procedure. After the conclusion of the hearing, the Commission shall render a reasoned decision on the basis of the established facts and presented evidence. In its decision, the Commission shall recommend to the HJC to adopt, dismiss or reject the objection. The HJC shall dismiss the objection in the event it was not filed on time, it may uphold the objection and change its decision on the termination of judicial office, it may reject the objection and confirm its initial decision. It may also refer the case back to the Commission for reconsideration. The HJC decisions may be appealed with the Constitutional Court.

Although these Rules are in accordance with the Venice Commission Opinion in the part in which they reaffirm the principle of adversariness, i.e. entitle the judges to participate in the procedure and present evidence, the HJC in its per-

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173 More on the judicial and prosecutorial reappointment procedures, their deficiencies and the views of professional international and domestic organisations and bodies in *Report 2010*, I.4.6.2.

174 *Sl. glasnik RS*, 35/11 and 90/11.

175 The Venice Commission recommended careful application of quantitatively measurable criteria. “Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.” The Commission further stated that as far as the number of completed cases is concerned, “(I)t cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues.” *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents*
manent composition is conducting the appointment review procedure by applying the same criteria as the ones laid down in the 2009 Decision on Criteria and Standards and boiling down merely to quantitatively measurable criteria: the percent of overturned decisions, the share of pending ‘old’ cases in the judge’s entire caseload compared to the departmental average and taking into account the inflow of cases, as well as whether the judge frequently violated the obligation to issue the decisions in writing (after the 30-day deadline since s/he rendered the decision, compared to the departmental average) and the effective time the judge spent working.

4.6.3.2. Termination of Judicial Office and Disciplinary Proceedings. – Under the Constitution, the tenure of a judge shall terminate at his or her own request, on meeting the legal retirement requirements, by dismissal or non-appointment on permanent tenure (Arts. 148 (1) and 57, Act on Judges). The decision shall be taken by the High Judicial Council (Art. 57). The Constitution does not list grounds for the dismissal of judges, leaving the regulation of this issue to law, whereby it reduces the constitutional protection of judges from the legislative branch. The Act on Judges lists the following grounds for dismissal: a) in the event s/he had been convicted to a prison sentence of minimum 6 months or a punishable offence rendering him/her unworthy of judgeship, b) in the event s/he had discharged his/her duties incompetently or committed a grave disciplinary offence (Art. 62). Incompetence shall denote insufficiently successful discharge of judicial duties, if a judge’s performance is appraised as “unsatisfactory” in accordance with the criteria for evaluating the performance of judges (Art. 63). Anyone may file an initiative for the dismissal of a judge. The dismissal procedure shall be launched at the proposal filed by the court president, the president of the immediately higher court, the President of the Supreme Court of Cassation, the authorities charged with evaluating the work of judges or the Disciplinary Commission. The High Judicial Council shall establish whether there are grounds for dismissal (Art. 64).

Article 151 of the Constitution and Article 5 of the Act on Judges guarantee immunity to judges, wherefore they may not be held liable for opinions they voiced or how they voted on a decision, unless they committed a criminal offence in violation of the law.

The disciplinary liability of judges is regulated by Chapter VII of the Act on Judges. The Disciplinary Commission shall initiate dismissal proceedings against a judge when it establishes that the judge had committed a grave disciplinary offence. The Disciplinary Prosecutor and the judge against whom the disciplinary proceedings were launched may appeal the Disciplinary Commission decision with the High Judicial Council. A judge may file a complaint with the High Judicial Council over a violation of any right which the Act on Judges does not provide a

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176 More on disciplinary proceedings and disciplinary authorities in Report 2010, I.4.6.3.2.
particular remedy for. If the High Judicial Council finds the complaint grounded, it shall undertake measures to protect the judge’s right.

4.6.3.3. Guarantees of Judicial Independence (Recusal, Case Assignment, Non-Transferability). – The Constitution guarantees the so-called principle of non-transferability of judges (Art. 150) and this principle is consistently elaborated in the Act on Judges (Arts. 2 (2) and 18). A judge may be assigned or seconded to another court only if s/he agrees to the transfer. Exceptionally, the consent of the judge shall not be required if the court s/he has been appointed to or most of its jurisdiction has ceased to exist. Judicial impartiality is guaranteed by Serbian law in provisions specifying a number of reasons when a judge may be recused from a proceeding. These reasons focus on conflict of interests or regard his/her prior involvement in the case. Recusal may be sought by the judge or the parties in the proceeding. The court president decides on the motion for recusal.

Under Art. 22 of the Act on Judges, a judge is not obliged to justify his/her legal views and findings of fact to anyone, including the court president and the other judges, except in the reasoning of the decisions and in instances explicitly stipulated by the law. This provision ensures the mutual independence of the judges.

The Act on Judges prescribes the assignment of cases solely on the basis of the designation and case file number in an order set in advance for each calendar year. The Act explicitly prescribes that the order of the files shall not depend on who the parties to the proceeding are or what the case concerns. No one may establish judicial panels or assign cases disregarding the work schedule or the order in which they were filed (Art. 24). In accordance with the Court Rules of Procedure, a case may be taken from a judge only in case of prolonged absence or in the event a final disciplinary sanction has been pronounced against him or her for committing a disciplinary offence of undue dilatoriness (Art. 25 (2)).

4.6.3.4. Incompatibility. – The Constitution of the Republic of Serbia prohibits judges from involvement in political activities (Art. 152). Although the prohibition of membership in political parties for judges may be qualified as positive, the formulation “involvement in political activities” is much too general and leaves ample room for interpretation and, thus, abuse.

Under the Act on Judges, a judge may not hold office in legislative or executive bodies, public services or provincial or municipal authorities. A judge may not be a member of a political party nor act politically in any other way; engage in any paid public or private work or provide legal services or advice for a fee. A judge may be a member of the Republican or a provincial or municipal election commission. Other functions, engagements and activities contrary to the dignity and independence of a judge or damaging the reputation of the court shall also be incompatible with judgeship. The High Judicial Council shall determine which actions are contrary to the dignity and independence of a judge or damaging the reputation of the court pursuant to the Ethics Code. In cases specified by the law, a judge may
engage in educational or scientific activities in judicial training institutions during working hours (Art. 30).

4.6.3.5. Judicial Training. – The Act on the Judicial Academy\(^{177}\) prescribes that future judges and prosecutors shall have to undergo additional training after internship and the Bar Exam. The Act regulates initial and continual training of judges, public prosecutors and deputy public prosecutors, judicial and prosecutorial assistants and court and prosecutorial staff (Art. 1). The aim of the establishment of the Academy is to contribute to the professional, independent, impartial and efficient discharge of judicial and prosecutorial duties and the professional and efficient discharge of court and prosecutorial staff duties (Art. 2).

For a candidate to attend the Judicial Academy, s/he has to fulfil the following requirements: to have passed the Bar Exam, to fulfil the general state employment requirements and to have passed the initial training entrance exam (Art. 28). Once the candidate passes the entrance exam, s/he must work in a court or prosecutorial office another two years and acquire specific professional and practical knowledge, after which s/he may take the final exam.

Initial training is to prepare the candidates for the posts of judge or prosecutor and the two-year training is to enable them to discharge their judicial or prosecutorial duties autonomously, professionally and efficiently. The High Judicial Council and State Council of Prosecutors shall determine the number of initial trainees on the basis of the assessment of judicial vacancies in misdemeanour and basic courts i.e. vacant deputy prosecutor posts in the basic public prosecution offices in the year following the year in which the trainees will complete initial training; this number will then be increased by 30%.

After completing initial training, the trainees shall take the final exam, which shall test only the practical knowledge and skills they acquired during initial training. The High Judicial Council and the State Prosecutors’ Council shall be obliged to nominate the candidates, who had completed the initial training at the Academy, for judgeships in the misdemeanour or basic courts i.e. the posts of deputy prosecutors based on the success they achieved during initial training (Art. 40).\(^{178}\)

Under the Act on the Judicial Academy, continual training aims to assist elected judges and prosecutors in the continuous improvement of their theoretical and practical knowledge and skills to ensure their professional and efficient discharge of judicial and prosecutorial duties. Such training shall be voluntary, except in cases when the High Judicial Council and the State Prosecutorial Council declare it mandatory (Art. 43).\(^{179}\)

\(^{177}\) Sl. glasnik RS, 104/09.

\(^{178}\) More on potential inconsistencies between the current Bar Examination system and the new judicial training concept in Report 2010, 1.4.6.2.9.

\(^{179}\) In case of change in specialisation, major changes in regulations, introduction of new work methods, to eliminate shortcomings in the work of judges and deputy public prosecutors iden-
The Academy has a broad scope of activities. In addition to training, it is also charged with establishing and maintaining cooperation with national, foreign and international institutions, organisations and associations, publishing, research and analysis, cooperation with scientific institutions, case-law collection and analysis (Art. 5).

4.6.4. Fairness

The Constitution guarantees everyone the right to equal protection of his rights in the proceedings before a court of law, other state bodies, agencies exercising public powers and provincial or local self-government authorities, and the right to appeal or to apply another legal remedy against a decision concerning his right, obligation or lawful interest (Art. 36). However, a mere declaration of the right of access to a court is insufficient; this right must be effective as well. For instance, when a person needs legal assistance to actually exercise the right of access to a court, the state is obliged to provide such assistance. An additional problem concerning the right of access to a court regards the issue of immunity of certain individuals, which may on occasion lead to the violation of the right of access to a court.

The right of access to a court may be rendered difficult or even impossible if it is conditioned by excessively high court taxes. Given the continuous decline in living standards in Serbia and the economic difficulties of the general population, the court taxes are extremely high and greatly jeopardise the right of access to a court. Procedural laws allow for realising the right to free legal aid in case of in forma paupers but these regulations are rarely applied in practice.


The working draft of the Legal Aid Act envisages two types of legal aid: primary (provision of general legal information and initial legal advice on all legal matters at the oral request to the provider) and secondary (right of the recipient to legal advice, aid in drafting documents and submissions, initiation of and participation in their work, and for judges and deputy public prosecutors elected for the first time to judicial i.e. prosecutorial posts who had not undergone the initial training programme.

182 The court taxes fixed in Serbia are not high in comparison with those in other countries in the region.
183 Sl. glasnik RS, 74/10.
tion in mediation procedures, defence and representation before courts, administrative authorities and other bodies, as well as in peaceful dispute settlement procedures, realised in accordance with this law).

Under the working draft, legal aid shall be provided by lawyers, local self-government legal aid offices, public authorities, notaries public, private enforcers and mediators, law clinics, associations and other organisations. The ministry charged with judicial affairs shall keep a register of legal aid providers.

Primary legal aid shall be afforded all persons in the territory of the Republic of Serbia, regardless of who the provider is. Secondary legal aid shall be afforded the citizens of the Republic of Serbia, asylum seekers, refugees, foreign nationals legally residing in the territory of the Republic of Serbia and other people entitled to legal aid under the law or international treaties. An alternative, and better, version of this article lays down that all persons under the jurisdiction of the Republic of Serbia shall be entitled to secondary legal aid. The recipients of secondary legal aid must satisfy the requirements regarding indigence or their status in the proceedings. The criterion of fairness is one of the grounds for according the right to legal aid.

The working draft specifies that only lawyers may provide secondary legal aid in civil and criminal proceedings. This provision provoked the most criticisms during the public debate of the text in December 2010 given that it negates the importance of non-governmental organisations which have abundant experience in providing legal aid, enjoy the trust of the citizens and are specialised in fields in which general providers of legal aid are not.

Local self-government unit legal aid offices and lawyers are defined as primary providers of legal aid in administrative proceedings; the legislator envisaged that associations and other organisations may provide secondary legal aid subsidiarily, via law graduates. Therefore, the legal aid that may be provided by associations actually boils down to drafting submissions, provision of advice and representation in administrative proceedings. Furthermore, under the working draft, associations and other organisations may provide this limited volume of legal aid only pursuant to a discretionary decision by the Justice Ministry, i.e. a public call and only in the event the Ministry establishes beforehand that the current capacities of the legal aid providers are insufficient and that there is a need for extending legal aid to specific recipients (vulnerable social groups), provided that the satisfaction of this need would be expedient and socially justified. These provisions would result in a de facto monopoly of lawyers which the authors of the working draft clearly derive from a restrictive and arbitrary interpretation of Article 67 of the Constitution which

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184 E.g. domestic violence, torture and trafficking victims, asylum seekers, children without parental custody.
185 The statutory penalty for the offence, the importance of the matter for the beneficiary, the economic power or position of monopoly of the opposing party.
stipulates that legal assistance shall be provided by lawyers, as an independent and autonomous service, and legal aid offices established in local self-government units in accordance with the law. However, Article 20 of the Constitution guarantees that the achieved level of human and minority rights may not be reduced. Limitations of human rights may not be presumed, as the provisions in the working draft do. This law ought to endeavour to create a well-organised legal aid system in which all actors that can improve the system and help achieve social justice will take part. The approach to the provision of legal aid should be inter-disciplinary to achieve synergetic effects and thus affirm the right of access to a court.

Furthermore, the authors of the working draft (which did not include any representatives of the NGO sector) are of the opinion that provisions allowing other legal aid providers to represent their clients in criminal and civil proceedings would be in collision with the CPC and CPA under which only lawyers may act as defence counsels and proxies. The Legal Aid Act is an *ex constitutione* law because it derives directly from Article 67 (2) of the Constitution of the Republic of Serbia, under which the conditions for the provision of free legal aid shall be laid down in the law, but it is also a *lex specialis* vis-à-vis the CPC and the CPA. This is why its provisions risk to derogate the more general provisions of other procedural laws. The participants in the public debate also criticised the procedure for entering legal aid providers in the register and the procedure for approving the right to legal aid to the recipients, which they qualified as overly complex and expensive. Work on the working draft and addressing its major shortcomings was still under way at the end of the reporting period.

One of the most important requirements for a fair trial is that the court must hear both opposing parties. Under the CPC, the defendant has the right “to respond to all the facts and evidence against him, and to present evidence and facts in his favour” (Art. 4 and Art. 68, new CPC).

A properly composed indictment must be served upon the accused without delay; a remanded accused must be served the indictment within 24 hours upon detention (Art. 270, CPC and Art. 335, new CPC). The provision stipulating that a copy of the appeal be served upon the opposing party to respond serves the same purpose. Non-abidance by these provisions amounts to a substantive violation of due process.

The Act on Misdemeanours also envisages the principle of adversariness (Art. 85).

The same principle applies in civil proceedings as well, given that the CPA stipulates that the court must give each party the opportunity to declare itself on the claims, proposals and allegations of the other party. Only exceptionally, in cases specified by the law, is the court authorised to rule on a claim if the other party was not provided with the opportunity to declare itself on the claim. This above all pertains to decisions on temporary measures where the principle of urgency has precedence over the principle of adversariness.
4.6.5. Trial within Reasonable Time

Under the Constitution, everyone shall have the right to a public hearing within reasonable time before an independent and impartial tribunal already established by the law which shall hear and pronounce a judgment on their rights and obligations, grounds for suspicion that brought about the initiated procedure and accusations brought against them (Art. 32 (1)).

Serbia’s procedural laws also recognise the rights of the accused to be brought before a court as soon as possible and to a trial without undue delay and oblige the courts to endeavour to conduct the proceedings without undue delay and prevent any abuse of the rights of the participants in the proceedings. Under the Act on Judges, a judge is obliged to notify the court president of the duration of first-instance proceedings or the application of legal remedies that has not been completed within a year i.e. two months (Art. 28).

This obligation is particularly emphasised in the Juvenile Justice Act, under which the judge chairing the panel must notify the court president of which proceedings against juveniles have not been completed and why on a monthly basis. The main hearings of juvenile cases may be adjourned or discontinued only exceptionally and the juvenile judge is under the obligation to notify the court president thereof.

A second-instance court reviewing an appeal of a first-instance judgment is under the obligation to hold the main hearing and itself render a judgment in the event it had already overturned a first-instance judgment and ordered a retrial of that particular case. Both the valid and new procedural laws include this obligation.

The Family Act\textsuperscript{186} also envisages urgent reviews of disputes regarding children or the exercise of parental rights. When hearing a labour dispute or a case regarding a collective agreement, the court is under a special obligation – to act with expedition, particularly when scheduling hearings and setting deadlines.

The Peaceful Resolution of Labour Disputes Act\textsuperscript{187} and the Act on Mediation\textsuperscript{188} regulating peaceful settlement of other forms of disputes could also help address problems regarding trials within reasonable time.

4.6.6. Public Character of Hearings and Judgments

The Constitution guarantees the public character of court hearings (Art. 32), but it does not explicitly guarantee the public pronouncement of court judgments. The Constitution lists the instances in which the public may be excluded from all or part of the court proceedings in accordance with the law only to protect the interests of national security, public order and morals in a democratic society, the interests of minors or privacy of the parties to the proceedings.

\textsuperscript{186} \textit{Sl. glasnik RS}, 18/05 and 72/11.
\textsuperscript{187} \textit{Sl. glasnik RS}, 125/04 and 104/09.
\textsuperscript{188} \textit{Sl. glasnik RS}, 18/05.
Civil and criminal proceedings are guided by the general rule that hearings and trials are public and may be attended by adults while the new CPC envisages that the main hearing may be attended by persons over 16 years of age. Under the CPC, the court may *ex officio* or upon a motion by a party, but only upon hearing the views of the parties, exclude the public from the entire or part of the trial in order to protect morals, public law and order, national security, minors or the privacy of the parties to the proceedings or to protect the interests of justice. The new CPC lays down the same grounds for excluding the public from a trial and replaces “to protect the interests of justice” by “to protect justified interests in a democratic society”.

The public is always excluded from a trial of a minor (Art. 75, Juvenile Justice Act\textsuperscript{189}). This provision is not in contravention of international standards. The Act on Misdemeanours\textsuperscript{190} excludes the public from trials if that is necessary in public interest or to protect morals and from trials of minors (Art. 296). Exclusion of the public from a main hearing is in contravention of the law, constitutes a grave violation of due process and grounds for appeal (Art. 368 (4), CPC and Art. 361 (2.11), CPA). The new CPC and CPA attach as much importance to the groundless exclusion of the public.

The CPA envisages that the public may be excluded from civil proceedings “during the entire hearing or part of it if necessary to preserve an official, business or personal secret, or if that is in the interest of public order or morality” (Art. 308, (1) CPA). The new CPA formulates the grounds for excluding the public from a hearing differently: the public may be excluded from a hearing to protect the interests of national security, public order and morals in a democratic society and to protect the interests of a minor or the privacy of the participants in the proceedings (Art. 322). Both the valid and the new CPAs allow for the exclusion of the public to ensure order in the court.

All procedural laws stipulate that the decision on the exclusion of the public must be reasoned and public.

Both the valid and new CPCs and CPAs lay down that that a judgment must always be delivered publicly, notwithstanding whether the public was excluded from the proceedings, but that the court shall decide whether the public will be allowed to hear the reasoning of the judgment.

The Act on Administrative Proceedings\textsuperscript{191} sets public hearings as a rule and lists grounds for excluding the public, which are in accordance with the ECHR (Art. 35).

### 4.6.7. Guarantees to Defendants in Criminal Cases

There are three forms of punishable offences in Serbian law: criminal offences, misdemeanours and economic offences.

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\textsuperscript{189} Sl. glasnik RS, 85/05.

\textsuperscript{190} Sl. glasnik RS, 101/05, 116/08 and 11/09.

\textsuperscript{191} Sl. glasnik RS, 111/09.
A criminal offence is an offence defined by the law as a criminal offence which is unlawful and committed with a guilty mind (Art. 14, CC). The legislator does not explicitly state that a criminal offence is a socially injurious, like the authors of the prior Criminal Codes had, given that this element is included in the concept of unlawfulness.

A misdemeanour is an unlawful act committed with a guilty mind and defined as a misdemeanour in regulations enacted by a competent authority (Art. 2, Act on Misdemeanours).

An economic offence is a socially injurious violation of regulations on economic or financial operations, which caused or may have caused grave consequences and which is defined as an economic crime in regulations enacted by a competent authority (Art. 2, Act on Economic Offences).

4.6.7.1. Presumption of Innocence. – The Constitution and the CPC are in keeping with international standards. Both prescribe that everyone shall be presumed innocent until proven guilty by a final decision of a competent court (Art. 34 (3), Constitution and Art. 3 (1), CPC).

In keeping with European standards, the valid CPC and the new CPC oblige not only the court to respect the presumption of innocence; no state authorities, media, civil associations, public figures or other persons may violate the rights of the accused by their public statements.

The Criminal Code incriminates public comments in the media of court proceedings until the rendering of the final verdicts with the intent of violating the presumption of innocence and the independence of the courts. Given that the presumption of innocence is already protected under Article 3 of the CPC, this provision provides additional protection from its frequent violations via the media. This provision may also threaten the freedom of expression and of the media although it protects the rights of the defendants and the independence and impartiality of the courts and does not explicitly apply to journalists. Press associations have called for the amendment or deletion of this provision, while the representatives of the prosecutors and Justice Ministry have argued that it was not directed against journalists and that it aimed at protecting the presumption of innocence and limiting the executive authorities’ interference in court trials.

The endeavours to protect the presumption of innocence are justified given its frequent violations in practice, not only by journalists, but by public figures, politicians and even representatives of the state authorities, police and prosecution offices as well. The legislator’s intent is justified to an extent by the argument that the Article incriminates those “making the statements” and not those quoting, using or publishing them. However, given the atmosphere in which Serbia’s media are working, it should be rephrased to take into account media freedoms and independence.

192 Sl. glasnik RS, 85/05, 88/05, 107/05, 72/09 and 111/09.
4.6.8. Rights of Defendants in Criminal Proceedings

4.6.8.1. Prompt Notification of Charges, in a Language Understood by the Defendant. – Under the Constitution, all persons accused of crimes shall have the right to be notified promptly, in detail and in a language they understand of the nature and reasons for the charges laid against them and the evidence against them (Art. 33).

This right is guaranteed by both the old CPC and the new CPC, under which a defendant must be notified of the charges against him/her in a language s/he understands and of the evidence against him/her already at the first interrogation. The police are also under the obligation to notify a person that they consider him/her a suspect in the event they assess as that s/he may be a suspect during the questioning.

The indictment shall be “served to an accused at liberty without delay and within 24 hours to a defendant in custody” and must include, inter alia, a description of the committed criminal offence and the circumstances of the offence in greater detail and the proposed evidence to be presented at the main hearing. Notice of indictment is also guaranteed in misdemeanour proceedings (Arts. 85 (2) and 86, Serbian Act on Misdemeanours).

The Constitution guarantees everyone the right to an interpreter free of charge in the event they do not understand the language officially used in court. Deaf, mute and blind persons shall be guaranteed the right to an interpreter free of charge (Art. 32 (2)).

Parties, witnesses and other participants in the proceedings are entitled to use their languages in court and interpretation shall be provided in such instances. The court is under the obligation to advise these persons of their right to interpretation and they may waive this right in the event they understand and speak the language in which the proceedings are held. The violation of this right of the defendant and defense counsel constitutes an substantive violation of due process.

Affording a defendant sufficient time to prepare his defence is one of the basic principles of the criminal procedure. Both the valid and the new CPCs thus lay down that summons to the main hearing must be served upon the defendant at least eight days before the main hearing to give the defendant enough time to prepare his/her defence. At least 15 days for preparing their defence will be provided to defendants accused of crimes warranting minimum ten years’ imprisonment.

The equality of arms of the prosecution and the defence has been seriously brought into question by the introduction of prosecutorial investigations in the new CPC, given that the prosecutor (in addition to expertise) enjoys the back-up of the entire state apparatus, whilst the law does not stipulate that all defendants be represented by professional defence counsels and given that the law on legal aid has not been adopted yet.

In second-instance proceedings, both the valid and new CPCs lay down that a copy of the appeal shall be delivered to the opposing party which shall have eight
days to respond to it. The above guarantees exist also in the Act on Misdemeanours (Arts. 85 (1, 3, 4), 108 and 109).

4.6.8.2. Prohibition of Trials in Absentia and the Right to Defence. – Under the Constitution, any person accused of a crime and available to the court shall be entitled to attend his or her own trial and may not be sentenced unless s/he has been given the opportunity to a hearing and defence (Art. 33 (4)).

Pursuant to both the valid and new CPCs, a trial in absentia is allowed only exceptionally, in the event the defendant is at large or otherwise inaccessible to government agencies and there are compelling reasons for trying him despite his absence. Furthermore, the defendant tried in absentia must have a defence counsel from the moment the decision is taken to try him in his absence (Art. 71 (3)). It is strictly prohibited to conduct in absentia trials of juveniles (Art. 48 (1), Juvenile Justice Act). At the request of the person convicted in absentia or his defence counsel, a new trial may be scheduled (Art. 413 (1), CPC).

The Constitution guarantees the right to defence (Art. 33). Under both the valid and the new CPCs, the defendant is entitled to defend himself or retain a defence attorney from among the ranks of attorneys of his own choosing. Under the new CPC, only lawyers with five or more years of practice, or who had at least five years worked as a judge, public prosecutor or deputy public prosecutor may act as defence counsels of defendants accused of crimes warranting minimum ten years’ imprisonment. This provision simultaneously increases the quality of the defence and limits the defendant’s right to freely choose his own counsel.

The court is under the obligation to assign a defendant a defence counsel ex officio in two instances: in the event the defendant must be represented by a defence counsel and he had not retained one and in the event the defendant cannot afford a lawyer. The court president shall assign a defendant a defence counsel ex officio who shall represent him the judgment becomes legally effective. In the event the defendant is sentenced to 40 years’ imprisonment, the assigned counsel shall also represent him in reviews of extraordinary legal remedies. The valid CPC explicitly enumerates cases in which the defendant must have a defence counsel: a defendant who is deaf, mute or otherwise unable to defend himself successfully or is charged with a crime warranting at least ten years’ imprisonment must have a defence counsel present already during the first interrogation; in the event the defendant is tried in absentia, he shall be assigned a defence counsel as soon as a decision to try him in absentia is rendered; a defendant remanded in custody must be assigned a defence counsel for the duration of detention (Article 71, paragraphs 1-3, CPC). The defendant must have a defence counsel at least eight days before a plea bargain hearing and upon the submission of a motion for a security measure of mandatory psychiatric treatment and custody in a health care institution or a measure of mandatory psychiatric treatment at liberty. A minor must have a defence counsel during the first interrogation and throughout the proceedings. The new CPC includes all these provisions, but stipulates that a defendant must have a professional counsel if
he is charged with a crime warranting eight or more years’ imprisonment. The new CPC also stipulates that the defendant must be represented by a defence counsel in the event the defendant is detained or is under house arrest. Moreover, a court president may dismiss an assigned legal counsel who is not fulfilling his/her duties.194

Both CPCs lay down that a defendant who cannot afford a defence counsel shall be appointed one at his request if he is accused of a crime warranting over three years’ imprisonment or in the interest of fairness (Art. 72, Art. 77 new CPC).

During the pre-investigation proceedings, the police shall advise a suspect of his right to an attorney, who shall attend his further interrogation, and that he is not obliged to answer any questions in the absence of his attorney (Art. 226 (7)). The new CPC also includes this provision, in Article 289.

Supervision of discussions conducted between the suspect/defendant and his defence counsel is especially regulated. The defence counsel has the right to a confidential conversation with the suspect deprived of liberty even before he has been interrogated, as well as with the defendant held in custody. Oversight of this conversation before the first interrogation and during the investigation is allowed only by observation, but not by listening (Art. 75 (2), CPC and Arts. 69 and 72 new CPC).

The Act on Misdemeanours guarantees the right to defence in Article 85. Defence may be presented in written form (Art. 177). The court may decide to hold the hearing in the absence of a duly summoned defendant if he has already been questioned and the court finds his presence is unnecessary (Art. 208). The right to defence counsel is guaranteed by the provisions in Articles 109 and 167 of the Serbian Act on Misdemeanours.

4.6.8.3. Status of Witnesses. – A defendant is entitled to question witnesses for the prosecution and require that the witnesses for the defence be questioned under identical conditions and in his presence. Both the valid and the new CPCs allow the defendant to call new witnesses or court experts or to present new evidence until the end of the main hearing. However, with the aim of achieving procedural economy, the new CPC envisages the holding of a preparatory hearing at which the evidence to be presented at the main hearing is elaborated and new evidence is proposed, wherefore the chairing judge may refuse to examine evidence at the trial which the parties had been aware of but had not proposed at the preparatory hearing without justified reasons.

The CPC in force enumerates in detail who may not take the witness stand, including defence counsels who may not be testify and thus violate the attorney-client privilege. An authorised police officer may not be asked to testify about the

194 This is in keeping with the case law of the ECtHR, which found that the authorities are not only obliged to provide a defence counsel, but that the legal aid counsel must be effective as well and that the authorities intervene if a failure by legal aid counsel to provide effective representation is manifest. See Kamasinski v. Austria, ECmHR, App. No. 9783/82 (1989) and Artico v. Italy, ECmHR, App. No. 6694/74 (1980).
content of the information obtained from citizens or a suspect during pre-investigation proceedings.

The valid CPC prohibits testimonies of persons who would thus violate their duty and reveal a state, military or official secret until the competent authority relieves them of this duty; of persons whose testimony would violate professional confidentiality, unless they are relieved of the duty by specific regulations or by a statement of the person for whose benefit the information had been kept confidential; and, the testimonies of minors unable to understand the importance of their right not to testify because of their age.

The new CPC does not prohibit the questioning of a police officer in the capacity of witness on what he had learned in the pre-investigation proceedings. It also allows the court to call to the witness stand persons relieved of the obligation to testify at the request of the defendant or his defence counsel (Art. 93).

Persons related to the defendant to a specific degree of kinship are also relieved of the duty to testify, but they may testify if they wish (Art. 98 (1) of the valid CPC, Art. 94 of the new CPC). Both CPCs also allow witnesses not to answer specific questions if they would thus expose themselves or relatives to a specific degree of kinship to grave humiliation, considerable material loss or criminal prosecution. Persons testifying in court are under the obligation to tell the truth. Perjury is punishable under the Criminal Code (Art. 206).

Both the valid and the new CPCs oblige the court to protect a witness from insults, threats and any other attacks. A witness may be granted the status of protected witness in circumstances specified by the law. The new CPC also introduces the institute of a particularly vulnerable witness.

Apart from the protection afforded by the CPC, the Act on the Protection of Participants in Criminal Proceedings\(^{195}\) also envisages witness protection measures under specific conditions.

4.6.8.4. Prohibition of Self-Incrimination. – Under the Constitution, a person accused of or standing trial for a crime is not obliged to make statements incriminating himself or herself or persons close to him or her or to confess guilt (Art. 33 (7)).

Under both the valid and the new CPCs, a defendant has the right to remain silent and the court or another state authority is under the obligation to warn him before questioning him that anything he may say may be used against him. Before questioning the defendant at the main hearing, the court must advise him of his rights to remain silent, not answer any questions and enter a plea if he wishes to. A court judgment may not be based on the defendant’s statement if he had not been duly advised of his rights (Art. 89 (10) of the valid CPC, Art. 85 (5) of the new CPC).

Any violence against or extortion of a confession or any other statement from the defendant shall be prohibited and punishable (Art. 12 of the valid CPC).

\(^{195}\) Sl. glasnik RS, 85/05.
The new CPC formulates the prohibition of torture more broadly and states that any resort to torture, inhuman or degrading treatment, force, threat, coercion and deception, medical treatment or other means affecting the free will of the defendant or extorting a confession or another statement from or action by the defendant shall be prohibited and punishable. A court judgment may not be based on a statement by the defendant obtained in contravention of this prohibition.

Both the valid and the new CPCs provide for the conclusion of a plea bargain between the defendant and the prosecutor. Both CPCs also allow the defendant and prosecutor to conclude an agreement under which the defendant shall be granted the status of collaborating witness in return for testifying.

4.6.8.5. Right to Appeal and Compensation. – Under Article 36 (2) of the Constitution, all persons shall have the right of appeal or to another legal remedy against a decision on their rights, obligations or legally vested interests. Second-instance judgments may be appealed under specific conditions (Art. 395 of the valid CPC, Art. 463 of the new CPC). A convicted person may apply the following extraordinary legal remedy – a motion for retrial. The new CPC entitles both the defendant and the defence counsel to file a motion for the protection of legality. Under the valid CPC, such a motion may be filed only by the Republican Public Prosecutor.

Under Article 35 (1) of the Constitution, a person groundlessly or unlawfully convicted for a punishable offence shall be entitled to rehabilitation and compensation of damages by the state and other rights stipulated by the law. The valid CPC lays down when these rights may be exercised and how (Chapter XXXIV, CPC). The new CPC also governs the procedures for exercising the rights of persons wrongfully deprived of liberty or convicted (Chapter XXV). This right is also envisaged by the Act on Misdemeanours (Arts. 280–284).

4.7. Protection of Privacy, Family, Home and Correspondence

Article 17, ICCPR:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 8, ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4.7.1. General

The ECHR and the ICCPR guarantee the right to privacy, which includes the protection of family life, home and correspondence. The ICCPR also guarantees the right to protection of honour and reputation. Although this right is not explicitly listed in the ECHR, the ECtHR acknowledged a similar interpretation of the concept of privacy in its judgments.\(^{196}\) The European Court of Human Rights accepts a wider interpretation of the concept of privacy and considers that the content of this right cannot be predetermined in an exhaustive manner.\(^{197}\) According to ECtHR case law, privacy encompasses, *inter alia*, the physical and the moral integrity of a person, sexual orientation,\(^ {198}\) relationships with other people, including both business and professional relationships.\(^{199}\)

The Constitution of Serbia does not protect the right to privacy as such but it does guarantee the inviolability of physical and mental integrity (Art. 25 (1)), of home (Art. 40), of letters and other means of communication (Art. 41).

The Constitution guarantees the right “to be informed” in Article 51, which prescribes that everyone shall have the right to access data in the possession of the state authorities and organisations exercising public powers and lays down that this right shall be exercised “in accordance with the law”, which means that the provisions protecting the right to privacy must be respected. It would have been much better had the Constitution explicitly envisaged respect for the right to privacy.

In addition to Article 8 of the ECHR, Serbia is also bound by the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,\(^ {200}\) the first binding international instrument on the protection of personal data. Parties to the Convention are obliged to undertake the necessary measures to ensure the legal protection of fundamental human rights with regard to the automatic processing of personal data. The Additional Protocol to the Convention, which Serbia also ratified,\(^ {201}\) obliges states to establish oversight authorities and regulates in greater detail the transborder flow of the personal data to a recipient which is not subject to the jurisdiction of a party to the Convention.

The Constitution includes a general provision guaranteeing the protection of personal data and prescribing that the collecting, keeping, processing and use of personal data shall be regulated by the law (Art. 42 (1 and 2)).

The Constitution explicitly prescribes that the use of personal data for any other purpose save the one they were collected for shall be prohibited and punish-


\(^{198}\) See *Dugeon v. United Kingdom*, ECmHR, App. No. 7275/76 (1981).


\(^{200}\) Sl. list SRJ (Međunarodni ugovori), 1/92 and Sl. list SCG, 11/05.

\(^{201}\) Sl. glasnik RS (Međunarodni ugovori), 98/08.
able as stipulated by the law, unless such use is necessary to conduct criminal proceedings or protect the security of the Republic of Serbia, (Art. 42 (3)).

Under the Constitution, everyone shall have the right to be informed of personal data collected about him, in accordance with the law, and the right to court protection in case they are abused (Art. 42 (4)).

4.7.2. Personal Data Protection

The Personal Data Protection Act has been in force for three years now. The relevant by-laws for the implementation of the Act have been adopted and the status of the institute of personal data protection commissioner has been consolidated. The Act expanded the remit of the Access to Information Commissioner, who became the Access to Information of Public Importance and Personal Data Protection Commissioner as of January 2009 (hereinafter: Commissioner).

Under the Act, personal data shall mean any information about a natural person, regardless of its form or format or at whose order, in whose behalf or for whose account it is stored. Information about a natural person shall constitute personal data regardless of the time of creation, place of storage or any other features of the information (Art. 3 (1 (1))).

The purpose of collecting data must be specified in advance and clearly. The Act distinguishes between processing of personal data with the consent of the data subject and in accordance with an authority’s legal remit. The data subject whose consent for processing his/her data is sought shall be clearly notified in advance of the purpose of the data processing and is entitled to subsequently withdraw his/her consent. Processing a data subject’s data without his/her consent is allowed when a vital interest of the data subject or another person prevails and “for the purpose of fulfilling obligations specified in a law, in an enactment adopted in accordance with the law or a contract concluded between the subject and the controller, and for the purpose of preparing the conclusion of a contract” (Art. 12 (1 and 2)).

The Act sets extremely broad grounds for the processing of personal data because it states that the state authority may process personal data without the consent of the data subject if such processing is necessary to perform the legally-defined duties within its purview laid down in the law or another regulation with the aim of achieving the interests of national or public security, state defence, prevention, detection, investigation and prosecution of a criminal offence, economic or financial interests of the state, protection of health and morals, protection of rights and freedoms and other public interests, and in other cases with the written consent of the data subject.

Although the Constitution lays down that the collection, storage, processing and use of personal data shall be regulated by the law, paragraph 3 of Article 12 of
the Act allows the processing of the data without the consent of the data subject in other cases specified by the Act or other regulations passed in accordance with the Act, which is not in accordance with the Constitution. The Commissioner filed an initiative to review the constitutionality of this paragraph with the Constitutional Court in February 2010.204

The Act entitles the citizens to be notified of, have insight in and a copy of the collected data. The restrictions of the above right in the new Act relate to the abuse of or threats to the public or personal interests of the data subject (Art. 23). The data subject is entitled to require their amendment, updating or deletion, or the termination of their processing if the purpose or manner of processing is unspecified or illicit, or if the data being collected are not commensurate to the purpose or incorrect (Art. 22). Before starting the processing and/or establishing the data filing system, the controller is obliged to notify the Commissioner of the intention to establish the data filing system unless the purpose of the processing, type of data and type of users with access to the data are specified in a separate regulation (Art. 49).

The Commissioner monitors the process of personal data processing, is entitled to take decisions in appeal proceedings and exercise other duties related to the collection, keeping and protection of personal data (Art. 44). The Commissioner is entitled limitless insight in data being collected and the documents, enactments and offices of persons authorised to collect data (Art. 45).205

In cooperation with the EU Commission experts, the Commissioner drafted the National Personal Data Protection Implementation Strategy with the aim of aligning the national legislation with the provisions in Directive 95/46/EC.206 The Government endorsed the Strategy with minor changes in 2010,207 but failed to adopt an Action Plan for its implementation within the set 90-day deadline, or, for that matter, until the end of 2011.208

Apart from the Personal Data Protection Act and its subsidiary legislation, other regulations also comprise provisions relevant to the protection of personal data. The Act on Police allows the police to collect, process and use personal data and in general envisages the application of the principle of proportionality (Art. 75).


205 The restrictions of the Commissioner’s monitoring powers in Art. 45 (3–4) of the Personal Data Protection Act, limiting the Commissioner’s access to data if such access would seriously undermine the interests of national or public security, defence of the country or actions aimed at the prevention, disclosure of a crime, criminal investigation or prosecution were abolished by the Classified Information Act and the Commissioner is now entitled to conduct full oversight.

206 Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 95/46/EC, 24 October 1995.

207 Sl. glasnik RS, 58/10.

208 Numerous NGOs, experts and the Commissioner have repeatedly alerted to the Government’s failure to fulfil this obligation and thus provide for the implementation of contemporary personal data protection standards.
The Security Intelligence Agency, the Military Security Agency and the Military Intelligence Agency have extremely broad powers with respect to data collection. Although the laws governing these agencies oblige the agents and their supervisors to preserve the confidentiality of the information they obtain, they do not lay down precise rules with respect to their powers to collect data or the instances in which these agencies are entitled to apply special operational measures or means for the secret collection of data. The Act on the Military Security Agency and the Military Intelligence Agency lays down the obligation of these agencies to provide information on collected personal data and data of public importance in accordance with the regulations on personal data protection, free access to information of public importance, classified information and that Act, but also specifies which data this obligation does not apply to.

The Classified Information Act entitles persons insight in security check data collected pursuant to the Act (Art. 81) but limits this right by specifying that a person shall not be entitled insight in data “disclosing the methods and procedures used during the collection of the data or identifying the sources of data obtained during the security check”. Although the need to protect specific methods and sources used by the state authorities during security checks is understandable, the formulation essentially limits the right of insight to a great extent.

The Electronic Communications Act obliges the provider of public telephone directory services to, inter alia, notify the subscriber free of charge that his or her personal data shall be included in the public telephone directory, of the availability of personal data via the telephone information services, and the possibility of third persons searching his/her personal data. The subscriber is entitled to refuse to have his or her personal data entered in the directory, and has the right to check or seek the rectification of data or have them deleted from the public directory in a simple manner and free of charge (Art. 120).

The Labour Act for the first time regulates the processing of and access to the personal data of the workers that are kept by the employer and prohibits employers from requiring of the job applicants to provide data which are not directly relevant to the job they have applied for.

The Tax Procedure and Tax Administration Act guarantees the tax payers the right to privacy and prescribes that all information about a tax payer is confidential, apart from strictly prescribed exceptions.

209 More in I.4.7.4.
210 Sl. glasnik RS, 104/09.
211 More on this Act in I.4.9.6.1.
212 Sl. glasnik RS, 45/10.
213 More on this Act in I.4.7.4.1.
214 Sl. glasnik RS, 24/05, 61/05 and 54/09.
215 Sl. glasnik RS, 80/02, 84/02, 23/03, 55/04, 61/05, 85/05, 62/06, 63/06, 61/07, 20/09, 72/09, 53/10 and 101/11.
The State Administration Act\textsuperscript{216}prescribes that state administration bodies are obliged to enable the \textit{public} insight in its work and refers to the Access to Information Act (Art. 11). However, the latter law regulates only access to information of public importance (i.e. information which the “public has a justified interest to know”) but does not mention the rights of individuals to have insight in information regarding them personally. The Act on Administrative Proceedings allows a party or interested person access to cases regarding them. On the other hand, the Act protects the privacy of individuals by envisaging that an authority will not disclose the requested information if such disclosure would violate the privacy of the person the information regards, but it does envisage exceptions.

Other laws and regulations, e.g. those on health, the banking sector, education, advertising, also include provisions relevant to the protection of personal data. The Strategy on Personal Data Protection, \textit{inter alia}, envisages that all these regulations be reviewed and aligned with the Personal Data Protection Act and that new regulations be adopted in fields of relevance to personal data protection where there are none (e.g. video surveillance, use of biometric data, etc).

The Criminal Code incriminates unauthorised collection, attainment, release and abuse of personal data collected, processed and used in accordance with the law (Art. 146). The Code allows for the release of data in criminal records to competent judicial bodies and other state authorities and listed entities if there is a justified and reasoned lawful interest therefor. Article 102 in general prohibits but does not penalise asking citizens to provide evidence that they have or have not been convicted (Article 102). The CC also envisages punishment for the invasion of privacy, incriminating unauthorised photographing (Art. 144), publication of another’s personal papers, as well as of portraits, photographs, film or audio recordings of a personal nature (Art. 145), unauthorised wiretapping and audio recording (Art. 143), violation of the privacy of correspondence (Art. 142), and disclosure of privileged information (Art. 141).

4.7.3. Home

The term “home” is broadly constructed in jurisprudence of the European Court as any enclosed space which serves as a dwelling either permanently or occasionally. Any premises legally owned by an individual, regardless of where he actually resides, are also considered a home. The ECtHR maintains that search of a lawyer’s office must be strictly proportionate to the aim of suppressing crime and protecting the rights of others and that the professional secrecy in the reviewed material may not be violated.\textsuperscript{218}

\textsuperscript{216} \textit{Sl. glasnik RS}, 79/05, 101/07 and 95/10.

\textsuperscript{217} The exceptions include: if the person gave his/her consent, if a person of public interest is at issue (this above all pertains to holders of state or political offices), if the information is relevant in terms of the office the person is discharging, and if a person gave rise to the request for disclosure of information by his/her conduct (Art. 14).

The Constitution prescribes that the home is inviolable, and that the home or other premises of others may be entered and searched against their will if so authorised by a written court warrant. The search must be conducted in the presence of two witnesses. Exceptionally, the home or other premises of another may be entered and searched without a court warrant if it is necessary to apprehend a perpetrator of a crime or to eliminate a direct and grave threat to people and property (Art. 40).

Search of homes is governed by the Criminal Procedure Code and the new CPC provisions on home search are the same as those in the valid CPC. A search may be conducted pursuant to a written and reasoned warrant issued by the court if it deems that the search is likely to result in apprehending the perpetrator or finding the traces of a criminal offence or objects relevant to the proceedings (Art. 77 of the valid CPC, Art. 152 of the new CPC). When military facilities, premises of state institutions, legal persons or lawyers are searched, the manager or lawyer have to be summoned to attend the search. The person whom the search warrant regards is entitled to request the presence of an attorney or defence counsel.

Police are under the obligation to submit a report on a home search conducted without a court warrant and the resident, who is present during the search, is entitled to file a complaint against the conduct of the police.

The disputed provision in the valid CPC (Art. 81), allowing entry and search without a warrant or witnesses if “someone is calling for help”, has been incorporated in the new CPC as well (Art. 158), although the existence of these grounds is difficult to prove and allows for abuse.

The Criminal Code incriminates the violation of the home: violation of the inviolability of the home (Art. 139) and illegal search (Art. 140).

4.7.4. Correspondence

In terms of Article 8 of the ECHR, the concept of correspondence encompasses both written correspondence and telephone conversations, 219 telex, 220 telegraphic and other forms of electronic communication. 221

The Constitution guarantees that the confidentiality of letters and other means of communication shall be inviolable and allows for derogation from this right only for a specified period of time if such derogation is necessary to conduct criminal proceedings or protect the security of the state and if it has been ordered by the court (Art. 41).

Both the new and valid CPCs govern in similar terms the secret surveillance and recording of telephone and other conversations or communication by other

technical means of persons reasonably suspected of committing a grave crime\textsuperscript{222} or exceptionally, if there is cause to believe that such a crime is about to be committed. The provisions in both CPCs are in compliance with international standards.

Detained persons may exchange letters with the consent and under the supervision of a judge. Both the new and valid CPCs limit their correspondence if it may be prejudicial to the proceedings. The detainee may appeal the decision but the appeal shall not stay its enforcement. The prohibition does not apply to the detainee’s letters exchanged with his/her defence counsel, international tribunals, international human rights organisations, the Protector of Citizens and the national legislative, judicial and executive authorities.

The inviolability of correspondence may be seriously violated if the protection of national security or pre-criminal and criminal investigations, especially of organised crime and war crimes, are at issue. The security agencies are afforded a broad scope of powers in such instances. They are allowed to secretly collect data, albeit with a court order. There are, however, provisions in the laws governing the work of the security agencies that permit specific persons to order the enforcement of special procedures without first obtaining a court warrant.\textsuperscript{223}

4.7.4.1. Electronic Communications Act. – The Electronic Communications Act\textsuperscript{224} lays down the conditions for and manner of conducting electronic communications activities and the status and work of the Republican Electronic Communications Agency. The adoption of the Act was accompanied by a polemic about whether it violated the privacy of the citizens and about the unconstitutionality of the provisions on the interception and retention of data on electronic communications.\textsuperscript{225}

The provisions on the confidentiality of electronic communications, lawful interception and retention of data, oversight over the enforcement of the Act, the measures against those acting in violation of the Act are relevant in terms of human rights. The provision obliging the operators to retain electronic communication data for the purposes of an investigation or criminal proceedings or the disclosure of a crime pursuant to the CPC or for the purpose of protecting national and public security is disputable.\textsuperscript{226}

\textsuperscript{222} These crimes comprise organised crime, crimes of corruption and other extremely grave crimes, such as murder, aggravated murder, abduction, robbery, extortion, counterfeiting of money, money laundering, illicit manufacture and trafficking in narcotic drugs, crimes against the constitutional order or security of the Republic of Serbia, illicit manufacture, carrying, holding and trafficking in weapons and explosive matter, illegal border crossing and smuggling of humans, trafficking in humans, trafficking of minors for adoption purposes, international terrorism, hostage–taking and funding of terrorism.

\textsuperscript{223} More on the agencies’ powers in the Report 2010, I.4.7.4.

\textsuperscript{224} Sl. glasnik RS, 44/10.

\textsuperscript{225} A detailed description of the agencies’ powers and operators’ obligations regarding the retained data and their storage is available in I.4.7.4.

\textsuperscript{226} More on the disputed provisions in the Report 2010, I.4.7.4.
The Protector of Citizens initiated that the Act be amended to allow the police and the Security Intelligence Agency insight in the communication or the data the operator is obliged to retain only with a court order, but his initiative was not upheld. The National Assembly, however, voted in the amendment under which the Information of Public Importance and Personal Data Protection Commissioner shall oversee the enforcement of the provisions in this law (Art. 130 (3)). The Protector of Citizens and the Access to Information of Public Importance and Personal Data Protection Commissioner in late September 2010 launched the proceedings for the review of the constitutionality of specific provisions of the Electronic Communications Act (Art. 128, paragraphs 1 and 5) and the Act on the Military Security Agency and the Military Intelligence Agency (Arts. 13 and 16). The Constitutional Court did not take a view on the constitutionality of these provisions by end 2011 but there were indications that it would hold a debate on the initiative in 2012. In the meantime, one and a half year since the adoption of this law, it is still unclear whether the provisions on lawful interception and retention are constitutional.

The constitutionality of the interception of electronic communications and retention of data on electronic communications again came to the fore in 2011 when public consultations were launched on the Ministry of Culture, Information and Information Society Draft Rulebook on the Technical Requirements for the Equipment and Software for the Lawful Interception of Electronic Communications and Retention of Data on Electronic Communications (hereinafter: Rulebook), a by-law the adoption of which is stipulated by the Electronic Communications Act.

If the Rulebook is adopted in its present form, the security agencies will be entitled to intercept and retain data on electronic communications (phone records) without a court decision, which is very dangerous and seriously infringes on privacy. Furthermore, the Rulebook does not regulate the existence of an undeletable trace of who, when, why and on what grounds accessed the data, wherefore it does not provide for any, even subsequent, control, of such actions. The Rulebook also allows for the secret surveillance of the user’s location (even when the user is not participating in communication.).

The public consultations on the Draft Rulebook were held in late July and early August 2011 but the Rulebook was not adopted by the end of the reporting period at the insistence of the Access to Information of Public Importance and Personal Data Protection Commissioner and under pressures from the expert public.

The Penal Sanctions Enforcement Act allows no restrictions on the right of correspondence of persons serving prison sentences at their own expense (Art. 75 (1)). A prison warden or the Director of the Penal Sanctions Enforcement Directorate may, however, ask the first-instance court with jurisdiction over the prison to order the surveillance of written correspondence in a maximum or high security prison or a high security ward for a specific period of time if so required to maintain law and order, safety and security, prevent the commission of a crime or protect an injured party (Art. 75 (2)). The court may prohibit correspondence for the same
reasons. The PSEA does not specify how long the surveillance or prohibition of correspondence may last or the periods at which the justification of these measures have to be reviewed. If there is cause to believe that impermissible matter is sent or received via a letter, the convict’s correspondence shall be opened and checked in his or her presence.\textsuperscript{227} A convict is entitled to free correspondence with his or her counsel, the Protector of Citizens or other state authorities and international human rights organisations. The Act, however, does not mention national human rights organisations in this context, only international ones.

\textbf{4.7.5. Family and Domestic Relations}

According to the ECtHR, family life is interpreted in terms of the actual existence of close personal ties.\textsuperscript{228} It comprises a series of relationships, such as marriage, children, parent-child relationships,\textsuperscript{229} and unmarried couples living with their children.\textsuperscript{230} Even the possibility of establishing a family life may be sufficient to invoke protection under Article 8.\textsuperscript{231} Other relationships that have been found to be protected by Article 8 include relationships between brothers and sisters, uncles/aunts and nieces/nephews,\textsuperscript{232} parents and adopted children, grandparents and grandchildren.\textsuperscript{233} Moreover, a family relationship may also exist in situations where there is no blood kinship, in which cases other criteria are to be taken into account, such as the existence of a genuine family life, strong personal relations and the duration of the relationship.\textsuperscript{234}

The Constitution does not include a provision protecting the family within the right to privacy and merely deals with the family from the aspect of society as a whole. Under Article 66 (1), “the family, mothers, single parents and children (...) shall enjoy special protection.”

Article 63 of the Constitution guarantees the right to freely decide whether to have children or not. The fact that this right is guaranteed “to all” is disputable. The question arises how one can guarantee this right to the prospective father, if the mother decides not to have the baby (a right she is guaranteed under this Article).

\begin{itemize}
\item \textsuperscript{228} See \textit{K. v. United Kingdom}, ECmHR, App. No. 11468/85 (1991).
\item \textsuperscript{229} See \textit{Marckx v. Belgium}, ECmHR, App. No. 6833/74 (1979).
\item \textsuperscript{230} See \textit{Johnston v. Ireland}, ECmHR, App. No. 9697/82 (1986).
\item \textsuperscript{231} See \textit{Keegan v. Ireland}, ECmHR, App. No. 16969/90 (1994).
\item \textsuperscript{232} See \textit{Boyle v. United Kingdom}, ECmHR, App. No. 16580/94 (1994).
\item \textsuperscript{233} See \textit{Bronda v. Italy}, ECtHR, App. No. 22430/93 (1998).
\item \textsuperscript{234} See \textit{X., Y. and Z. v. United Kingdom}, ECmHR, App. No. 21830/93 (1997). In its judgment in the case \textit{Schalk and Kopf v. Austria}, ECHR, App. No. 30141/04 (2010) the ECtHR for the first time took the view that a stable relationship between two persons of the same sex living together falls under the concept of family life protected under Article 8.
\end{itemize}
The Constitution guarantees everyone the right to freely enter and dissolve a marriage and prescribes that entry into, duration and dissolution of a marriage are based on spousal equality (Art. 62). The Constitution also envisages that a marriage is valid only with the freely given consent of a man and woman, whereby it effectively renders any legislation allowing homosexual marriages unconstitutional. Article 12 of the ECHR also gives the right to marry and have a family only to “men and women”.

The provisions of the Family Act\(^\text{235}\) are in accordance with international standards in terms of the right to privacy. The new Act introduces major improvements in that respect. The Act for the first time envisages that everyone has the right to the respect of family life (Art. 2 (1)). It also guarantees the right of the child to maintain a personal relationship with the parent s/he is not living with, unless there are reasons for partly or fully depriving that parent of parental rights or in case of domestic violence (Art. 61). The child also has the right to maintain personal relationships with other relatives s/he is particularly close to (Art. 61 (5)). Provisions regarding the child’s education take into account also the interests of the parents. The Act envisages the right of parents to provide their children with education in keeping with their ethical and religious convictions (Art. 71).

The Criminal Code penalises whoever relates or disseminates information of a person’s family circumstances that may harm his or her honour or reputation (Art. 172).

4.7.6. Sexual Autonomy

Sexual autonomy is also covered by Article 8 of the ECHR.\(^\text{236}\) According to the case law of the European Court of Human Rights, any restriction of sexual autonomy must be prescribed by law, necessary and proportionate. A restriction is easy to justify when it concerns the abuse of minors,\(^\text{237}\) and relatively difficult to justify when it concerns consensual intercourse between adults.\(^\text{238}\)

The right to express one’s sexual orientation is not explicitly granted in the legal system of Serbia, including the new Constitution; the authors of the latter have also failed to explicitly list sexual orientation as grounds on which discrimination is prohibited. The Labour Act and the Anti-Discrimination Act expressly prohibit discrimination on grounds of sexual orientation.

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\(^\text{235}\) Sl. glasnik RS, 18/05 and 72/11.


\(^\text{237}\) See MK v. Austria, ECmHR, App. No. 28867/95 (1997).

\(^\text{238}\) See Dudgeon v. United Kingdom, ECmHR, App. No. 7275/76 (1981); Norris v. Ireland, ECmHR, App. No. 10581/83 (1988).
4.8. Freedom of Thought, Conscience and Religion

Article 18, ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such restrictions as are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

Article 9, ECHR:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

4.8.1. General

The Constitution of Serbia states that Serbia is a secular state and prohibits the establishment of a state religion (Art. 11), regulates the issue of individual religious freedoms and freedom of thought and explicitly guarantees the right to change one’s religion or belief and the right to manifest one’s religion in religious worship, observance, practice and teaching and to manifest religious beliefs in private or public (Art. 43). Under the Constitution, no one is obliged to declare his or her religion or beliefs. The Constitution explicitly guarantees parents the right to freely decide on their children’s religious education and upbringing. The Constitution enshrines the freedom of religious organisation (Art. 44) and the right to conscientious objection (Art. 45).239

Freedom of religion per se is unlimited. The Constitution only allows for restrictions of the freedom to profess one’s religious beliefs. Restrictions must be determined by law and may be imposed only if they are necessary in a democratic society to protect the lives and health of people, other rights enshrined in the Constitution, public safety and public order or to prevent incitement to racial, ethnic or religious hatred. Limitations are allowed also for the protection of the “morals of a

239 Compulsory army service was abolished as of 2011 and the Army of Serbia has been fully professionalised.
democratic society”. If correctly interpreted, this phrase ought to indicate a higher degree of acceptance of diverse moral beliefs in a heterogeneous society.

4.8.2. Equality of Religious Communities and Religious Organisation

The Constitution guarantees the equality of all religious communities, the freedom of religious organisation and collective manifestation of religion and the autonomy of religious communities (Art. 44). The Anti-Discrimination Act also prohibits religious discrimination. Under the Anti-Discrimination Act, religious discrimination shall occur when the principle of freedom of professing one’s religious beliefs is breached, i.e. in the event a person or a group are denied the right to adopt, maintain, express or change their religious beliefs, or the right to privately or publicly express or act in accordance with their beliefs (Art. 18).

The Act on Churches and Religious Communities guarantees the equality of all religious communities before the law (Art. 6). This law, however, distinguishes between four categories of churches. The first group comprises the traditional churches and religious communities granted that status under various laws passed in the Kingdom of Serbia (Kingdom of Serbs, Croats and Slovenes, later Kingdom of Yugoslavia): the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Lutheran Church, Reformed Church, Evangelical Christian Church and the Islamic and Jewish communities. The second group comprises confessional communities, the legal status of which was regulated by application submitted in accordance with the federal Act on the Legal Status of Religious Communities and the republican Act on Legal Status of Religious Communities. The third group includes new religious organisations. The fourth group, which the Act does not mention but establishes implicitly, comprises all those unregistered religious communities which are in an extremely unfavourable position because it is unclear whether such communities are allowed to perform any religious activities, although it is fully clear that they cannot possess property or enjoy the benefits other religious organisations can. Any interpretation that would deprive these organisations of the right to perform religious activities would be in contravention of the Constitution and international practice.

The Regulation on the Register of Churches and Religious Communities, regulating the registration of churches and religious communities in detail, is the most relevant by-law vis-à-vis the freedom of thought, conscience and religion. An analysis of this enactment shows that traditional churches and religious communi-

240 Sl. glasnik RS, 36/06.
241 Sl. list FNRJ, 22/53, Sl. List SFRJ, 10/65.
242 Sl. glasnik SRS, 44/77, 12/78, 45/85 and 12/80.
244 Sl. glasnik RS, 64/06.
ties enjoy the most privileged status. To re-register, they need only to submit an application including the name of the church or religious community, its seat, the name and office of the person authorised to act for and on behalf of the church or religious community, while other religious organisations, including confessional communities, also need to submit the decision founding the organisation with the names, ID numbers and signatures of at least 0.001% of Serbia’s citizens of age with permanent residence in Serbia according to the latest official census or foreign nationals with permanent residence in Serbia (Art. 18 (2.1)).

The Regulation specifies that a religious organisation shall be registered if it has 100 founders and that the threshold shall be further harmonised with the legal provisions (Art. 7 (3)). This threshold is excessively high and difficult to reconcile with the constitutional prohibition under which no one may be forced to declare his or her religious beliefs. Moreover, all religious organisations apart from traditional ones must also submit their statutes or other written documents describing their organisational and management structure, rights and obligations of their members, procedures for founding and dissolving the organisational units, a list of organisational units with the status of legal person and other relevant data. The obligation to submit an outline of religious teachings, religious rites, religious goals and basic activities is particularly problematic as the Act allows administrative authorities to assess the quality of religious teaching and goals, which is absolutely impermissible from the viewpoint of the freedom of thought and religion. Under Article 20 (4) of the Act, a religious community’s application may be rejected if the state finds that its religious teaching or goals are inadequate. The provision not allowing the registration of religious organisations the name of which includes the name or part of the name expressing the identity of a church, religious community or religious organisation that has been registered earlier or has filed a request for entry into the Register (Art. 19) is also disputable in terms of the equality of religious communities. The Act also obliges communities to submit data on their regular sources of income. A religious organisation acquires the status of a legal person by entry in the register. The equality of religious institutions is also violated by the provisions giving the state bodies broad discretion in deciding on various forms of cooperation between the state and religious communities.245

An initiative for a review of the constitutionality of some provisions of this Act was filed with the Constitutional Court. In the view of the applicants, they violate the constitutional principle under which the church shall be separated from the state and discriminate against minority religious communities.246 The Constitutional Court at long last held a public debate four years after the Act was adopted, but failed to render a decision on the case by the end of 2011. Namely, the draft decision proposed by the judge rapporteur failed to win a majority vote at a Court ses-

245 See more in II.5.
sion held in the latter half of 2011 and the Constitutional Court appointed another judge rapporteur to draft a new decision.\footnote{247 See Constitutional Court statement issued after its 6 October 2011 session, available in Serbian at http://www.ustavni.sud.rs/page/view/156-101498/saopstenje-sa-sednice-ustavnog-suda-o-ve- canju-i-glasanju.}

**4.8.3. Prohibition of a Religious Community and Its Deletion from the Register**

The Constitutional Court may ban a religious community only if its actions violate the right to life, the right to physical and mental health, the rights of the child, the right to personal and family integrity, right to property, public safety and order or if it incites and foments religious, ethnic or racial intolerance (Art. 44 (3)). The provision appears to narrow down the possibility of banning the work of religious organisations, as the Constitution does not provide for the prohibition of religious organisations violating human rights and freedoms enshrined in the Constitution and international documents. For instance, it would be impossible to ban a religious organisation violating the freedom of expression of its believers or denying another community the freedom of religious association.

The provisions in Article 22 (4) in conjunction with Article 20 (4) of the Act on Churches and Religious Communities empowering the Ministry of Religions (administrative authority) to delete an organisation from the register if it assesses that its goals, teaching, rites or activities are in contravention of the Constitution or public order or threaten the lives, health, rights and freedoms of others, the rights of the child, the right to personal and family integrity and the right to property without the prior decision thereto of the Constitutional Court (as stipulated by Art. 44 (3) of the Constitution) are not in compliance with the Constitution or international standards.

**4.8.4. Restitution of Property of Religious Organisations\footnote{248 This section will focus only on issues relevant to the freedom of religion. More on restitution in I.4.12.3.}\footnote{249 Sl. glasnik RS, 46/06.}

The Act on the Restitution of Property to Churches and Religious Communities\footnote{249 Sl. glasnik RS, 46/06.} regulates the restitution of the property in Serbia to the churches and religious communities and their foundations and societies that had been taken away from them in accordance with the agrarian reform, nationalisation, sequestration and other regulations passed and adopted since 1945 and any other legislation and for which they had not received compensation reflecting the market value of such property. The Act provides for the restitution of real estate and movable property of cultural, historical or artistic relevance that had been in the possession of the churches and religious communities at the time it was taken away. The Act does not explicitly list the restitution of temples, as the vast majority were never national-
ised, although there were some cases in which monastery property, synagogues, et al. had been taken over by the state.

The right to restitution is afforded churches and religious communities, i.e. their legal successors in accordance with the valid enactments of churches and religious communities. If this provision is interpreted in accordance with the Act on Churches and Religious Communities, then this right is limited only to registered churches and religious communities in view of the fact that only they have the status of legal persons i.e. may exercise the right to property. This leads to the conclusion that if a religious organisation fails to re-register pursuant to the provisions in the Act on Churches and Religious Communities, its property will primarily be restituted to its legal successors, i.e. the natural and legal persons listed in their statutes as their legal successors. As the constituent enactments of religious communities rarely contain such provisions, it appears that the state will practically have no obligation to restitute property to a religious community that has lost the status of a legal person.

The Act envisages equal treatment of all churches and religious communities, but envisages the restitution of property seized from churches and religious communities in accordance with regulations adopted since 1945. The enforcement of this Act with respect to the Jewish Community will be very problematic in view of the fact that its property was taken away from it before or during the WWII occupation of Yugoslavia, a period not included in the timeframe set by the Act.

The procedure for reviewing the constitutionality of this Act was launched before the Constitutional Court back in 2009. Many of the disputed provisions regarded the non-compliance of the Act with the constitutional principle of non-discrimination, because it allows for the restitution of some but not all the damaged parties. In the view of the applicants, this discrimination can be eliminated by the adoption of a general law on restitution. The Constitutional Court on 20 April 2011 dismissed the initiative.²⁵⁰ It stated that the Court was of the view that the legislator opted for “gradual or cascaded denationalisation”, i.e. to first regulate the restitution of property to the churches and religious communities and then to the other citizens. In the view of the Constitutional Court, the state’s intention to conduct a general denationalisation of property seized after 1945 is reflected in its adoption of a law on the registration of seized property in 2005. The existence of different models of regulating this issue does not per se indicate discrimination given that the state enjoys a broad scope of discretion in regulating important economic and social issues. What does, however, give rise to concern is the Finance Ministry’s view voiced before the Constitutional Court rendered its decision, notably, that the model of restitution the state would opt for, i.e. whether natural restitution (by physically returning the seized assets) or another form of restitution would depend on the Constitutional Court’s decision on the initiative to review the constitutionality of the Act on the Restitution of Property to Churches and Religious Communities. In view of the fact that associations lobbying for the protection of private property and

²⁵⁰ The Constitutional Court Decision No. 119/2008 is available in Serbian at http://www.ustavni.sud.rs/page/jurisprudence/35/.
citizens expecting to benefit from denationalisation are advocating natural restitution, this government view may constitute pressure on the Constitutional Court. The Finance Ministry said that “in the event the Court assesses the Act on the Restitution of Property to Churches and Religious Communities is constitutional, then the future law on denationalisation cannot have a different concept due to constitutional principle of equality”. Although the state has a broad scope of discretion in this context, an absurd situation has occurred – that the constitutionality of the law on denationalisation is used as an excuse to put off the adoption of a general law on the restitution of property. On the other hand, the main question raised with the Constitutional Court regarded the equality of the churches and religious communities vis-à-vis the other citizens, not the form of restitution. Finally, given that it has opted for so-called cascaded restitution, the Republic of Serbia will have to ensure that the equality of citizens is not violated by its solutions governing the denationalisation of property of different categories of beneficiaries.

4.9. Freedom of Expression

Article 19, ICCPR:
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in para. 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health and morals.

Article 10, ECHR:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

4.9.1. General

The right to freedom of expression of opinion is guaranteed by the Constitution (Art. 46). The Constitution guarantees the freedom of the press – publication of newspapers is possible without prior authorisation and subject to registration, while 251 http://www.b92.net/biz/fokus/analiza.php?yyyy=2011&mm=03&nav_id=503289.
television and radio stations shall be established in accordance with law (Art. 50). Censorship of the press and other media is prohibited (Art. 50 (3)). The competent court may prevent the dissemination of information only if that is “necessary in a democratic society to prevent incitement to the violent change of the constitutional order or the violation of the territorial integrity of the Republic of Serbia, to prevent propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Art. 50 (3)). The right to correction is guaranteed by the Constitution (Art. 50 (4)), which leaves its detailed regulation to the law.

Freedom of expression may be restricted by law if necessary to protect the rights and reputation of others, uphold the authority and impartiality of the courts and protect public health, morals of a democratic society and the national security of the Republic of Serbia (Art. 46 (2)). It is unclear what is exactly implied by “morals of a democratic society”, a coinage introduced by the Constitution as grounds for restricting specific rights, which is found neither in international standards nor elaborated in Serbian legislation. These provisions are in keeping with the ICCPR, although they mention public security rather than public order. An additional reason for restriction – preservation of independence and impartiality of courts – has been taken from the ECHR.

4.9.2. Public Information Act

The Public Information Act252 governs the right to public information, as the right to the freedom to express one’s opinion. This right particularly encompasses the freedom to express opinion, the freedom to gather, publish and disseminate ideas, information and opinions, the freedom to print and distribute newspapers, the freedom to produce and broadcast radio and television programmes, the freedom to receive ideas, information and opinions, as well as the freedom to establish legal entities engaged in public information (Art. 1). The Act forbids censorship and indirect ways of restricting the freedom of expression, promotes informing about issues of public interest, protects the interests of national and ethnic minorities and persons with special needs, forbids media monopolies and narrows the scope of privacy of state and public officials (Arts. 2–10).253

4.9.3. Establishment and Operation of Electronic Media

The Broadcasting Act,254 governs broadcasting activities, establishes the Republican Broadcasting Agency (hereinafter: Agency) as an independent and self-governed organisation performing a public office and having the status of a legal person. The decision-making body is the Council. As many as 3 of the 9 Council members are nominated by the parliamentary Culture and Information Committee,

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252 Sl. glasnik RS, 43/03, 61/05, 71/09, 89/10 and 41/11.
253 See the detailed analysis of the Public Information Act in the Report 2010, I.4.9.2.
254 Sl. glasnik RS, 42/02, 97/04, 76/05, 62/06, 85/06 and 41/09.
whereby political parties practically have major influence on the composition of the Council. On the other hand, media associations may nominate only one member and only with the consent of professional associations of film and drama artists and composers.255

4.9.3.1. Licencing of Electronic Media. – A TV or radio station may not broadcast its programme unless it has first obtained a radio station licence issued by the telecommunications regulatory authority (the Republican Electronic Communications Agency) at the request of the Republican Broadcasting Agency.

Only a domestic natural or legal person, registered or residing in Serbia may be granted a broadcasting licence. A domestic legal person, whose founders are foreign legal persons registered in countries, the internal regulations of which do not allow or where it is impossible to determine the origin of the founding capital, may not take part in the public broadcasting licence tender. A foreign legal or natural person may have a share of a maximum 49% in the overall founding capital of the broadcasting licence holder unless otherwise envisaged by ratified international agreements. A foreign natural or legal person may not possess a share in the capital of a public broadcasting service (Art. 41).

Political parties, as well as organisations and legal persons established by them, may not become licence holders; the same applies to companies, institutions and other legal persons established by the Republic of Serbia, with the exception of the public broadcasting services (Art. 42).

Licences are issued by way of a public tender. The Act stipulates the reasons why a licence may be revoked before its validity expires.256 In such a case, the Agency conducts a procedure in which the broadcaster must be given an opportunity to state his case and be present at the session debating the revocation of the licence, after which a reasoned decision shall be taken. The broadcaster has the right to appeal the decision, as well as the right to initiate a judicial review and administrative proceedings against the Agency decision on the appeal (Art. 62).

255 This allows any registered association to nominate candidates and obstruct an agreement on the candidates and, consequently, the Assembly Committee to take the final decision on the NGO list of candidates. A more detailed analysis of the Broadcasting Act is available in the Report 2004, I.4.9.3, whilst the amendments to the Act are elaborated in the Report 2010, I.4.9.3.

256 A broadcasting licence is revoked if: a broadcaster notifies the Agency in writing that it no longer intends to broadcast its programme; if it is established that a broadcaster presented untrue data in the application for the public tender; if a broadcaster has not commenced programme broadcasts within the prescribed deadline; if a broadcaster has not conducted a technical inspection of the radio station within the prescribed timeframe; if a broadcaster has unduly terminated broadcasts for more than 30 (thirty) consecutive days or for 60 (sixty) days intermittently in one calendar year; if a broadcaster has violated the provisions on prohibited concentration of media ownership envisaged by this Law; if the broadcaster has not paid the broadcasting licence fee despite a prior written warning.
4.9.3.2. Public Service Broadcasters. – A whole chapter in the Broadcasting Act (Chapter V) is devoted to public service broadcasters (PSBs) and governs their internal organisation and operations in detail. The public broadcasting services in the Republic shall comprise the Broadcasting Institution of Serbia (former Serbian Radio and Television) and the provincial broadcasting institutions. Under Article 77 of the Broadcasting Act, a PSB shall produce and broadcast programmes of general interest and it must ensure the diversity of content in its programmes and support democratic values, human rights and the cultural, national, ethnic and political pluralism of ideas and opinions. The programmes must be designed for all segments of society, may not discriminate against anyone and the PSBs must ensure that the programmes are not under the influence of the authorities or economic power centres. They must ensure the satisfaction of the needs of the citizens for programme content expressing their cultural identities, provide appropriate air time for broadcasting content on the activities of civic associations, non-government organisations and religious communities. PSBs are also under the obligation to ensure free and balanced broadcasts of political party promotions during election campaigns and are prohibited from broadcasting paid election promotions. The Act governs in detail the funding of PSBs as well.

4.9.4. Criminal Law and Freedom of Expression

The crimes of libel and defamation warrant only fines (Arts. 170 and 171, CC). However, the Criminal Code envisages imprisonment for the criminal offence of “disclosing information about someone’s personal and family circumstances” (Art. 172). These provisions are not fully aligned with international standards. Both the Human Rights Committee and the European Court of Human Rights are of the view that a prison sentence or criminal liability in general are not necessary for the protection of honour and reputation, and that apart from the right to correction and other extra-judicial procedures it is enough to ensure civil liability in the form of indemnity in a corresponding amount.257

Graver forms of libel/slander are defined in Serbian legislation as offences committed via the media and where “the stated or spread falsehood is of such importance that it could have incurred graver consequences to the injured party” (Art. 170 (2) CC). The provision, which incriminates the spreading and not only the voicing of falsehoods can also affect the journalists.258


258 The ECtHR found that a journalist must not be held responsible for quoting or conveying the text. See Thoma v. Luxemburg, ECtHR, App. No. 38432/97 (2001).
Serbian criminal law does not discriminate between the injured parties, whereas the European Court holds firmly that politicians and other people in public office need to withstand much more criticism than the others, particularly with regard to issues affecting their financial integrity. The ECtHR affirmed the view in its judgment in the case *Lepojić v. Serbia*. This flaw was partly rectified after the Supreme Court Criminal Division adopted a legal interpretation introducing into the local legislation some elements of the ECtHR case law.

Exclusion of liability for acts against honour and reputation is also provided for in Serbian laws, inter alia, in the case of serious criticism, scientific or literary work and works of art, in journalism, etc, if it can be determined from the manner of expression that it had not been done with the intent of contempt. Contrary to this, the European Court of Human Rights articulated a clear view that freedom of expression also includes the right to disclose information and opinions that are insulting and shocking, if it is the matter of public interest, and that freedom of the press includes the right to exaggerate and be provocative to a certain extent. National law also excludes liability if the accused proved the authenticity of his claims or if there had been sufficient grounds for him/her to believe in their authenticity. However, the burden of proof set in such a manner deviates from the guaranteed presumption of innocence and is not in accordance with international standards.

The Criminal Code envisages imprisonment for damaging another’s reputation on grounds of race, religion, ethnic or other affiliation, for damaging the reputation of a foreign state or international organisation and for damaging Serbia’s reputation (Arts. 173-175).

4.9.5. Prohibition of Propaganda for War and Advocacy of National, Racial or Religious Hatred

Article 49 of the Constitution prohibits incitement to national, racial or religious hatred. The Constitution merely mentions propaganda for war as grounds for restricting the freedom of expression.

The Anti-Discrimination Act prohibits hate speech, defining it as “ideas, information and views inciting discrimination, hatred or violence against persons or
groups of persons on grounds of their personal features by written and displayed messages or symbols or in another way in the media and other publications, at gatherings and other public venues,” (Art. 11).

The Criminal Code explicitly prohibits incitement to national, racial and religious hate, dissension or intolerance (Art. 317) but limits the prohibition only to “peoples and national minorities living in Serbia”, although the ICCPR prohibits “any” incitement to hate, i.e. against any group no matter where it lives. Article 174 of the CC also incriminates ridicule of a person or a group on grounds of race, skin colour, religion, nationality, ethnic origin or another personal feature.

The Criminal Code incriminates incitement to genocide and other war crimes (Art. 375), instigation of or incitement to a war of aggression and ordering a war of aggression (Art. 386) all of which warrant long prison sentences.\(^\text{265}\)

Hate speech, which is unfortunately still frequent in both public discourse and the media, is also incriminated. The Criminal Code prohibits any propagation of ideas or theories advocating or inciting hate, discrimination or violence on grounds of race, skin colour, religion, nationality, ethnicity or another personal feature (Art. 387 (4)) as well as threats to commit a crime against an individual or group on grounds of their race, skin colour, religion, nationality, ethnicity or another personal feature (Art. 387 (5)).

Article 344a of the Criminal Code incriminates violent conduct at sports events or public gatherings and prohibits incitement to “national racial, religious or other hate or intolerance on any discriminatory grounds” (italics ours). The prohibition applies not only to sports events but to public gatherings in general as well. This provision is problematic because the crime is committed only in the event the incriminated conduct resulted in violence or physical clashes with the participants while inciting national, religious and religious hate and intolerance at sports events or public gathering is not an act of crime per se.

The Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia\(^\text{266}\) prohibits members and followers of neo-Nazi and Fascist organisations and associations to organise events, display symbols or act in any other way that propagates neo-Nazi and Fascist ideas. The Act prohibits all public appearances, both organised and spontaneous, which incite, encourage or spread hate against persons belonging to any nation, national minority, church or religious community and propagation or justification of ideas, actions or conduct for which persons have been convicted for war crimes. The Act lays down fines for natural persons participating in such events and for the associations and their responsible persons spreading or inciting hate and intolerance (Arts. 7 and 8). Under the Act, a procedure may be initiated to delete from the Register a registered organisation or association acting in violation of the Act (Art. 2 (2)).

\(^{265}\) Persons found guilty of inciting or instigating a war of aggression shall be sentenced to between two and twelve years in jail, while those found guilty of ordering a war of aggression face imprisonment ranging from 10 to 40 years.

\(^{266}\) Sl. glasnik RS, 41/09.
The Public Information Act\textsuperscript{267} also regulates hate speech. It is forbidden to publish ideas, information and opinions that incite to discrimination, hatred or violence against persons or groups of persons on the grounds of their race, religion, nationality, ethnic group, gender or sexual preference, notwithstanding whether this criminal offence has been committed by such publication (Art. 38). Liability is excluded if such information is a part of a scientific or journalistic work and (1) was published without intent to incite to discrimination, hatred or violence, as a part of an objective journalistic report or (2) intends to critically review such occurrences (Art. 40). Under the Act, charges may be filed both by the persons the incriminated information applies to and human rights organisations.

The Broadcasting Act provides for the jurisdiction of the Republican Broadcasting Agency to prevent broadcasting of programmes that incite to discrimination, hatred or violence against certain individuals or groups of individuals on the grounds of their sex, religion, race, nationality or ethnicity (Art. 8 (2.3)), and only the public broadcasting services have the obligation “to prevent any form of racial, religious, national, ethnic or other intolerance or hatred, or hatred with regard to sexual orientation” in the production and broadcasting of their programmes (Art. 79).

With the adoption of the Act Ratifying the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems,\textsuperscript{268} use of computer systems to promote ideas or theories advocating, promoting or inciting hatred, discrimination or violence against individuals or groups on grounds of race, skin colour, descent or national or ethnic origin and religion is now prohibited in Serbia.

4.9.6. Free Access to Information of Public Importance

The Constitution of the Republic of Serbia regulates the freedom of access to information under a title “Right to Information”. Article 51 (1) of the Constitution guarantees persons within the state’s jurisdiction the right to receive true, full and prompt information on issues of public importance and envisages the corresponding duty of the media to enable the exercise of this right. The formulation of the provision is “left hanging” as it corresponds neither to the freedom of expression, from which the freedom of access to information derives (Art. 46 (1), Constitution), nor to the right to participation in the administration of public affairs (Art. 53), as this \textit{sui generis} right may be qualified as the expression of participative democracy. The freedom of access to information in the true sense of the word is regulated by paragraph 2 of Article 51, although this definition of the bodies from which information may be sought is much more restrictive than the one in the Act on Free Access to Information of Public Importance of the Republic of Serbia,\textsuperscript{269} which governs this matter in greater detail.

\textsuperscript{267} \textit{Sl. glasnik RS}, 43/03, 61/05, 71/09, 89/10, and 41/11.
\textsuperscript{268} \textit{Sl. glasnik RS}, 19/09.
\textsuperscript{269} \textit{Sl. glasnik RS}, 120/04, 54/07, 104/09 and 36/10.
The Act precisely defines information of public importance, governs the right of access to information, the obligations of the public authorities with respect to improving the transparency of their work and the procedures for accessing information held by the public authorities. To ensure the realisation of the right of free access to information, the Act establishes the Commissioner for Access to Information of Public Information as an autonomous and independent state authority elected by the National Assembly at the proposal of its Information Committee (Art. 1 (2)). Anyone who is dissatisfied with accessing information in a procedure before a public authority is entitled to file a complaint with the Commissioner, who shall render a binding, final and enforceable decision (Arts. 22-28). The implementation of the Act is overseen by the ministry charged with the public administration and local self-government.

Although the Act was in the meantime amended to improve some of its provisions, the legislator however missed the chance to improve all the provisions of the law because the National Assembly did not uphold the amendment submitted by the Protector of Citizens and envisaging protection of so-called whistle-blowers, state administration employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities. Not only is it in the interest of society to provide support to whistle-blowers and thus help combat corruption; the state also has an international obligation to provide such persons with protection. The adopted Act does include a provision on the protection of whistle-blowers, but does not provide them with adequate protection, because it lays down that an employee shall first report his/her suspicions to the responsible person in the authority. This practically means that the employee will sometimes have to first report an irregularity to the very person s/he suspects of committing it, which renders meaningless the whole idea of the need to protect whistle-blowers. The Anti-Corruption Agency Director in 2011 adopted a Rulebook on the Protection of Persons Reporting Suspicions of Corruption, but the experts are of the view that the Rulebook does not suffice and that a law governing the status and protection of whistle-blowers has to be adopted.

4.9.6.1. Classified Information. – The Classified Information Act came into force in 2010, but its application required that the Government of the Republic

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270 More on the work of the Commissioner in II.2.


272 Under Article 9 of the CoE Civil Law Convention on Corruption, which Serbia ratified, and in accordance with the recommendation by GRECO (CoE’s anti-corruption body). The CoE Parliamentary Assembly adopted a resolution on the protection of whistle-blowers (Resolution 1729 (2010).

273 The Rulebook is available in Serbian at http://acas.rs/sr_cir/zakoni-i-drugi-propisi/ostali-propisi/pravilnici.html

274 Sl. glasnik RS, 104/09.
of Serbia adopt within six months by-laws governing issues not regulated by the Act (such as the manner and procedure for classifying information or documents as confidential, the criteria for establishing the degree of confidentiality, etc.) The public authorities were given one year to bring their regulations in line with the provisions of the Act.

Although the Act was adopted in December 2009, only several of the required by-laws were adopted by the end of 2011, but they do not include the one of utmost importance for the enforcement of the Act, notably, the criteria for establishing the degree of confidentiality of the information.\(^\text{275}\) This brings into question the very enforcement of the Act, endangers the right of free access to information of public importance because the classification of information as confidential is still fully at the discretion of the authorities holding it. Furthermore, there is still an outstanding problem of documents categorised as classified under the prior laws, although the Act lays down the obligation under which the heads of public authorities are to review the declaration of documents as classified information under the prior regulations within two years from the day the Act takes effect (Article 105). A lot of currently classified information should not be classified at all. Such information includes some normative acts, even those regulating the declaration of information as classified.

The Act itself governs the classification of information only in the most general terms and introduces a novel categorisation of classified information, which is now divided into four classification levels – top secret, secret, confidential and restricted (Art. 14). Article 15 envisages the same classification levels for classified international documents. The period during which information must remain classified depends on the classification level and ranges between two and thirty years (Art. 19). The Act also provides for periodic assessments of whether information should remain classified (Art. 22). Only the Speaker of the National Assembly, the President of the Republic and the Prime Minister may access classified information without a security clearance certificate (Art. 37). Other state authorities elected by the Assembly and their heads, Constitutional Court and other judges may access information at all classification levels they need to discharge their duties upon receipt of the certificate; in most cases, they need not undergo security checks (Art. 275) The following by-laws have been adopted: the Decree on Special Measures for the Physical and Technical Protection of Classified Information, (Sl. glasnik RS, 97/11); the Decree on the Manner and Procedure for Designating Classified Information or Documents, (Sl. glasnik RS, 8/11); the Decree on the Record-Keeping Form and the Procedure for Keeping Records on Processing of Personal Data, (Sl. glasnik RS, 50/09); the Decree on Special Classified Information Treatment Supervision Measures, (Sl. glasnik RS, 90/11); the Decree on the Content, Form and Procedure for Keeping Records of Access to Classified Information, (Sl. glasnik RS, 89/10); the Decree on the Increase in Wages of Civil Servants and Employees Charged with the Protection of Classified Information in the Office of the National Security and Classified Information Protection Council and the Justice Ministry, (Sl. glasnik RS, 79/10) and the Decree on the Content, Form and Communication of Certificates for Access to Classified Information, (Sl. glasnik RS, 54/10).
A natural or legal person may access confidential information after passing a security check. Security checks of persons seeking access to information at lower classification levels shall be conducted by the Ministry of the Interior, while the Security Information Agency shall conduct security checks of persons seeking access to information at higher classification levels (54). Security checks shall be conducted on the basis of security questionnaires, the texts of which are incorporated in the Act.

The certificate, i.e. clearance to access classified information, shall be issued by the Office of the National Security and Classified Information Protection Council. The Council Office has been established as a professional service of the Serbian Government. Council Office decisions to refuse access to classified information may be appealed with the Justice Minister (Art. 71). The Justice Ministry shall oversee the enforcement of the Act (Art. 97). The Ministry established a Classified Information Oversight Group but did not publish on its website what the Group has done.

The Act also includes penalties for non-abidance by its provisions. Whereas the disclosure of classified information is strictly penalised (it is considered a crime warranting a prison sentence of up to 15 years). On the other hand the penalties for the unjustified declaration of information as classified are very mild and range from 5 to 50 thousand dinars (50–500 EUR).

4.10. Freedom of Peaceful Assembly

Article 21, ICCPR:

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals.
or for the protection of the rights and freedoms of others. This Article shall not prevent the im-
position of lawful restrictions on the exercise of these rights by members of the armed forces,
of the police or of the administration of the State.

4.10.1 General

Under Article 54 of the Constitution, “(C)itizens may assemble freely”. The
Constitution mentions free “peaceful” assembly, the formulation also used in inter-
national treaties.

The exercise of this right is regulated in greater detail by the Public Assem-
by Act,279 adopted in the early 1990s. Many of its provisions are obsolete and not
in accordance with international standards, and some are also in contravention of
the Constitution. In their joint Opinion issued in 2010, the Council of Europe Ven-
ice Commission and the OSCE ODIHR criticised the Act and found that it did not
include effective mechanisms protecting the freedom of assembly.280 No amend-
ments to this law were, however, made in 2011 either.

4.10.2. Limitations of the Freedom of Assembly

The constitutional provisions on limitations of the freedom of peaceful as-
sembly are for the most part in conformity with international standards. In Article
54 (4), the Constitution provides that the freedom of assembly may be restricted by
law and “if it is necessary for the protection of public health, morals, rights of oth-
ers or the security of the Republic of Serbia”.281 The Constitution prescribes that
the restriction must be “necessary in a democratic society” which is in accordance
with the ICCPR and the ECHR.

Although the Public Assembly Act allows “any natural or legal person” to
submit notice of a public gathering, the scope of this provision is limited by the
constitutional formulation of the right to freedom of assembly. Namely, the Con-
stitution guarantees the freedom of peaceful assembly only to “citizens” but not to
everyone. The ECHR, notably Article 16, allows states to restrict political activity
of aliens; this, however, does not per se justify restrictions on the right of aliens
to peaceful assembly if their goals are not political in nature. The ICCPR does not
contain a similar provision. The Venice Commission also qualified this restriction
as “problematic in view of Article 11 ECHR which does not restrict freedom of as-
sembly to nationals”.282

279 Sl. glasnik RS, 51/92, 53/93, 67/93, 48/94, 101/05 and Sl. glasnik SRJ 21/01.
280 See: Joint Opinion on the Public Assembly Act of the Republic of Serbia, CDL-AD(2010)031,
pdf, notably para 13, recommendations C and J, and paras 51–53.
281 This is in accordance with the standards of the ICCPR and the ECHR, although the Constitu-
tion does not list specific grounds such as “public order” (ICCPR) or “the prevention of disor-
der or crime” (ECHR).
282 See Venice Commission, Opinion on the Constitution of Serbia, Opinion No. 405/2006, CDL-
AD(2007)004, 19 March 2007, para 37. The Commission, inter alia, notes that most constitu-
Pursuant to the Act on Police, police officers may not attend party or other political gatherings in uniform, unless they are on duty (Art. 134 (3)).

4.10.2.1. Assembly Venues. – Under the Constitution, the state authorities have to be notified in accordance with the law of an assembly only in the event it is to be held outdoors, while assemblies held indoors are not subject to approval or notification (Art. 54 (2 and 3)).

The Serbian Act states that public assemblies may be held at a venue or along a specified route (Art. 3 (1)). This is in accordance with the practice of the European Court of Human Rights. The Act unnecessarily limits public processions by laying down that a public procession along a public traffic route must be continuous (Art. 3 (2)).

The Serbian Act defines a public assembly as “convening and holding a meeting or other gathering at an appropriate venue” (Art. 2 (1), (italics added) and goes on to define an appropriate venue (Art. 2, paras. 2 and 3), but the right to freedom of assembly is limited by this provision as well, because it stipulates that an assembly at the appropriate venue inter alia does not “lead to the disruption of public traffic”. This restriction cannot be subsumed under any of the grounds allowed by international standards and the “disruption of public traffic” as grounds for restricting the right to public assembly. This restriction is not mentioned in the Constitution of Serbia, wherefore the constitutionality of this legal provision is also brought into question. The Act does allow for assembly at venues open to public traffic “if the temporary rerouting of the traffic can be ensured by additional measures”, provided that the organiser agrees to bear the costs of the rerouting and additional public utility services, albeit it sets further restrictions on the times at which such assemblies may held. Although a prohibition of an assembly at a specific time may be justified in specific cases, each specific case needs to be individually weighed. General limitations, like the ones in the valid legislation, are much too restrictive.

The ODIHR Guidelines on Freedom of Peaceful Assembly suggest that the costs of providing adequate security and safety (including traffic and crowd management) should be fully covered by the public authorities, because levying charges could create a significant deterrent for those wishing to enjoy their right to freedom of assembly, and may actually be prohibitive for many organisers.

Under the Public Assembly Act, municipalities and cities shall in advance designate the “appropriate” venues at which public assemblies may be held (Art. 2 (5)). This provision is overly restrictive and leaves room for abuse. The Act provides that a public assembly may not be held in the vicinity of the Serbian Assem-

283 See Christians against Racism and Fascism v. United Kingdom, ECmHR, App. No. 8440/78 (1980).

bly buildings, immediately prior to or during the sessions (Art. 2 (4)). One may bring into question the justification of this general prohibition because the existence of constitutional grounds for restricting the right must be established in each particular case.

4.10.2.2. Notification of Assemblies. – Under Serbian law, the organiser of an assembly need not obtain consent in advance, merely submit notice of it 48 hours before it is held. The assembly must be reported five days before it is held in the event it is to be held at a venue open to public traffic (Art. 6), which is generally in accordance with international standards.

The Act also states that police will disperse an assembly that is being held without prior notification of the authorities and “take measures to restore public order and peace” (Art. 14). ECtHR case law needs to be taken into account with respect to this issue. The Court found that prohibition of an assembly is not always justified just because the legal requirement to give prior notice has not been fulfilled as specific gatherings by their very nature do not leave enough time for prior notification.285

4.10.2.3. State’s Obligation to Protect a Peaceful Assembly. – According to international standards, the state is not only obliged to refrain from undue restrictions of the freedom of peaceful assembly; it also has positive obligations comprising the protection of peaceful demonstrations from threats of violence by third parties. The right to assembly of one group may not be restricted because another group does not support the views promoted at the gathering.286 According to ECtHR case law, “(I)t would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority”.287 The Serbian legislation is silent on this issue, although the problems caused by it in practice so far288 corroborate that the competent authorities must be explicitly bound to provide protection to peaceful protesters and enable them to hold their assembly which third parties are trying or threatening to prevent by employing violence.

4.10.3. Prohibition of Public Assembly

The Serbian Act makes it possible for the police to ban a public assembly for lawful reasons (threat to public health, morals or to the safety of human life and property, as well as disruption of public traffic) (Art. 11 (1)). The Act also allows for a temporary prohibition of an assembly.289 The assembly may be prohibited

287 See Barankevich v. Russia, ECtHR, App. No. 10519/03 (2007).
288 See Report 2009, II.2.9.
289 A public assembly may be temporarily prohibited in the event it is directed at a violent change of the constitutional order, undermining Serbia’s territorial integrity or independence, violation
permanently only by the court. The organiser must be notified of the prohibition not less than 12 hours before the assembly is to begin. The decision on the permanent prohibition of the assembly may be appealed in administrative proceedings (the appeal does not stay the enforcement of the decision) and the final decision may be challenged in an administrative dispute. Namely, the court ruling on an administrative dispute has the jurisdiction to rule only on the legality of a final individual administrative enactment or lack of it, not on the expediency of the enactment. Given that the Public Assembly Act gives the police broad discretionary powers in assessing whether an assembly should be prohibited or not, the Administrative Court cannot go into substantive issues of human rights violations. It remains unclear why the legislator envisaged greater legal protection in cases of temporary prohibition by stipulating the involvement of the courts and laying down short deadlines within which decisions have to be rendered.

However, given that the organiser shall be notified of both a temporary or permanent prohibition not later than 12 hours before the assembly is due to begin, it is difficult to imagine a situation in which a higher instance will take a decision overturning the prohibition and allowing the assembly to proceed in time to allow the organiser to hold the assembly as scheduled. This may practically render a specific assembly meaningless and lead to it not being held at all although the court reversed the ban, which raises the question of the existence of an effective legal remedy. Any legal remedy resulting in an *ex post facto* decision allowing an assembly may be considered ineffective.\(^{290}\)

Practice has shown that another problem may appear with respect to the existence of an effective legal remedy – the failure to act on part of the authority charged with prohibiting an assembly. Namely, when the Pride Parade was announced in 2009, the competent authority (MIA) did not issue a formal decision on its prohibition but merely recommended to the organisers to “dislocate” to another venue, whereby it *de facto* banned it.\(^{291}\) Due to the absence of an effective legal remedy, the organisers of the Pride Parade, represented by the BCHR, directly lodged a constitutional appeal with the Constitutional Court. In December 2011, the Constitutional Court upheld the appeal and concluded that the state authorities had violated the freedom of peaceful assembly.\(^{292}\)

The organisation of the 2011 Pride Parade ended with the adoption of a Decision prohibiting the assembly, which only stated that “the reasons for prohibition have been met” but did not specify the factual or legal grounds for the prohibition.

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291 See *Report 2009*, II.2.9.
Pursuant to the Act, the organisers submitted notice of the assembly scheduled for 2 October to the Belgrade Savski venac municipal police station on 26 August 2011. The notice of the gathering was identical to the one submitted the previous year. A meeting with the Minister of Internal Affairs Ivica Dačić was held in late August to review the preparations for the Pride Parade and its security and political implications. It was concluded at the meeting that there should be more political support for the event but the Minister vowed that the police would do their utmost to protect the participants in the Pride Parade. On September 30, the media reported that the National Security Council had held a session and recommended the prohibition of all public assemblies on 1 and 2 October. A representative of the Savski venac police station asked the Parade organisers to pick up the decision on the prohibition. The media reported that police had knowledge that the hooligans were planning to provoke unrests in various parts of Belgrade, by setting car tires and old cars on fire and thus preventing the police from doing their job and that the police forces assessed that they were unable to cope with such threats. Although the police remanded in custody several suspected hooligans who had rallied despite the police ban during the weekend of 29/30 September, to the best of BCHR’s knowledge, no one has to date been detained for organising or preparing the unrests because, according to the police representatives, the prosecutors could not initiate the relevant proceedings only on the basis of indications and operational information.

Given that these indications did not amount to sufficient grounds to initiate court proceedings, the question arises whether they amounted to justified and sufficient grounds for restricting the freedom of peaceful assembly in a democratic society. Although a formal Decision prohibiting the gathering (and instructing the organisers on the available legal remedies) was adopted in 2011, the Parade organisers, represented by the BCHR, lodged a constitutional appeal maintaining that the appeal in administrative proceedings and an action before the Administrative Court did not constitute effective legal remedies, particularly since the organisers were served the Decision only two days before the event was to have been held, although the state authorities had known the date of the Parade months in advance.

By adopting the impugned Decision prohibiting the Pride Parade, the Republic of Serbia violated the right of citizens to the freedom of peaceful assembly because it prohibited the holding of the Pride Parade without a legitimate reason necessary in a democratic society. The state also failed to fulfil its positive obligation to protect the participants from third parties, members of extremist organisations. Pursuant to Article 54 of the Constitution and Article 11 of the ECHR, it can never be necessary to prohibit a peaceful assembly, the participants of which are absolutely

293 See e.g. the article in the Belgrade daily Blic “Police Bring in Six People with Balaclavas and Baseball Bats” http://www.blic.rs/Vesti/Hronika/280503/Policija-privela-sest-osoba-sa-fantom-kama-i-bejzbol-palicama.
294 Data obtained pursuant to a request for access to information of public importance.
295 See Alekseyev v. Russia, ECtHR App. Nos. 4916/07, 25924/08 and 14599/09.
non-violent, because of threats of violence by others. Furthermore, there are well-founded reasons for believing that the state authorities failed to protect the freedom of assembly of the Pride Parade organisers for their own discriminatory motives.\textsuperscript{296} The BCHR has also filed an application with the ECtHR regarding this case.

4.10.4. Prevention of Violence and Unbecoming Behaviour at Sports Events

Under the Act on Preventing Violence and Unbecoming Behaviour at Sports Events,\textsuperscript{297} regulations on the assembly of citizens shall accordingly apply to the organisation of sports events (Art. 5). The Act sets out “the measures for preventing violence and unbecoming behaviour at sports events, the obligations of the organisers and the powers of the competent authorities to apply these measures” (Art. 1). The punitive provisions in Chapter III lay down misdemeanour penalties and protection measures in case the Act is violated.

Article 344a of the Criminal Code incriminates violent behaviour at a sports or public event. Article 89b of the Criminal Code allows for the imposition of a security measure prohibiting a criminal offender from attending specific sports events if such a ban is necessary to protect general security. This security measure must be imposed on offenders convicted for violent behaviour at a sports or public event. Under the Criminal Code, the duration of this measure shall range from one to five years. The same measure, lasting between one and three years, is envisaged as a protective measure in the Misdemeanours Act.\textsuperscript{298}

Under the Act on Preventing Violence and Unbecoming Behaviour at Sports Events, special measures shall be taken during high-risk sports events (Arts. 10–18). An organiser of a sports event is under the obligation to establish an appropriate steward unit or hire a legal person or entrepreneur to provide physical security services and maintain order at a sports event (Art. 8). Under the amendments to the Act, in force as of January 2011, only individuals who had undergone an MIA training programme, may be engaged as stewards.

4.11. Freedom of Association

Article 22, ICCPR:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals.

\textsuperscript{296} More on the reasons for the submission of the constitutional appeal at www.bgcentar.org.rs.

\textsuperscript{297} Sl. glasnik RS, 67/03, 101/05, 90/07, 72/09 and 111/09.

\textsuperscript{298} Sl. glasnik RS, 101/05, 116/08 and 111/09.
or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4.11.1. General

The Constitution of Serbia guarantees the freedom of political, trade union and all other forms of association (Art. 55), but also guarantees the right not to join any association.299

Two crucial laws governing this field – The Act on Associations300 and the Act on Political Parties.301

The Act on Associations regulates the founding, legal status, registration and deletion from the register, the membership, bodies, changes in status, dissolution and other issues of relevance to the work of associations and the status and activities of foreign associations. The Act primarily concerns non-governmental organisations but its provisions shall also apply to other associations, the activities of which are regulated by specific laws (political and trade union organisations, religious organisations, etc), with respect to issues not governed by the specific laws.

The Act allows associations to engage in economic and other profit-making activities under specific conditions but prohibits them from distributing the profits to their members and founders. Under the Act, funds to support or co-fund programmes of associations of public interest shall be secured in the state budget. These funds shall be granted to associations by way of public competitions. Autonomous provinces and local governments may also set aside funds for associations implementing programmes of public interest.

299 It is in accordance with the ECtHR view that states must guarantee everyone the right not to associate with others i.e. not to join an association. See Sigour A. Sigurjonsson v. Iceland, ECHR, App. No. 16130/90 (1993); Sorensen and Rasmussen v. Denmark, ECHR, App. Nos. 52562/99 and 52620/99 (2006).

300 Sl. glasnik RS, 51/09 and 99/11.

301 Sl. glasnik RS, 36/09.
Under the Act, a natural or legal person making a donation or gift to an association may be exempted from paying a tax pursuant to the law governing the relevant tax (Art. 36 (2)). The tax laws, however, still have not been amended to allow for these forms of tax exemption.\footnote{More on financing of political parties in I.4.14.4.1.}

### 4.11.2. Registration and Dissolution of Associations

The Constitution of Serbia does not require obtaining prior consent for founding an association, which is established merely by entry in a register kept by the state in accordance with the law (Art. 55 (2)).

The Act on Associations explicitly states that registration shall be voluntary but only registered associations shall enjoy the status of a legal person (Art. 4). An association shall be deemed founded even if it has not been entered in the register. In such cases, though, it shall be liable to regulations on civil partnership. The Register of Associations shall be kept by the Serbian Business Registers Agency.

Under the Act, an association may be established by at least three founders. The Act introduces a novel provision, allowing also older minors (persons over 14 years of age) to found associations (Art. 10), but only with the certified written consent of their legal representatives, a proviso pre-empting abuse of children in this area.

Political parties shall be entered in the register of political parties kept by the Ministry for State Administration and Local Self-Government.\footnote{More on the establishment of political parties in I.4.14.4.} Political parties may associate with other parties in broader political alliances. They may also merge with other parties in which case the new party shall gain legal personality, while the individual parties that had merged will have lost their legal personalities (Arts. 33 and 34 of the Act on Political Parties).

Trade union organisations are registered with the ministry charged with labour (Arts. 217 and 238, Labour Act and Art. 4, Rules on Entry of Trade Union Organisations in Register\footnote{Sl. glasnik RS, 50/05 and 10/10}).

An association struck out of the register shall lose the status of a legal person. An association shall be deleted from the register in the event: a) the number of members declined below the number of founders required for its establishment; b) the period for which the association was established expired; c) a decision terminating its work was rendered; d) there was a change in status resulting in the termination of the association; e) it failed to conduct activities laid down in its statute for over two years i.e. failed to hold a session of its assembly within double the time-frame set out in the statute; f) its work was prohibited; g) of bankruptcy (Art. 49).

Under the Act on Political Parties, a political party shall cease to exist upon deletion from the register. A party shall be deleted from the register in the event it
decides to terminate its operations, merges with one or more other political parties, its work is prohibited by the Constitutional Court or it fails to apply for re-registration within the deadline (under Article 30, parties are duty bound to apply for re-registration every eight years) (Arts. 35 and 36).

4.11.3. Restrictions

The Constitution of the Republic of Serbia prohibits the founding and activities of secret and paramilitary associations. It also allows for prohibiting associations the activities of which are directed at the violent change the constitutional order, violation of guaranteed human and minority rights or incitement to racial, ethnic or religious hatred. The decision to ban an association may be reached only by the Constitutional Court (Art. 55 (4), Constitution).

The Act on Associations prohibits the work of secret and paramilitary associations. Both the Act on Associations and Act on Political Parties list the objectives an association or a political party may not be guided by in its work. These grounds for prohibiting their work correspond to those listed in the Constitution. The Act on Associations and Act on Political Parties also introduce new grounds for prohibiting the work of an association or political party – objectives and activities aimed at violating the territorial integrity of the Republic of Serbia.

The Anti-Discrimination Act also prohibits forming of an association the goal of which is to exercise discrimination, i.e. actions by organisations and groups aimed at violating the rights and freedoms guaranteed by the Constitution, international or domestic law or at inciting ethnic, racial, religious and other kinds of hate, dissent or intolerance (Art. 10).

Decisions on banning political parties are taken by the Constitutional Court, at the proposal of the Government, state prosecutor or the Ministry (Arts. 37 and 38, Act on Political Parties).

A Constitutional Court decision on the prohibition of an association may apply both to associations entered in the register and those that are not. The prohibition procedure may be initiated at the request of the Government, the Republican Public Prosecutor, the ministry charged with administrative affairs or the ministry charged with the field in which the association or the person that registered it pursue its goals.

The National Assembly in 2009 adopted the Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia,305 which bans all activities by Neo-Nazi or Fascist organisations and associations violating the constitutional rights and freedoms of citizens. The Act defines these organisations as those reaffirming neo-Nazi and Fascist ideas in their programmes and statutes. Propagation of ideas and activities of these organisations by a registered association shall be grounds for deleting it from the register. A fine

305 Sl. glasnik RS, 41/09.
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shall be imposed against an association, a member of which propagates neo-Nazi or Fascist ideas by his/her actions.

At its session in June 2011, the Constitutional Court rendered a decision in which it found that the organisation National Formation was a secret association, the activities of which were prohibited *ex constitutione*. The Act on the Constitutional Court lays down deletion from the relevant register as the legal effect of a Constitutional Court decision prohibiting a political party or an association of citizens but it does not specify the effect of a Constitutional Court decision finding that an association is a secret one and thus prohibited *ex constitutione*. Article 171 (2) of the Constitution, however, states that the Constitutional Court shall, if necessary, specify how its decisions will be enforced. In its decision establishing that National Formation is a secret association and that its activities and the promotion of its ideas and objects are thus prohibited, the Constitutional Court also bans its registration in the relevant register and imposes on the state authorities and organisations the obligation to take measures within their remits to enforce its decision. National Formation is defined in its Statute as an alliance of racially aware nationalists. This is the first extremist organisation the Constitutional Court prohibited although it does not fulfil the formal requirements for being an association of citizens. The Constitutional Court established that the lack of formal requirements was the consequence of its founders’ conscious intention to keep the activists and their activities beyond the grasp of the public, i.e. that they act as a secret organisation. This decision by the Constitutional Court is extremely important in view of the fact that the Constitutional Court declared in March 2011 that it did not have jurisdiction to rule on a motion by the then Acting Republican Public Prosecutor to prohibit 14 fan sub-groups whose activities are directed at violating guaranteed human and minority rights and inciting racial, national and religious hatred. During the review of the motion, the opinion prevailed that the Constitutional Court had jurisdiction only to prohibit registered associations and that the prohibition and criminal prosecution of informal, extremist fan groups were governed by the Criminal Code. Had this view of the Constitutional Court become embedded in its case law, it would have undoubtedly left room for numerous abuses. This is why the decision on the prohibition of the informal organisation National Formation constitutes an important precedent. The Constitutional Court is reviewing a motion for the prohibition of the registered extremist association Fatherland Movement Obraz, while the review of the motion for the prohibition of the association 1389 has been suspended.306

4.11.3.1. Restrictions on Association of Civil Servants. – Under the Constitution of Serbia, judges, public prosecutors and army and police staff are prohibited from political association.307 Because it excludes a significant proportion of the

307 The ICCPR and ECHR allow states to impose restrictions on the right to association of members of the armed forces and police and, in the case of the Convention, on the administration of the state too (Art. 22 (2), ICCPR and Art. 11 (2), ECHR).
population from political affairs, prohibiting civil servants and judges and prosecutors from membership in a political party is debatable and constitutes a serious restriction on the freedoms of association and expression.\textsuperscript{308} For its part, the European Commission of Human Rights has found that prohibiting members of the armed forces, police and state administration from organising in trade unions is in accordance with the ECHR.\textsuperscript{309} The Commission considered that states should have a large measure of freedom in judging what measures are required to defend their national security.\textsuperscript{310}

The Act on Police allows trade union, professional and other forms of organisation and activity of police employees. The Act prohibits party organisation and political activity in the Ministry (Art. 134).

Article 49 of the Serbian Act on the Public Prosecutor’s Office\textsuperscript{311} and Article 30 of the Act on Judges envisage that a judge, a public prosecutor and his deputy may not be members of a political party. However, judges, public prosecutors and deputies are expressly recognised the right to associate in their judicial capacity in order to protect their interests and in order to take measures to protect and maintain their independence (public prosecutors and deputies) or their independence and autonomy (judges).

\subsection*{4.11.4. Association of Aliens}

The Act on Associations regulates activities of foreign associations in Serbia (in Chapter VIII).\textsuperscript{312} Under the Act, the branch office of a foreign association is entitled to operate freely in Serbia in the event its activities are in accordance with valid legal regulations.

For a foreign association to operate in Serbia, it must establish its branch office, which shall be entered in a separate register of foreign associations. This register shall also be kept by the Serbian Business Registers Agency.

The branch office of a foreign association shall be deleted from the register in the event either the foreign association or the branch office suspends its op-

\textsuperscript{308} The ECtHR in the case of Rekvény v. Hungary ECtHR, App. No. 25390/94 (1999), found that prohibiting police officers from belonging to political parties and taking part in political activities was not in contravention of Article 10 (freedom of expression) and Article 11 (freedom of association) of the ECHR. In view of this judgment, it may be said that the relevant legal provisions in principle impose permissible restrictions.


\textsuperscript{311} Sl. glasnik RS, 116/08, 104/09, 101/10 and 101/11.

\textsuperscript{312} A foreign association shall denote an association with headquarters in another state and established under the regulations of that state, as well as an international association or another foreign or international non-governmental organisation on condition that the members of the association or organisation associated to pursue a common or general interest or objective not directed at profit making.
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operations or the work of the branch office is prohibited pursuant to a Constitutional Court decision.

Like in the case of domestic associations, the decision prohibiting the work of the branch office of a foreign association shall be rendered by the Constitutional Court. The procedure for prohibiting a branch office of a foreign organisation may be initiated by the Government, Republican Public Prosecutor, the ministry charged with administrative affairs, the ministry charged with the field within which the association pursues its objectives or the person that registered the foreign association. The Constitutional Court shall prohibit the work of the branch office in the event its objectives or activities are in contravention of the Constitution, the Act on Associations, international treaties entered by Serbia or other regulations.

4.12. Peaceful Enjoyment of Property

Article 1, Protocol No. 1 to the ECHR:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

4.12.1. General

The right to property guaranteed by Article 1 of Protocol 1 to the ECHR is comprised of three different rules. The first rule, expressed in the first sentence of Article 1 (1), is general in nature and outlines the principle of peaceful enjoyment of property. The second rule, formulated in the second sentence of the same paragraph, regulates the deprivation of property and subjects it to certain conditions. The third rule, in para. 2, recognises the right of state parties to control the use of property based on public interest. According to ECtHR case law, the second and third rules should be interpreted in light of the general principle expressed in the first rule.313

In its case-law, the ECtHR has held that a balance between public interest and the rights of individuals must be found in every case of interference in the right to peaceful enjoyment of property. The question of monetary compensation does not arise only with respect to expropriation and may be sought also in the case of restrictions on the use of property.314

Article 58 of the Constitution of Serbia guarantees the right to property. The Constitution is mostly in compliance with international standards, especially with

respect to seizure of property, which, as it explicitly prescribes, shall be allowed only in public interest and if the owners are fairly compensated for the property. However, the provision allowing for the restriction of the right to enjoy property does not include a provision on the proportionality of such a restriction, which is in contravention of Serbia’s international obligations. Under the Constitution, the seizure or restriction of property to collect taxes and other levies or fines shall be permitted only in accordance with the law.

4.12.2. Expropriation

Serbian legislation fulfils the requirement to achieve a balance between public and private interests and to prevent violations of the rights to property by setting the following two prerequisites: that expropriation is in public interest and that fair compensation is granted for expropriated property.

The Expropriation Act 315 regulates the restriction and deprivation of the right to real estate constituting the most serious forms of interference in the peaceful enjoyment of property. Under the law, the Serbian government shall determine the existence of public interest by a decision. These individual decisions may be contested in an administrative dispute.

In addition to the Republic of Serbia, autonomous provinces, cities, municipalities, socially-owned and public companies, beneficiaries of expropriation also include companies established by public companies and companies in which the state has a majority holding and which were established by the Republic, autonomous provinces, cities, the City of Belgrade and municipalities.316

The Act does not bind the Serbian government to take into account the interests of the owner of the real estate or to examine whether his or her interest to keep the property and continue his or her activities overrides general interest (Art. 20). The manner in which the Serbian government has decided on the existence of public interest has in practice proved that it really did not take individual interest into consideration.

The administration of the municipality where the real estate in question is located shall conduct the proceedings pursuant to the expropriation proposal and render the appropriate order (Art. 29 (1)). Appeals of such orders shall be heard by the Serbian Ministry of Finance (Art. 29 (5)).

Under the Act, the beneficiary of expropriation may take possession before the finalisation of a decision on compensation for the property (i.e. before a contract on compensation is concluded) if the Ministry of Finance considers this necessary because of the urgency of the matter or construction work (Art. 35 (1)). The lan-

315 Sl. glasnik RS, 53/95 and 20/09.
316 This scope of beneficiaries of expropriation was expanded by the 2009 amendments to the Act (Sl. glasnik RS, 20/09). The amendments also extended the list of instances in which a public interest may be established.
guage of this provision is too general and imprecise to meet European standards. Under the ECHR, the law must, *inter alia*, provide protection from arbitrary decision-making by state bodies.317

The Expropriation Act does not provide for any time limit within which the previous owner of the expropriated real estate may file a request for annulment of an effective expropriation order.

Along with the condition that expropriation be performed in public interest, fair compensation is another prerequisite that must be fulfilled to avoid violation of the right to property. The Expropriation Act stipulates that fair compensation may not be lower than the market value of the real estate. The court shall decide on the compensation if the parties involved are unable to agree on an amount. Due to the length of the proceedings, the awarded compensation often does not reflect the market value of the real estate, because it is set by court experts who are not always able to follow increases in prices.

### 4.12.3. Restitution and Compensation of Former Owners

A general318 Property Restitution and Compensation Act (hereinafter: the Restitution Act)319 was at long last adopted in the last quarter of 2011. The restitution of property seized from the owners before the ECHR came into force is not an international obligation of Serbia under this international treaty and the state has full discretion to decide whether it will return the property, to whom, under what circumstances and to what extent, how and within which period.320 The restitution of property appropriated without paying its market value to the owners after World War II by the enforcement of regulations on nationalisation, the agrarian reform, confiscation, sequestration, expropriation and other regulations applied after 9 March 1945 should be viewed primarily in the context of Serbia’s accession to

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318 The state had earlier adopted laws governing specific types of property or owners: the Act on Recognition of Rights to and Restitution of Land Transformed into Socially Owned Property by Inclusion in the Farmland Fund or by Confiscation due to the Non-Fulfillment of Obligations Arising from the Obligatory Sale of Farm Produce (*Sl. glasnik RS*, 18/91, 20/92 and 42/98) allows for the restitution of farmland to its prior owners or their heirs. See also the Act on the Restitution of Property to Churches and Religious Communities (*Sl. glasnik RS*, 46/06). Specific laws govern the procedures for registering the taken property and owners. See: Act on Registration of Appropriated Property (*Sl. glasnik RS*, 45/05).

319 *Sl. glasnik RS*, 72/11.

the European Union. Namely, the provision of full certainty in property relations in Serbia is prerequisite for the participation of Serbian capital in the EU’s open market.\(^\text{321}\) It goes without saying that the enforcement of the adopted Restitution Act will have to be in accordance with the ECHR.\(^\text{322}\)

Therefore, although the state is in no way limited by the ECHR in governing restitution, it cannot regulate it in contravention of its own Constitution, under which everyone shall be equal before the Constitution and the law (Art. 21 (1)) and be entitled to equal legal protection (Art. 21 (2)). The BCHR is of the view that restitution in Serbia has to be regulated in accordance with the principles of fairness, prohibition of discrimination and economic plausibility.

The general Restitution Act governs the conditions, manner and procedure for the restitution of and compensation for the property which was appropriated from natural and specific legal persons in the territory of the Republic of Serbia by the enforcement of 42 regulations\(^\text{323}\) on agrarian reform, nationalisation, sequestration, and other regulations and nationalisation enactments after 9 March 1945, and transferred into people’s, national, state, social or cooperative property (Art. 1 (1)). The Act also applies to property seized during the Holocaust committed in the territory of the Republic of Serbia (Art. 1 (2)).

The right to restitution may be exercised by domestic natural persons, i.e. nationals of the Republic of Serbia who had owned the property at the time it was appropriated and their legal heirs (Art. 5 (1 (1))), owners already in possession of the property in the event they obtained it on the basis of an encumbered legal transaction (Art. 5 (1 (3))). The latter provision aims at eliminating the loss of material gain of owners who had practically bought their property back from the state. Under Art. 5 (1 (4)), persons who sold their property to the state at a value below the market rate are also entitled to restitution. With the exception of endowments,\(^\text{324}\) legal persons are not entitled to restitution under this Act. This is reasonable given that there are no legal persons that can be deemed the successors of the pre-WWII legal persons and the Act entitles natural persons who had owned pre-WWII legal persons to restitution or compensation. Finally, foreign nationals are entitled to restitution in accordance with the principle of reciprocity (Art. 5 (1 (5))). Reciprocity shall also apply to the nationals of states, which have not regulated property restitution, provided that the nationals of the Republic of Serbia may purchase and inherit real estate in those states. Foreign nationals are not entitled to restitution in the event they received compensation and/or were granted the right to property restitution by the foreign state even in the absence of an international treaty (Art. 5 (2)).

\(^{321}\) See Chapter 23 of the Responses to the EC Questionnaire and the answer to question 135 within the Political Criteria in the Questionnaire.


\(^{323}\) Article 2 of the Act comprises a detailed list of relevant regulations.

\(^{324}\) Art. 5 (1 (2)) of the Act.
Natural persons, who had fought within the occupying forces in the territory of the Republic of Serbia in WWII and their heirs, are not entitled to restitution either. This provision caused displeasure amongst the citizens of Serbia, mostly persons belonging to national minorities and foreign nationals, who claim that it reaffirms the principle of collective responsibility because it applies also to persons who were mobilised under duress as well as to persons who had not committed war crimes.\textsuperscript{325} The provision is unclear as it fails to enumerate which military and paramilitary formations are deemed occupying forces. Furthermore, it remains unclear whether it also applies to domestic organisations that actively cooperated with the occupying forces during WWII. Most of the shortcomings of this provision were eliminated by the adoption of the Rehabilitation Act,\textsuperscript{326} under which members of the occupying forces that had occupied parts of Serbia during WWII and members of quisling formations who had committed or participated in the commission of war crimes are not entitled to rehabilitation and restitution (Art. 2). It shall be deemed that a person had committed a war crime in the event he was convicted by a final court decision for a war crime by an authority under the control of the National Committee for the Liberation of Yugoslavia, other authorities of the Federal People’s Republic of Yugoslavia or the \textit{State Commission Ascertaining Crimes Committed by the Occupying Powers} and their Helpers in WWII unless it is established during the rehabilitation procedure that this person had been wrongfully convicted (Art. 2 (2)).

The Rehabilitation Act, however, does not eliminate all the shortcomings of the Restitution Act, given that it lays down that members of the occupying forces and quisling formations who had lost their lives in the armed conflicts during WWII in the Republic of Serbia may not be rehabilitated (Art. 1 (4)). According to the letter of the law, it appears that their involvement in war crimes is irrelevant, i.e. that their death in the ranks of the occupying forces and quisling formations is legally equated with war crimes, which is absurd. Furthermore, the Act does not elaborate which paramilitary formations are deemed quisling formations.

The Act explicitly prohibits the restitution of property to deceased victims of the Holocaust without legal heirs and sets out that the disposal of such property shall be governed by a separate law. This is the logical consequence of the fact that such property simply does not have living title-holders and that the general restitution rules thus cannot apply to it.

The Act gives precedence to restitution in kind and lays down that compensation shall be offered only when restitution in kind is impossible (Art. 8 (1)). Paragraph 2 of this Article allows for the restitution of property to an owner whose property is held by a private person and requires of the holder and the owner to establish

\begin{itemize}
\item \textsuperscript{325} “Serbia Adopts Restitution Act, Owners Dissatisfied”, Radio Free Europe, 26 September 2011, available in Serbian at http://www.slobodnaevropa.org/content/srbija_usvojila_zakon_o_restituciji/24340687.html.
\item \textsuperscript{326} \textit{Sl. glasnik RS}, 92/11.
\end{itemize}
a lease agreement at the going market rate. Restitution of movable and immovable property is not possible if it was sold to a private owner after it was nationalised; the former owners of such property shall be granted compensation. This provision prevents unfair treatment of conscientious holders and owners of the property and appears to be a proportionate solution ensuring legal certainty, economic rationality and equal respect for the rights of all citizens. It also prevents the reversal of the effects of privatisation.

Owners may receive compensation only for immovable and movable property. Economic rationality simply does not allow for the recovery of lost profits and expectation damages, wherefore the Act explicitly rules out such a possibility (Art. 14).

Under the Act, restitution shall apply to movable and immovable property that is the public property of the Republic of Serbia, an autonomous province or a local self-government unit in state, social or cooperative ownership except for the property owned by a co-operative and property in social and cooperative ownership which the holder acquired for a fee. The following nationalised real estate shall be subject to restitution: construction and farm land, forests and forestland, residential and commercial buildings, apartments and business facilities and other real property that existed on the day the Act came into force. Nationalised movable property entered in the public register as well as other movable property categorised as cultural property or cultural property of great or exceptional significance under the regulations on cultural property that existed on the day the Act came into effect shall also be subject to restitution. Real property shall be recovered without mortgage encumbrances. Claims secured by the mortgage shall be guaranteed by the Republic of Serbia. Existing personal servitude shall cease to exist whilst the existing real servitude constituted in favour or at the expense of the real property shall not cease to exist (Art. 21). These provisions satisfy the legal certainty and fairness requirements.

The Act enumerates which immovable and movable property, including state companies, shall not be subject to restitution (Art. 18). The former owners of state companies are entitled to compensation, in the form of government bonds of the Republic of Serbia and in cash for the payment of advance compensation (Art. 30). The total amount of compensation may not jeopardise the macroeconomic stability and economic growth of the Republic of Serbia, wherefore the state allocated a total of two billion EUR for compensation plus the sum of accrued interests for all compensation beneficiaries, calculated at an interest rate of 2% per annum, for the period from 1 January 2015 to the maturity dates set by the Law (Art. 30 (2)). The compensation amount shall be set in EUR by multiplying the compensation base with the coefficient equalling the ratio of the two billion EUR and the total sum of individual compensation bases determined in decisions granting the right to compensation plus the estimated undetermined bases (Art. 31 (1)). Assessments are that the compensation bases total around 4.5 million EUR, two times more than the 2
billion EUR specified in the Act. The base value of the compensation is set pursuant to the market value of the property on the day of its assessment (Arts. 32-34). One owner may receive compensation not exceeding 500,000 EUR. This restriction was set in order to protect public interests (Art. 31 (3 and 4)).

The Act lays down a separate restitution/compensation administrative procedure, which is conducted before the Restitution Agency (Arts. 39-50). An Agency decision may be appealed in administrative proceedings, while a second-instance administrative decision may be challenged in an administrative dispute (Art. 48). Reviews of administrative disputes shall be urgent (Art. 48 (4)).

The Serbian restitution system established by the Restitution Act and related laws generally appears to satisfy the requirements regarding the prohibition of discrimination (apart from the specific provisions elaborated above), the respect for legal certainty and fairness. Furthermore, the restitution procedure guarantees the right to a legal remedy, wherefore it satisfies this aspect of human rights protection as well. It remains to be seen to what extent the system is actually based on the principle of economic rationality. At first glance, it seems that the state will have difficulties fulfilling its obligations, but it remains to be seen how the laws will be applied in practice and what arrangements the Republic of Serbia will be able to conclude with international financial institutions given that restitution in Serbia will simply be impossible without their support.

4.12.4. Specially Protected Tenancy

Specially protected tenancy is a specific form of the right to housing created in the former Yugoslavia that applied both to socially and privately owned apartments. The Serbian Housing Act regulates for the most part the manner in which the institute will gradually disappear from the Serbian legal system.

After the socially owned apartments were bought by their tenants and became private property (in accordance with two housing laws passed in the early nineties entitling the holders of specially protected tenancy to buy the apartments at favourable prices), specially protected tenancy in Serbia has applied only in cases of privately owned apartments appropriated in an administrative procedure by 1973 and was transformed into the right of rent but specific administrative restrictions were set, notably with respect to rent amounts and termination of tenancy. The position created in Serbian case-law is that the special protected tenancy on privately owned apartments cannot be awarded to persons born after 1973 notwithstanding the fact that they have lived in the joint household with the last holder of the specially pro-

328 Sl. glasnik RS, 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 48/94, 49/95, 16/97, 46/98, 26/01 and 99/11.
tected tenancy right. This institute will therefore naturally “die out”. The question remains whether there will be violations of the right to the peaceful enjoyment of property of a person, who was born after 1973 and has lived his or her entire life in the apartment but received an eviction order after the death of the holder of the special protected tenancy right because he or she was unable to transfer this right to him or her self.

Due to the unresolved issue of restitution, the Housing Act residents of privately owned apartments in a subordinate position vis-à-vis the holders of tenancy rights to socially-owned apartments, who have had the possibility of buying the apartments they lived in at a discounts and fully disposing of them. In the 1945–1990 period, residents of privately owned apartments were considered to have solved the housing problem and were unable to apply for socially-owned apartments.

4.13. Minority Rights

Article 27, ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

4.13.1. General

Serbia ratified the most significant universal and regional instruments guaranteeing, directly or indirectly, minority rights and freedoms, including the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages defining the minimum protection guaranteed to minority groups. The CoE Advisory Committee on the Framework Convention for the Protection of National Minorities (hereinafter Advisory Committee) has to date adopted two opinions on Serbia and is scheduled to visit it again in September 2012.

The Constitution was adopted “considering the state tradition of the Serbian people and equality of all citizens and ethnic communities in Serbia” (Preamble), and defines Serbia as the “state of the Serbian people and all citizens who live in it, based on ... human and minority rights and freedoms...” (Art. 1). Thus, the ethnic and not the civil definition of Serbia as a state of primarily the Serbian people and, secondarily, all other peoples has prevailed. Although the Venice Commission took a neutral view on this definition in the Constitution, one should bear in mind the

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330 Specially protected tenancy for these housing units were established by laws valid at the time: the 1945 Act on the Disposition of Apartments and Business Premises, the 1959 FNRY Act on Housing Relations, and the 1973 Serbian Act on Housing Relations.

331 The FRY acceded to some agreements by succession (as the ex-SFRY was a party to them); others were acceded to by the State Union of Serbia and Montenegro.

332 The Venice Commission is of the opinion that “(W)hile this definition may be criticised for emphasising the ethnic character of the state, no legal consequences should follow from it in
fact that comparison of constitutional law practice has shown that such appropriation of the state by the majority nation has frequently impacted on the state bodies’ attitude towards minority problems in practice.

4.13.2. Definition of a Minority

The status of minorities in Serbia is primarily governed by the Constitution of the Republic of Serbia but it does not provide a definition of an ethnic minority. Serbia does not have a separate law on minority protection. The Act on the Protection of the Rights and Freedoms of National Minorities (hereinafter: Minority Protection Act)\(^{333}\) was adopted while Serbia was still part of the Federal Republic of Yugoslavia and continued to apply in the territory Serbia after Montenegro left the State Union in 2006.

The Minority Protection Act defines a national minority in the following manner in Art. 2 (1):

“a group of citizens of (...)sufficiently representative, although in a minority position on the territory (...), belonging to a group of residents having a long term and firm bond with the territory and possessing some distinctive features, such as language, culture, national or ethnic belonging, origin or religion, upon which it differs from the majority of the population, and whose members should show their concern over preservation of their common identity, including culture, tradition, language or religion.”

Within the meaning of this Act, national minorities shall comprise also “(...) all groups of citizens who consider or define themselves as peoples, national and ethnic communities, national and ethnic groups, nations and nationalities, and who fulfil the conditions specified in paragraph 1 of this Article” (Art. 2 (2)). Judging by this definition, only citizens of Serbia, but not immigrants or non-citizens, may be considered persons belonging to national minorities. In its Opinions, the Advisory Committee of the Council of Europe noted that limiting the scope of the term national minority to citizens only may have a negative impact for example on the protection of those Roma or other persons whose citizenship status, following the break-up of Yugoslavia and conflict in Kosovo, has not been regularised and who, in the absence of personal documentation, have had difficulties in obtaining confirmation of their citizenship, and therefore called on the Serbian authorities to remove the citizenship criterion.\(^{334}\) The Venice Commission took the same view in its 2006 Report on Non-Citizens and Minority Rights.\(^{335}\)

The Serbian authorities are of the view that “leaving out citizenship from the definition of a national minority would beyond reasonable doubt open the possibil-

\(^{333}\) Sl. list SRJ, 11/02.

\(^{334}\) Paragraph 37 of the Advisory Committee Second Opinion on Serbia.

ity that other, not only vulnerable categories of the population the Committee points out to with all reasons, might be included in the protection of minorities for which in the Republic of Serbia there is neither any need nor economic capabilities (the immigrant labour from Asian countries, asylum seekers, etc.). Given that Article 2 of the Minority Protection Act defines as national minorities only groups of citizens with a long term and firm bond with the territory of the Federal Republic of Yugoslavia (now Serbia), the Government’s apprehensions are manifestly groundless because only those persons whose citizenship status has not been regularised after the disintegration of the SFRY, mostly Roma, may fall under the legal regime protecting national minorities. This is why eliminating the citizenship criterion from the definition of a national minority cannot produce any negative effects, but it may improve the status of undoubtedly vulnerable groups of the population to an extent.337

4.13.3. Protection of the Rights and Equality of National Minorities

The articles in the section of the Constitution entitled Constitutional Principles stipulate that the Republic of Serbia shall protect the rights of national minorities and guarantee special protection to national minorities so that they can realise full equality and preserve their identity (Art. 14). Alongside rights guaranteed to all citizens, the Constitution guarantees persons belonging to minorities “additional individual and collective rights” in a separate, third section of Chapter II.

4.13.3.1. Equal Participation in the Administration of Public Affairs and Political Life. – In addition to provisions entitling all citizens to participate in the administration of public affairs and hold public offices on an equal footing (Arts. 53 and 77 (1)), the Constitution of Serbia stipulates that the state, provincial and local authorities and public services shall take account of the ethnic breakdown of the population and of the appropriate representation of national minorities when recruiting staff (Art. 77 (2)). The Minority Protection Act includes a similar provision, although there are no records on the representation of national minorities in the state administration and it is practically impossible to establish whether the regulations adopted to increase such representation are respected in practice.338

The Act on Political Parties339 defines a national minority party as a party “whose activities, defined by its Articles of Association, programme and statute, are particularly directed at presenting and advocating the interests of a national minority and the protection and promotion of the rights of the persons belonging to that particular national minority in accordance with the Constitution, law and interna-

336 Government of Serbia Comment of paragraph 35 of the Advisory Committee Second Opinion on Serbia.
337 More on the status of persons who have not realised their right to citizenship in I.4.15.2, II.3. and II.4.5.
339 Sl. glasnik RS, 36/09.
tional standards” (Art. 3). A national minority party may be established by 1000 adult able-bodied citizens (Art. 9), i.e. it needs a tenth of the signatures required for registering political parties which are not national minority parties. The so-called election threshold does not apply to national minority parties and they are awarded seats even if they did not win 5% of votes cast.

4.13.3.2. Expression of Ethnic Affiliation. – The Constitution of Serbia guarantees the freedom of expression of ethnic affiliation (Art. 47). The Minority Protection Act comprises a corresponding but more detailed provision; Article 5 (1) stipulates that no one shall suffer damage or injury due to his/her affiliation or expression of national background or due to associating theretofore.\textsuperscript{340} Collection of ethnicity related data must be legally protected and the persons, whose data are gathered, must be informed that the imparting of such data is voluntary.\textsuperscript{341} Article 16 of the Personal Data Protection Act\textsuperscript{342} defines data related to ethnicity, race, language and religion as “particularly sensitive data”. Such data may be processed only with the written consent of the data subject; the consent shall specify the designation of the data being processed, the purpose of the processing, and the manner of use (Art. 17). A violation of the freedom of expression of national or ethnic affiliation shall carry a fine or maximum one-year imprisonment; in the event it is committed by a public official in the performance of duty, it shall carry a prison sentence of maximum three years (Art. 130, CC).

Under the Population, Household and Housing Census Act\textsuperscript{343} the census form shall include open-ended questions on nationality and native language and the respondents are entitled not to declare their religion (Art. 27). The census was conducted on 1-15 October 2011.

4.13.3.3. Preservation of the Identity of Minorities. – The Constitution guarantees minorities the right to the expression, preservation, fostering, development and public expression of national, ethnic, cultural, religious specificities; the rights to use their symbols in public and their languages and scripts, including in specific administrative proceedings; the right to education in their own languages in public institutions and institutions of autonomous provinces; the right to full, timely and objective information in their languages and to establish their own media, in accordance with the law, etc (Art. 79 (1)). The Constitution prohibits forced assimilation and measures that may result in the artificial change of the ethnic composition of the population living in areas in which national minorities have been living traditionally and in large numbers (Art. 78 (3))\textsuperscript{344} and the right to free and unimpeded contacts and cooperation with their ethnic kin living outside Serbia (Art. 80 (3)).

\textsuperscript{340} The Framework Convention deals with this issue identically (Art. 3 (1)).
\textsuperscript{341} Advisory Committee Opinion on SaM, n. 4, para. 27.
\textsuperscript{342} \textit{Sl. glasnik RS}, 97/08 and 104/09.
\textsuperscript{343} \textit{Sl. glasnik RS}, 104/09 and 24/11.
\textsuperscript{344} This provision is important given such developments in the recent past.
Constitution of Serbia allows persons belonging to national minorities to establish educational and cultural associations funded on a voluntary basis with a view to preserving and developing national and cultural specificities (art. 80 (1)). Under the Minority Protection Act, the state is to provide such assistance in accordance with its funding abilities, to ensure public service broadcasts of cultural content in the languages of national minorities. State museums, archives and institutions charged with the protection of cultural heritage are obliged to ensure the exhibition and protection of the cultural and historical heritage of minorities in their territory and involve representatives of minority national councils in decisions on the manner of presenting minority cultural and historical heritage (Art. 12). Under the Culture Act, national councils of national minorities shall be charged with the implementation of national minority culture policies and shall participate in the decision making process or themselves decide on specific issues related to their cultures, establish cultural institutions and other legal persons dealing with culture in accordance with the law (Art. 5).

The Act on Churches and Religious Communities also regulates the status of minority churches and religious communities. Although this Act in principle guarantees the equality of religious confessions in the territory of Serbia, a number of its provisions essentially violate the declared equality by not treating the religious communities equally.

4.13.3.4. Use of Language. – The Constitution sets out that the Serbian language and Cyrillic script shall be officially in use in the Republic of Serbia and that the official use of other languages and scripts shall be regulated by the law. Under the Act on the Official Use of Languages and Scripts, municipalities inhabited by persons belonging to nationalities shall establish in their statutes when languages of nationalities shall also be officially in use in their territories (Art. 11). The official use of languages and scripts in the AP of Vojvodina, inhabited by the greatest number of minorities, is governed also by the Decision on the detailed regulation of specific issues related to the official use of languages and scripts of national minorities in the AP of Vojvodina. The AP of Vojvodina Statute sets out that the Serbian Language and Cyrillic Script and the Hungarian, Slovak, Croatian, Romanian and Ruthenian languages and scripts shall be officially used in the AP Vojvodina authorities and organisations (Art. 26).

Apart from languages officially used in the territory of AP Vojvodina, Albanian, Bosniak and Bulgarian are in official use in several other Serbian municipalities.

The Official Birth, Death and Marriage Registries Act allows for entering the name of a person belonging to a national minority into the birth, death and

345 Sl. glasnik RS, 72/09.
346 More in I.4.8.
347 Sl. glasnik RS, 45/91, 53/93, 67/93, 67/93, 48/94, 101/05 and 30/10.
348 Sl. list APV, 17/91.
349 Sl. glasnik RS, 20/09.
marriage registries in the language and script of the national minority regardless of whether the minority language is officially used in the local self-government unit whose authority is entering the data (Art. 17). The name shall simultaneously be entered in the registry also in the Serbian language and the Cyrillic script.

Under the Act on the Basis of the Education System, persons belonging to national minorities shall be schooled in their native languages, and, exceptionally bilingually or in the Serbian language (Art. 9 (2)).

Article 129 of the Criminal Code incriminates violation of the right to use one’s own language and script.

4.13.4. Special Protection of Minorities in the Statute of the AP of Vojvodina

The Constitution explicitly allows autonomous provinces to guarantee additional rights to national minorities (Art. 79 (2)). The AP of Vojvodina Statute comprises more detailed provisions on the protection of minorities than the Constitution. Apart from guaranteeing national equality in Article 6, the Statute defines multilingualism, multiculturalism and multi-religiousness as “a universal value of particular interest to the AP of Vojvodina” (Art. 7) and establishes the duty of all provincial authorities and organisations “to foster and facilitate protection and development of multilingualism and the cultural heritage of national communities traditionally living in the AP of Vojvodina, as well as to support mutual respect and familiarisation with different languages, cultures and religions in the AP of Vojvodina, within the scope of their rights and duties”. The Statute guarantees special protection of all rights guaranteed national minorities and persons belonging to national minorities by the enactments of the Republic of Serbia (Art. 22). It also entitles the AP of Vojvodina to establish additional or supplementary rights i.e. establish a higher level of protection of rights of persons belonging to national communities constituting a numerical minority in the total population of the AP of Vojvodina (Art. 23 (3)). Moreover, the Statute lays down that the AP of Vojvodina shall monitor the realisation of human and minority (individual and collective) rights and ensure their realisation and protection when such protection is not afforded at the republican or local level (Art. 23 (3)).

The Vojvodina Statute also lays down the obligation of the Vojvodina government to undertake special measures and activities pursuant to a Vojvodina Assembly decision to ensure their proportional representation in specific authorities or organisations (Art. 24).

The Advisory Committee noted considerable discrepancies in the implementation of minority rights between the Province of Vojvodina, where regulations and relevant practice relating to minority language use and education are more advanced, and other parts of the country where minorities are living in substantial numbers such as Sandžak, South Serbia and East Serbia. In its reply, the Government stated that the existing differences “should neither be taken nor interpreted as
the differences between the Autonomous Province of Vojvodina and other regions, which do not enjoy the political territorial autonomy but as the differences existing between certain units of the local self-government”. “Such differences, which are most frequently the failure to introduce certain minority languages in the official use, or the failure to have certain forms of the official use or education in the languages of the national minorities, are not, according to the opinion of the authorities of the Republic of Serbia, dramatic nor of essential importance,” the Government concludes. This is true, but it is also true that the provincial authorities have devoted greater attention to issues relevant to minority rights.350

4.13.5. Prohibition of Discrimination and Prohibition of Incitement to Racial, Ethnic, Religious or Other Inequality, Hatred or Intolerance

Apart from the general prohibition of discrimination (Art. 21), the Constitution includes a separate provision in Article 76 (2) and bans discrimination on the grounds of belonging to a national minority. It expressly allows for affirmative action measures i.e. the introduction of special regulations and interim economic, social, cultural and political measures for the achievement of the full equality of persons belonging to national minorities and the majority nation. However, these measures may be undertaken only “if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them” (italics added). The Anti-Discrimination Act is to ensure the protection of equality guaranteed by the Constitution. The AP Vojvodina Statute (Art. 20) and the Act on the Basis of the Education System (Art. 44) also prohibit discrimination and envisage positive discrimination measures.

The Constitution expressly prohibits the incitement to racial, ethnic, religious or other inequality, hatred or intolerance (Art. 49). Serbian criminal legislation treats as criminal offences and prescribes penalties for violations of minority rights, discrimination, and incitement to or fomenting of racial, ethnic or other forms of hatred in a number of provisions. The Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia prohibits instigation to, incitement or dissemination of hate or intolerance of persons belonging to any nationality, national minority, church or religious community, and prohibits propagation or justification of ideas, actions or conduct for which persons have been convicted of war crimes (Art. 4).

4.13.6. National Councils

The Constitution guarantees persons belonging to national minorities the right to elect their national councils in keeping with the law in order to realise their right to self-governance in culture, education, informing and official use of language

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and script (Art. 75 (3)). National councils, as institutions of cultural autonomy with specific public and legal powers, were introduced by the Minority Protection Act\textsuperscript{351} but their powers and election were regulated in greater detail only when the Act on National Councils of National Minorities (hereinafter: National Councils Act) was adopted.\textsuperscript{352}

ELECTIONS OF NATIONAL COUNCIL MEMBERS

Elections of national council members will be held every four years. The Act provides for direct and indirect elections via electoral assemblies. A separate voter register shall be kept for every national minority; citizens fulfilling the general requirements for acquiring the right to vote may register in them. The national council of a national minority shall be elected directly when the number of persons belonging to the national minority and registered in the voter register exceeds 40% of the number of citizens who declared themselves as persons belonging to that minority at the last census. National councils of minorities that have not fulfilled this requirement shall be elected at electoral assemblies (Art. 29). The status of elector shall be granted a member of a national minority who has collected 100 signatures or been appointed elector by a national minority organisation or association (Art. 102). The first elections for the National Councils were held in June 2010.\textsuperscript{353}

A national council shall represent a national minority in the fields of education, culture, information in the language of the national minority and the official use of the language and script of the national minority, and it shall participate in the decision making process or decide on issues in these fields and establish institutions, undertakings and other organisations in these fields (Art. 2 (2)). A national council may establish institutions, associations, foundations, undertakings in the fields of culture, education, information and official use of language and script and other fields of relevance to the preservation of the identity of a national minority (Art. 10 (6)). A national council may initiate proceedings before the Constitutional Court, Protector of Citizens, provincial and local ombudspersons and other competent authorities in the event it assesses that the rights and freedoms of persons belonging to national minorities and guaranteed by the Constitution or law have been violated (Art. 120 (12)). A national council may initiate proceedings before these authorities also on behalf a person belong to a minority with his/her written consent (Art. 10 (13)).

A national council may cooperate with international and regional organisations, the state authorities, organisations and institutions in ethnic kin states and the national councils and similar national minority bodies in other states. Representatives of a national council may also take part in negotiations or shall be consulted

\textsuperscript{351} Although highlighting the importance of introducing national councils in the SaM legal system, the Advisory Committee maintains it is important they are not perceived as the sole and exclusive interlocutor of the authorities in minority questions and that other relevant actors – including NGOs and associations of national minorities – are brought into the relevant decision-making processes; Advisory Committee Opinion on SaM, n. 4, para. 109.

\textsuperscript{352} Sl. glasnik RS, 72/09.

\textsuperscript{353} More in the Report 2010, II.2.2.5.1.
in negotiations regarding bilateral agreements with ethnic kin states with respect to provisions directly regarding rights of national minorities (Art. 27).

Under the Act, national councils shall participate in the procedure for selecting projects and programmes in the fields of culture, education, informing and the official use of languages and scripts of national minorities by way of a public tender. The projects and programmes will be funded from the budget fund for national minorities. The Government in 2009 enacted a new Decree on the Council of National Minorities of the Republic of Serbia, which is to monitor and review the realisation of minority rights and inter-ethnic relations in Serbia.

The Culture Act, the Act on the Basis of the Education System and the Vojvodina Statute specify the matters national councils may decide on or be consulted about and the competences that may be transferred to national councils. Article 14a of the Public Information Act, prohibiting founders of media from transferring their rights (the rights to establish and operate a media outlet) to other persons, and thus to national councils, is not in compliance with the National Councils Act which allows for such transfers in Article 11 (3).

4.14. Political Rights

Article 25, ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 3, Protocol No. 1 to the ECHR:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.


In addition to the right to vote, the ICCPR and the ECHR acknowledge the rights of citizens to be elected. ICCPR also acknowledges the rights of citizens to have access, on general terms of equality, to public service in their country.
to participate in the conduct of public affairs and to have access, on general terms of equality, to public service in their country. These rights may be restricted. The ICCPR insists the restrictions cannot be unreasonable, while the ECtHR found that the right of a citizen to be elected may be subjected to qualification requirements as long as they are not discriminatory.\textsuperscript{359}

The Constitution proclaims the sovereignty of the people, and that suffrage is universal and equal (Arts. 2 and 52). Every adult citizen with a working capacity shall be entitled to vote and to be elected (Art. 52 (1)). The Constitution guarantees all citizens the right to participate in the administration of public affairs, to employment in public services and to hold public office under equal conditions (Art. 53).

The constitutional provision provides concrete principal guarantees of direct democracy and prescribes the popular initiative for adoption of legislation and for amending the Constitution. In Serbia, the right to propose a law, other regulation or general act belongs to 30,000 voters (Art. 107). The proposal to change the Serbian Constitution may be submitted by at least 150,000 voters.

\subsection*{4.14.2. Electoral Rights}

Under the Constitution, every adult citizen of the Republic of Serbia with a working capacity shall have the right to vote and be elected. Elections shall be free and direct and voting shall be by secret ballot and in person (Art. 52). Whether a person may vote and be elected to a public office depends on whether he or she is entered in the voter registers. Persons fully or partly deprived of legal capacity are not entered in the Single Voter Register. This is not in keeping with the view that the comprehensive and automatic restriction of the right to vote of persons placed under partial guardianship constitutes a violation of the ECHR.\textsuperscript{360} The Act on a Single Voter Register\textsuperscript{361} introduces a single nationwide voter register, a public document kept \textit{ex officio} by the ministry charged with administrative affairs, which maintains a single electronic database of all citizens of Serbia with the right to vote. This Act is expected to enable the establishment of an accurate, updated nationwide register of all voters in Serbia before the next regular parliamentary elections.\textsuperscript{362}


\textsuperscript{361} Sl. glasnik RS, 104/09 and 99/11. The Act came into effect eight days upon publication but its enforcement was put off for two years, until December 2011. The single voter register was not, however, completed by end of 2011.

In the event the single voter register is completed by May 2012, when parliamentary elections are to be held at the latest, every voter will be able to vote anywhere in the country. In the event the elections are held earlier or the single voter register is not operational by election day, citizens will be able to vote in their places of residence, like before.

4.14.2.1. Electoral Procedures. – The electoral procedures are governed in detail by the Act on the Election of Assembly Deputies (AEAD),363 the Local Elections Act (LEA),364 the Act on the Election of the President of the Republic,365 and the Decision on the Election of AP Vojvodina Assembly Deputies (DEVD).366

In addition to the electoral statutes, rules governing the election procedure are to be found also in the decisions of the electoral commissions. These commissions supervise the legality of the election process and the uniform application of the electoral statutes, appointment of the permanent members of the electoral commissions in the election districts, the appointment of members of polling committees (bodies directly administering elections), and hand down instructions for the work of other permanent electoral commissions (if any)367 and polling committees. The Republican Election Commission (REC) is also empowered in the first instance to review complaints against decisions, actions or omissions by polling committees (under Art. 95 (2)), AEAD). Pursuant to the provisions of the election laws, bodies administering elections are independent. However, the legal provisions under which the bodies charged with conduct of elections are accountable to the body that appointed them (Art. 28 (2), AEAD and Art. 11 (3), LEA) are disputable. Since municipal election commission members are appointed by the municipal assemblies, the inclusion of representatives of political parties in some municipal commissions was seen as membership on the basis of the political balance in the respective municipality, and resulted in those commissions taking decisions along political lines.

The election board determines the overall number of votes received by each election list (elections at all levels are conducted according to the proportional representation system except in Vojvodina, where a mixed system is applied) and, in proportion with the number of votes received, establishes the number of mandates belonging to each election list, on the basis of D’Hondt system. Mandates are allocated only to election tickets that have won at least 5% of votes of the overall

363 Sl. glasnik RS, 35/00, 57/03, 72/03, 18/04, 101/05, 85/05, 104/09 and 36/11.
364 Sl. glasnik RS, 129/07, 34/10 and 54/11.
365 Sl. glasnik RS, 111/07 and 104/09.
366 Sl. list AP Vojvodine, 12/04, 20/08, 5/209, 18/09 and 23/10.
367 The Republican Election Commission and the election boards are the authorities charged with implementing republican parliamentary elections, while the local government unit election commissions and election boards are charged with implementing local elections (See Arts. 28–38, AEAD and Arts. 11–17, LEA). All three – the Republican Electoral Commission, the local government unit election commissions and election boards – are charged with the implementation of presidential elections (Art. 5, Act on the Election of the President of the Republic).
number of voters who have voted in the electoral district.\textsuperscript{368} Half of the deputies in the Vojvodina Assembly are elected under a proportional and half under the majority election system (Art. 5 (3), DEVD).

\textbf{4.14.2.2. Terms of Office of National Deputies (Termination and Resignations).} – The Constitution of the Republic of Serbia states that the election, termination of office and status of national deputies shall be governed by the law but simultaneously entitles a national deputy to irrevocably place his mandate at the disposal of the political party on whose election ticket he ran under legally defined circumstances (Art. 102 (2). The Act on the Election of Assembly Deputies defines in detail when the term of office of a Serbian Assembly deputy shall terminate.

At its session in April 2011, the Constitutional Court of Serbia reviewed the constitutionality of the AEAD and declared unconstitutional Article 84 of the Act.\textsuperscript{369} This Article envisaged that the submitter of the election ticket would notify the Republican Election Commission which of its candidates on the ticket would be allocated the seats, and, in the event it failed to do so within the set deadline, the Republican Election Commission would allocate all the seats the ticket won to the candidates by their order of presentation on the ticket.

The Act Amending the AEAD\textsuperscript{370} replaces the unconstitutional Article by a new Article 84, under which the Republican Election Commission shall allocate all the seats an election ticket won to the candidates by their order of presentation on the ticket within ten days from the day all election results are published. The Assembly adopted amendments to the Local Elections Act\textsuperscript{371} in July 2011, which also envisage that the seats in the local parliaments shall be allocated to the candidates according to their order of presentation on the ticket. A councillor shall personally submit his or her resignation to the local assembly chairperson and his/her seat shall be allocated to the next candidate on the election ticket.

The latest amendments to the election laws put an end to a much disputed practice of political parties to require of their candidates to sign “blank resignations” in advance. The practice had been based on a legal provision under which a deputy’s mandate terminated if his or her membership in the political party or the coalition on whose ticket s/he ran had terminated.\textsuperscript{372}

\begin{itemize}
\item \textsuperscript{368} The election threshold of 5\% does not apply to national minority political parties (Art. 81, AEAD; Art. 40, LEA and Art. 74, DEVD).
\item \textsuperscript{369} Statement issued after the 17\textsuperscript{th} Regular Session of the Constitutional Court, held on 14 April 2011; available in Serbian at the Constitutional Court website: http://www.ustavni.sud.rs/page/view/149-101418/saopstenje-sa-17-redovne-sednice-ustavnog-suda-odrzane-14-aprila-2011-godine-kojom-je-predsedavao-dr-dragisa-slijepcevic-predsednik-ustavnog-suda.
\item \textsuperscript{370} \textit{Sl. glasnik RS}, 36/11.
\item \textsuperscript{371} \textit{Sl. glasnik RS}, 54/11.
\item \textsuperscript{372} More in Report 2010, 4.14.5.3.
\end{itemize}
4.14.2.3. Legal Protection of Electoral Rights. – According to the European Court of Human Rights, electoral and political rights are not “civil rights” in the sense of the right to a fair trial in Article 6 of the European Convention, and guarantees of a fair trial do not apply to procedures of reviewing the lawfulness of the conducted elections.

Election laws provide for a basic legal remedy that ensures legal protection in the electoral process – the complaint that each voter or participant in the election may lodge with the competent election commission. The AEAD lays down that a complaint shall be filed with the Republican Electoral Commission for “a violation of the electoral right during the elections or irregularities in the procedure of nomination or election” (italics added) (Arts. 95 and 52, LEA). Legal protection is linked to the period in which the elections are being held and solely applies to the protection of the right to vote in this process. It does not include the protection of the right to vote outside the election process, e.g. the protection of the passive right to vote in case of the early termination of mandates.

The 24-hour deadline for submitting complaints on an election board decision is reckoned from the moment the decision is reached (Art. 95, AEAD and Art. 52, LEA). Such a short deadline gives rise to concern as the right of complaint may easily be lost in the event the complainant is not informed of the decision on time.

The electoral statutes provide also for the possibility of appeal against the decisions of the competent electoral commissions to dismiss or reject a complaint: to the Administrative Courts through competent electoral commissions. The laws prescribe that procedures before courts are urgent – decisions are taken within 48 hours since the receipt of an appeal.

Under the Constitutional Court Act, motions to review election disputes may be filed with the Constitutional Court within fifteen days from the day the challenged election dispute ended. The whole part of the Act devoted to the decision making on these matters is unclear and inapplicable in the present political circumstances given that the Act foresees that “(T)he Constitutional Court shall annul the whole election procedure or part of the procedure, which shall be precisely specified, in the event an election procedure irregularity that significantly affected the election results has been proven” (Art. 77). This provision may lead to additional legal uncertainty of the election process. It is very difficult to imagine the Constitutional Court annulling elections and the whole election procedure being repeated.

375 Provisions of the Act on the Election of Assembly Deputies are accordingly applied to the presidential election procedure (Art. 1, Act on the Election of the President of the Republic).
4.14.3. Participation in the Conduct of Public Affairs

The sovereignty of the people calls for building maximally efficient systems for civic participation in decision making. The Constitution of Serbia also recognises popular initiative as an instrument for achieving Article 2 (2) of the Constitution vesting sovereignty in the people. Under the Constitution, the National Assembly shall call a referendum at the request of the majority of all national deputies or at least 100,000 voters. The Constitution lays down which issues may not be decided at referenda: obligations arising from international treaties, laws relating to human and minority rights and freedoms, tax and other finance-related laws, the budget and annual statements of accounts, introduction of a state of emergency, amnesty and the National Assembly powers related to elections (Art. 108).

Referendums and popular initiatives are governed in greater detail by the restrictive Referendum and Popular Initiative Act, which does not mention all types of referendums mentioned in the Constitution of Serbia. Furthermore, the Act stipulates that thirty thousand signatures need to be collected within seven days for a popular initiative, but does not provide strong guarantees that the Assembly will discuss such an initiative. A new law on referendums and popular initiatives has not been passed yet, although the Constitutional Act on the Implementation of the Constitution envisaged the harmonisation of this law with the Constitution by 2009.

The Ministry for Human and Minority Rights, State Administration and Local Self-Government drafted a new law on referendums and popular initiatives, which was commented by the Venice Commission. A public debate of the draft law was held on 1 June 2011. The draft law merely entitles the citizens to propose laws, but does not elaborate this right, which prompted a group of NGOs to launch a joint initiative to amend it. The proposed amendments, submitted to the Ministry for Human and Minority Rights, State Administration and Local Self-Government, would allow the citizens to influence the legislative process more directly. They provide for electronically launching and signing popular initiatives and transparent reviews of popular initiatives. The NGOs also proposed provisions governing the funding of referendum and popular initiative campaigns, which would improve the fight against corruption, and providing for judicial protection of the right to submit a popular initiative. The draft law had not been submitted to parliament for adop-

376 Sl. glasnik RS, 48/94 and 11/98.
tion by end 2011. No information was available on whether any headway had been made in drafting a law on lobbying, which would help institutionalise the relationship between the citizens and their representatives in parliament.

4.14.3.1. Restrictions on Performing a Public Office. – The Responsibility for Human Rights Violations Act,380 adopted in 2003 with the aim of temporarily preventing persons who had consciously violated human rights in the previous undemocratic regimes from discharging a specific public office. Under the Act checks into violations of rights are made by perusing the files of the Security Intelligence Agency, the police, the judiciary and other official documents.

Due to political disputes, however, the lustration commission charged with implementing the vetting procedure never began working. The full complement of the commission membership was never appointed and it was never afforded the basic working conditions. Given such lack of support from the authorities, nearly all the commission members resigned in 2004. Their resignations were never reviewed by the National Assembly. Apart from the technical requirements, the adequate enforcement of the Act necessitates the adoption of a law on the opening of secret files.381 The draft submitted by the Serbian Renewal Movement in December 2010 has not been submitted to parliament yet.382

A group of deputies submitted amendments to the Act, under which it would also apply to violations of the 2003 Human and Minority Rights Charter and the 2006 Serbian Constitution. The amendments also extend the application of the law from 10 to 20 years from the day it came into force.383

Impartiality of officials in the discharge of public office and preventing use of a public office for private gain or benefit are regulated by the Act on the Anti-Corruption Agency,384 which is tasked with monitoring the enforcement of the Act. The Agency shall initiate proceedings, pronounce measures for violations of the Act, decide on conflict of interests and perform duties in accordance with the law regulating the financing of political parties. The Agency shall also keep a register of officials i.e. political entities and their property and incomes (Art. 5), the list of legal persons in which the officials own over 20% of the stake or shares, a catalogue of gifts and of political party final accounts with reports pursuant to the law regulating the financing of political parties (Art. 68).385

380 Sl. glasnik RS, 58/03 and 61/03.
381 Recap of vetting Remind me, what is lustration all about...... Istinomer, available in Serbian at: http://istinomer.rs/teme/podseti-me-sta-to-bese-lustracija/
383 The draft, submitted on 9 November 2010, is available in Serbian at http://www.parlament.gov.rs/content/lat/akta/predzakoni.asp.
384 Sl. glasnik RS, 97/08, 53/10 and 66/11.
385 The Agency Director enacted Rulebooks governing the keeping of these records.
Article 51 of the Act lays down the following measures that may be pronounced against officials who violate the Act: caution and public announcement of the recommendation for dismissal. The competent authority is under the obligation to notify the Agency of the steps taken with respect to the measure. The Act also stipulates reimbursement of the material gain acquired by the discharge of another public office, job or activity in contravention of the Act, lays down fines for violations of this law and envisages imprisonment for the failure to report property and the provision of false information about property.

In its legislative expertise of the draft Anti-Corruption Agency Act, the CoE Directorate General of Human Rights and Legal Affairs stated that specific provisions needed to be amended or systemic changes made, because the Act did not ensure sufficient independence and autonomy of the Agency; it, inter alia, did not specify restrictions applying to civil servants transferring to the private sector.386

4.14.4. Political Parties

The Act on Political Parties387 defines a political party as a free and voluntary association of citizens established for the purpose of achieving political aims by democratically shaping the political will of citizens and participating in elections (Art. 2). The Act defines a political party of a national minority as a party the activities of which are directed at representing and advocating the interests of a national minority, at protecting and advancing the rights of persons belonging to that national minority. A party of a national minority enjoys specific rights: it needs fewer signatures to register, is entitled to use the name of the party in the minority language and to seats in parliament even if it won less than 5% of all cast votes.

A political party shall acquire the status of a legal person by entry into the Register of Political Parties and may begin work on that day (Art. 5). A political party may be established by at least 10,000 adult citizens of Serbia with a working capacity (Art. 8), while a political party of a national minority may be established by at least 1,000 adult citizens of Serbia with a working capacity (Art. 9). The Act explicitly prohibits political party activities aimed at changing the constitutional order by force and violating the territorial sovereignty of the Republic of Serbia, guaranteed human or minority rights or causing and inciting racial, ethnic or religious hate (Art. 4). The Act regulates the entry of a party in the Register of Political Parties and the maintenance of the Register.

Membership in a political party is free and voluntary for all adult citizens of Serbia with a working capacity, with the exception of the Constitutional Court


387 Sl. glasnik RS, 36/09.
judges, judges, public prosecutors, the Protector of Citizens, police and army staff and other persons whose office is incompatible with political party membership under the law (Art. 21)

The procedure to ban a political party shall be initiated at the proposal of the Government, the Republican Public Prosecutor or the ministry charged with administrative affairs. The Constitutional Court shall decide on the prohibition of a political party (Arts. 37 and 38).

4.14.4.1. Financing of Political Parties. – A new Act on the Financing of Political Activities was enacted in June 2011. It is to ensure greater transparency of the financing and work of political parties by the enforcement of anti-corruption measures. The Act was voted in by 133 deputies (of the ruling coalition and the opposition Liberal Democratic Party (LDP)) after the parliament debated over 130 amendments to the working draft designed by an expert working group and put forward by the Government. The new Act distinguishes between the money used for funding the regular (everyday) work of the parties and for funding their election campaigns, envisages much stricter oversight of party finances, and provides for fines and imprisonment for violations of the Act. The Act also regulates the activities of other political entities – coalitions and citizens’ groups. It entitles them to raise funds but also imposes on them all the obligations arising from the Act, including those regarding record-keeping and oversight of their revenues and expenditures.

Under the Act, political entities may receive funding from public sources (funds allocated for political activities in the budget) and from private ones (membership fees, donations, property-based revenues, inheritance, legacies, loans from banks and other financial organisations in Serbia). Parties are under the obligation to keep bookkeeping records and submit financial statements. Furthermore, every political entity running in elections is under the obligation to open a separate account for funds to be used in the election campaign and from which all election campaign funding must be paid. This provision aims at ensuring more efficient control of the campaign revenues and expenses.

Under the Act, direct public funding standing at 0.15% of the state, provincial and local budgets is provided on a monthly basis to support the regular work of the entities that have won political representation in the state, provincial or local parliaments. The draft law initially set the amount of funding at 0.30% but the Venice Commission stated in its Opinion that the 0.15% allocated in the prior law was already a sizeable amount and recommended that this increase be reconsidered. The Venice Commission was nevertheless “duped”, because the 0.15% is calculated on the basis of the entire budget amount, before the transfers are subtracted, i.e. the

388 Sl. glasnik RS, 43/11.
389 Opposition deputies did not attend the voting on the Act.
effect is nearly identical and, practically, twice as much shall be allocated for political activities than under the prior law.\textsuperscript{391} The new Act abolishes the limit of funds that a political entity may receive from a private source, but it lays down that annual donations from natural and legal persons may not exceed 20 and 200 average monthly wages respectively.\textsuperscript{392} All donations exceeding one average monthly wage a year must be published on the political entity’s official website (Art. 10).

The Act lays down that 0.1\% of the budgetary expenditure shall be designated for funding election campaign costs from public sources in the election year. It introduces “election bonds” deposited by political entities planning on using public source funds to fund their election campaigns and which they must repay if they do not win one percent of the valid votes (0.2\% in case of minority political entities). Twenty percent of the total budget funds allocated for funding the campaigns is divided equally among the submitters of the proclaimed election tickets which declare that they will use the funds from public sources to cover their election campaign costs when they submit their election tickets. The remaining 80\% is distributed to the submitters of the election tickets that won seats in proportion to the number of seats they won, regardless of whether they used funds from public sources to fund their election campaigns. The proposals by smaller parliamentary parties to amend the provisions on the election bond and increase the threshold were rejected.

Pursuant to the Act on the Financing of Political Activities, the Anti-Corruption Agency Director in September 2011 enacted a Rulebook on Donation and Property Records, Annual Financial Reports and Reports on Election Campaign Costs of Political Entities\textsuperscript{393} governing these matters in detail. Political parties are also under the obligation to report non-monetary assistance they receive from international political associations.

The Act provides for imposing penalties for political finance infractions, including the loss of the right to public source funding. After checking a political entity’s financial reports, the Anti-Corruption Agency may file a motion with the State Audit Institution (SAI) to audit its reports in accordance with the law governing the powers of the SAI. The Act also defines a series of misdemeanour and criminal offences for which responsible persons in the political entities may be held liable if they raise funds in contravention of the law.\textsuperscript{394}

Article 38 defines giving and/or obtaining funds for the financing of a political entity for and on behalf of a political entity contrary to the provisions of this Act as a criminal offence warranting between three months and three years of imprisonment. Proving this crime is hindered by the requirement to prove the existence of

\textsuperscript{391} This solution was moderated by putting off the effectiveness of these provisions in the Transitional and Final Provisions until 1 July 2012.
\textsuperscript{392} Amounting to around 7,000 i.e. 70,000 EUR respectively.
\textsuperscript{393} \textit{Sl. glasnik RS}, 72/11.
\textsuperscript{394} Chapter VII (Penal Provisions), Act on the Financing of Political Activities.
the intent to conceal the source of the funds or the amount of funds the political entity raised. The qualified form of the crime is committed in the event the value of the funds exceeds 1,500,000 dinars, in which case the responsible person (usually the secretary or president of the political party) shall be punished to between six months and five years’ imprisonment. Loss of the right to public source funds (Art. 42) shall be pronounced against those convicted of a crime in Article 38 or a misdemeanour in Article 39. The decision on this measure shall be rendered by the Agency, which may also initiate an administrative dispute against the political entity. The law also introduces a temporary measure suspending transfers of public source funds to a political entity until a decision in criminal proceedings or misdemeanour proceedings against it becomes final. The decisions to suspend transfers shall be requested by the Agency and rendered by the Finance Ministry, or the competent provincial or local self-government authority (Art. 43). Like in most other countries, the statute of limitations of misdemeanours was extended to five years, which provides enough time for prosecuting them.395

4.15. Right to a Legal Personality and Right to Citizenship

Article 6, Universal Declaration of Human Rights:
Everyone has the right to recognition everywhere as a person before the law.

Article 15, Universal Declaration of Human Rights:
Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nor denied the right to change his nationality.

4.15.1. General

Under the Universal Declaration of Human Rights, everyone has the right to be recognised as a person before the law (Art. 6) and to a nationality, while arbitrary deprivation of one’s nationality and the denial of the right to change one’s nationality shall be prohibited (Art. 15). The ICCPR does not refer to the right to a nationality specifically, but it guarantees the right of every child to acquire a nationality (Art. 24 (3)). National legislation regulates the manner and procedure for acquiring nationality and it must not discriminate against new-born children on whatever grounds.

The Constitution of the Republic of Serbia guarantees everyone the right to a legal personality, on the basis of which they have the right to legal capacity and the right to the freely choose and use their personal names and the names of their children. A person shall acquire legal capacity at the age of 18 (Art. 37). Legal personality is acquired at birth and terminates at death.

Under Article 11 of the Family Act, the court may allow a minor over 16 to acquire legal capacity in a non-contentious procedure in the event s/he is a parent and has achieved the physical and mental maturity needed to independently decide on his/her personality, rights and interests. An adult may be fully or partly deprived of legal capacity due to an illness or a psychological or physical developmental disorder (Art. 147).\textsuperscript{396}

4.15.2. Right to Citizenship

The Constitution does not guarantee the right to citizenship, an attitude which is commonplace and generally accepted. The Constitution guarantees the right to citizenship of the Republic of Serbia only to a child born in the Republic of Serbia, unless s/he fulfils the conditions for acquiring the citizenship of another state (Art. 38 (3)). Under Article 38 (2), a citizen of the Republic of Serbia “may not be expelled or deprived of citizenship or the right to change it”.

The Republic of Serbia ratified the Convention Relating to the Status of Stateless Persons\textsuperscript{397} which binds the Contracting States to accord to persons without a nationality the treatment accorded aliens and stateless persons with respect to specific rights and as favourable as that accorded to their nationals. Serbia in 2011 ratified the Convention on the Reduction of Statelessness\textsuperscript{398} which, inter alia, lays down that no one may be deprived of nationality on racial, ethnic, religious or political grounds (Art. 9). Under this Convention, the Republic of Serbia is under the obligation to grant its nationality to a person born in its territory who would otherwise be stateless and restrictively defines the grounds upon which the state may condition the right to a nationality (Art. 1). Serbia’s positive law, however, does not specify a procedure for identifying stateless persons and for issuing ID documents to them.

The European Convention on Nationality\textsuperscript{399} adopted within the CoE, sets the basic principles, rules and recommendations concerning citizenship.\textsuperscript{400} Serbia has not signed the Convention yet.

\textsuperscript{396} More in I.4.1. and II.4.3.1.

\textsuperscript{397} Sl. list FNRI, 9/59.

\textsuperscript{398} Sl. glasnik RS (Međunarodni ugovori), 8/11.


\textsuperscript{400} The main principles of the European Convention on Nationality are that each state party shall determine under its own law who are its nationals and that this right, if consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality, shall be accepted by other states (Art. 3). Under the Convention, everyone has the right to a nationality, statelessness shall be avoided, no one shall be arbitrarily deprived of his or her nationality and neither marriage nor dissolution of a marriage between a national of a state party and an alien shall automatically affect the nationality of the other spouse (Art. 4). The rules of a state party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin; a state is also prohibited from discriminatory treatment
Acquisition and termination of Serbian citizenship are regulated by the Serbian Citizenship Act.\textsuperscript{401}

Under Article 6 of the Citizenship Act, Serbian citizenship may be acquired by origin, birth, naturalisation or pursuant to an international treaty.\textsuperscript{402} Citizenship shall be acquired by origin or birth in the territory of the Republic of Serbia by entry in the birth register. Citizenship acquired by naturalisation shall be acquired pursuant to a legal binding decision rendered by the Ministry of Internal Affairs. Citizenship shall terminate by release from citizenship, renunciation and pursuant to an international treaty (Art. 27).

The Citizenship Act facilitates the acquisition of citizenship for specific categories of people and allows dual and multiple citizenship.

The applications for the acquisition or termination of citizenship are reviewed by the Ministry of Internal Affairs in urgent proceedings (Art. 38).\textsuperscript{403} Records of the nationals of the Republic of Serbia are kept in the birth registers (Art. 46). Notwithstanding the constitutional guarantees and an apparently good legal framework, a large number of people living in Serbia do not have legal subjectivity or a nationality (\textit{legally invisible persons}).\textsuperscript{404} The Official Birth, Death and Marriage Registries Act\textsuperscript{405} suffers from a number of legal lacunae and contradictory provisions on subsequent entry into a birth register. The applicants have to submit evidence confirming the circumstances of their birth,\textsuperscript{406} which is impossible to obtain. The Act on the Non-Contentious Procedure\textsuperscript{407} also lacks provisions allowing legally invisible persons to resolve their status. Transgender persons also have trouble exercising their right to entry of their data in the registers after their sex change and achieving legal recognition of their new personal situation.\textsuperscript{408}

The Ministry for Human Rights, Public Administration and Local Self-Government issued in April 2011 Instructions on the Work of Authorities Reviewing Requests for Entry into the Birth Registry in the First Instance. The adoption of the Instructions has not, however, improved the situation in practice. Furthermore, the

\textsuperscript{401} \textit{Sl. glasnik RS}, 135/04 and 90/07.
\textsuperscript{402} A detailed overview, explanation and analysis of the individual provisions governing the acquisition of citizenship in the \textit{Report 2005}, I.4.16.2.
\textsuperscript{403} The provision on the emergency adoption procedure is in conformity with Article 10 of the European Convention on Nationality, which requires that all citizenship applications are processed within a reasonable time.
\textsuperscript{404} Most of the legally invisible persons are of Roma origin and mostly IDPs from Kosovo. More in II.3.
\textsuperscript{405} \textit{Sl. glasnik RS}, 20/09.
\textsuperscript{406} Notably: place, day, month and year of birth, parents’ data, nationality.
\textsuperscript{407} \textit{Sl. glasnik SRS} 25/82 and 48/88 and \textit{Sl. glasnik RS}, 46/95 and 18/05.
\textsuperscript{408} More under I.4.1.3.6.
Instructions are not a legally binding enactment and do not have the legal power to permanently address the status of legally invisible people.\textsuperscript{409}

With the aim of facilitating the resolution of the status of such persons, the Protector of Citizens in 2011 filed an initiative with the Government of the Republic of Serbia to amend the Act on the Non-Contentious Procedure and proposed the adoption of the draft amendments\textsuperscript{410} prepared by the association Praxis and the Centre for Advanced Legal Studies. They propose that the courts have subsidiary jurisdiction vis-à-vis the administrative authorities in the procedure for issuing birth certificates. The courts would be under the obligation to act even when the first and last names of a person not entered in the birth register cannot be proven during the procedure. The amendments allow the entry of such a person into the birth register pursuant to a court decision which can be rendered only on the basis of the person’s statement and the statements of two adult witnesses and in the absence of other evidence.

\textbf{4.16. Freedom of Movement}

\textbf{Article 12, ICCPR:}

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

\textbf{Article 2, Protocol No. 4 to the ECHR:}

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in para. 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

\textbf{Article 3}

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

\textsuperscript{409} A detailed overview of the procedure for subsequent entry in the birth registers and the problems persons whose status has not been resolved and who have not been entered in the birth registries in \textit{Still No Solution for Legally Invisible Persons in Serbia}, Praxis, 2011. More under II.4.5.

\textsuperscript{410} See http://www.praxis.org.rs/index.php?option=com_content&task=blogcategory&id=130&Itemid=73.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Article 1, Protocol No. 7 to the ECHR:

1. An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed:
   (a) to submit reasons against his expulsion,
   (b) to have his case reviewed, and
   (c) be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under para. 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

4.16.1. General

Under the Constitution, everyone shall have the right to free movement and residence in the Republic of Serbia and the right to leave it and return to it (Art. 39 (1)). Unlike Article 12 (1) of the ICCPR and Article 2 (1) of the Protocol 4 to the ECHR on freedom of movement and free choice of residence, the Constitution does not require that persons protected by this provision are lawfully within the territory of Serbia.

The Aliens Act411 regulates the conditions for the entry, movement and residence of aliens. An alien is allowed to enter and stay in Serbia with a valid travel document in which a visa or residence permit has been entered unless otherwise specified by the law or an international agreement (Art. 4). The movement or residence of an alien in a specific part of Serbia shall be prohibited or limited if so required to protect public order or security of Serbia and its citizens or pursuant to international agreements (Art. 5). The Act shall not apply to aliens granted asylum in Serbia unless otherwise specified by the law, to aliens enjoying privileges and immunity under international law insofar as they are exempted from specific provisions of the Aliens Act by virtue of such privileges and immunities, and aliens with the status of refugees. Provisions of the 1954 Convention on the Status of Stateless Persons412 shall apply to persons without citizenship in the event they are more favourable than those of the Aliens Act (Art. 2).

Under the Act, an alien may be refused entry into Serbia in the event s/he does not have a valid travel document or there is reason to suspect that s/he is not entering Serbia for the declared reasons (Art. 11). The border police have full discretion to determine whether there is reason to suspect that the alien will not stay

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411 Sl. Glasnik RS, 97/08.
412 Sl. list FNRJ (Međunarodni i drugi sporazumi), 9/59.
in Serbia for the declared reasons. Article 10 of the Act lists which types of entry of foreign nationals into Serbia shall be deemed unlawful. The Aliens Act further states that an alien may leave Serbia freely, but lists conditions under which the border police may temporarily prohibit an alien from departing the country (Art. 13).

Article 28 lists the conditions an alien needs to fulfil to be issued a temporary residence permit. Foreign citizens, who are victims of human trafficking, need not fulfil these conditions in the event their temporary residence is in the interest of conducting criminal proceedings and there are no obstacles in terms of Article 11 (1.6 and 1.8). If an alien does not have enough money to support himself or herself, s/he shall be provided with adequate accommodation, nutrition and basic living conditions (Art. 28 (5)). The Act lists grounds for denying an alien further residence in or entry into Serbia (Art. 35) and grounds for terminating residence (Art. 36). An alien may be granted permanent residence in Serbia under specific circumstances. The conditions under which permanent residence may be granted or denied that are specified in Articles 37-41 of the Aliens Act are in accordance with international standards.

4.16.1.1. Expulsion of Aliens. – The Constitution provides that foreign citizens may be expelled only by a decision of a competent body, in a procedure stipulated by the law and allowing for appeal of the decision, but only when there is no threat of persecution on grounds of race, sex, religion, national affiliation, citizenship, membership in a particular social group, political opinions, or of serious violations of rights guaranteed by the Constitution (Art. 39 (3)). However, the Aliens Act prescribes somewhat lesser protection of aliens facing expulsion from Serbia as it does not comprise the last grounds listed in the Constitution – serious violations of rights guaranteed by the Constitution. The prohibition of expulsion shall not pertain to aliens reasonably suspected of endangering Serbia’s security or convicted of a grave crime by a final decision and thereby constituting a threat to public order (Art. 47). Notwithstanding this provision, however, an alien may not be expelled to a territory where there is a risk that s/he may be subjected to torture, inhuman or humiliating treatment or punishment, which is an international standard incorporated in Article 47 (3).

Competent authorities conducting the expulsion proceedings shall take into account the specific situation of an alien falling within the category of persons with special needs, such as minors, persons fully or partly deprived of working ability, children separated from their parents or guardians, persons with disabilities, the elderly, pregnant women, single parents and their underage children, or persons who had been subjected to torture, rape or other grave forms of psychological, physical or sexual violence and they shall act in accordance with international agreements (Art. 58).

Expulsion of an alien is a security measure also envisaged by Serbian criminal law (Art. 79 (1.8), CC). A foreign offender may be expelled in this event s/he
was sentenced by a penalty or by probation (Art. 80 (5), CC). When deciding on the measure, the court is to take into consideration the time and gravity of the offence, its motives, manner of commission and other circumstances for declaring an alien a *persona non grata* in Serbia (Art. 88 (2), CC). This measure may be pronounced for a period between one and ten years (Art. 88 (1), CC). This security measure may not be pronounced against an offender enjoying protection in accordance with ratified international agreements (Art. 88 (4) CC).

### 4.16.2. Right to Asylum

Serbia ratified a number of international treaties directly or indirectly related to the issue of asylum, notably the 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol thereto, the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECHR, the European Convention for the Prevention of Torture, Inhumane or Degrading Treatment or Punishment and the UN Convention on the Rights of the Child.

Under the Constitution, any foreign national with reasonable fear of persecution based on his race, gender, language, religion, national origin or association with some other group or political opinions, shall have the right to asylum in the Republic of Serbia (Art. 57 (1)).

The Asylum Act 413 came into force in April 2008. Although the adoption of the Act is a positive step towards improving the protection of asylum seekers, refugees and persons granted humanitarian protection (dubbed subsidiary protection in the Act) and the Act contains numerous guarantees protecting the rights of these persons, this law, like many others adopted in Serbia in the recent years, was put in the parliament pipeline without having undergone a proper public debate, which may be one of the reasons why some of its provisions are not fully in accordance with international standards.

According to the constitutional terminology, asylum is a concept comprising the provision of refuge (entailing refugee protection) and the provision of subsidiary protection. The Act, however, occasionally uses the word asylum where it is obviously referring only to refuge.

#### 4.16.2.1. Asylum-Granting Procedure

Some of the principles listed in Chapter II of the Asylum Act lay down the procedural guarantees to be applied during reviews of asylum applications – the principles of directness, to be informed, confidentiality and free legal aid, as well the principle of free translation/interpretation.

The entire first-instance procedure and all decisions on applications for asylum and the termination of that right are within the remit of the Asylum Office, i.e. the Asylum Department as it is still called, until a new enactment on the staffing

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413 Sl. glasnik RS, 109/07.
and organisation of the MIA is adopted. The Asylum Department is still understaffed, given that only 7 of the 11 envisaged vacancies have been filled.\footnote{Answers to the EC Questionnaire, Chapter 24, p. 43.} of the seven staff members, only four are charged with reviewing the applications.\footnote{Consultative meeting: Towards Serbia’s Europeanisation – Monitoring of the Asylum and Re-admission Policies and Practices in the Republic of Serbia, organised by NGO Group 484 and held on 12 December 2011. According to UNHCR data for the first half of 2011, only two staff members were engaged in approving asylum, \textit{Serbia as a Safe Third Country}, p. 6, Hungarian Helsinki Committee (http://www.unhcr.org/refworld/publisher,HHC,,,4e815dec2,0.html).} The Asylum Department, and the future Asylum Office, are part of the MIA Border Police Directorate, the part of the Ministry with a strict hierarchy, wherefore it should as soon as possible be transformed into an organisationally independent unit and its capacities should be considerably raised.\footnote{More in \textit{Challenges of Forced Migration in Serbia}, Group 484, June 2011, pp. 102–103. (http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf).}

An alien’s oral or written expression of the intention to apply for asylum shall be entered into the records (Art. 22). Only three percent of the asylum seekers in 2011 were entered into the records at the border,\footnote{Consultative Meeting: Towards Serbia’s Europeanisation – Monitoring of the Asylum and Re-admission Policies and Practices in the Republic of Serbia, organised by NGO Group 484 and held on 12 December 2011.} which may give rise to the question whether border officials are actually entering asylum seekers in the records and notifying them of their rights and entitlements in Serbia, which is why more funds need to be invested in their adequate training.\footnote{“The UNHCR held training sessions for the Border Police and organised six seminars in 2009 and 2010 (attended by 135 border guards), but so far there is no visible improvement”. \textit{Serbia as a Safe Third Country}, p. 12.} Furthermore, the border police need to be subjected to independent oversight.

Entry into records entails issuing a certificate serving as proof that the holder had expressed the intention to seek asylum (Arts. 23 and 59). The issued certificate entitles the future asylum seeker to stay in Serbia 72 hours from the moment it was issued; the person is under the obligation to report to the Asylum Office or Asylum Centre and register as an asylum seeker within the 72 hours. An authorised Asylum Office staff member shall register the alien and his/her family members.\footnote{The Act provides for the adoption of a rulebook specifying the procedure for entering into records and registering asylum seekers, but it has not been adopted yet.} The registration entails establishing the individual’s identity, taking his/her photograph and fingerprints and temporary seizure of all identity and other documents that may be of relevance in the asylum procedure. The alien shall be issued a certificate on the seized documents (Art. 24). The MIA shall keep records of persons entered into records and asylum seekers in the Republic of Serbia (Art. 64). The database in which the personal data of the registered asylum seekers are entered allows only for storing the entered data but not their search as well, wherefore the identity-
related data are checked manually from the existing database. Once an alien is registered as an asylum seeker, s/he shall be issued an asylum seekers’ ID card (Art. 60). The Centres accommodating asylum seekers lack the capacity to take in all the registered aliens, who are forced to find themselves accommodation until there is a vacancy in one of the Centres. The MIA has practiced registering only asylum seekers staying at the Asylum Centres.

The asylum-granting procedure is initiated by the submission of an application for asylum in the prescribed form, which may be obtained only from an authorised Asylum Office staff member. The application must be submitted within 15 days from the day of registration (this deadline may be extended at the alien’s request and only in justified cases, Art. 25). At the initiative of the Asylum Office, the MIA has embarked on setting up a working group to propose amendments to the Asylum Act to issue the IDs to the asylum seekers after they file their asylum applications rather than after they are registered.

The authorised Asylum Office staff member shall interview the asylum seeker to establish his/her identity, the reasons why s/he is applying for asylum, his/her movement after leaving his/her country of origin and whether s/he has already sought asylum in another country (Art. 26).

The Asylum Office may render a decision upholding the asylum application and recognising the alien’s right to refuge or subsidiary protection or a decision rejecting the asylum application and ordering the alien to leave the territory of the Republic of Serbia by a specific deadline unless s/he has other grounds for residence in it. Article 27 of the Act lays down when the Asylum Office may render a decision suspending the asylum-granting procedure. Article 33 of the Act lists when the Asylum Office may dismiss an application for asylum without reviewing whether the asylum seeker meets the asylum requirements. A first-instance decision in the asylum procedure may be appealed within 15 days from the day of receipt of the decision (Art. 35).

4.16.2.2. Application of the Safe Third Country and Safe Country of Origin Concepts. – Under the Act, a state may inter alia dismiss an asylum application without examining whether the asylum seeker fulfils the requirements by applying the concepts of safe third country and safe country of origin (Arts. 2 and 33). In all such cases, it is crucial that the state is reassured that the protection the asylum seeker can be afforded in another state is truly effective, and that it always provides the asylum seeker with the opportunity to dispute the claims about the safety of that other state in his/her particular case, but the Act does not always afford this.

The solution under which the Government unilaterally defines safe third countries in a Decision\(^{422}\) is also problematic, because it practically declares these third countries accountable for reviewing the asylum applications, without guarantees that these countries will review the asylum applications in efficient and fair proceedings. Furthermore, the Government Decision designates as safe third countries all the neighbouring countries, as well as some countries which cannot and, indeed, are not considered safe by most European countries because of their human rights records, such as, e.g. Greece,\(^{423}\) Turkey,\(^{424}\) Tunisia or Belarus. Another question that arises regards how a person who wishes to be granted refugee status in Serbia can actually reach it without passing through a neighbouring safe third country (Serbian competent authorities consider even air transit through these states sufficient grounds to reject the applications) and thus providing grounds for the rejection of his/her asylum application.\(^{425}\)

Given the manner in which the competent authorities interpret and apply Article 33 of the Asylum Act, asylum seekers in Serbia always risk chain refoulement and violation of the principle of non-refoulement,\(^{426}\) in contravention of the ECtHR case law.\(^{427}\)

4.16.2.3. Procedure before the Asylum Commission. – First instance decisions on asylum applications may be appealed within 15 days from the day of their receipt (Art. 15). The appeals of the Asylum Office decisions are reviewed by the Asylum Commission’s nine members, appointed to four-year terms of office by the Government.\(^{428}\) The Commission renders decisions on appeals by a majority of votes (Art. 20). Given that the Asylum Act does not specify a deadline within which the Commission is to render a decision on the appeal, it is guided by the 60-day deadline in the General Administrative Act, which is reckoned from the day the appeal is filed.

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\(^{422}\) Decision on the Establishment of a List of Safe Countries of Origin and Safe Third Countries, Sl. glasnik RS, 67/09.

\(^{423}\) Greece has not been considered a safe third country since the ECtHR rendered its judgment in the case of M. S. S. v. Belgium and Greece, ECHR, App. No. 30696/09, judgment of 21 January 2011.

\(^{424}\) Turkey made an objection to the 1967 Protocol to the Convention relating to the Status of Refugees, under which Turkey would apply the Convention only to persons who had become refugees by reason of events that occurred in Europe, see: http://www.unhcr.org/4dac37d79.html.

\(^{425}\) Challenges of Forced Migration in Serbia, p. 106.

\(^{426}\) Other NGOs and international organisations agree with this assessment, See Challenges of Forced Migration in Serbia and Serbia as a Safe Third Country.


4.16.2.4. Procedure before the Administrative Court. – An Asylum Commission decision may be challenged in an administrative dispute before the Administrative Court which shall rule on the complaint in a three-judge panel.\textsuperscript{429} The complaint lodged with the Administrative Court does not have suspensive effect and there is a real risk of the asylum seekers being returned to countries where their human rights may be endangered.\textsuperscript{430} The Administrative Court has so far mostly limited itself to reviewing whether the asylum procedure had been conducted properly,\textsuperscript{431} but it did render its first judgment on the merits in 2011.\textsuperscript{432} The case regarded an Uzbek national who came via Russia to Serbia, where he sought asylum. His application was rejected by invoking the Government Decision under which Russia is designated as a safe third country. The Court was of the view that the complaint was groundless and that the Asylum Commission properly applied the national law, whereby it confirmed the opinion of the BCHR and other non-governmental and international organisations\textsuperscript{433} about the shortcomings in the practice of automatically applying the Decision on the Establishment of a List of Safe Countries of Origin and Safe Third Countries without first establishing whether the person would genuinely be safe in the third country.

4.16.2.5. Rights of Asylum Seekers, Refugees and Beneficiaries of Subsidiary Protection. – These rights are regulated in Chapter VI of the Act and include the right to residence, accommodation, fundamental living conditions, health care, education, etc. These provisions, too, suffer from shortcomings, the most significant of which is that specific rights are guaranteed to persons granted the right to refuge but not to beneficiaries of subsidiary protection.

As far as integration is concerned, the Asylum Act lays down a general obligation of the Republic of Serbia to, commensurate with its capacities, ensure conditions for the integration of refugees in social, cultural and economic life and enable the naturalisation of the refugees (Art. 46). The integration process should definitely entail temporary accommodation in an “integration home”,\textsuperscript{434} mastering the language and help in finding adequate employment.\textsuperscript{435} Nothing has yet been done to create conditions for integration; no funds in the state budget have been allocated

\textsuperscript{429} Answers to the EC Questionnaire, Chapter 24, p. 43.
\textsuperscript{430} Challenges of Forced Migration in Serbia, p. 109.
\textsuperscript{431} Serbia as a Safe Third Country, p. 9.
\textsuperscript{432} Decision No. U 8/3815/11, of 7 July 2011.
\textsuperscript{433} Serbia as a Safe Third Country, p. 7.
\textsuperscript{434} Two of the five people granted subsidiary protection were still in Serbia at the end of the reporting period: one was living in an Asylum Centre and the other was covering accommodation expenses alone. BCHR was unable to obtain any data of whether any assistance in integration was available to them.
for that purpose, nor has a state authority that would be in charge of the integration of persons approved the status been designated.\textsuperscript{436} The health services provided to persons granted the status are covered from the state budget only in the event they are indigent. A person granted asylum needs to obtain a permanent or temporary residence permit and a work permit in order to conclude an employment contract. Persons accorded subsidiary protection to date have not been officially employed anywhere yet and there are no reliable data on whether they were hired to do temporary jobs in the informal sector.\textsuperscript{437}

The right to family reunion is not regulated uniformly with regards to all categories of persons provided with protection as it should be. This right is envisaged for persons granted refuge (Art. 48) while persons granted subsidiary protection shall be entitled to this right “in accordance with regulations on the movement and residence of aliens” (Art. 49).\textsuperscript{438} Persons granted temporary protection shall have this right only in “justified cases” (Art. 50).

Movement of asylum seekers may be restricted only exceptionally. The grounds for restricting movement in Article 51 are mostly in accordance with international standards, but the restrictive measures ought to be limited until the preliminary hearing in the event they are applied to establish the elements of the asylum application and ought not to be extended to the application review period. In any case, detention ought to be ordered only exceptionally, not as a rule.

\textit{4.16.2.6. Unaccompanied underage asylum seekers.} – As provided for in international standards, Article 15 of the Serbian Asylum Act lays down the principle under which particular care shall be provided asylum seekers with special needs, including minors and children separated from their parents or guardians. “An unaccompanied minor shall mean an alien under 18 years of age not accompanied by his/her parents or guardian during entry into the Republic of Serbia or left unaccompanied by his/her parents or guardian during his/her stay in Serbia” (Article 2). Serbia does not have specific norms or protocols for establishing the age of the asylum seekers.\textsuperscript{439}  

\textsuperscript{436} The Commissariat for Refugees is of the view that it does not have jurisdiction over these matters. Source: Consultative meeting: Towards Serbia’s Europeanisation – Monitoring of the Asylum and Readmission Policies and Practices in the Republic of Serbia, organised by NGO Group 484 and held on 12 December 2011.


\textsuperscript{438} Article 9 of the Act foresees that “persons granted asylum shall be entitled to family reunion in accordance with the provisions of this Act” (italics added) i.e. that provisions on family reunion in the Asylum Act pertain both to those granted the right to refuge and those granted subsidiary protection.

4.16.3. Restrictions of the Freedom of Movement

Restrictions of the freedom of movement in the Constitution of Serbia are formulated in accordance with international standards. They prescribe that restrictions may be imposed only by law and if necessary to attain a legitimate goal – for the purpose of conducting criminal proceedings, protecting public law and order, preventing the spreading of contagious diseases or defending the Republic of Serbia. The grounds for restrictions are less numerous and more narrowly defined than those in the ICCPR and ECHR.

Under the Act on Travel Documents, the competent body shall issue a reasoned decision rejecting the application for a travel document if an investigation has been opened or charges raised against the applicant and at the request of the competent court or public prosecution office; if the applicant has been sentenced to an unconditional prison sentence exceeding three months i.e. until s/he has served the sentence; if the applicant is prohibited from travelling pursuant to recognised international treaties; if the applicant’s movement is prohibited pursuant to valid regulations enforced to prevent the spreading of contagious diseases or epidemics; if the applicant has not obtained approval for travel abroad for reasons related to the defence of the country or if there is another legal obstacle envisaged by the law regulating the military obligation in case a state of war or emergency has been declared (Art. 40). An application for a travel certificate (a travel document issued to a national of Serbia abroad and lacking a passport to return to Serbia) may not be rejected (Art. 35).

In particularly justified cases (e.g. the law quotes in example the death of a family member, medical treatment abroad, pressing official business), a passport of limited validity may be granted at the request of the person whose application had been rejected or whose passport has been seized (with the exception of persons whose passports were seized because they no longer have Serbian citizenship) with the prior consent of the court i.e. public prosecutor which had demanded that the applicant not be issued a travel document (Art. 41).

The Act on the Army of Serbia adopted in December 2007 obliges professional members of the Army of Serbia to report their travels abroad to their superiors. Under the Act, the Defence Minister shall regulate the conditions under which professional army members and conscripts serving the army may travel abroad (Art. 49). Under the Act, professional members of the Army of Serbia comprise both professional Army of Serbia staff and the civilians employed in the Army (Art. 8 (1)).

4.16.4. Readmission

In September 2007, Serbia and the European Community (i.e. EU member-states with the exception of Denmark) signed an Agreement on the Readmission of Persons Residing without Authorisation in the Territory of the other High Contract-
ing Party. This Agreement explicitly sets out that it shall be without prejudice to the rights, obligations and responsibilities arising from International Law and, in particular, from: the Convention on the Status of Refugees and the Protocol on the Status of Refugees, the international conventions determining the State responsible for examining applications for asylum lodged, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention of against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, international conventions on extradition, multilateral international conventions and agreements on the readmission of foreign nationals (Art. 17).

Under the Agreement, Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in the Agreement, any person who does not fulfil the conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State (Art. 2 (1)).

Under the Agreement, Serbia is above all obliged to readmit its own nationals. The citizenship of the person need not be established with certainty but “proved, or (...) assumed on the basis of prima facie evidence furnished, that such a person is a national of Serbia”. Serbia shall also readmit persons who have renounced the nationality of Serbia since entering the territory of a Member State, unless such persons have at least been promised naturalisation by that Member State (Art. 2 (3)). Apart from its nationals, Serbia shall also readmit their minor unmarried children regardless of their place of birth or their nationality, and their spouses, holding another nationality provided they have the right to enter and stay or receive the right to enter and stay in the territory of Serbia, unless they have an independent right of residence in the Requesting Member State (Art. 2 (2)). The Agreement specifies instances in which Serbia is obliged to take in a person possessing the nationality of a third state in addition to Serbian nationality, as well as a citizen of a third state and a stateless person.

EU Member States shall readmit any person illegally in the territory of Serbia. The conditions that need to be fulfilled for readmission in the EU correspond to those that need to be fulfilled for Serbia to readmit persons illegally in the EU (Art. 4 (1–3) and Art. 5 (1–2)).

Under the Agreement, Serbia and EU Member States have assumed also the obligation to restrict the transit of third-country nationals or stateless persons to cases where such persons cannot be returned to the State of destination directly and at the request of the other Party to the Agreement if the onward journey in possible other States of transit and the readmission by the State of destination is assured (Art. 13 (1–2)). Article 13 (3), however, lists the conditions under which they may refuse transit.

442 Sl. glasnik RS (Međunarodni ugovori), 103/07.
444 Transit may be refused if the person runs the real risk of being subjected to torture or to inhuman or degrading treatment or punishment or the death penalty or of persecution because of his
4.17. Economic, Social and Cultural Rights

4.17.1. General

In addition to the ICESCR, Serbia is also a signatory of numerous conventions of specialised UN agencies and specific regional organisations on these rights. In 2009, Serbia ratified the Revised European Social Charter (hereinafter: ESC), the fundamental Council of Europe document ensuring social and economic rights.

Serbia accepted 88 of the 98 paragraphs, thus joining the states that accepted most of the obligations in the ESC. Serbia accepted all nine “hard articles” of the ESC in their entirety, but failed to accept specific obligations regarding the right to just working conditions in Article 2 of the ESC, the right to collective bargaining in Article 6, the right to appropriate facilities for vocational training in Article 10, the right to social, legal and economic protection of children and young people in Article 17 and the rights of migrant workers and their families to protection and assistance in Article 19 of the ESC.

Serbia’s non-acceptance of the ESC provisions on the right of workers with family responsibilities to equal opportunities and equal treatment at work and employment is problematic from the viewpoint of advancing safe, healthy and just working conditions, family safety and the protection of the rights of the child.

On the other hand, by ratifying ILO Maternity Protection Convention 103, under which states shall adopt measures supporting parenthood and appropriate measures ensuring that maternity is not a source of discrimination in employment, Serbia has provided women the guarantees they would have enjoyed under the ESC as well.

Finally, Serbia did not accept the system of collective complaints, a form of monitoring envisaged by the ESC. This constitutes a major shortcoming given that Serbia thus does not provide its citizens with the possibility of resorting to one of the chief features of the European system of protecting social and economic rights – the possibility to file collective complaints against specific violations of economic and social rights.

Serbia submitted its first report on the implementation of the ESC in November. The protection of social rights is based on two main procedures: the review of national reports and the review of collective complaints. The importance of the monitoring system is reflected in the states’ changes of their national legislation and

race, religion, nationality, membership of a particular social group or political conviction, if the person shall be subject to criminal sanctions in the Requested State or in another State of transit and on grounds of public health, domestic security, public order or other national interests of the Requested State.

Act Ratifying the European Social Charter (Revised), (Sl. glasnik RS, 42/09). See also: Declaration contained in a Note Verbale from the Ministry of Foreign Affairs of Serbia, dated 11 June 2009, deposited with the instrument of ratification on 14 September 2009.
practice to bring them into line with the Revised ESC. The ESC Secretariat every year publishes a survey of the extent to which each country’s law complies with the ESC. Given that Serbia submitted its report for the first time in 2011, the text below provides an overview of the national report review procedure.

The ESC, the monitoring procedure is based on the review of reports of contracting parties on the application of the ESC provisions they have accepted in their law and practice. The contracting parties are under the obligation to submit periodic reports to the Council of Europe, which they also submit to representative national organisations of workers and employers. The representative social partners are entitled to require that their comments be appended to the state report. Furthermore, the CoE Secretary General communicates the national reports also to representative international NGOs with a consultative status within the CoE.

The following bodies take part in the review of the reports, Committee of Independent Experts (Committee of Social Rights), the Governmental Committee, the CoE Parliamentary Assembly and the Committee of Ministers. Although the procedure is important, the absence of a more active role of the social partners (organisations of employers and workers at the national and European levels) has been qualified as the greatest obstacle to improving the application of the ESC.

The Committee of Ministers, comprising representatives of all CoE member states, including those which had not ratified the ESC (pursuant to Art. 29 of the ESC), is authorised to issue the necessary recommendations which are then communicated to the member states not (entirely) fulfilling their obligations under the ESC. Given that the report review procedure is an extremely complex one, there was clearly no time for the Committee of Ministers to complete in 2011 its report with recommendations to Serbia on how to improve its economic and social rights.

Economic, social and cultural rights are guaranteed by the Constitution. Although formally constitutional, these rights are regulated in detail by laws and subsidiary legislation, not only in terms of their realisation but content as well, which gives legislative bodies ample room to restrict or expand them. These rights are thus within the legislative jurisdiction whereby they practically cease to be fundamental constitutional guarantees.

446 Due to the increase in the number of CoE member states and the inability to review all reports every year, it was decided in 1985 that half of the countries would submit their reports one year and the other half the following year.

447 The report comprises a general introduction, in which the Committee reviews the developments in specific fields governed by the ESC (employment policy, equal treatment, trade union freedoms, collective bargaining, etc), and two parts: Part I – review of the measures the state is taking to comply with the ESC provisions (article by article) and Part II, in which the state is rated by the extent to which it enforces the rights enshrined in the ESC.

448 The Committee of Independent Experts is under the obligation to submit its report and conclusions to the Governmental Committee and the CoE Parliamentary Assembly.
4.17.2. Right to Work

Article 6, ICESCR:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 1, ESC:

With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;

3. to establish or maintain free employment services for all workers;

4. to provide or promote appropriate vocational guidance, training and rehabilitation.

Serbia is a member of the ILO and a signatory of many conventions under ILO auspices, including the Employment Policy Convention (No. 122) and Convention No. 111 Concerning Discrimination in Employment and Occupation.

According to the practice of the Committee for Economic, Social and Cultural Rights, the right to work does not imply the right of a person to be provided with a job s/he wants, but the state’s obligation to take necessary measures to achieve full employment. The right to work implies the right to employment, the right to the freedom of choice of work, i.e. prohibition of forced labour and the prohibition of arbitrary dismissal.

The Constitution guarantees the right to work and free choice of occupation (Art 60). Under the Constitution, everyone shall have the right to fair and favourable working conditions and equal access to all jobs. The Constitution does not include a provision under which the state is obliged to ensure that everyone can make a living by work, which is the main purpose of the right to work.

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449 Serbia has to date adopted 77 ILO Conventions.
450 Sl. list FNRJ (Međunarodni ugovori i drugi sporazumi), 34/71.
451 Sl. list FNRJ (Međunarodni ugovori i drugi sporazumi), 3/61.
452 General Comment No. 18, UN doc. E/C.12/GC/18.
453 See I.4.4.3.
454 Article 4 of the ESC guarantees the right to a fair remuneration. See Digest of the Case Law of the European Committee of Social Rights, pp. 44–48 and General Comment No. 18, para. 1.
Labour law is regulated primarily by the Labour Act\textsuperscript{455} and the Employment and Unemployment Insurance Act.\textsuperscript{456} The General Collective Agreement\textsuperscript{457} regulates relations between employers and workers in greater detail.

The National Employment Strategy for the 2011-2020 Period was adopted in May 2011.\textsuperscript{458} The primary goal of the employment policy is to establish an efficient, stable and sustainable trend of employment growth and fully align the employment policy and the labour market indicators with the practices of EU member states. The Strategy envisages a rise in employment from 45.5\% to 66\%.\textsuperscript{459} The working age population (15-64) accounted for 67.6\% of Serbia’s total population in 2011 (i.e. it was lower than in any of the new EU member states). Comparing with 2,281,909 employed and 756,000 (23.7\%) unemployed people in April 2010, Serbia’s unemployment rate reached 23.7 percent at the end of November 2011 – an increase compared with 22.2 percent recorded at the end of April 2010. The employment rate is the percentage of employees in the total of the population aged 15 years and older, ant it amounted to 35.3 percent in November 2011. Of these, the employment rate for men was 43.1 percent and 28.2 percent for women.\textsuperscript{460}

Serbia in 2010 adopted the Act on Volunteering,\textsuperscript{461} which regulates the rights and obligations of persons providing services or performing activities to everyone’s benefit or the benefit of another person free of charge. The category of volunteering, legally distinct from other forms of free service provision, such as internship and traineeship, was thus finally introduced in Serbia’s legal system.

4.17.2.1. Right to Assistance in Employment and in the Event of Unemployment. – Employment is regulated in greater detail by the Employment and Unemployment Insurance Act. Assistance in finding employment to interested jobless workers is provided free of charge by the National Employment Service and recruitment agencies. This National Employment Service has been headquartered in Kragujevac since 2010. Job seekers can also look for employment through private recruitment agencies. The costs of the recruitment agency services are fully borne by the employers. The National Employment Service is duty-bound to publish a job vacancy within 24 hours from the moment it learns of the vacancy. The definition of persons searching for employment now includes an additional category in addition to the existing categories (the unemployed) – that of persons seeking to change jobs. This category covers persons who cannot be categorised as unemployed due

\textsuperscript{455} Sl. glasnik RS, 24/05, 61/05 and 54/09.
\textsuperscript{456} Sl. glasnik RS, 36/09 and 88/10.
\textsuperscript{457} Sl. glasnik RS, 50/08, 104/08 – Annex I and 8/09 – Annex II.
\textsuperscript{458} Sl. glasnik RS, 55/05, 71/05, 101/07, 65/08 and 16/11.
\textsuperscript{459} The National Employment Strategy for the 2011–2020 Period.
\textsuperscript{460} Statistical Office of the Republic of Serbia, 2011.
\textsuperscript{461} Sl. glasnik RS, 36/10.
to lack of legal grounds (high school and university students, pensioners) and provides them with the opportunity to avail themselves of the services of the National Employment Service.\textsuperscript{462}

Article 33 of the Act stipulates that a job seeker is duty-bound after 12 months to accept a job requiring lower qualifications but within the same profession and taking into account the job seeker’s prior work experience and circumstances in the labour market. This provision is in keeping with the practice of international bodies monitoring economic and social rights.

The Act includes an extremely important provision entitling unemployed individuals to unemployment allowances, which are within the jurisdiction of the National Employment Service. The unemployment allowances are paid out for a maximum of 12 months, exceptionally 24 months in the event the unemployed person lacks two years of service to retire (Art. 72). The amount of the monthly unemployment allowance was reduced to range from 80 to 160 percent of the minimum wage.

According to Article 1 of the ESC, the very existence of unemployment does not constitute a violation of the Charter but the efforts made by states must be adequate in the light of the economic situation and the level of unemployment.\textsuperscript{463} High unemployment and the lack of secure employment are causes that induce workers to seek employment in the informal sector of the economy. According to the Centre for Democracy surveys, the number of people working in the grey economy ranges between 300,000 and 1,000,000. Most of them appear to be working in the manufacturing, construction and hospitality industries, et al. Young, unqualified, uneducated, inexperienced workers and workers over 40 years of age are particularly vulnerable categories.\textsuperscript{464} In its General Comment 18, the CESCR underlined that states parties must take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.\textsuperscript{465} The Labour Act provisions on employment contracts need to be amended to that effect. One of the possible solutions would be to oblige the employers to register the employment contract with the competent National Employment Service unit or the competent municipal administration authorities before the worker starts the job and to keep the employment contracts and the mandatory social insurance registration forms in their offices.\textsuperscript{466}


\textsuperscript{463} Digest of the Case Law of the European Committee of Social Rights, p. 19.

\textsuperscript{464} Decent work in the Republic of Serbia, putting equality in the heart of EU integration, Centre for Democracy, 2011, str. 5.

\textsuperscript{465} See para. 10 of General Comment 18.

\textsuperscript{466} Draft amendments to Articles 32 and 33 of the Labour Act proposed by the Centre for Democracy, more at http://www.politickiforum.org/tribina_stampa.php?naredba=stampaTeksta&id=646.
On the other hand, the labour inspectors’ endeavours to combat the grey economy have been inefficient, inter alia, because the Labour Act provides room for manipulations in registering workers. The amendments to the Labour Act to be adopted in 2012 are expected to address this issue.

4.17.2.2. Workers’ Rights Concerning Termination of Employment. – According to the article 179 of the Labour Act employment may be terminated against the employee’s will for a just cause relating to his/her working ability (if the worker does not perform or does not have the necessary knowledge or ability to perform the assigned duties), his/her conduct (if the worker violates the duties laid down in the employment contract, violates work discipline, his/her conduct precludes his/her further work for the employer, commits a criminal offence at work or related to work, fails to return to work within 15 days from the day of expiry of the period of unpaid leave or dormancy of employment or abuses the right to sick leave). Termination of employment may also ensue if the employer’s needs or circumstances change (if a particular job becomes redundant or the volume of work is reduced due to technological, economic or organisational changes). The Labour Act also allows for termination of employment if the worker refuses reassignment to another appropriate job for work organisation or process reasons, transfer to another work location or to an appropriate job with another employer. Under the Act, an appropriate job means a job requiring the same type and degree of qualifications laid down in the employment contract. In addition, employment may be terminated against the employee’s will in the event s/he disagrees with an annex to the provisions in the employment contract regarding remuneration. A worker who assents to the annex to the contract is still entitled to contest the legality of the contract in civil proceedings (Art. 172 (4)). There is no reason why this right cannot be exercised by a worker whose employment contract was terminated because s/he refused to sign the relevant annex to the employment contract, although the Act does not explicitly provide for such a right.

An employer may not dismiss a worker without prior notice or if s/he can offer him or her another job or re-training. Article 183 (4), prohibits discrimination in dismissal, including dismissal on the grounds of political opinion, which is in accordance with the case-law of the Committee. An unlawfully dismissed worker enjoys judicial protection and the right to compensation of damages.

With the aim of providing special protection to specific groups, the Labour Act comprises provisions banning the dismissal of employees during pregnancy, maternity or child care leave, and the protection of the representatives of employees during their terms in office and in the subsequent year, if the representative of the employees has acted in keeping with the law, general enactments and the employment contract. This is in keeping with both with the Committee’s principle of free trade unionist activities and ILO Convention 135 on workers’ representatives.

The privatisation process has additionally undermined job certainty in Serbia. A number of Labour Act provisions are devoted to the termination of employment against the worker’s will, on grounds of redundancy caused by technological, economic or organisational changes in the company, and to the realisation of the workers’ rights due to the bankruptcy of the company. In the former case, the employer has to adopt a redundancy programme, which will notably specify: the reasons why there is no need for the jobs, the number of and other data on the redundant workers, the possibility of their retraining or advanced training, transfer to another employer or reassignment to another job, funds for regulating the social and economic status of the redundant workers and the deadline within which their employment contracts will be terminated. The employer shall pay the redundancies to the workers prior to the termination of their employment contracts. The Act lays down the minimum redundancy payments. Once a worker’s employment contract is terminated on grounds of redundancy, the employer may not hire anyone else to do that job within the next six months. In the event the employer needs to re-open the job before the six months expire, the worker declared redundant shall have precedence over the other candidates.

The Bankruptcy Act\(^{468}\) additionally ensures the payment of the workers’ claims against their bankrupt company by transferring them from the second to the first rank of creditors (Art. 54). It also increases the amount of debt to be paid to the workers in bankruptcy proceedings by including in it the interest rates from the date of maturity to the day the bankruptcy proceedings are opened. The provisions also provide for the coverage of the unpaid private pension and disability insurance borne by the employer.

4.17.2.3. Employment Related Lawsuits. – A worker is entitled to complain against a violation or denial of his or her employment right to the labour inspection (Arts. 268-272, LA), launch proceedings before the competent court (Art. 195, LA) or require the arbitration of the disputed issues together with the employer (Art. 194, LA). Provisions of the Peaceful Resolution of Labour Disputes Act apply to individual and collective labour disputes.\(^{469}\) Serbia also needs to adopt as soon as possible a law on labour inspection in order to improve protection at work and the prevention of abuse of employment contracts, particularly the concealment of the existence of such contracts.

The key problem arising in claiming one’s rights, particularly proving the employer’s discriminatory conduct, is that they are extremely difficult to prove in practice, as the labour inspection data show – only several misdemeanour reports on these grounds have been filed with this authority. Furthermore, the courts’ case law demonstrates that labour disputes tend to last several years and that they rarely end in judgments favourable to the damaged workers.\(^{470}\)

\(^{468}\) Sl. glasnik RS, 104/09.
\(^{469}\) Sl. glasnik RS, 125/04 and 104/09.
\(^{470}\) Dignified Work in Serbia, Centre for Democracy, 2011, p. 9.
4.17.3. Right to Just and Favourable Conditions of Work

Article 7, ICESCR:
The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:
   (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
   (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 2, ESC:
With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;

2. to provide for public holidays with pay;

3. to provide for a minimum of four weeks’ annual holiday with pay;

4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;

5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;

6. to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;

7. to ensure that workers performing night work benefit from measures which take account of the special nature of the work.

Article 3, ESC – The right to safe and healthy working conditions
With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers’ and workers’ organisations:

1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;

2. to issue safety and health regulations;
3. to provide for the enforcement of such regulations by measures of supervision;
4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

Article 4 ESC – The right to a fair remuneration
With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;
2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
3. to recognise the right of men and women workers to equal pay for work of equal value;
4. to recognise the right of all workers to a reasonable period of notice for termination of employment;
5. to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

4.17.3.1. Fair Wages and Equal Remuneration for Work. – Serbia is a signatory of the ILO Minimum Wage Fixing Convention (No. 131) and the ILO Equal Remuneration Convention (No. 100). Serbia has not yet ratified ILO Minimum Wage-Fixing Machinery Convention (No. 26) and the ILO Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99).

The Constitution guarantees the right of workers to fair remuneration for their work (Art. 60 (4)), although it does not include a provision explicitly prescribing equal remuneration for work of equal value.

According to the CESCR’s case-law, the obligation to provide fair wages above all implies establishment of a system for fixing minimum wages, and the setting of the wage in accordance with the real social value of each specific job. In the interpretation of the CESCR, “decent living” means the enjoyment of the rights that depend on wages, such as the right to housing, food, clothing, even to education, medical treatment and culture standards. Fair remuneration shall also mean an increased rate of remuneration for overtime work. An increased rate of remuneration for overtime work need not be guaranteed to the members of the company management or the senior officials in the state administration.

471 According to the test drafted by the Committee of Independent Experts supervising the implementation of the European Social Charter, a minimum wage may not be lower than 60% of the national average in any economic sector. See D. Harris, *European Social Charter*, 1984, p. 4951.
474 *Conclusions X–2, Ireland*, p. 62.
The Labour Act prescribes that an appropriate wage shall be fixed in keeping with the law, a general enactment or an employment contract and that an employee shall be guaranteed equal wage for the same work or work of the same value, adding that the employment contract violating this principle shall be deemed null and void. The Act defines work of the same value as work requiring the same qualifications, working capacity, responsibility and physical and intellectual work.

With a view to ensuring financial and social security of employees, the Labour Act envisages the right of employees to minimum wages (the so-called right to guaranteed wages under previous regulations). Conditions for fixing the minimum wage are regulated by the General Collective Agreement. Under its provisions, the determination of the minimum wage shall take into account the existential and social needs of the workers and their families, the value of the consumer basket, the overall level of economic development, the current level of remuneration and how it compares to remuneration offered by other employers in the same branch, the growth of living costs, the share of wages in the operating costs and the achieved financial and business results. The minimum wage was set at 95.00 dinars (net) per working hour for the January-May 2011 period and at 102.00 dinars (net) per working hour for the June-December 2011 period.475

Under the Labour Act, overtime work shall be paid at a rate at least 26% higher than the wage base. The same rate is paid for work in shifts or at night, in the event the employment contract does not specify remuneration for such work. The Act also lays down a 0.4% progressive annual increase in wages for every year of service (Art. 54).

The Labour Act introduce the possibility of the employer ordering the employee to take a leave of absence exceeding 45 days with adequate compensation of wage which shall not be lower than 60% of the average wage in the past three months in the event the undertaking halts work or reduces the volume of work; such compensation may not be lower than the minimum wage set in accordance with the Act (Art. 116).

The Act does not oblige employers to keep records of overtime. This has greatly obstructed the checks by the labour inspectors because most employers do not render decisions on overtime or keep records of their staff’s overtime. A labour inspector has a hard time establishing the facts regarding overtime and whether the employer paid the staff for it. In practice, workers tend not to report violations of their labour rights in fear of losing their jobs; such violations are reported only once they no longer work for the employer.476

4.17.3.2. Occupational Safety. – Serbia has ratified all chief ILO conventions on occupational safety and compensation for work-related accidents or professional

475 Republic of Serbia Social and Economic Council Decision No: 95/2011 (Sl. glasnik RS, 35/11). Exchange rate in December 2011 was 104,69 RSD for 1 EUR.
diseases, health care and occupational health services. The following two ILO Conven-
tions are the most relevant in that respect: Convention No. 187 on a Promotional
Framework for Occupational Safety and Health477 and Convention No. 167
on Safety and Health in Construction.478 The ESC specifically guarantees the right
to safe and healthy working conditions in Article 3.479

The ratification and effective implementation of the ILO Convention No. 167
is very important given the many accidents experienced by construction workers in
Serbia.480

Article 60 (4) of the Constitution guarantees everyone the right to occupa-
tional safety and health and the right to protection at work. Para 5 of the Article
guarantees special protection at work to women, the young and persons with dis-
abilities.

Under the Labour Act, an employee has the right to health and safety at
work. The Act introduces in Article 80 (2) the obligation of the employee to abide
by safety and health protection regulations so as not to endanger his/her own health
and safety and those of other employees and people. An Occupational Safety and
Health Directorate has been set up within the Ministry of Labour and Social Min-
istry. It is charged with monitoring the implementation of occupational safety and
health regulations and measures, overseeing the work of employers with respect to
safety and health at work, collecting and analysing data on work-related injuries,
organising counselling and professional training for the employers and informing
the public of the state of health and safety at work.

The Serbian Occupational Safety and Health Act481 complies with the rati-
fied ILO Conventions and the main Directive 89/391/EEC and the directives deriv-
ing from it by adhering to all the guidelines in these directives to the extent and in
the form reflecting the national circumstances. Apart from the Occupational Safety
and Health Act, the following laws also affect various aspects of safety and health
at work: the Labour Act, the Health Protection Act,482 the Health Insurance Act,483
the Pension and Disability Insurance Act,484 etc. The legislative framework of the
system of health and safety at work has been completed with a number of by-laws
that have been adopted.485

477 Sl. glasnik RS (Međunarodni ugovori), 42/09.
478 Ibid.
479 More in Digest of the Case Law of the European Committee of Social Rights, pp. 35–43.
480 The number of work-related injuries is extremely high in the manufacturing and construction
industries – 37% of injuries in these industries were lethal, as opposed to 22% in the grey
481 Sl. glasnik RS, 101/05.
482 Sl. glasnik RS, 107/05, 88/10, 99/10 and 57/11.
483 Sl. glasnik RS, 107/05, 109/05 and 57/11.
484 Sl. glasnik RS, 34/03, 64/04, 84/04, 85/05, 5/09, 107/09 and 101/10.
Inspectorial supervision of the implementation of the laws and other safety regulations, measures, norms and technical measures, company enactments and collective agreements shall be performed by the labour inspectors in the ministry charged with labour affairs (Art. 60, Occupational Safety and Health Act). The Act also prescribes penalties for violating the provisions of the Act and the norms, standards, regulations and directives.486

The Serbian Government in 2009 adopted the Strategy of Safety and Health at Work in the Republic of Serbia for the 2009–2012.487 Although the Strategy envisages inter alia the raising of the inspectorates’ professional capacities, the enforcement of the law and its standards in practice is still encountering problems. The inspectors are in need of professional advanced training, the inspectorates are understaffed and coordination of work in the field is in need of improvement.

4.17.3.3. Right to Rest, Leisure and Limited Working Hours. – Serbia ratified nearly all ILO conventions regarding weekly rest and paid leave. Serbia withdrew from ILO Holidays with Pay Convention (No. 52) and Holidays with Pay (Agriculture) Convention (No. 101). Serbia never ratified ILO Hours of Work (Commerce and Offices) Convention (No. 30) or the Forty-Hour Week Convention (No. 47).

Article 60 (4) of the Constitution explicitly guarantees the right to limited working hours, daily and weekly rest, and paid annual vacations. The Labour Act stipulates a five-day working week (Art. 55) and a 40-hour full-time working week (Art. 50). However, in the event the employer reschedules the working hours, an employee may work up to 60 hours a week (Art. 57 (3)). The rescheduling of working hours shall not be reckoned as overtime work (Art. 58). This provision is in accordance with the Committee case law, which considers that a working week exceeding 60 hours under certain conditions is unreasonable.488

A workday lasts eight hours as a rule, but the law allows up to four hours of overtime per day. The employer may organise work in various ways under conditions prescribed by the law. To ensure effective oversight of the respect of this legal provision, which has proven extremely disputable in practice, employers ought to be obliged to keep records of the hours their employees work every day, which would be signed by the employees and the employer or the person s/he authorised at the end of the month or wage calculation period.489

Employees have the legal right to a break during working hours and the right to daily, weekly and annual rests, as well as to paid and unpaid leave in keeping with the law. Employees may not be deprived of these rights. The Labour Act provisions on paid leave are in keeping with minimal European and UN standards. Ac-
According to European standards, a worker is also entitled to paid leave during public holidays (Art. 2.2 ESC) and work performed on a public holiday should be paid at least double the usual rate. Under Article 108 of the Labour Act, an employee shall be entitled to an increase in pay for work during a public holiday amounting to a minimum 110% of the wage base.

The CESCR considers that, save in exceptional cases, periods of on-call duty during which the employee has not been required to perform work for the employer, although they do not constitute effective working time, cannot be regarded as a rest period.

4.17.4. Trade Union Freedoms

Article 8, ICESCR:

1. The States Parties to the present Covenant undertake to ensure:
   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 5 – The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

490 Conclusions XVIII–1, Croatia, p. 116.
491 See Digest of the Case Law of the European Committee of Social Rights, p. 28.
Article 6 – The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

4.17.4.1. Freedom to Form Trade Unions. – Freedom to form trade unions is the only trade union right guaranteed by all four general human rights protection instruments Serbia has ratified – ICCPR (Art. 22), ECHR (Art. 11) and ICESCR (Art. 8) and ESC (Art. 5 and 6). This freedom entails the right to found a trade union and the right to join in a trade union of one’s own free will, the right to establish associations, national and international associations of trade unions, and the right of trade unions to function independently, without state interference.

Serbia is a signatory of the following ILO Conventions: Right of Association (Agriculture) (No. 11), Freedom of Association and Protection of the Right to Organise (No. 87), Right to Organise and Collective Bargaining (No. 98), and on Workers’ Representatives (No. 135).

Article 55 of the Constitution guarantees the freedom to associate in trade unions. Persons establishing trade unions need not obtain prior consent and trade unions shall be set up by entry in a register kept by the competent state authority in accordance with the law. Only the Constitutional Court may prohibit the work of an association, including a trade union, in instances explicitly enumerated in paragraph 4 of the Article. The realisation of the freedom of organisation in trade unions is regulated in greater detail by the Labour Act, laws regulating associations of citizens and bylaws. The Labour Act defines a trade union as an autonomous, democratic and independent organisation of employees which they associate in of their own free will to represent, advocate, promote and protect their professional, labour, economic, social, cultural and other individual and collective interests (Art. 6). Article 206 guarantees the employees freedom of organisation in trade unions.

Trade unions do not need approval for registration in the register kept by the ministry charged with labour affairs. The trade union registration procedure is regulated by the Rules on Entry of Trade Union Organisations in the Register. Under

492 Sl. novine Kraljevine Jugoslavije, 44–XVI/30.
493 Sl. list FNRJ (Dodatak), 11/58.
494 Sl. glasnik RS, 50/05 and 10/10.
Article 7 of the Rules, a trade union organisation shall be deleted from the register, *inter alia*, pursuant to a legally binding decision prohibiting the work of the trade union (Art. 7 (2) of the Rules).495 Only the Constitutional Court may reach a decision prohibiting the work of any association (Art. 50 (1)).496

The freedom of association in trade unions of police and other civil servants is not explicitly addressed by the Constitution. Under Article 55 (5) of the Constitution, specific categories of civil servants (judges and prosecutors, police and army staff and the Ombudsman) are prohibited from membership in political organisations. As the Constitution does not include a provision prohibiting their association in trade unions, it should be interpreted so as to imply that these categories of employees are constitutionally guaranteed the right to association in trade unions.

4.17.4.2. Protection of Workers’ Representatives. – The ILO in 1971 adopted Convention 135 on Workers’ Representatives. The need for giving this category of employees a special status arises from the sensitivity of their position.

The Labour Act in Article 188 prohibits the employer from terminating an employment contract or placing a workers’ representative at a disadvantage in another manner while the employee is holding the position of workers’ representative and over the following year if the workers’ representative is acting in keeping with the law, general enactments and the employment contract. The Act defines workers’ representatives as: members of staff councils and staff representatives in the employer’s executive or supervisory boards, chairmen of trade union branches in the company and appointed and elected trade union representatives. The employer may nevertheless in keeping with the law dismiss a workers’ representative who refuses to sign an amended employment contract. Under the Act, authorised trade union representatives have the right to paid leave to perform the trade union duties in keeping with the collective agreement or agreement between the employer and their trade unions; the leave shall be proportionate to the number of trade union members in the company (Art. 211, Labour Act). An authorised trade union representative may be fully relieved of his duties under the employment contract while holding the function by a collective agreement or another agreement.

An analysis of the survey State of Social Dialogue in Serbia leads to the conclusion that most citizens distrust institutions, including trade unions. Only 15 percent of the citizens trust trade unions, while the percentage of those who absolutely or mostly distrust them is three times greater. The number of trade union organisations in Serbia is estimated at around 22,000. Most of their members are unquali-

495 Article 4 of the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise explicitly prohibits the dissolution and suspension of work of a trade union by the administrative authorities. According to the CFA, this is the most extreme form of interference in the independent operations of trade unions by public authorities.

496 Prior provisions, under which *municipal administration authorities* charged with internal affairs passed decisions prohibiting the work of trade unions, were abolished when the Act on Associations was adopted.
fied or semi-qualified workers (37%), white-collar workers (36%) and technicians (34%). They are followed by university graduates (29%) and qualified and highly qualified workers (28%). However, regardless of how long they have worked and their education, many workers do not actually know what membership in a trade union entails. Only one out of eight workers, who are members of a trade union, is totally uninformed about the activities of the organisation they belong to.\footnote{State of Social Dialogue in Serbia after Twenty Years of Transition, available in Serbian at http://www.politickiforum.org/dokumenta/44_Socijalni.pdf.}

4.17.4.3. Right to Strike. – The right to strike is guaranteed by Article 61 of the Constitution. Workers shall have a right to strike in accordance with the law and the collective agreement. The right to strike may be restricted only by law and in accordance with the type and nature of activity.

Under the Strike Act\footnote{Sl. list SRJ, 29/96.} the right to strike is limited by the obligation of the strikers’ committee and workers participating in a strike to organise and conduct a strike in a manner which does not jeopardise the safety of people and property and people’s health, which prevents causing of direct pecuniary damage and enables the continuation of work upon the termination of strike. Besides that general restriction, a special strike regime is also established: “in public services or other services where work stoppages could, due to the nature of the service, endanger public health or life, or cause major damage” (Art. 9 (1)). Activities of public interest are those implemented by an employer in the following spheres: power generation industry, water supply industry, transport, information, PTT services, public utilities, staple foods production, health and veterinary protection, education, social care of children and social welfare, as well as activities of general interest to the defence and security of the state and affairs necessary for the implementation of the state’s international obligations.\footnote{The list is much too extensive and is not in conformity with international standards. The same view was taken by the Committee on Economic, Social and Cultural Rights in its Concluding Observations on the realisation of social, economic and cultural rights in Serbia and Montenegro. The Committee reviewed the Report at the time Serbia was still a member of the State Union of Serbia and Montenegro, see: Concluding Observations, UN doc. E/C.12/1/Add.108, 23 June 2005.}

Fields in which work stoppage could jeopardise people’s life and health or cause major damage are: the chemical industry, ferrous and non-ferrous metallurgy (Art. 9 (2–4)). In these branches, the right to strike may be exercised if special conditions are met, which means to “ensure the minimum process of work which ensures the safety of people and property or is an indispensable condition for life and work of citizens or another enterprise or a legal or natural person performing an economic or other activity or service” (Art. 10 (1)). The minimum process of work is set by the director, and for public services and public enterprises by the founder, in the manner established by the general employment act, under the collec-
The director and the founder have the obligation to take into account opinions, remarks and proposals of trade unions (Art. 10 (3 and 4)).

The obligation to ensure minimum services in specific fields is in keeping with the practice of the European Committee and the CESCR.\(^{500}\) The Strike Act’s definition of the minimum is so broad that it brings into question the possibility of a strike or its effectiveness. Moreover, vague formulations such as “compliance with international obligations” make it possible completely to ban industrial action in some cases, for example in companies that are exclusively export-oriented. Thus the established regimen of strikes to an extent contradicts the very right to strike.

Article 8 (2) of ICESCR allows countries to restrict by law the right to strike of members of the armed forces, the police or of the state administration. The Constitution does not explicitly deny civil servants the right to strike. As it includes a provision allowing for restrictions of the right to strike by law in specific areas of activity and as this provision must be interpreted in conjunction with Article 18 (2) of the Constitution, under which laws may not affect the essence of constitutionally guaranteed rights, it can be concluded that employees in state administration and members of the police in Serbia have the right to strike.

The Strike Act\(^{501}\) in Article 18 stipulates termination of employment of an Army, state and police employee if it is established that s/he organised a strike or took part in one.

A working draft of the new Strike Act presented in 2011 was criticised by many trade unions and professionals. They mainly objected to the procedure by which it was prepared, claiming that it was absolutely non-transparent and the fact that the public debate was organised in a way that did not afford all workers in all sectors and all trade unions with the opportunity to take part in it.\(^{502}\) They also criticised some of the provisions. Many trade unions and associations of citizens noted that the draft deprived them of the existing right to strike and gave more rights to the employers and the state, whereby it denied them their constitutional rights and freedoms of association, assembly and expression. Specific provisions, like the one prohibiting staging a strike outside company grounds, directly restrict the freedom of assembly and the freedom of expression. Given that the freedom of assembly is governed by a separate law, its additional restriction by the Strike Act is unjustified. Under the draft, the decision to go on strike may be taken by the competent trade

\(^{500}\) Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour “Podkrepa” and European Trade Union Confederation (CES) v. Bulgaria, Complaint No. 32/2005, Decision on the Merits, 16 October 2006, para. 24.

\(^{501}\) Sl. list SRJ, 29/96 and Sl. glasnik RS, 101/05.

\(^{502}\) Assistant Labour and Social Policy Minister Radmila Bukumirić Katić said that the work on this new law began back in 2010 and that a working group, comprising two representatives of each of the following organisations – UGS Nezavisnost, the Alliance of Independent Trade Unions of Serbia and the Union of Employers of Serbia – had held 10 meetings by mid-2011. She said that the working group finalised the draft of the law (Politika, 25 June 2011).
union body or most of the workers. This article may lead to limiting the right to strike in the absence of a decision of the trade union since it is clearly difficult to persuade most workers in large companies to support the decision to go on strike.

Given that the draft was withdrawn from the Assembly pipeline and that the Social and Economic Council issued a statement saying that the adoption of the new law should not be hurried, expectations are that work on the draft will continue in 2012 and that the disputed articles will be aligned with the constitutional principles, ILO recommendations and good practices.

4.17.4.4. General Collective Agreement. – Representatives of two representative trade unions (UGS Nezavisnost and the Alliance of Independent Trade Unions of Serbia) and the Union of Employers signed a General Collective Agreement in 2008. The competent minister signed the agreement expanding it to apply to all employees and employers in Serbia. Provisions on meals, holiday bonuses, transportation, night shifts and other allowances for employees provided for by the Labour Act were temporarily suspended by the Social and Economic Council in 2008, due to the impact of the global economic crisis on Serbia’s economy. The enforcement of these provisions did not begin in 2011 either. The talks on reintroducing the obligation of the employers to pay the workers the meal and holiday allowances in 2011 were suspended because the state was unwilling to exempt them from tax.503

4.17.5. Right to Social Security

Article 9, ICESCR:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 12, ESC:

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
   a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
   b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

503 See: Marija Obrenović, “Talks Halt over Croissant”, Odjek, No. 68, December 2011, p. 11.
Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 14 – The right to benefit from social welfare services

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:

1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services

Under Article 69 of the Constitution, citizens and families in need of welfare to overcome their social and existential difficulties and begin providing subsistence for themselves shall have the right to social protection, the provision of which shall be based on the principles of social justice, humanity and respect for human dignity. In its Opinion on the Constitution of Serbia, the Venice Commission commented that social protection is not granted generally but only to citizens and families by the Constitution.504

The Constitution also guarantees the rights of the employed and their families to social protection and insurance, the right to compensation of salary in case of temporary inability to work and to temporary unemployment allowances. The Constitution also affords special social protection to specific categories of the population and obliges the state to establish various types of social insurance funds. Article 70 of the Constitution specifically guarantees the right to pension insurance.

Social security comprises pension, disability, health and unemployment insurance. The issues are regulated by a number of laws.

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Social insurance against old age and disability is regulated by the Pension and Disability Insurance Act and the Act on Voluntary Pension Funds and Pension Plans. Compulsory insurance encompasses all employees, individual entrepreneurs and farmers. This insurance ensures the rights of the insurants in old age, or in the event of disability, death or corporal injury caused by a work-related accident or occupational disease.

The law also allows voluntary insurance for persons who are not covered by the compulsory insurance schemes, in the manner prescribed by a separate law (Art. 16, Pension and Disability Insurance Act). At the same time, by voluntary insurance, the insured persons may secure a wider scope or other form of rights for themselves and their families, other than those prescribed by the Act. The Pension and Disability Insurance Act provisions related to voluntary insurance resolved the dilemma whether an employer-pension fund agreement (so-called pension plan) may be concluded on behalf of third parties i.e. employees.

The 2010 amendments to the Pension and Disability Insurance Act lay down stricter retirement requirements and envisage a gradual increase of the retirement ages of men and women until 2023.

The National Assembly of the Republic of Serbia adopted the new Welfare Act in March 2011. Article 17 of the Act commendably allows not only state, provincial and local authorities but natural and legal persons fulfilling the legal requirements as well to provide social protection services, and thereby affirms the plurality of social protection service providers. The local self-governments may establish social work centres, while the state and province may establish social protection institutions.

Social security rights include the right to welfare benefits, outside assistance and care allowances, job training allowances, home care, day care, placement in an institution or another family, social welfare services, preparatory work for placement of beneficiaries in a welfare institution or another family, and one-off assistance.

The Act lists the forms of material support, including, among others, outside assistance and care allowances and increased outside assistance and care allowances (Art. 79). These allowances are granted people who are in need of the assistance and care of another person to perform basic everyday activities because of a physical or sensory impairment, intellectual difficulties or health problems (Art. 92 (1)). The Act introduced major changes in the institutional and regulatory spheres. It provides for the introduction of a social protection chamber, licensing of professionals and service providers, introduction of the public procurement of services, redesign of...
the oversight, supervision and inspection mechanisms. Furthermore, the Act envisages targeted transfers from the state budget for funding community-based services within the remit of the local self-governments (Arts. 206 and 207).

4.17.6. Protection Accorded to Family

Article 10, ICESCR:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 16, ESC:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 17, ESC:

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1.a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;

b) to protect children and young persons against negligence, violence or exploitation;

c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support;

2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Apart from the ICESCR, Serbia is a signatory of the Convention on the Rights of the Child, the Optional Protocol to the Convention on Sale of Children, Child Prostitution and Pornography, and the ILO Conventions on Maternity Protec-
tion (No. 3); Medical Examination of Young Persons (Sea) (No. 16), Underground Work (Women) (No. 45), Night Work (Women) (Revised) (No. 89), Night Work of Young Persons (Industry) (Revised), (No. 90), Maternity Protection (Revised) (No. 103), Minimum Age (No. 138), Workers with Family Responsibilities (No. 156) and Worst Forms of Child Labour (No. 182).

By ratifying the ESC, Serbia undertook also to fulfill the obligations regarding the full protection of children and young people (Art. 7) and the right of employed women to protection of maternity by defining the legal minimum obligations of employers towards pregnant women (Art. 8). Furthermore, it undertook to promote the economic, legal and social protection of family life by such means as social and family benefits (Art. 16) and to take measures to ensure the protection of children and young people from negligence and violence, provide them with free education and provide special aid to young people deprived of their family’s support (Art. 17)

Article 66 of the Constitution guarantees special protection to the family and the child, mothers and single parents. In paragraph 2 of this Article, it guarantees support and protection to mothers before and after childbirth and, in paragraph 3 of this Article, it guarantees special protection to children without parental care and children with physical or mental disabilities. The Constitution prohibits employment of children under 15; minors over 15 are prohibited from performing jobs that may adversely affect their health or morals. Article 64 of the Constitution is devoted to the rights of the child.

The Labour Act does not afford special protection to employed women, except in case of pregnancy, which is in conformity with European trends to equate treatment of men and women at work, although Serbia did not denounce the relevant ILO conventions.509

Maternity leave is a fundamental right of working women. Pregnant women and women with children under the age of three may not work overtime or at night. Exceptionally, a woman with a child over the age of two may work at night but only if she specifically requests this in writing. Single parents with a child under seven or a severely handicapped child may work overtime or at night only if they make a written request to this effect (Art. 68 (3), Labour Act).

If the condition of a child requires special care or if it suffers from a severe disability, one of the parents has the right to additional leave. One of the parents may choose between leave and working only half-time, for 5 years maximum (Art. 96, Labour Act). Under the Labour Act, one parent may take leave from work until

509 Namely, all EU member states apart from Slovenia have denounced Convention 89 Concerning Night Work of Women Employed in Industry at ECtHR’s indirect suggestion (see: Stoeckel C–345/89 and Levy C–158/91). Some European states denounced Convention 45 on hiring women to work underground in mines of all categories (UK, The Netherlands, Finland, Sweden, Ireland and Luxembourg) while Denmark, Norway, Latvia, Lithuania and Cyprus never signed it.
the child’s third birthday and his/her labour rights and duties will remain dormant during this period. (Art. 100 (2), Labour Act).

The law guarantees to an extent a woman’s job during pregnancy, maternity leave and additional leave (and to a man exercising the right to ordinary and additional child care leave). The Labour Act provides for extensive protection of employees on the basis of exercising the above-mentioned rights (Art. 187 (1)). The only exception regards employees with limited contracts if their employment contract expires while they are exercising the rights.

The Labour Act sets 15 as the minimum employment age (Art. 24) and affords special protection to employees under 18. In order to protect their health, minors and young adults may not be hired to perform specific jobs.

Under the Act on Financial Support to Families with Children,\textsuperscript{510} parental benefits shall be paid only for the first four children to mothers who are citizens of Serbia, have residence in Serbia and state health insurance. Parents are not entitled to benefits for their successive children, unless the mother gives birth to twins or more children the next time (with the special consent of the ministry charged with social affairs).

The Act on Infertility Treatment by Bio-Medically Assisted Fertilisation Procedures\textsuperscript{511} defines the principle under which the medical justifiability of bio-medically assisted fertilisation shall be applied in the event infertility treatment by other procedures is impossible or has considerably lesser chance of success unless bio-medically assisted treatment leads to unacceptable risks to the health, life and safety of the mother or child.

Specific provisions in the bill, however, are not in conformity with modern trends, given that contemporary families do not always comprise the mother, father and children, but single mothers and fathers as well. The Act on Infertility Treatment allows artificial insemination of women who are not in a union with a man but lays down special criteria (Art. 26 (3)). A single woman shall exceptionally be entitled to fertility treatment with the consent of the ministers charged with health and family relations if there are justified reasons for such treatment. This provision discriminates against women who want children but do not have male partners.

\textit{4.17.7. Right to an Adequate Standard of Living}

Article 11, ICSECR:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

\textsuperscript{510} \textit{Sl. glasnik RS}, 16/02, 115/05 and 107/09.

\textsuperscript{511} \textit{Sl. glasnik RS}, 72/09.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

4.17.7.1. Right to Housing. – This right is enshrined notably in the Universal Declaration of Human Rights (Art. 25 (1)), the Convention on the Rights of the Child (Art. 27) and the Convention on the Elimination of All Forms of Discrimination against Women (Art. 14). The most comprehensive provision is the one in Article 11 of the ICESCR. Serbia has ratified all these international treaties, but did not accept the obligations in Article 31 of the ESC when it ratified it.

In Serbia, minimum housing standards are not fixed. This creates insurmountable problems in statistically establishing the number of substandard dwellings.\(^{512}\)

The Social Housing Act\(^ {513}\) systemically governs state support to households unable to acquire housing under market conditions due to social, economic or other reasons. The Social Housing Act does not define a dwelling but it does define social housing. Solidarity housing may only be leased, but the Act prohibits its purchase, permanent ownership transfer or subletting. Under the Act, persons without housing i.e. persons without housing of adequate standard shall be provided assistance in addressing their housing problems. The Act sets the main criteria for establishing priority in social housing: current housing status, income level, health, a disability, number of household members and property status of the applicant. The Act in addition lists vulnerability (children and young people, refugees, persons with disabilities, Roma, etc) as a criterion. The right to housing of vulnerable groups, especially refugees, IDPs and Roma, living in unhygienic and unsuitable housing, is a burning issue.

The Welfare Act\(^ {514}\) provides for accommodation in social protection institutions for persons with physical and sensory impairments, chronically ill persons, persons with mental disabilities, pensioners and other elderly people whose ability to live independent lives is unimpaired or slightly impaired.

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512 The Housing Act defines a dwelling as “A dwelling within the meaning of the present Act is one or more rooms intended and suitable for habitation which, as a rule, makes up a single unit with a separate entrance” (Art. 3). The definition in official statistics is: “a built unit consisting of one or more rooms with ancillary rooms (kitchen, pantry, entranceway, bathroom and similar, or without ancillary rooms and with one or more entrances” (italics added).

513 Sl. glasnik RS, 72/09.

514 Sl. glasnik RS, 24/11.
The Act on Refugees\textsuperscript{515} lays down state measures for addressing the housing needs of refugees and former refugees aimed at their integration. These measures include: ceding for free or renting state-owned real estate for a specific period of time and the possibility to purchase it, granting funds for improving housing conditions, purchasing rural homes, etc.

Available data on social inclusion and poverty indicators show that the housing conditions and quality of housing of socially vulnerable people are inadequate. The Republic of Serbia’s housing fund is insufficient, outdated and poorly maintained. The Roma are in a particularly precarious situation. There is a large number of illegal Roma settlements, whilst the forced resettlement of Roma families by the city authorities poses an even greater challenge.

The absence of a national housing policy represents one of the key challenges in this sector. This notably regards the fact that a social housing strategy has not been adopted even one year after the endorsement of the Social Housing Act.

Finally, all the relevant state stakeholders and institutions have to face a particular challenge: that the collective centres that are being closed are still the only homes to the most vulnerable, the elderly, chronically ill people and people with disabilities.\textsuperscript{516}

\section*{4.17.8. Right to Highest Attainable Standard of Physical and Mental Health}

Article 12, ICESCR:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

   (b) The improvement of all aspects of environmental and industrial hygiene;

   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The right to physical and mental health implies freedoms and obligations: freedom from physical and mental torture and injury, freedom of decision on therapy, prohibition of experimentation for health purposes, etc. On the other hand, there is the obligation to establish a health care system within which health care benefi-

\textsuperscript{515} Sl. glasnik RS, 18/92, 45/02 and 30/10.

ciaries may be set obligations with the purpose of providing equal health care to all citizens without discrimination.517

The right to health protection is guaranteed by the Constitution, which entitles children, pregnant women, mothers on maternity leave, single parents of children under seven and the elderly to free medical aid even if they are not beneficiaries of compulsory health insurance. The Constitution obliges the state to assist the development of health and physical culture but does not specify how. It also obliges the state to establish health insurance funds.

4.17.8.1. Health Insurance and Health Protection. – The matter is regulated by the Health Insurance Act518 and the Health Protection Act.519

The Health Insurance Act regulates compulsory and voluntary health insurance. The Republican Health Insurance Bureau is charged with managing and ensuring compulsory health insurance, while voluntary health insurance may be provided by private insurance and special health insurance investment funds whose organisation and activities will be regulated by a separate law. In late 2008, the Assembly passed the Act on Freezing and Writing Off Overdue Compulsory Health Insurance Contributions,520 which allows for freezing the obligation to pay overdue compulsory health insurance contributions and for writing off debts arising from the non-payment of due compulsory health insurance contributions. Under the Act, the debts would be inactive until the end of 2011.

Health protection comprises curative, preventive, and rehabilitative care. It is funded from the health insurance funds, the state budget and by beneficiaries in cases specified by the law (participation). The right to health protection provided by compulsory health insurance comprises: prevention and early diagnosis of illnesses, check-ups and treatment of women with regard to family planning, during pregnancy, delivery and maternity; check-ups and treatment in case of illness or injury, dentistry check-ups and treatment;521 medical rehabilitation in case of illness or injury, medications and medical equipment and technical aids. Health protection in the above cases may be fully covered from insurance funds or with the participation of the insured person. The Act enumerates all the cases in which the insurant must participate in the medical costs and sets the amounts in percents (Art. 45, Health Insurance Act). Specific categories are exempted from paying the participation (war military and civilian invalids, other persons with disabilities, blood donors, et al).

A set of so-called health laws was adopted in 2009 and 2010. These laws improve the possibilities for planning the national health policies, oblige the state to define a public health policy and strategy and special public health programmes

518 Sl. glasnik RS, 107/05, 109/05 and 57/11.
519 Sl. glasnik RS, 107/05, 72/09, 88/10, 99/10 and 57/11.
520 Sl. glasnik RS, 102/08 and 31/09.
521 The new Act introduces extensive restrictions with respect to dental services.
and define and implement tax and economic policy measures encouraging healthy lifestyles. They also lay down the procedure, conditions, oversight and organisation of blood transfusion, govern issues of relevance to the transplantaton of organs or parts of organs, the harvesting and donation of organs, and the procurement, donation, testing, processing, preservation, storage and distribution of human cells and tissues for human application.522

4.17.8.2. Rights of Patients. – The Health Protection Act devotes special attention to the protection of patients’ rights. The patient has the fundamental right to access health care in keeping with the financial possibilities of the health care system (Art. 26, Health Protection Act). All patients have the right to all types of information notwithstanding their state of health, medical service or manner in which they are using it and to all information available on the basis of research and technological innovations, as well as the right to timely information needed for a decision on whether to consent or not to a proposed medical measure (Arts. 27 and 28, Health Protection Act). The Act also envisages an exception from the obligation to inform the patient of the diagnosis if that would endanger the patient’s health, but in that case, a relative of the patient must be informed of the diagnosis. A patient has the right to free choice of a medical team i.e. doctor and to free choice of medical procedure, including the right to refuse treatment. As a rule, no medical measures may be taken with respect to a patient without his consent. Exceptions pertain to the immediate need for medical measures in circumstances in which the patient is unable to give his/her consent (including the impossibility of obtaining the timely consent of the patient’s guardian or legal representative) as well as medical treatment of a person with a mental disorder. The Act allows the patient to himself decide who will reach decisions on medical measures in case he is incapable of taking the decision (so-called advance care directives). A patient shall enjoy the protection of personal data and privacy s/he imparted to the health workers or that were obtained during diagnostic check-ups or treatment. Experimenting on patients without their explicit consent is also forbidden. A patient also has the right to compensation of damages caused by medical negligence. This right cannot be ruled out or restricted in advance.

The Health Protection Act establishes protectors of patient rights who will be charged with reviewing patient complaints within the health institutions (Art. 39, Health Protection Act). A protector of patient rights will be independent in his/her work and must decide on a complaint within eight days. If the patient is dissatisfied with the decision, s/he may complain to the health inspectorate.

4.17.9. Right to Education

Under the Constitution, everyone shall have the right to education. Article 71 sets out that primary and secondary education shall be free of charge. In addition, primary education shall be mandatory. Under the Constitution, all citizens

522 The Blood Transfusion Act, the Transplantation of Organs Act and the Cell and Tissue Transplantation Act (Sl. glasnik RS, 72/09). More in Report 2010, I.4.18.9.3.
shall have equal access to tertiary education; the state shall provide free tertiary education to successful and talented students, who are unable to pay the tuition, in accordance with the law.

The Act on the Basis of the Education System\textsuperscript{523} provides for the non-segregated inclusion of children in education and continuous schooling, extends the duration of the mandatory and free Preschool Preparatory Programme from six to nine months, governs the inclusive education approach and envisages mechanisms to support the children and the teaching staff. Although over a year has passed since this law providing for inclusive education of children has been adopted, a number of problems have been identified in Serbia’s school system. The general assessment is that the kindergarten and grade teachers have been insufficiently prepared to ensure quality inclusion to the benefit of all children in class.\textsuperscript{524} Over 80\% of the kindergarten teachers and 70\% of the grade teachers said that they did not feel professionally prepared to work in mainstream education and adjust their teaching methods to the requirements posed by inclusive education, although they had undergone the training organised by the Education Ministry. Inclusion does not pertain only to children with developmental difficulties, but also to children from marginalised communities, underachievers, children from internally displaced communities and all those who have problems in school for social reasons. The law also provides for the establishment of inter-sectoral cooperation and coordination at the local level to support children from vulnerable groups.\textsuperscript{525}

The Preschool Education Act\textsuperscript{526} gives priority to enrolment of children from vulnerable groups and provides for the implementation of separate, specialised and alternative programmes. Children under 6 need not attend the preschool program, whilst the local governments shall provide transportation for the children and the persons accompanying them.

The Act on Pupil and Student Standards\textsuperscript{527} governs the rights related to pupil and student standards, the establishment of organisations and the work of pupil and student standard institutions.

In 2010, the Government of Serbia established the Vocational and Adult Education Improvement Council, which is chaired by the Serbian Chamber of Commerce.\textsuperscript{528}

Education laws comprise provisions protecting groups and individuals from discrimination and protection from physical punishment and verbal abuse of stu-

\begin{itemize}
\item \textsuperscript{523} \textit{Sl. glasnik RS}, 72/09 and 52/11.
\item \textsuperscript{524} As a survey conducted by the Educational Research Institute, \textit{Tanjug}, 12, July 2011.
\item \textsuperscript{525} \textit{The First National Report on Social Inclusion and Poverty Reduction}, March 2011, Government of the Republic of Serbia, p. 129.
\item \textsuperscript{526} \textit{Sl. glasnik RS}, 18/10.
\item \textsuperscript{527} \textit{Ibid}.
\item \textsuperscript{528} \textit{The First National Report on Social Inclusion and Poverty Reduction}, March 2011, Government of the Republic of Serbia, p. 121.
\end{itemize}
dents. In this way the laws underline the provisions of the Convention on the Rights of the Child related to non-discrimination, protection from abuse and school discipline in terms of the way it can be exercised (Arts. 2, 19 (1) and 28 (2), Convention on the Rights of the Child)\textsuperscript{529} These prohibitions are supported by appropriate protection mechanisms and their breach constitutes the grounds for dismissal of teachers or associates from the teaching process (Art. 73 (1), Act on Primary Schools and Art. 80 (1), Act on Secondary Schools). These are also the grounds for dismissal of school principals who do not take appropriate action in cases of improper conduct of the teachers (Art. 88 (3), Act on Secondary Schools), and penalties have also been prescribed for the school, which is obliged to pay a fine for the offence if it fails to take action against such conduct (Art. 109 (11 and 12), Act on Primary Schools and Act. 140 (1 and 2), Act on Secondary Schools).

The Republic of Serbia allocates only between 3.5 and 3.8 percent of its GDP\textsuperscript{530} for education, i.e. the least in Europe. The percent earmarked for welfare transfers, standing at 1.4\%, is also the lowest in the region.\textsuperscript{531}

The Act Establishing the Jurisdiction of the Autonomous Province of Vojvodina\textsuperscript{532} lays down the competences of the AP of Vojvodina in the field of education. Through its authorities, the AP of Vojvodina shall establish and look after the work of preschool, primary and secondary educational institutions, perform inspectorial supervision of them and be charged with other duties regarding their work.

The Constitution of Serbia explicitly guarantees the autonomy of the universities, colleges and scientific institutions (Art. 72). Under paragraph 2 of the Article, they shall decide freely on their organisation and work in accordance with the law. Article 73 of the Constitution also guarantees the freedom of scientific and artistic creation.

This area is regulated by the Higher Education Act.\textsuperscript{533} In its introductory provisions, the Act says that higher education is of special relevance to the Republic of Serbia and part of international, notably European education, science and arts (Art. 2). Higher education is based \textit{inter alia} on the principles of academic freedoms, autonomy, respect of human rights and civil liberties, including prohibition of all forms of discrimination, participation of students in management and decision making, especially on issues of relevance to quality of instruction (Art. 4). The Act explicitly prescribes the equality of higher education institutions notwithstanding their


\textsuperscript{530} According to the latest surveys, 4.6\% of the GDP is now earmarked for education, which is still too low. See www.inkluzija.gov.rs.

\textsuperscript{531} Republic of Serbia Report to the Committee on the Rights of the Child (CRC/C/SRB/1) http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.SRB.CO.1.pdf.

\textsuperscript{532} \textit{Sl. glasnik RS}, 99/09.

\textsuperscript{533} \textit{Sl. glasnik RS}, 76/05, 100/07, 97/08 and 44/10.
ownership i.e. who their founders are (Art. 4 (1 (9))). In several provisions, the Act especially insists on prohibition of discrimination. The most explicit prohibition of discrimination is found in Article 8 (1).

Work needs to continue on the social dimension of the Bologna process and on the improvement of measures supporting under-represented students (the poor, Roma, students with disabilities) need to be promoted. It would also be helpful if the tertiary education enrolment policy brought into conformity with labour market demand and if systems of informal education for students of all colleges in Serbia were strengthened.
II

HUMAN RIGHTS IN PRACTICE – SELECTED TOPICS

INTRODUCTION

The associates of the Belgrade Centre for Human Rights monitored the following of the numerous media outlets for its 2011 Report: the dailies Politika, Večernje novosti, Blic, Danas and Kurir and the weeklies Vreme and NIN. The authors of the Report also monitored the Beta, Tanjug and Fonet agency wires and the websites of all these and some other news media.

A total of 6,256 articles were read in preparation of the 2011 Report. The greatest number of them, 18.03%, dealt with confrontation of the past, notably, the work of the ICTY, reports on war crime trials in Serbia and reports on the rehabilitation proceedings. Articles on political rights and democracy ranked second, accounting for 16.34% of the selected reports. Increased interest in these topics can be ascribed to the continuous political squabbles, early preparations for the upcoming elections and numerous corruption scandals, which appear to implicate public officials.

Articles on social and economic rights and their violations ranked third, marking an increase from 8.72% in 2010 to 15.12% in 2011. This trend comes as no surprise given the dire social and economic circumstances in the country and the fact that a large number of citizens have not been exercising some of these rights at all. The surge in the number of reports on these issues clearly indicates that the media were simply unable to ignore them although they as a rule do not provoke much public interest and do not rank amongst sensationalist news that increase readership.

Reports on the right to a fair trial ranked fourth, accounting for 13.74% of the monitored articles, due to the problematic judicial reform that frequently made the public limelight in 2011. The media also often reported on the inefficiency of the national courts and prosecutors and the interference of the executive authorities in their work. Nearly all articles on the right to a fair trial highlighted these problems.

Articles on the freedom of expression ranked fifth, accounting for 8.33% of the selected reports, which testifies to the rise in problems in this area in Serbia. Reports on violations of the prohibition of discrimination, which ranked sixth and
accounted for 5.74% of the reports, demonstrate that discrimination is still a grave problem in Serbia.

The fewest reports regarded criminal law amendments (0.27%), the work of the Constitutional Court of Serbia (0.62%), the status of NGOs (0.71%) and Serbia’s appearance before international bodies (0.94%). The media have probably not devoted much attention to these important topics involving respect for human rights because they do not attract much interest among the readers.

BCHR associates also regularly perused the reports and recommendations of UN committees monitoring the implementation of international universal human rights treaties. They have also studied and used the materials of the UN Human Rights Council, the Council of Europe (CoE), the European Committee for the Prevention of Torture (CPT), the European Union (EU), the European Commission and the Organization for Security and Cooperation in Europe (OSCE).

The analyses and reports published by international NGOs (such as Human Rights Watch, Amnesty International, Transparency International, Rapporteurs sans Frontières, Freedom House) on the developments and situation in Serbia have again been extremely useful, inter alia, because they allow for a comparison of the respect for specific human rights in Serbia with their respect in other states.

BCHR’s associates have also used the information published by state institutions, official statistical data and, notably, the reports and statements of the following independent regulatory authorities, which were an invaluable source of information regarding the work of state authorities and the state of human rights in specific areas: the Protector of Citizens, the Information of Public Importance and Personal Data Protection Commissioner, the State Audit Institution, the Anti-Corruption Agency, the Commissioner for the Protection of Equality and the Anti-Corruption Council. The reports and data of international organisations with offices in Belgrade (UNDP, UNHCR, OSCE, et al) were also referred to during the preparation of this Report.

The 2011 Report is BCHR’s 14th annual human rights report and the BCHR is pleased to note that the local NGOs’ professionalism in reporting has been steadily improving over the years. They have published a number of extremely useful specialised researches, analyses and reports with detailed information on the categories of the population they focus on and issued recommendations on specific topics.

BCHR therefore needs to acknowledge the invaluable contribution of the analyses, reports and statements of Serbian NGOs dealing with human rights protection and improvement (Humanitarian Law Center, the Helsinki Committee for Human Rights in Serbia, the Lawyers’ Committee for Human Rights, the Youth Initiative for Human Rights, the Child Rights Center, the Gay Straight Alliance); the NGOs following fields impacting on human rights (Democratic Centre, Centre for the Development of Civil Society, Transparency Serbia, Fund for an Open Society Serbia, Centre for Free Elections and Democracy (CeSID), Civic Initiatives, Group 484, Judges’ Association of Serbia, Belgrade Centre for Security Policy, Praxis, Center for
Peace and Democracy Development, the Victimology Society of Serbia and many others); and the reports and press releases published by media associations.

1. New Procedural Laws and Reform of the Judiciary

1.1. Procedural Laws

Fairness entails different guarantees, notably the right of access to court, that a trial must be oral and adversary in nature, that a judgment be delivered within reasonable time, the right to be heard by an independent and impartial court, the right to a public hearing, and the respect for the presumption of innocence.¹

All these elements of a fair trial are governed by various laws the efficient enforcement of which is to ensure abidance by Article 6 of the ECHR. Although Serbia has ratified numerous international conventions, it has not yet fully aligned its national law with the valid international standards. Most of the ECtHR judgements against Serbia concern violations of the right to a fair trial in Article 6 of the ECHR.² A number of laws were passed in 2011 that are to ensure the fuller realisation of the right to a fair trial and the alignment of the practice of the national courts and other state authorities with the ECtHR case law and international standards. The most important new procedural laws in this respect are: the Criminal Procedure Code,³ the Civil Procedure Act⁴ and the Enforcement and Security Act.⁵ Two other laws affecting the rights of citizens and procedural regulations were also adopted in 2011: the Act on Lawyers⁶ and the Notaries Public Act.⁷

Specific provisions of the new laws, have, however caused concern among legal professionals. The text below will give an overview of the improvements they bring as well as their serious shortcomings and violations of specific human rights guaranteed under ratified international treaties and the Constitution of the Republic of Serbia.

1.1.1. Criminal Procedure Code

The new Criminal Procedure Code (CPC), adopted on 26 September 2011, will come into force on 15 January 2013, but will be applied in war crimes and organised crime proceedings as of 15 January 2012.

¹ More on the general principles and rules applied in proceedings in I.4.6. This chapter focuses on the amendments to procedural laws adopted in 2011.
² More in II. 4.9.
³ Sl. glasnik RS, 72/11.
⁴ Sl. glasnik RS, 72/11.
⁵ Ibid.
⁶ Sl. glasnik RS, 31/11.
⁷ Ibid.
1.1.1.1. Investigation (Roles of the Prosecutors and Courts). – The most important change the new CPC brings is the change of the court’s role in proving and establishing the truth, i.e. the introduction of the so-called prosecutorial investigation model. According to the new investigation concept, prosecutor shall be charged with collecting evidence on the basis of which they will decide whether to file an indictment against someone. The CPC radically changes the role of the public prosecutors throughout the proceedings: the burden of proof will rest on the prosecutor, while the court will present evidence upon the motion of the parties and will be entitled to intervene only exceptionally and subsidiarily (Art. 15 (3)). The court may order a party to propose additional evidence, or, exceptionally, itself order the presentation of such evidence if it finds that the evidence that has been examined is contradictory or unclear and finds that such action is necessary for a comprehensive examination of the facts or events (Art. 15 (4)). The meaning of the criterion “unclear or contradictory evidence” will be easy to establish by this measure in practice, but the scope of the action “necessary for a comprehensive examination of the facts or events” remains to be ascertained during the enforcement of the CPC given that what one considers comprehensive and, in particular, what one considers necessary to comprehensively examine the facts or events are clearly very subjective issues.\(^8\) Regardless of the direction in which the enforcement of these provisions will take, it may be presumed that the court will be able to interfere in the evidentiary proceedings if necessary. Whether the court will be able to introduce absolutely new evidence or whether its powers to intervene will be limited to clarifying the existing evidence is a question the CPC provisions do not answer, although it will arise as the crucial issue in the courts’ future case law. For instance, this may mean in practice that the court can seek another expert examination in addition to the one already conducted at the request of the other parties to the proceedings or the presentation of fresh evidence to clarify the presented evidence, but that it cannot itself initiate these actions.

Prosecutorial investigation should in practice safeguard the impartiality of the courts enshrined in Article 32 (1) of the Constitution, because it is based on the principle under which the court, as an impartial authority, plays a corrective and supervisory role. With the introduction of the prosecutorial investigation model, the court will no longer be in the position to present evidence ex officio in lieu of an inactive prosecutor and supporting his case and thus risk deviating from impartiality. Practice will, however, show how the court will use its powers, because, in the event it applies its exceptional powers extensively and as a rule, it will leave the ambit of a fair trial and violate its obligation to be impartial. On the other hand, major problems may also arise if it exercises its powers too restrictively, if it does not react when it should and allows an ignorant party to be fully subordinated to the prosecutor.

Although prosecutors are undergoing training in applying their new powers, there are justified apprehensions that the prosecution offices currently lack the ca-

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capacities to successfully assume their new roles. Particularly given that such a radical change does not require only that the prosecutors possess knowledge, but also necessitates in the means to conduct the investigations and in the cooperation with the police, courts and lawyers, all of which need to be prepared to assume their new roles.

1.1.1.2. Protection of Human Rights. – Prosecutorial investigation will pose a major challenge to the prosecutors, because they will be also under the obligation to guarantee the respect for human rights of the participants in criminal proceedings,\(^9\) while the court will still play an important oversight role and safeguard the respect for human rights throughout the criminal proceedings. These rights will be safeguarded by preliminary proceedings judges during the investigation stage and by the trial judges during the main hearings. Although the court’s role will be somewhat limited, it will still play the key part at the onset of the proceedings because a main hearing may be held only if the court upholds the indictment. This will be an additional filter for dismissing groundless indictments. Under Article 338 (3), the court may decide by a ruling that the charges are unfounded and terminate the criminal proceedings in the event it finds that there is insufficient evidence justifying the suspicion that the defendant committed the offence. Furthermore, under Article 337 (3), when the court finds that the state of the matter calls for additional clarification before it can assess whether the indictment is justified, it will order a supplemental investigation or the collection of specific evidence. The court shall render decisions on: awarding a witness the status of a particularly vulnerable witness (Art. 103 (1); a special protection measure involving withholding the data on the identity of a protected witness from the defence counsel and the defendant (Art. 106 (2)); the undertaking of specific evidentiary actions on the motion of the suspect and his/her defence counsel after the motion was rejected by the public prosecutor (Art. 302 (2)); the placement of the defendant in a health institution for an expert medical examination (Art. 122 (1)); the publication of a suspect’s photograph (Art. 140 (2)); oversight and temporary suspension of financial transactions (Art. 144 (1)); search (Art. 152 (3)); secret surveillance and recording (Art. 172 (1)); simulated business services (Art. 174); computer data search (Art. 179); undercover interception of communication (Art. 165); engagement of undercover investigators (Art. 183); electronic surveillance of convicts under house arrest (Art. 424); prohibiting a defendant from approaching, meeting or communicating with specific persons (Art. 197); prohibiting a defendant from leaving his/her place of residence (Art. 199); bail (Art. 202); detention (Art. 212); and, disciplinary measures and sanctions (Art. 221), et al.

1.1.1.3. Equality of Arms. – A defendant may be placed in a disadvantaged position by the introduction of the prosecutorial investigation model, because the

\(^9\) This is why the state needs to take timely measures before the CPC comes into effect to improve the organisation of work in the prosecution offices and organise the appropriate training for the prosecutors.
issue arises as to the equality of arms of the defendant on the one hand, and the prosecutor, who is a professional and is backed by the entire state apparatus, on the other. A very important and sensitive issue arising with respect to this is whether the court will be able to intervene _ex officio_ in cases in which the defendants are defending themselves or obviously retained incompetent counsels and are thus not equal to the prosecutor, who is presumed to be qualified.

The new CPC also entitles the defendants and their defence counsels to collect evidence during the investigation and, for that purpose, to interview people who may provide them with information which is beneficial to the defence, to obtain written statements from such persons with their consent or take objects and instruments that may be used as auxiliary material during the examination of witnesses or tests of the credibility of their statements. This new right is upheld by complementary provisions in Article 36 of the Act on Lawyers, entitling lawyers to seek and on time obtain information, documents and evidence, which are in the possession or control of the state authorities, institutions, companies and other organisations and which they need to build their defence.

The CPC further develops the adversarial principle by allowing the parties to make introductory statements at the main hearing and entitling the defendant to first be questioned by his/her defence counsel. The role of the defence counsels will particularly come to the fore during the initial and cross examinations and credibility checks based on the material collected during the investigation.

The question that remains unanswered is how a defendant representing himself will be able to collect evidence in his favour and whether this will remain the privilege of those who have lawyers and the funds to launch their own investigations.

1.1.1.4. Right to Defence. – The new CPC comprises all the principles of the right to defence, as well as the mandatory defence principle, and improves them to an extent. Under the new CPC, when composing the list of court-appointed counsels, the competent bar association shall take into account that a candidate’s practical or professional work in a specific field of law provides grounds to presume that defence will be effective (Art. 76 (2)).

Only an attorney with at least five years of experience as an attorney, or an attorney, who was a judge, public prosecutor or deputy public prosecutor for at least five years, may act as a defence counsel in proceedings for criminal offences warranting ten or more years of imprisonment (Art. 73 (1)). Lawyers have disputed this provision before the Constitutional Court. They are of the view that it limits their right to work. Another question that arises regards the adequacy of this competence criterion, given the fact that the law does not require practical attorney experience in a specific field, wherefore the question remains whether a lawyer with

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five years of experience in civil or commercial disputes has more experience than a lawyer with three years of experience in criminal disputes.

The court is under the obligation to appoint a defence counsel to defendants in two cases: in the event mandatory defence is necessary due to the gravity of the crime they are charged with and the defendants had not retained a lawyer, and in the event the defendants plead indigence. The new CPC expands the scope of mandatory defence (Article 74): defendants must be represented by counsel from the first interrogation until the rendering of the final judgment in the event they are deaf, mute, blind or unable to defend themselves successfully, and in the event they are charged with a crime warranting eight or more years of imprisonment. Furthermore, defendants must be represented by counsel from the moment they are deprived of liberty until the decision suspending their custody, detention or house arrest becomes final, or if they are tried in absentia, from the adoption of a decision on a trial in absentia until the completion of the trial. A defendant removed from the courtroom for disrupting order until the completion of the presentation of evidence or the main hearing must have a defence counsel from the moment the decision to remove him/her is issued until s/he is allowed to return or until the judgment is rendered. A defendant must also be represented by a defence counsel if the court is considering imposing a safety measure of compulsory psychiatric treatment against him/her and from the onset of negotiations with the public prosecutor on the conclusion of a plea agreement or an agreement on testimony in the event the hearing is conducted in his/her absence.

Under the CPC, a defendant who cannot afford an attorney shall be appointed one at his request in the event s/he is charged with a crime warranting over three years’ imprisonment or when the interests of fairness so require (Art. 77). Citizens accused of milder crimes, who cannot afford a lawyer, are thus still deprived of an adequate right to defence. They will be in a precarious position until the issue of free legal aid is addressed and fears are that many will not be afforded adequate defence in practice.

1.1.1.5. Presumption of Innocence. – The new CPC brought the expected changes in the interpretation of the presumption of innocence. Like Art. 34 (3) of the Constitution and as provided by international standards, the CPC states that everyone shall be presumed innocent until proven guilty by a final decision of a competent court, (Art. 3 (1)). In accordance with the European standards, the new CPC, like the valid one, lays down that not only the courts, but the state and other authorities and organisations, media, associations of citizens and public figures as well, are under the obligation to respect the presumption of innocence and not violate the defendant’s rights in their public statements about the defendant, the crime or the proceedings (Art. 3 (2), CPC).

This view of the legislator confirms the inconsistency between this provision and Article 336a (1) (adopted in 2009) of the Criminal Code, which incriminates public comments of court proceedings and obstruction of justice by making state-
ments regarding court proceedings with the intent of violating the presumption of innocence and the independence of the court in such a way that anyone risks to commit it. The CPC aligned the presumption of innocence institute with the ECtHR case law, which distinguishes between public and private individuals – this prohibition primarily applies to public figures.

1.1.1.6. Presence of the Defendant and Detention. – Defendants have been kept in custody for long periods of time in practice, some even longer than warranted by the gravity of the crime they are charged with or although there were no sufficient grounds to extend their detention because courts have by inertia tended to order the defendants’ detention to ensure their presence, without precisely explaining the reasons for their decisions. The new CPC introduces a number of measures that aim to ensure the presence of the defendants without keeping them in detention. The alternative milder measures are clearly defined and the new CPC allows for their enforcement in a greater number of instances than the valid one. Article 202 expands the possibilities in which bail can be set, while Article 208 defines the house arrest measure. Article 204 (2) entitles the court to set bail even if the parties do not initiate it and in the amount it considers to be a sufficient guarantee. These provisions come closer to the ECtHR case law as they allow the court to review ex officio the possibility of replacing detention with bail in each case, whereby bail will not be a privilege of the affluent. The court must seek and collect data to determine the real financial status of the defendant and his/her family. This will facilitate the setting of the bail as the court will be able to determine with greater certainty the amount that constitutes a sufficient guarantee that the defendant will not abscond.

1.1.1.7. Rationalisation of the Proceedings. – Expectations are that criminal proceedings will be simplified and take less time as the new CPC provides possibilities for striking agreements with the prosecution offices, because such agreements can now be concluded not only by indictees but by persons convicted for all crimes as well. The CPC introduces plea agreements (Art. 313), agreements on testimony with indictees (Art. 320) and agreements on testimony with convicts (Art. 327).

Another important novelty introduced by the CPC is the preparatory hearing (Art. 345), at which the prosecutor and defence will declare which evidence they will present, which facts they find disputable and which not. The facts that are undisputed either by the parties to the proceedings or the court will not be the subject of the evidentiary proceedings at the main hearing, at which the parties, primarily the prosecutor, will present only evidence connected to the part of the indictment which has been challenged. The goal of the preparatory hearing is to improve the efficiency of the criminal proceedings, introduce the discipline of the parties in the presentation of evidence, prevent abuse of the proceedings by the parties and allow the court to plan the main hearing as efficiently as possible.

The new CPC also expands the powers of individual judges, who will be able to try cases warranting up to eight years’ imprisonment, instead of five years’ imprisonment like now.
Court efficiency has already improved after the adoption of amendments increasing the degree of accountability of second-instance courts and obliging them to render final judgments in cases in which the first-instance judgments have already been quashed once, which also means that they may themselves open the main hearing within the review of the appeal if necessary (Art. 455 (2)).

1.1.1.8. Witnesses and Court Experts. – The CoE Committee of Ministers recommendations were taken on board by the introduction of new measures for the protection of witnesses, especially of particularly vulnerable witnesses. The better treatment of victims in criminal proceedings will be ensured by the special privileges afforded specific witnesses during their questioning. This is particularly important with respect to questioning witnesses and participants in the proceedings in which the victims were victims of human trafficking or of crimes with elements of violence.

The new CPC also introduces the institute of a professional adviser during a court expert examination. A professional adviser is a person with expert knowledge in the field in which a court expert examination has been ordered (Art. 125). Professional advisers will be entitled to attend the court expert examinations, to examine the documents and the objects of the court expert examinations, to propose that the court experts conducting the examinations undertake specific actions, to comment the findings and opinions of the court experts, to examine the court experts at the trial and to be examined about the subject of the expert examinations.

1.1.2. Civil Procedure Act

The Civil Procedure Act, the key law for realising subjective civil rights, was adopted on 28 September 2011 and will come into force on 1 February 2012. Practice has shown that the courts’ inefficiency has greatly been caused by specific provisions in the valid CPA, wherefore the most important changes in the proceedings the new CPA brings regard the timeframes within which civil proceedings must be completed, the correspondence between the litigants and the court and the stricter procedural discipline of the participants in civil proceedings.

1.1.2.1. Timeframes. – One of the chief novelties is the court’s obligation to set a timeframe within which the proceedings must be completed in accordance with the principle of a trial within reasonable time (Art. 10). The legislator’s main

11 Recommendation R (85) 11 on the position of the victim in the framework of criminal law and procedure; Recommendation R (87) 21 on the assistance to victims and prevention of victimisation; Recommendation R (97) 13 on intimidation of witnesses and the rights of the defence and Recommendation R (2005) 9 on the protection of witnesses and collaborators of justice.

12 More on the alignment of national law with the case law of the ECtHR and the possibility to seek a re-trial by invoking an ECtHR judgment finding any state (not just Serbia) in violation of human rights which may result in the adoption of a decision more favourable for that party (Art. 426 (11)) in I.2.2.
objective was to prevent the intentional prolongation of the proceedings, which has to date mostly been achieved by seeking the recusal of the judges or transferring to proceedings to another court. Both the court and the parties will from now on be under the obligation to abide by the set timeframe and hearings will be adjourned only exceptionally, to present evidence or due to the unavailability of the judge (Art. 109). Every time it adjourns a hearing, the court will have to set a new timeframe, which may not exceed the initial one by more than one-third. The new CPA also includes the possibilities of seeking the recusal of a judge and delegating the case to another court, but, since the court is constrained by the timeframe, it will have to be active and take measures to prevent the parties from abusing the rights they are entitled to during the proceedings.

1.1.2.2. Rationalisation of the Proceedings. – Under the new CPA, cases shall, as a rule, be heard by individual judges and only exceptionally by judicial panels (Art. 35). Individual judges shall hear general cases and family disputes in the first instance. The evidentiary proceedings are also improved in the new CPA, which allows for the presentation of evidence by questioning witnesses and parties via video links or the use of audio and video recording equipment (Art. 245 (3)).

Proceedings are further rationalised by the provision in the (both valid and new) CPAs allowing the court to render a judgment without holding the main hearing, in the event it establishes on the basis of the lawsuit and the defendant’s response that the facts are undisputed, in the event a simple dispute is at issue or in other circumstances laid down in the law.

The duration of second-instance proceedings is rationalised by the institute of second-instance interim judgments, the restriction of substantive violations of the civil procedure provisions the second-instance court is obliged to keep an eye on *ex officio* and the filing of an appeal through an alternative motion for review.

The new CPA also introduces novel provisions regarding the presentation and duration of court expert examinations, which are now based on substantially different foundations and in accordance with the consistent enforcement of the adversarial principle, in which the parties to the proceedings are pitted against each other and the court is the guarantor of lawfulness and the regularity of the proceedings. The valid CPA allows only courts to seek the opinions of court experts; under the new CPA, the parties to the proceedings are entitled to themselves engage court experts listed in the newly-established Register of Court Experts13 and present their findings and opinions as evidence, which, like all other evidence, will be assessed by the court. Parties will have until the end of the preparatory hearing (i.e. the main hearing in the event a preparatory hearing is not held) to submit the findings and opinions of the court experts they had opted for (Art. 263).

The new CPA brings also specific technical improvements because it allows for the electronic communication of submissions and provides for the audio and

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13 The Register of Court Experts is posted on the Justice Ministry website, www.mpravde.gov.rs.
video recordings of the trials. Under the valid CPA, all actions conducted during the hearings are recorded in the transcript.

Given that proceedings have frequently been delayed due to the inability to serve the court documents to the parties to the dispute, Article 141 (2) of the new CPA states the party not served the court documents because s/he was not present at his/her address shall be left a notice that s/he may pick them up in the court within 30 days and the copies of the documents shall be simultaneously posted on the court bulletin board, whereby it shall be deemed that the documents have been served. This provision does away with unsuccessful service, which will allow for the continuation of the proceedings and considerably cut down their duration.

The CPA also lays down in detail penalties for violations of procedural discipline – insults, abuse of procedural powers, obstruction of civil law actions and service of documents (Art. 186). Hitherto practice has shown that judges do not apply the procedural discipline provisions enough and that they are not held accountable if the proceedings are prolonged due to their passivity. The new CPA introduced some new provisions in that respect, but it remains to be seen whether the judges will avail themselves of these possibilities in court.

1.1.2.3. Settlements. – Under the valid CPA, parties may settle only until the completion of the first-instance proceedings. The new Act expands the institute and entitles parties to settle throughout the proceedings, until a final decision is rendered. The fate of the first-instance decision in case the parties settle during the appeals proceedings is resolved in the following manner: the court will render a decision rendering the first-instance decision ineffective and suspending the proceedings or concluding that the appeal was withdrawn.

1.1.2.4. Human Rights Restrictions in the new Civil Procedure Act. – Specific provisions of the new CPA jeopardise guaranteed human rights and should be deleted from the law as soon as possible.

The right of representation in civil proceedings is limited only to lawyers, because Article 85 of the new CPA states that a litigant must be represented by a lawyer (italics ours). This provision deprives the most vulnerable citizens of Serbia, who are physically unable to access the court or cannot afford a lawyer, of the constitutional guarantee entitling everyone to an appeal or another legal remedy against any decision on his right, obligation or lawful interest (Art. 36). Under the Constitution of Serbia, the achieved level of human and minority rights may not be reduced (Art. 20). This Article in the new CPA violates the right Serbia’s citizens have had under the valid CPA allowing a litigant to name any person with litigation capacity as its attorney.14 This Article also violates the principle of equality

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14 Apart from lawyers, parties often availed themselves of the legal aid provided by trade unions, law college clinics and experts active in NGOs, whose services were most often free of charge, which is an additional reason why these provisions are in contravention of this Article of the Constitution.
with respect to the right of access to a court because not all parties can afford to hire a lawyer to represent them in court, as well as the constitutionally guaranteed right that everyone is entitled to legal assistance (Art. 67 (2)). This right is also brought into question by the interpretation of Articles 170 and 168 (4) of the new CPA, under which a civil court will issue a decision on the right to free legal aid if such aid is “necessary to protect the rights of the party or is prescribed by a separate law”. Furthermore, when assessing whether a litigant is eligible for free legal aid, the court shall take into account how many dependents the litigant is supporting, the litigant’s income and property, whereby it reduces the right to free legal aid to indigence, which is not in compliance with the case law of the ECHR, which interprets this right much more broadly. A coalition of NGOs reacted to these provisions, as did the Protector of Citizens who said that he would initiate a review of the constitutionality of the impugned provisions, but had failed to file a motion to that effect by end 2011.

Unless the litigant is a lawyer, s/he must be represented by a lawyer in reviews of extraordinary legal remedies. Given that the Constitution does not set any restrictions, but, rather, guarantees that everyone is entitled to a legal remedy, the provision in the new CPA under which a litigant must be represented by a lawyer in a review of legal remedies is in direct violation of the right to a legal remedy enshrined in the Constitution and Article 6 of the ECHR.

Disputes against the Republic of Serbia, a territorial autonomy unit or a local self-government unit – are governed by Article 193 of the new CPA. The Article is vague and unclear, but what is particularly concerning is that it introduces “mandatory” mediation because everyone who intends to sue the Republic of Serbia, its province or local government is under the obligation to submit a proposal for the peaceful settlement of the dispute to the state Attorney General before filing the lawsuit. This Article thus puts the state in a privileged position vis-à-vis the other participants in the proceedings because the mandatory mediation principle applies only to cases in which the state is being sued. This also violates the principle of the procedural equality of the litigants as an element of the right to a fair trial. The Attorney General has a 60-day deadline to respond to the proposal and only in the event that no such response arrives may the lawsuit be filed with the competent court. Although the new CPA was adopted with the aim of improving the efficiency of civil proceedings, the

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15 Under the Constitution, legal aid shall be provided by lawyers and legal aid departments established within local self-government units in accordance with the law. A law on free legal aid providing for the exercise of this constitutional right has not been adopted yet. Not all municipalities have established legal aid departments, and not all of those that are operational have provided efficient protection.

16 See Airey v. Ireland, ECtHR, App. No. 6289/73.


state has been given an unjustifiably long deadline to respond to the mediation offer. The fact that parties may not sue the state during that time is particularly concerning, because they risk losing the opportunity to realise their other rights. Furthermore, this Article has elements of discrimination because all plaintiffs suing the state are placed in an unequal position *vis-à-vis* the defendant.

*The special proceedings* envisaged by the new CPA are the most disputable. The CPA introduces a procedure for the protection of collective rights and interests (Chapter XXXVI) under which associations, their federations (consumer protection organisations, organisations protecting persons with special needs, civil society organisations) and other organisations established in accordance with the law may initiate a procedure to protect the collective rights and interests of citizens (Art. 495). These organisations may initiate a procedure for the protection of collective rights and interests and demand in their lawsuits the prohibition of activities endangering these rights and interests which they are legally entitled to protect. They may also demand the elimination of an existing violation of the citizens’ collective rights and interests or of the harmful consequences of the defendant’s actions and *restitutio in integrum*, the restoration of a state in which such a violation cannot recur or of a state approximately corresponding to the state before the violation. They may also ask the court to declare inadmissible the activity that violated the citizens’ collective rights and interests and the publication of the judgment in favour of the plaintiff in the media at the expense of the defendant. However, the powers of the defendant bring into question both the constitutionality and lawfulness of these provisions and the legislator’s intent.

Under the CPA, a person, who, according to the associations, is conducting activities in a manner jeopardising collective rights and interests of citizens, is entitled to file a lawsuit demanding that the court find that s/he has not jeopardised or violated the collective rights and interests of citizens by his/her activities. S/he may also ask the court to prohibit the associations or other organisations from undertaking specific activities, particularly making public statements about the allegations that s/he is conducting activities in a manner jeopardising collective rights and interests and is entitled to seek compensation of damages caused by the voicing or citing of untrue allegations and the publication of the judgment in his/her favour in the media and at the expense of the sued association or organisation. This provision endangers the freedom of expression enshrined in Article 46 of the Constitution and Article 10 of the ECHR.

The plaintiff may initiate proceedings in the event his/her rights were violated by the allegations of the defendant. In the absence of a clear definition in the CPA, the presumption is that an allegation voiced in public is at issue, which means that the lawsuit concerns an allegation publicly conveyed via the media. The CPA also allows the plaintiff to sue persons authorised to represent the defendant, members of its bodies, and the persons appearing in public in its behalf, which may have adverse consequences on the work of journalists, editors, non-government organisations et al.
1.1.3. Enforcement and Security Act

The new Enforcement and Security Act was adopted on 5 May 2011 and came into force on 17 September 2011 (apart from provisions regarding enforcers, which shall apply as of 17 May 2012). The Act was adopted to address the unjustifiably long enforcement proceedings and relieve the courts of the burden of duties which do not constitute adjudication in the stricter sense of the word and which the new Act entrusts also to private enforcers. Furthermore, there was the need to align the enforcement and security procedures with the Act on Organisation of Courts and the new procedural laws.

1.1.3.1. Implementation of the Enforcement Procedure. – Under the Enforcement and Security Act, the court shall order the enforcement and security of claims, which may be effected by both the courts and (private) enforcers. Only the court may effect the enforcement of decisions regarding family relations and reinstatement of workers to their jobs. Enforcers are defined as natural persons appointed by the Justice Minister who shall effect the enforcements within the limits of the enforcement decisions and pursuant to the public powers entrusted to them under the new Act. An enforcer shall conduct enforcement activities as an entrepreneur or a member of a partnership company which may comprise exclusively enforcers (Art. 312). The Act also lays down the requirements a person must fulfil to be appointed an enforcer (Art. 313).

The enforcement creditor shall indicate in the motion to enforce whether he wants the court or an enforcer to effect the enforcement. All enforcers must be members of a Chamber, the work of which shall be overseen by the Justice Ministry (Art. 338). An enforcer may have one or more deputies and may appoint his/her assistants (Arts. 333 and 334). This institution is expected to substantially improve the efficiency of the enforcement procedures in view of the fact that the enforcement of judgments used to take several years due to the lack of court enforcers, which undermined the authority of the court decisions and rendered judicial protection almost absurd.

The new Act governs in detail police assistance (Art. 73), and lays down a fine which the responsible person in the police will have to pay in the event s/he

19 A person with a legal capacity, who is a national of the Republic of Serbia, has a law degree, at least two years of experience in enforcement or three years of legal experience, is worthy of performing the duties of an enforcer, has passed the professional exam, who is not criminally prosecuted and who has not been convicted for a crime to an unconditional prison sentence of six or more months or for an offence rendering him/her unworthy of performing the duties of an enforcer, and who is not a partner in a partnership company under bankruptcy, may be appointed an enforcer.

20 The police are under the obligation to take measures and apply coercive measures needed to conduct an action to effect enforcement at the order of the court or enforcer, particularly to check and establish the identity of a person and identify objects, to search for persons and objects, to seize motor vehicles or other objects which are the subject of enforcement and to safeguard persons and property during the implementation of enforcement.
does not act upon the court’s order or fails to provide the court with the appropriate assistance (Art. 73 (3)).

The Act also allows the enforcement creditor and debtor to reach an agreement under which the debtor will repay the debt in instalments. Such a certified agreement shall be submitted to the court, which will then suspend the proceedings ex officio (Art. 76).

A decision on the conclusion of the enforcement procedure shall be rendered once the enforcement creditor’s claim is satisfied (Art. 77). Under the prior law, no formal decision was rendered after the creditor’s claim was satisfied.

1.1.3.2. Service. – The Act includes novelties with regard to service as well as new deadlines which are expected to substantially speed up the course of the enforcement procedure. The court is under the obligation to decide on a motion to enforce within five workdays from the day of its submission and communicate its decision to the parties within another five days (Art. 7), while the prior law did not set any deadlines by which the court had to communicate its enforcement decisions. None of the deadlines for the implementation of enforcement actions ordered by the court may exceed five workdays.

In the event the documents cannot be served upon the debtor at the address specified in the motion to enforce, the court now has to effect their service after the expiry of the five-day deadline for the service of the documents by posting them on the court bulletin board (Art. 29). The documents shall be deemed to have been served upon the expiry of five days from the day the documents were posted on the court bulletin board.

1.1.3.3. Postponement of the Enforcement and Security Procedure and Legal Remedies. – To ensure efficiency, the new Act does not provide for the postponement of the enforcement and security procedure except in explicitly enumerated instances (Art. 6). The prior Act allowed for mandatory and optional hearings, while the new law explicitly lays down that the court or enforcer shall act in accordance with submissions and instruments (Art. 28). The Act restricts *restitutio in integrum*, which may be sought only if the deadline for filing a complaint against the enforcement decision has been missed, and does not allow court expert examinations during the procedure (Art. 30).

The new Act introduces a single legal remedy, a complaint, which may be filed within five workdays from the day of service of the enforcement decision (Art. 39). The court shall rule on the complaint within five workdays. The complaints are now reviewed by first-instance courts, which will also contribute to the speedier completion of the enforcement procedure. The Act enumerates grounds for complaints against enforcement decisions on the basis of an authentic document and specifies which evidence must be submitted together with the complaint (Arts. 46

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21 Enforcement Procedure Act, (Sl. glasnik RS, 125/04).
The prior Act did not comprise such provisions and debtors were known to abuse their procedural rights by submitting unelaborated complaints not corroborated by evidence. In the event the debtor does not specify all the reasons for submitting the complaint and submit all the evidence, s/he shall not be entitled to do so subsequently.

Under the new Act, an enforcement creditor’s complaint shall stay counter-enforcement unless the creditor first deposited a guarantee (Art. 79).

1.1.3.4. Enforcement and Authentic Documents. – The Act introduces new enforcement and authentic documents and explicitly lays down that an enforcement document shall mean an excerpt from the register of security rights in movable property and rights, an excerpt from the financial leasing register, a mortgage contract, i.e. a lien statement, an adopted reorganisation plan in bankruptcy proceedings the adoption of which was acknowledged by a court decision, an enforcement decision acknowledged as a European enforcement instrument and other documents legally defined as enforcement documents (Art. 13).

The new authentic documents provided by the Act include promissory notes, checks and invoices of foreign persons, et al (Art. 18). Under the new Act, a delivery note or other written evidence that the debtor has been notified of the obligation must be submitted alongside the invoice.

The Act introduces a special procedure regarding the enforcement of claims for rendered communal and similar services. In this procedure, the motion to enforce is submitted to the enforcer (Art. 252). Together with the motion, the enforcement creditor must also submit evidence that it had sent a letter before action to the enforcement debtor.

1.1.3.5. Object and Means of Enforcement. – Under the new Act, the enforcement creditor may seek in the motion to enforce the implementation of these activities with respect to the debtor’s entire property or submit together with the motion a request for a statement on the property of the enforcement debtor without specifying the means and object of enforcement, in which case the court shall order the enforcement i.e. security of the entire property of the enforcement debtor (Art. 20). After the debtor’s property is identified, the court shall issue a conclusion defining the means and object of enforcement. The provisions on the possibility of changing the means of enforcement (with respect to financial claims) have been substantially changed in the new Act. Under the new Act, the court may order another means of enforcement throughout the procedure either *ex officio* or at the request of the enforcement creditor, as opposed to the prior Act, which laid down that requests could be submitted only until the onset of the enforcement and allowed the enforcement debtors to file them as well.

Furthermore, under the new Act, the enforcement creditor may file a request for a statement on the debtor’s property either when s/he submits a motion
to enforce or during the procedure (Art. 54). Pursuant to the request, the court shall render a decision ordering the enforcement debtor to come to court and give a statement on the record or submit a written statement under threat of a fine (Art. 55). The prior law conferred this right only upon enforcement creditors whose financial claims were not satisfied in the enforcement procedure, within an extended enforcement procedure. Under Article 59 of the new Act, if so ordered by the court, the enforcement debtor is under the obligation to submit instruments on objects and rights specified in the property statement alongside the property statement. A debtor who defaults on the court’s order thrice may be sentenced to maximum 30 days in prison. The Act introduces a nationwide public electronic register of persons entered in the book of debtors (Art. 67). The register shall be posted on the court’s Internet page. However, a property statement may not be sought from the Republic of Serbia, its autonomous province or local self-government unit in their capacity of enforcement debtors, whereby the legislator is groundlessly granting privileges to the state and putting the parties to the procedure in an unequal position.

The Act governs the inventory, assessment and sale of the debtor’s movable property to satisfy the financial claims. The sale of the debtor’s property by public auction shall be posted on the court’s bulletin board and website eight days before the day of auction at the latest. If the property is not sold at the public auction, the court i.e. enforcer will conclude that the first auction was unsuccessful and immediately schedule a new auction which must be held within a minimum of 15 and a maximum of 30 days (Art. 97). Since the prior Act did not set these deadlines, more than six months would often pass between two public auctions.

The Act introduces the obligation of the organisation enforcing the settlement of financial claims against the enforcement debtor’s account to notify the court i.e. enforcer of effected enforcements on a daily basis (Art. 187). The Act envisages the introduction of a single register of enforcement debtors and court-ordered prohibitions, as well as the restrictive application of administrative prohibitions. At the order of the court, part of the debt shall be withdrawn from the debtor’s account upon the payment of his/her wages; the amount will be redefined in case the debtor’s wages change or the debtor finds a job with another employer.

1.1.3.6. Costs of Procedure and Court Penalties. – The costs of the enforcement procedure shall be borne by the enforcement debtor, while the enforcement creditor is now under the obligation to pay the costs in advance and submit proof of the paid advance deposit together with the motion to enforce (Art. 34). Otherwise, the court or the enforcer shall suspend the procedure. The provisions in the new Act on court penalties and when they can be pronounced (Art. 53) differ considerably from the ones in the prior law. The creditor may demand the payment of penalties for the failure to fulfil the financial obligation set in the final court decision. The Act no longer allows for the reduction of the court penalties at the proposal of the enforcement debtor who voluntarily fulfilled the financial obligation. The new Act
explicitly lays down that a complaint against a decision ordering the payment of a court penalty is inadmissible, which places the debtor in an extremely disadvantageous position.

1.2. Reform of the Judiciary

By adopting the amendments to the Act on Judges, the Public Prosecution Act, the High Judicial Council Act, the State Prosecutors Council Act and the Act on Organisation of Courts in late 2010, the Justice Ministry and the High Judicial Council practically acknowledged the fact that there had been shortcomings in the judicial and prosecutorial appointment procedures and that every individual appointment decision needed to be re-examined. This outcome could have been pre-empted had standards that would have guaranteed the judges the opportunity to refute doubts about their competence and worthiness, an adequate appeals procedure for speedy reviews of the HJC decisions and the transparency of its work been in place. Had these prerequisites been met, the judicial reform would have met with less criticism, a whole year would not have been wasted and the reputation of the reform implementers would not have been undermined. Numerous mistakes were, unfortunately, made in 2011 as well. They, coupled with the disrespect of the procedures and deadlines, kept the judicial reform in the centre of attention of the media, international institutions and experts. Like in the past, the European Commission criticised the judicial reform in its report again in 2011, noting that Serbia had to invest further efforts to achieve European standards in the field of the judiciary.22

1.2.1. Election of the High Judicial Council and State Prosecutors Council Members

The permanent members of the High Judicial Council (HJC) and the State Prosecutors Council (SPC) were elected in March 2011. Under the Acts on the High Judicial Council and the State Prosecutors Council, candidates for the HJC and SPC may be nominated both by the courts and prosecution offices in their plenary sessions and by a specific number of judges and prosecutors. These provisions allow judges and prosecutors to participate more directly in the work of the HJC and the SPC and nominate candidates they know personally and trust. The names of the candidates who won the greatest number of votes of their colleagues were then submitted to the National Assembly, which leads to the conclusion that the opinions of the judges were respected in the election procedure. The National Assembly elected the six members of the HJC from the ranks of judges out of the 50 candidates that won the most votes of their peers.23

23 The following judges were elected to the HJC: Supreme Court of Cassation judge Mirjana Ivić, Belgrade Appellate Court judge Milomir Lukić, Zrenjanin Commercial Court judge Ale-
The Judges Association of Serbia (JAS) disputed the credibility of the HJC election on a number of occasions and maintained that the main problem arose from the exclusion of the 837 non-reappointed judges from the election process. The JAS also noted that two of the elected HJC members from among the ranks of judges held the office of acting president (of the Zrenjanin and Subotica courts) although the Constitution prohibited court presidents from being HJC members.\(^{24}\) It also criticised the participation of misdemeanour judges in the election procedure, given that the Constitutional Court had not yet ruled on the constitutionality of the provision allowing the misdemeanour judges to vote.\(^{25}\) The JAS also criticised the fact that three of the six judges elected to the HJC came from Vojvodina, although only one-fourth of all Serbian judges sit in Vojvodina courts, and that none of the candidates were from the jurisdictions of the Kragujevac and Niš Appellate Courts.\(^{26}\)

The National Assembly elected prosecutors Branko Stamenković, Danijela Sindelić and Majda Rakić to the State Prosecutors Council from among the nominees. The following prosecutors were also elected to the SPC: Deputy Public Prosecutor in the Republican Public Prosecution Office Zorica Stojšić, Organised Crime Prosecutor Miljko Radisavljević and Deputy Public Prosecutor in the Novi Sad Appellate Public Prosecution Office Dragoljub Barjamović.

1.2.2. Review of Objections Filed by the Non-Appointed Judges and Prosecutors

The decision on the appointment of judges to permanent tenure in courts with general or special jurisdiction was published on 16 December 2009. In the opinions it rendered at the request of the Justice Ministry, the Venice Commission criticised some of the provisions in the Draft Criteria and Standards for the Appointment of Judges and Court Presidents and the Draft Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for Public Prosecutorial Offices. As expected, the Venice Commission had voiced the greatest concerns about the appointment of existing judges. It was right to ask why the judges whose qualification, competence or worthiness had been brought into question had not been given an opportunity to refute these doubts. This solution is also in contravention of Article 32 of the Constitution, under which everyone shall be entitled to a public hearing before an independent and impartial tribunal established by the law within reasonable time, which shall render a decision on their rights and obligations, on the grounds for suspicion that led to the initiation of the proceedings and on the charges against them.

ksandar Stojilkovski, High Misdemeanour Court judge Blagoje Jakšić, Subotica Court judge Sonja Vidanović and Novi Sad Appellate Court judge Branka Bančević.

25 More on status of misdemeanour judges in the II.1.2.4.
26 JAS Statement of 6 March 2011. Available at www.sudije.rs.
The Venice Commission also recommended that the quantitative criteria be applied with caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled, the Commission said. Furthermore, the Venice Commission stated that, as far as the number of completed cases was concerned, it could not be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues.

The chief concern of the Venice Commission regarded the issue of legal remedies, which was not adequately addressed until the end of the general appointment procedure. To recall, the 2010 amendments to the judiciary laws entitled the non-appointed judges and prosecutors to file objections against the decisions on the termination of their offices with the HJC or SPC in their permanent composition, but not with the Constitutional Court, as the law initially envisaged. These amendments were justified by the need to address the backlog in the Constitutional Court of Serbia which was unable to review the appeals of the non-appointed judges rapidly. However, the question arises as to whether they violate other constitutionally guaranteed rights (the right to an effective legal remedy, the principle prohibiting the retroactive application of the law, the *ne bis in idem* rule et al).27

The HJC entered 2011 with the task of addressing the status of over 800 non-appointed judges. The hearings at which the judges were interviewed began on 15 June. The initial plan to complete the interviews with the judges and render decisions on their objections by September was not, however, achieved by the end of 2011.28 The HJC set up two three-member commissions to interview the judges. The first commission comprised: Supreme Court of Cassation judge Mirjana Ivić (chairwoman) and judges Branka Bančević and Blagoje Jakšić. The second commission comprised Belgrade Appellate Court judge Milimir Lukić (chairman) and judges Aleksandar Stojiljkovski and Sonja Vidanović. A major discrepancy in the percentages of the objections upheld by the two commissions was apparent: the first commission upheld 27.7% and the second commission 59% of the objections, as the JAS, too, warned.29

By the end of the reporting period, the HJC’s two commissions held 591 hearings at which they heard the objections of the non-appointed judges: the first commission held 285 and the second 306 hearings.30 Three hundred decisions were

27 More in I.4.6.3.1.
rendered: 73 objections by the judges were upheld, 215 were rejected, six were dismissed, three were upheld but the petitioners had in the meantime satisfied the age requirements for retirement, while the reviews of three objections were suspended due to the deaths of the petitioners. The HJC is yet to render decisions on another 291 objections filed by judges who have already been heard and there is another 200 judges who have not been heard.31

1.2.2.1. Violations of the Procedure. – The terms of office of several HJC members have been discontinued or are disputable. Several months after the HJC in its permanent composition began working, judge Milimir Lukić resigned from the HJC and judge Blagoje Jakšić was arrested. Apart from reopening the issue of the HJC’s credibility, these two events also raised the question regarding the (dis) respect of the appointment procedure.

Judge Milimir Lukić won the most votes of the judges of all four Serbian Appellate Courts among the nominees elected by these four courts but he tendered his resignation already in November 2011.32 When he resigned, he stopped taking part in the work of the HJC commission reviewing the objections of the non-appointed judges which he had chaired. In his explanation, he said that he wanted to believe that “the day will come when the HJC will strive to ensure that the independence and autonomy of the courts and judges are not affected in any way or by anyone”.33 He said that he had resigned due to the absence of clear and precise rules and procedures for the appointment, promotion and dismissal of judges. He said that rules had to be introduced to ensure “that the most honourable and educated cadres are appointed to courts and that promotions in the court hierarchy are based solely on the results they have achieved, on their worthiness and authority”.34

Judge Lukić spoke of pressures on the HJC before he resigned as well. These pressures prompted him to postpone all hearings of non-appointed judges in August, under the explanation that he “does not want to work in circumstances in which HJC are pressurised”.35 The HJC reacted by issuing a statement saying that the HJC held a session on 26 August at which all the judges elected to the HJC said that “none of them have been exposed to any influence or pressures from the executive authorities or Justice Minister Snežana Malović with respect to their work in the HJC and that a conclusion to that effect was adopted”.36

Judge Blagoje Jakšić was arrested in September on suspicion that he had abused his office while he was president of the Kosovska Mitrovica Municipal

31 Ibid.
33 Ibid.
34 Ibid.
Court by helping businessman Ljubomir Biševac unlawfully obtain property worth 20 million dinars.\textsuperscript{37} The HJC revoked Jakšić’s immunity.\textsuperscript{38}

The election of Predrag Dimitrijević, the Niš Law College Dean, to the HJC is also problematic after the Anti-Corruption Agency issued a decision finding him in conflict of interest.\textsuperscript{39} The Anti-Corruption Agency established that Prof. Predrag Dimitrijević had acted in contravention of Article 28 (2) of the Anti-Corruption Agency Act and that his “office of High Judicial Council member shall terminate by force of law, and that a decision to that effect shall be rendered by the National Assembly of the Republic of Serbia, within eight days from the day of receipt of this decision”. Prof. Dimitrijević appealed the decision but the Agency soon dismissed it as groundless.\textsuperscript{40} The National Assembly did not render the relevant decision until December 2011, i.e. after the legal deadline, because, according to Chairman of the Assembly Justice and Administration Committee Boško Ristić (himself an HJC member \textit{ex officio}), the Committee had not received the Anti-Corruption Agency decision. The media published a copy of the Agency decision with the stamp of the National Assembly certifying that it was received on 8 June 2011. On 29 December 2011, the Assembly voted on the Agency decision but did not uphold its request to relieve Dimitrijević of his office in the HJC.\textsuperscript{41}

Six of HJC’s 11 members are judges. However, given that one of them has resigned and that another is in detention, the question arose whether the HJC was entitled to rule on the objections of the non-appointed judges at all. Decisions on the objections have to be voted in by a majority of the HJC members who had not participated in the 2009 general appointment procedure. That means that the following HJC members should not be taking part in the vote: Justice Minister Snežana Malović, Supreme Court of Cassation and High Judicial Council President Nata Mesarović, National Assembly Justice and Administration Committee Chairman Boško Ristić, who are HJC members \textit{ex officio}, as well as lawyer Dejan Ćirić, who was elected from the ranks of lawyers in 2009. The HJC stated this view in its official memo to the JAS on 27 October 2011.\textsuperscript{42}

\textsuperscript{37} “Judge Jakšić to be Detained up to 30 Days”, 24 September 2011, www.b92.net.
\textsuperscript{38} The following Kosovska Mitrovica staff were also remanded in custody: Miroslav Božović, Blagoje Ćurović and Dragan Gavrilović, while arrest warrants were issued against Ljubomir Biševac and Miodrag Laketić, who were at large. Blagoje Jakšić was arrested on suspicion of enabling Biševac to certify in court a doctored contract on the purchase of a commercial facility whereby the latter unlawfully profited. Jakšić is suspected of ordering the court staff to forge the official records and certify the contract on the unlawful sale of the real estate.
\textsuperscript{39} The Anti-Corruption Agency decision and confirmation that the National Assembly received it on 24 December 2010 and a copy of the confirmation of the receipt of the decision by Predrag Dimitrijević on 15 December 2010 are available in Serbian at www.pistaljka.rs.
\textsuperscript{40} The Anti-Corruption Agency’s decision on the appeal with the National Assembly stamp verifying the receipt of 8 June 2011 is available at www.pistaljka.rs.
\textsuperscript{41} “Dimitrijević Not Relieved of Office of HJC Member”, Blic, 29 December 2011, www.blic.rs.
After judge Lukić resigned, the HJC held two sessions, on 24 November and 1 December, and rendered decisions on 33 objections. The HJC decided that the rest of the hearings would hereinafter be held before only one commission, not two.\textsuperscript{43} In the absence of information on how the HJC has been operating since judge Lukić resigned, a number of legal interpretations appeared about whether the HJC could rule on the objections of the non-appointed judges in its present composition and the majority by which its decisions were rendered. Given that it is clear that the four “old” members cannot vote on the objections against the decisions they themselves rendered in 2009, it transpires that only the new members, appointed to the HJC in its permanent composition, – i.e. the six judges and Prof. Dimitrijevic – are entitled to rule on the objections. Since one of them resigned and another is in custody, it appears that decisions can actually be taken by only five members.

The quorum at the last session at which the HJC decided on the objections was achieved by entitling an old HJC member, lawyer Dejan Ćirić to vote. The HJC spokesperson said that the session had a quorum because nine of the 11 HJC members were present. Although this definitely constitutes a majority, the question of its legitimacy remains questionable.

It remains unclear why lawyer Dejan Ćirić was subsequently allowed to vote given that the HJC precisely specified in its statement who was considered an old HJC member under the law. The HJC did not issue any statements about his voting, but Ćirić himself said that he was the one who had ensured the quorum with his vote and that he saw no reason why he should not vote because he was “representing the lawyers’ views in decisions on judicial appointments”.\textsuperscript{44} This conclusion may be perceived as valid had the HJC itself not laid down that none of the old members were entitled to vote, particularly in view of the fact that decisions taken without the vote of an HJC member from amongst the ranks of lawyers renders senseless voting on them in terms of consultations with the lawyers.

When the seat vacated after the arrest of judge Blagoje Jakšić will be filled remains uncertain. He was suspended and may not reassume his duties in the HJC or be replaced until a final verdict in the proceedings conducted against him is rendered.

\textit{1.2.3. Efficiency of the Judiciary}

The work of the judiciary has been criticised the most because of the overly long proceedings, which can be attributed to the lack of judges and court staff, uneven burdens on courts and judges and the judges’ insufficient resort to the possibilities afforded by procedural laws. The establishment of a new network of courts and prosecution offices envisaged by the 2009 set of judicial laws was geared at

\begin{itemize}
\item \textsuperscript{43} “Rump High Judicial Council”, \textit{Politika}, 1 December 2011, www.politika.rs.
\item \textsuperscript{44} “High Judicial Council: Nine Present, Four Abstained, Six Voted”, \textit{Politika}, 3 December 2011, www.politika.rs.
\end{itemize}
addressing these problems. It, however, became starkly apparent in 2011 that the new organisation of courts failed to resolve the problems related to inefficiently and the uneven burdens on the judges. This is particularly evident in the basic, higher and misdemeanour courts – some judges in the Belgrade courts have caseloads of over 2000 cases, while other courts have very small inflows of cases. Although the Court Rules of Procedure (which came into force on 1 January 2010) were to have improved the case assignment system to ensure that judges have even and equal caseloads, it is obvious that this objective has not been achieved and that this problem has yet to be addressed.

To eliminate this anomaly, the work of the court units must be analysed in detail, because the performance data cast doubts on the justifiability of the existence of specific basic court units both in terms of their caseloads and in terms of the parties’ access to justice and the costs they have to sustain. This view was taken also by the implementers of the judicial reform after the Supreme Court of Cassation decided at its plenary session to submit an initiative to the Justice Ministry to amend the law defining the courts’ headquarters and jurisdictions.45

According to data presented by Supreme Court of Cassation President Nata Mesarević, the caseload of the courts with general jurisdiction totalled 3,876,488 cases and resolved 600,000 of them. Of the 3,276,299 unresolved cases, 2,830,826 were pending because the rendered judgments had not been enforced. Courts with special jurisdiction had a total caseload of 970,570 cases, out of which they had resolved 427,228 cases46. Given that there was no doubt that the review of objections would not be completed by the end of 2011, the courts lacking judges, such as the Belgrade Higher Court and First Basic Court, were sure to remain seriously understaffed in the imminent future. The basic courts across Serbia in May had a caseload of over 906,000 cases.47 The Enforcement and Security Act adopted on 5 May 2011 and in effect as of September 2011 is expected to address the decades-long problem of the non-enforcement of court judgments to a considerable extent.48

The courts’ inefficiency is undoubtedly exacerbated by the uncertainties surrounding the appointments of court presidents who bear the greatest responsibility for the organisation of the work of the courts. The legal deadline for the appointment of court presidents (March 2010) has been exceeded by a long shot and all the courts in Serbia were in 2011 managed for the second year running by the acting presidents. The vacancies were published in October 2011 and expectations were that the court presidents would be appointed in 2012.

48 More on the improvements envisaged in the new law in II.1.1.3.
The efficiency of the judicial system will undoubtedly be improved by the completion of the appointment review procedure as soon as possible, and, if need be, the recruitment of judges to fill the judicial vacancies.

### 1.2.4. Specific Status of Misdemeanour Judges

Misdemeanour courts became part of the regular judicial system after the new judicial network was established. The Act on Organisation of Courts eliminated the shortcoming in the prior judicial system and radically changed the status of the misdemeanour courts. Before the Act was adopted, misdemeanour authorities had a specific status: they had the features of both the regular courts and the administrative authorities and the misdemeanour judges had been appointed by the Government. Under the valid laws, misdemeanour judges have the same status as other judges.

Although this concept is fully in accordance with international standards, the status of misdemeanour judges is still not absolutely clear in practice. After the general appointment procedure, which was annulled by the amendments to the Act on Judges, the Constitutional Court ceded the review of the appeals by non-appointed judges to the HJC, which treats them as objections. These provisions, however, do not apply to appeals filed by non-appointed misdemeanour judges. The Constitutional Court started rejecting these appeals as inadmissible and advising the misdemeanour judges to challenge the decisions in administrative proceedings. The decision not to include the non-appointed misdemeanour judges in the review procedure is based on the fact that, under the prior laws, the terms of office of misdemeanour judges were not permanent. However, in view of the fact that this solution was not in accordance with international standards, the question arises as to whether it can be grounds for the resolution of this issue.

### 2. Independent Regulatory Institutions

The year 2011 saw a change in the attitude of the legislative and executive authorities towards independent regulatory authorities, primarily with respect to the provision of the material prerequisites they need for their work. One such change, which can be qualified as an involuntary concession of the authorities rather than their sincere desire to enable these institutions to work free from political pressures, occurred at the very beginning of 2011, when the National Assembly adopted a Decision Amending the National Assembly Rules of Procedure at the insistence of the independent regulatory authorities, supported subsequently by the representatives of the international community and the general public. The Decision deleted

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49 Sl. glasnik RS, 13/11. Decision adopted at the session of the First Extraordinary Sitting of the National Assembly Session, 28 February 2011.
the impugned provision in Art. 237 (5 (5)) of the Rules of Procedure allowing the parliament to launch a procedure to establish the accountability of an official of an independent regulatory authority in the event the Assembly does not endorse its report after reviewing it.

Furthermore, the executive authorities provided some independent institutions with more or less adequate office space which they had lacked for years. The Access to Information of Public Importance and Personal Data Protection Commissioner and the Protector of Citizens were designated additional office space to use together in Belgrade, while the Protector of Citizens was also provided with premises for its local offices in Bujanovac, Medveda and Preševo. Furthermore, the Government designated a building in Karadordeva Street in Belgrade, to be shared by these two institutions and the Judicial Academy. It, however, remains to be seen when the Commissioner and Protector will actually resolve their office problems given that this building, which is a monument of culture under state protection, cannot be used until it is reconstructed and the institutions lack the necessary funds in their budgets. According to the data in the State Audit Institution Information Booklet, this institution has been designated offices in Belgrade, Niš and Novi Sad. The Republic of Serbia 2012 Budget Act allocated 4.5 million EUR for the purchase of an office building for the Anti-Corruption Agency which this institution has been renting. According to available official data, the Commissioner for the Protection of Equality was given offices in Belgrade which had to be reconstructed before the Commissioner started working in them and the reconstruction was funded from the Commissioner’s budget.

Data published by the Access to Information of Public Importance and Personal Data Protection Commissioner, the Protector of Citizens and the Anti-Corruption Agency provided the necessary information.

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53 Sl. glasnik RS, 101/11.
Corruption Agency\textsuperscript{58} show that the Government and National Assembly allocated funding matching or exceeding the financial plans of these state authorities in the Republic of Serbia 2011 Budget Act.\textsuperscript{59} The Act Amending the Republic of Serbia 2011 Budget Act\textsuperscript{60} increased the total allocations for the Protector of Citizens and the Anti-Corruption Agency compared to the 2011 Budget Act allocations mostly thanks to the funds these authorities obtained through donations of foreign states and international organisations, but cut the budget of the Access to Information of Public Importance and Personal Data Protection Commissioner.\textsuperscript{61} BCHR was unable to conclude to what extent the funds allocated to the State Audit Institution and the Commissioner for Protection of Equality in the 2011 Budget corresponded to the funds they formally applied for since neither institution published its 2011 financial plans.

With the exception of the Protector of Citizens, none of the other regulatory institutions had full complements of staff set out in their internal organisation and job classification enactments. The Access to Information of Public Importance and Personal Data Protection Commissioner had 41 staff members, although it is to have 69 under the job classification enactment\textsuperscript{62} the Protector of Citizens engaged more staff than initially envisaged (70 instead of 63);\textsuperscript{63} the State Audit Institution had 75 instead of the envisaged 164 members of staff;\textsuperscript{64} the Anti-Corruption Agency had 53\textsuperscript{65} instead of the 95 members of staff envisaged in the job classification enactment;\textsuperscript{66} while the Commissioner for Protection of Equality made do with 18 staff members instead of the 60 envisaged by its internal enactment.\textsuperscript{67}

\textsuperscript{58} Compare the Draft Budget at http://www.acas.rs/sr_cir/sektor-za-opste-poslove.html and the Republic of Serbia 2011 Budget Act, Section 53.
\textsuperscript{59} Sl. glasnik RS, 101/10.
\textsuperscript{60} Sl. glasnik RS, 78/11.
\textsuperscript{61} See the Act Amending the Republic of Serbia 2011 Budget Act, Section 10, Section 44 and Section 45.
\textsuperscript{62} Information Booklet on the Work of the Access to Information of Public Importance and Personal Data Protection Commissioner, Narrative Overview of the Organogram, p. 17.
\textsuperscript{64} See Information Booklet on the Work of the State Audit Institution, Job Classification and Current Staff Breakdown, with Elected Staff, p. 8.
\textsuperscript{65} Information Booklet on the Work of the Anti-Corruption Agency, Revenue and Expenditure Data, pp. 32–34.
\textsuperscript{66} See the Rulebook on the Internal Organisation and Job Classification in the Anti-Corruption Agency Professional Unit, available in Serbian at http://www.acas.rs/sr_cir/zakoni-i-drugi-propisi/ostali-propisi/pravilnici/156.html.
\textsuperscript{67} See Information Booklet on the Work of the Commissioner for the Protection of Equality, Comparative Overview of the Envisaged and Current Staff Positions in the Commissioner’s Profes-
The inability of the independent regulatory institutions to hire quality staff stems from the legal framework governing the status of civil servants and favouring the ossified bureaucracy and deep-rooted particracy. A significant number of civil servants would not be competitive in the general labour market if the public administration were demonopolised and a greater number of citizens were able to apply for jobs in it. The State Audit Institution was one of the first to alert to the problems independent institutions have had in attracting quality staff.68 This issue was also highlighted by the Protector of Citizens in his initiative to amend the Act on the Salaries of Civil Servants and State Employees,69 as well as the Anti-Corruption Agency’s annual report,70 but both the Protector of Citizens’ initiative and the Anti-Corruption Agency recommendation, fell on deaf ears in the executive and legislative branches.

Although they did take steps to improve the material and financial conditions the independent regulatory authorities worked in, the Government and parliament, however, continued ignoring their decisions and recommendations and at best, extended merely declarative support to them. A comparison of the conclusions the National Assembly adopted after reviewing and endorsing the independent institutions’ annual reports71 shows that the parliament’s views in the conclusions on all the reports follow the same pattern, that they are overly general and lack accountability. They do not lay down any specific measures and/or mechanisms that have to be established to provide the Assembly with the prerequisites to play an active role in improving the situation in the areas the independent institutions are charged with, although the latter are primarily to assist the parliament in the fulfilment of its oversight function.

The independent institutions were more or less successful in formulating, implementing and publicly advocating public policies and values entrusted to them by the law in the year behind us. The following institutions stood out in 2011 by the implementation and emancipation of their missions: the Access to Information of Public Importance and Personal Data Protection Commissioner, the Protector of Citizens, and the most recently established regulatory authority, the Commission-

68 More data in 2010 Report, II.2.1.3.3.
er for Protection of Equality. The OSCE Mission to Serbia presented the officials heading these three institutions the “Person of the Year” Awards in late 2011.\footnote{See http://www.osce.org/serbia/86240.}

The Access to Information of Public Importance and Personal Data Protection Commissioner still faced the extremely challenging task of protecting the right of free access to information, the right to privacy and personal data protection in quite adverse circumstances in 2011, given that the executive authorities, agencies, security agencies and many other state institutions are prone to resist fulfilling their obligations under the laws the Commissioner is protecting and the enforcement of which this institution is overseeing. Rodoljub Šabić, whom the public perceives and recognises as its ally in relations with the de-institutionalised state, was re-elected Commissioner before his first term of office expired in December.

There is no doubt that the Commissioner dealt with a much greater number of access to information cases in 2011 than in the previous years although the precise number of complaints will be known in early 2012. In his press statement in November, the Commissioner warned of the inadmissible attitude public authorities had towards requests filed by citizens and civil society organisations to access the information in their possession. He qualified the inflow of complaints as “dramatic” and specified that he received 530 new complaints during that month alone, as opposed to e.g. 2005, when 437 complaints were filed with his Office during the whole year.\footnote{See http://poverenik.rs/index.php/sr/saopstenja/1261-29-11-2011.html.} He also noted that “the number of complaints against republican authorities is at least double the number of complaints against local authorities” because “the amount of interesting information in the possession of the republican authorities is much greater...”\footnote{Danas, 9 December, 2011, p. 6.}

The charges against a journalist and editor of the newspaper Nacionalni gradanski list for publishing a strictly confidential report on the state of the country’s defence, which was debated at a closed Assembly session, drew a lot of public attention in 2011. The charges filed by the Basic Public Prosecution Office in Novi Sad were withdrawn after a sharp outcry from civil society and the meeting between the Access to Information of Public Importance and Personal Data Protection Commissioner and the Republican Public Prosecutor. The Commissioner on that occasion condemned pressures on the media and voiced his concerns about media freedoms in Serbia.\footnote{See http://poverenik.rs/index.php/sr/saopstenja/1248--15-10-2011.html.} He also noted that charges could be raised only against the official who had disclosed the report if the prosecutors could “muster the strength” to take that avenue.\footnote{Politika, 23 October, 2011, p. A10.}

The Commissioner interceded in another high profile case in late December 2011. The Tax Administration within the Finance Ministry had rejected the request of the authors of the TV B92 show Insider to provide them access information on

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\footnotesize{72 See http://www.osce.org/serbia/86240.}
\footnotesize{73 See http://poverenik.rs/index.php/sr/saopstenja/1261-29-11-2011.html.}
\footnotesize{74 Danas, 9 December, 2011, p. 6.}
\footnotesize{75 See http://poverenik.rs/index.php/sr/saopstenja/1248--15-10-2011.html.}
\footnotesize{76 Politika, 23 October, 2011, p. A10.}
the 50 companies that owed the most in taxes and contributions. The administrative enforcement of the Commissioner’s decision was launched after the Tax Administration did not act in accordance with the Commissioner’s decision to communicate the relevant information to the applicant, but the Tax Administration still refused to provide access to the sought information. The Assembly in the meantime enacted amendments to the Tax Procedure and Tax Administration Act which the representatives of the executive deemed to be relevant legal grounds for publishing this kind of information and the Tax Administration ultimately published the list of the tax defaulters.77

Another illustration of the deeply-rooted voluntarism in the use of public revenues that has become the modus operandi of the senior state officials in 2011 was the “access to information” the Ministry of Economy and Regional Development provided to the Anti-Corruption Council. Namely, the Ministry communicated to the Council a completely blacked out text of the Joint Venture Investment Agreement between the Republic of Serbia and the company Fiat Group Automobiles S.p.A, although the Council sought access to information on Serbia’s investments in the deal funded by the tax payers.

The Commissioner in 2011 filed an initiative with the Ministry for Human and Minority Rights, Public Administration and Local Self-Government for amending the Public Administration Act, which probably appears as a vision of the distant future given the prevalent value system in Serbia’s public administration. The Commissioner proposed that an obligation be imposed on the public authorities to design their Internet presentations with at least the prescribed content under threat of penalty.78 It remains to be seen whether the Ministry, and the Government and parliament after it, will take up this extremely useful initiative.

The Commissioner’s activities have increased public awareness of the importance of the right to personal data protection, as evidenced by the increase in complaints about such violations. The citizens especially complained about the abuse of their personal data by political party activists.79 The Commissioner in 2011 reacted also to the regulation and use of video surveillance by both the public authorities and companies not vested with public powers. The “Centralised School Database and System for Notifying the Parents of the Pupils’ Grades”, which the Vojvodina Provincial Education Secretariat set up in 2008 in cooperation with the private company WDW Soft Ltd and comprising data of 200,271 people, was deleted on the Commissioner’s orders.80 The Commissioner also reacted to the collection and processing of data for the purpose of establishing a Single Information System in the

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77 B92, 29 December, 2011.
80 See http://poverenik.rs/index.php/sr/saopstenja/1030--2642011.html.
Primary and Secondary Education System of the Republic of Serbia\(^{81}\) and sought to protect consumers from the unlawful processing of their personal data companies ask for when they complain about the merchandise they bought.\(^{82}\)

In 2011, the *Protector of Citizens* was accredited with A status by the UN International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights for the 2010–2015 period.\(^{83}\) A status means that the relevant institution fulfils the six criteria established by the Paris Principles on the mandate, autonomy, independence, pluralism, adequate resources and adequate powers of investigation an institution entrusted with human rights protection and promotion has in practice.\(^{84}\)

Like the Access to Information of Public Importance and Personal Data Protection Commissioner, the Protector of Citizens also reviewed a greater number of complaints in 2011 than in 2010. For example, the Protector of Citizens Office received nearly 1000 complaints more in 2011 than in 2010 or nine times more than during its first year of work.\(^{85}\) Of the 206 recommendations the Protector of Citizens issued, 105 were implemented, the deadlines for implementing 67 were still running, while 34 of the recommendations were not fulfilled.\(^{86}\) The competent authorities did not accept any of the 40 legal or other initiatives launched by the Protector of Citizens.\(^{87}\)

In July 2011, the National Assembly enacted the amendments to the Act Ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment initiated by the Protector of Citizens nearly a year earlier. The amendments introduced the National Mechanism for the Prevention of Torture in the Serbian legal system, which entails the establishment of a local system for monitoring the treatment of persons deprived of liberty with the aim of preventing their torture. The Protector of Citizens has thus formally been entrusted with another broad and complex remit, which is why he recommended in his initiative that the amendments to the Act specify the amount of necessary funds and how they will be obtained, as well as the human resources required for conducting the activities within this field.\(^{88}\) Not unexpectedly, this amendment was

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86 Ibid.
87 Ibid.
88 See *Initiative to Amend the Act Ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at http://www.ombudsman.rs/index.php/lang-sr/zakonske-i-drugie-inicijative/1153---opcat.
not included in the final version of the Act, most probably because the executive branch is unwilling to give up its monopoly on spending budget funds.

Apart from conducting a large number of activities regarding oversight of the treatment persons deprived of liberty, the Protector of Citizens dealt with a large number of complaints the citizens filed against public authorities for ignoring the principles of good governance. A broad and at times sharp polemic between various stakeholder groups also accompanied debates about the first draft of the law on the rights of the child prepared under the auspices of the Protector of Citizens in 2011. The cases that provoked public concern and revolt and which the Serbian Ombudsman also addressed regarded the grave abuses and unlawful auxiliary provision of primary health care in the Niš Clinical Centre, as well as the pressures the High Judicial Council exerted on the Judges’ Association of Serbia.

In late December 2011, the State Audit Institution presented its audit reports of 47 entities and the Report on the Financial Audit of the Draft Act on the Republic of Serbia 2010 Budget Final Account. It is worth mentioning here that the National Assembly failed to adopt the laws on Serbia’s final accounts for 2008 and 2009 although the State Audit Institution had submitted it its audit reports on the 2008 and 2009 state budgets. Only two of the 47 audited entities received positive opinions from the State Audit Institution. It issued opinions with reservations about 39 entities and did not issue any opinions about six entities “due to lack of property inventories, the non-compliance of the subsidiary ledgers and records and the main ledgers, of the analytics and synthetics, of the claims and dues, and the SAI’s inability to obtain enough other evidence to issue an opinion”.

The 2011 reports include audits of the financial reports of 7 ministries, two directorates and the National Employment Service; audits of the National Bank of Serbia financial reports and the lawfulness of its operations (the part regarding the use of public funds and budget-related operations), the Republic of Serbia Development Fund, AP of Vojvodina, 13 local self-government units and 19 public companies (three of these companies had their 2009 reports audited). The shortcomings the State Audit Institution identified during the audits prompted it to file criminal charges against responsible persons in the public companies Serbian Railroads, Serbian Roads and Mediana.
During its second year of existence, the Anti-Corruption Agency failed to make much headway in publicly promoting its mission and raising the awareness of various target groups of the essence of the mandate it has been trusted with. This independent authority still does not command public trust. Having lost its trust in the professional capacity and independence of the courts, particularly the prosecutors’ capacities to autonomously and independently prosecute perpetrators of corruption, the public in Serbia has expected of the anti-corruption authority to be able to do everything the judiciary was unable to. However, the Act gives the Agency a primarily preventive and oversight role, directing it to focus on the formulation of effective anti-corruptive public policies. Such expectations are the consequence of the endemic corruption reigning in Serbia, which has set it back from 3.5 in 2010 to 3.3 in 2011 and 86th place on the Transparency International Corruption Perceptions Index.\(^\text{96}\) Although the Corruption Perceptions Index does not measure the actual amount of corruption in a society in a specific period of time, this tool is extremely useful because it indicates the degree of trust the citizens of a country have in their state and institutions. Serbia has obviously found itself in a paradoxical situation in which the citizens electing their political representatives to institutions simultaneously have very little trust in those very institutions.

The Anti-Corruption Agency in 2011 coordinated the drafting of the new law on the financing of political entities, which had on a number of occasions been qualified as the generator of systemic corruption in Serbia by national and international actors alike. The National Assembly adopted the Act on the Financing of Political Activities\(^\text{97}\) in June 2011. The Agency also drafted the Guide to the Act on the Financing of Political Activities, adopted the relevant by-laws and conducted training in 22 cities to inform the representatives of political entities about their obligations under the Act.\(^\text{98}\) Furthermore, the Agency published a call for election campaign observers in the run-up to the elections to be scheduled and held in 2012.

The Constitutional Court declared unconstitutional Article 29 (3) of the Act Amending the Anti-Corruption Agency Act nearly one year after the Agency filed an initiative for the review of its constitutionality.\(^\text{99}\) The Agency then continued reviewing incompatibility of offices it had put on hold until the Constitutional Court rendered its opinion.\(^\text{100}\)

The Agency in 2011 also adopted a Rulebook on the Protection of Persons Reporting Suspicions of Corruption.\(^\text{101}\) The Rulebook was adopted to clarify the

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\(^{96}\) See http://cpi.transparency.org/cpi2011/results/.

\(^{97}\) Sl. glasnik RS, 43/11.


\(^{100}\) See http://acas.rs/sr_cir/aktuelnosti/291-2011-09-09-15-54-44.html.

\(^{101}\) See http://acas.rs/sr_cir/zakoni-i-drugi-propisi/ostali-propisi/pravilnici.html.
quite confusing provision in the Anti-Corruption Agency Act.\textsuperscript{102} However, regulating the protection of the so-called whistle-blowers by a bylaw is inexpedient unless a material legal framework governing the volume, type of protection and penalties for violating the material provisions is already in place. This conclusion was voiced also at an expert debate held after the presentation of the Draft Rulebook.\textsuperscript{103}

The Agency in 2011 organised a large number of educational events for various target groups, took part in the design of a new strategic framework for combating corruption and was finalising the draft integrity plans,\textsuperscript{104} which the relevant public authorities will use as the basis for the adoption of their own integrity plans, a preventive anti-corruption measure aimed at building and consolidating institutional integrity.

\textbf{Commissioner for the Protection of Equality} – According to available data, the Commissioner for the Protection of Equality received 138 complaints in the first six months of 2011. Most of them regarded work and employment related issues, the public sphere and hate speech, the judiciary, local self-governments and the work of the public administration, and other issues, albeit to a lesser extent.\textsuperscript{105} The Commissioner reviewed 76 complaints and found that discrimination had been committed in 15 of the cases.

The presence of hate speech in Serbia is quite concerning. The Commissioner found hate speech on grounds of sexual orientation in her reviews of the complaints filed with respect to the 2010 Pride Parade. She found Serbian Orthodox Metropolitan Amfilohije Radović and the Belgrade Law College student association Nomocanon in violation of the Anti-Discrimination Act\textsuperscript{106} but the two ignored the Commissioner’s recommendations.\textsuperscript{107} The Commissioner also reacted to an article the Moslem Youth Club of the Islamic Community in Serbia published in the daily \textit{Danas} and warned that it constituted hate speech against Aida Ćorović, the Director of the Novi Pazar NGO Urban In.\textsuperscript{108}

Ironically, the Legislative Committee of the National Assembly is also on the list of those found in violation of the prohibition of discrimination that had failed to fulfil the Commissioner’s recommendations in 2011.\textsuperscript{109}

\begin{enumerate}
\item Sl. glasnik RS, 97/08, 53/10 and 66/11.
\item See http://acas.rs/sr_cir/sektor-za-poslove-prevencije/planovi-integriteta.html.
\item Sl. glasnik RS, 22/09.
\item See http://ravnopravnost.gov.rs/lat/vesti.php?idVesti=41.
\end{enumerate}
3. Roma – Social Vulnerability and Discrimination

The implementation of the measures laid down in the Strategy for the Improvement of the Status of Roma (hereinafter: Strategy) continued in 2011 but the improvement of the living conditions of this national minority has not been uniform. There was visible headway in some areas, above all education and health, but hardly any tangible progress was achieved in the fields of housing and employment.

In 2011, the negative connotations of the Roma issue were publicly voiced mostly in the context of the threats to reintroduce the Schengen visa regime on Serbia’s nationals. The surge in the number of false asylum seekers from Serbia, most of whom Roma, in West European countries, notably in Belgium, Luxembourg, Germany and Sweden, prompted warnings from the EU that the visa-free regime may be revoked. The Minister of Internal Affairs called on the Roma not to go to Europe and seek asylum there because they would not be granted it and that they were jeopardising the interests of all citizens of Serbia.110 In order to cut the number of asylum seekers from both Serbia as well as Macedonia and other Western Balkan countries, the Serbian Government imposed stricter border control measures which verged on discrimination in practice. The selective and different treatment of Roma vis-à-vis the other citizens prompted the European Roma Rights Centre (ERRC) and the Minority Rights Centre to file a lawsuit against the Republic of Serbia for discriminating against a group of 12 or 13 Macedonian nationals, all Roma, who were not allowed to enter Serbia on their way to Germany on 17 October 2010. The Preševo border police did not review each case individually; they collectively prohibited the whole group of Roma from entering the country although they had first stamped their passports (and later invalidated the entry stamps). Witnesses said that the border police officers explained that they “were ordered not to let groups of Roma travelling together cross the border”.

As regards the political framework for implementing Roma policies in 2011, the Government reshuffle in early 2011 resulted in the transformation of the then Roma National Strategy Office within the Human and Minority Rights Ministry into the Roma Status Improvement Group within the Human and Minority Rights Directorate of the Ministry for Human and Minority Rights, Public Administration and Local Self-Government. The resignation by Deputy Prime Minister charged with EU integration Božidar Đelić in December 2011 has brought into question the further work of the Roma Status Improvement Council which he had chaired.

The Ministry for Human and Minority Rights, Public Administration and Local Self-Government in late 2011 began drafting a new three-year Action Plan for the implementation of the Strategy in the 2012–2014 period. The Ministry consulted with the representatives of the civil sector, who were involved in the working

110 See the Minister’s statement in Serbian at http://sps.org.rs/2011/05/09/da%C4%8Di%C4%87-romi-neka-ne-tra%C5%BEe-azil/.
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groups together with the representatives of the competent ministries and international organisations in November and December. The agreed draft action plan was not, however, endorsed either by the ministries or the Government by the end of this year.

Some headway was made with respect to the lack of personal documents. The amendments to the Republican Administrative Taxes Act abolished the administrative tax on subsequent registration in the birth registerr, while the new Permanent and Temporary Residence Act allows people who are not registered at an address to register their residence at the address of the social work centres covering the area in which they live. This provision above all allows people living in informal settlements and the homeless to obtain IDs and thus exercise a number of welfare rights. However, the subsequent birth register entry procedure is inadequate for a specific category of people, the regulations are not in accordance with the Constitution, generally recognised rules of international law and international treaties. This is why the NGOs Centre for Advanced Legal Studies and Praxis filed an initiative with the Constitutional Court of Serbia in July 2011 asking it to review the constitutionality and legality of the Birth, Death and Marriage Registries Act. Assessments are that around 6,500 “legally invisible” people, mostly Roma, are living in Serbia.111 A total of 7,966 people exercised the right to subsequent entry in the birth registers in 2010.112 In addition, the Act on the Non-Contentious Procedure is to be amended in 2012 to facilitate the procedure of certifying a person’s birth before the court, which cannot be implemented in an administrative proceedings before a birth, death or marriage registration authority.

A UNICEF Multiple Indicator Cluster Survey (MICS4) survey shows that the health of Roma women and children living in informal settlements has considerably improved over 2005.113 The mortality rate of Roma infants and children under five has nearly halved, but is still double the average mortality rate of this age group in Serbia. Children under five living in the Roma settlements still do not have access to quality food and they still lag behind their non-Roma peers in development, as much as 3.5 times. Indicators show that nearly the same percentage of Roma women in the settlements and non-Roma women gave birth in hospitals. The preliminary data from this survey were published in July 2011 but their comprehensive analysis was not completed by the end of the reporting period. As far as the coverage of Roma population by health insurance is concerned, indicators show that the amendments to the regulations allowing Roma without registered residence, and even the “legally invisible” people to obtain health cards have been effective – over

111 The statement on the initiative is available in Serbian at http://www.praxis.org.rs/index.php?option=com_content&task=view&id=238&Itemid=49.
113 MICS4 findings are available at http://www.unicef.org/mdg/serbia_59264.html.
4,500 people acquired health insurance on these grounds in one year alone. However, there are still many Roma and staff in the local Republican Health Insurance Fund branch officers who are not aware of the new legal provisions and a significant number of Roma still do not have access to health care.

It may be concluded that the enrolment of Roma children in primary schools has continued growing in 2011, despite the absence of the relevant data. This trend can be ascribed both to the easier enrolment procedures and the engagement of around 175 pedagogical assistants in kindergartens and primary schools in 2011. UNICEF’s survey shows that the percentage of children in Roma settlement attending primary school increased from 66% in 2005 to 91% in 2010, that the mandatory preschool preparatory programme is attended by 78% of the Roma children, vis-à-vis 97% of the general population pre-schoolers, and that the rate of Roma children who enrolled in 1st grade and did not drop out by 8th grade stands at 86%. These almost unbelievable data are still being verified and should be interpreted with caution until the final analysis is published, particularly since experience in the field paints a different picture. According to the report published by CARE International and the Novi Sad Humanitarian Centre entitled “Situation Analysis of the Education and Social Inclusion of Roma Children in Serbia”, a total of 1,735 Roma pupils, slightly half of whom girls, were registered in nine primary schools in the three cities in the sample (Novi Sad, Kraljevo, Niš). The survey shows that the greatest drop-out rates are registered at the end of 4th grade (10.5%) and in 1st grade (7.7%), while around 30% of the Roma pupils leave school before 8th grade. Furthermore, the Minority Rights Centre in 2011 published its survey of the generation that enrolled in 1st grade in the 2009/2010 school-year and their status the following school year. The survey covered 16 primary schools in five cities with 1,371 first graders, of whom 35% (486) were Roma. Data show that nearly 15% of the Roma first-graders did not move on to 2nd grade. As regards achievements in 1st grade, only 26% of the Roma first graders (vis-à-vis 92% of the other pupils) fully mastered the 1st grade curriculum. By the end of the winter term of 2nd grade, only 10.5% of the Roma (vis-à-vis 77% of the other) pupils had an A average. Despite the increase in the primary school enrolment rates, these data demonstrate that there is still a major discrepancy in the quality of education between Roma and other pupils, which is reflected in the high drop out rates and poorer achievements of the Roma pupils.

The increased rate of enrolment of Roma children in primary schools has led to increased segregation of Roma pupils. School enrolment actually best reflects society’s distance towards this national community. The increases in the numbers of Roma children enrolled in primary schools led the parents of non-Roma children to enroll their children in the so-called “white” schools. The problem of segregation is evident in specific cities, including Belgrade and Novi Pazar. The Leskovac primary school Petar Tasić is the starkest example – it enrolled only Roma children in 1st grade in the 2011/12 school year, for the first time.
Groundless referrals of Roma children to schools for children with developmental difficulties has been a serious and evident problem in the past years. The primary school enrolment procedure was changed with the aim of promoting inclusive education and preventing the unjustified enrolment of children into the so-called special schools. However, the real effects of these measures, which have been in effect for two years, are still unknown. The number of first graders without developmental difficulties and/or disabilities enrolled in special schools has undoubtedly fallen, but the number of children transferred from mainstream to special schools remains unknown. The Bor primary special school had 18 Roma pupils (13 Roma first-graders and five Roma pupils transferred from mainstream schools) in November. These children were referred to the school although the Inter-Departmental Commission\textsuperscript{114} had not first issued opinions to that effect about them, which constitutes a flagrant violation of the Act on the Basis of the Education System. Under the Act all children between 6,5 and 7,5 years of age must be enrolled in 1th grade. Children thought to be suffering from developmental difficulties and/or disabilities are referred to the local Inter-Departmental Commissions which test and examine them and draft individual support plans and issue opinions on any additional educational, health or social support measures they may need. A child may be referred to a special school only in the event the Commission assesses that s/he cannot attend a mainstream school. The situation was addressed through the joint efforts of the school, education advisers and inspectors, the Roma civil society within the DILS-REF project of the Ministry of Education and Science and the children on whom the commission had not issued opinions upholding their education in a special school (15 of them) were transferred back to the mainstream schools. Roma children account for 80% of the pupils of the Bor special school.

Housing is still one of the key problems of Roma, particularly those internally displaced from Kosovo. Belgrade witnessed five evictions of Roma, 22 families and 112 individuals in all, in 2011.\textsuperscript{115} The eviction problem was highlighted also in the European Commission 2011 Analytical Report, which stated that a large number of Roma were living in illegal settlements under unacceptable conditions and that there was still no systematic approach to the relocation of illegal Roma settlements, which was often conducted inappropriately, resulting in serious violations and breaches of basic human rights. The European Commission against Racism and Intolerance (ECRI) appealed in its May 2011 report on the Serbian authorities to take urgent measures to protect Roma from forced evictions, by ensuring that: an opportunity for genuine consultation by those affected is created; adequate and reasonable notice is given; information on proposed evictions is provided within a reasonable time; evictions do not take place in particularly bad weather or at night; adequate resettlement opportunities are provided; legal remedies are provided, and

\textsuperscript{114} Report by the Primary and Secondary Education School Vidovdan of 9, December 2011.
\textsuperscript{115} Pančevo Bridge (June 2011), Skadar Street (August 2011), Lješka Street and Ratko Mitrović settlement (October 2011), Golubinac Street (November 2011).
legal aid is provided to persons who are in need of it to enable them to seek redress through the courts.116

The forced eviction of the residents of an informal settlement in the New Belgrade Block 72 began in early November, after the New Belgrade Municipality inspected the settlement and served the decision on its demolition to its residents. The forced eviction was launched without prior consultations with the residents or providing them with adequate alternative housing. This settlement is inhabited by 33 families, nearly half of which have been internally displaced from Kosovo. There are a large number of children, ten pregnant women and thirty or so “legally invisible” people living in the settlement. After several NGOs interceded, the Human and Minority Rights Directorate established a group rallying the representatives of the competent institutions, including the local self-government, and opened consultations with the families that were to be relocated. The New Belgrade Municipality, however, went ahead and served the eviction notices on the residents, which brought the very purpose of the consultations into question. The only alternative offered the internally displaced families was accommodation in collective centres far away from large cities, although it is well-known that the residents of the settlement earn their living by collecting secondary raw material, something they cannot do in smaller and poorer municipalities in Serbia. Families from Belgrade were offered to move to metal containers – up to five family members will be sharing the 16m² on Belgrade’s outskirts. The residents of the settlement proposed several accommodation alternatives during the consultations, which the authorities immediately rejected. The NGOs and the residents of the settlement were of the view that the resettlement solutions offered by the competent authorities were not in accordance with international obligations binding on Serbia.

Civil society organisations responded to these events by drafting a Platform for the Realisation of the Right to Adequate Housing117 in which they expressed their concern over the increasing number of forced evictions conducted in contravention of the ratified international standards binding on the Republic of Serbia. The Platform focuses primarily on the eviction of the Block 72 residents but also gives recommendations regarding all future evictions in the offing. The Platform was presented to the Ministry for the Environment, Mining and Spatial Planning, the Ministry for Human and Minority Rights, Public Administration and Local Self-Government – the Human and Minority Rights Directorate, the Republican Housing Agency, the Commissariat for Refugees of the Republic of Serbia and the representatives of the City of Belgrade. The Platform was supported by over 60 NGOs, eight civil society networks and coalitions and the National Council of the Roma


National Minority. The Protector of Citizens also established that the state authorities had begun relocating the residents of this settlement in contravention of the strategic documents and international standards and recommended to the competent authorities to take a set of measures to find a humane solution to the problem and provide these families with appropriate temporary or permanent accommodation.

Several good practices were introduced during the Block 72 process: the process of consultations was launched, a working group rallying all the stakeholders was established, the internally displaced families were provided with the opportunity to visit the collective centres and see for themselves what the accommodation they were offered was like. The decision was taken not to relocate the families during winter and the process was put off until the spring of 2012.

The year 2011, unfortunately, did not pass without ethnically motivated attacks targeting Roma. Three men assaulted a Roma pupil of the Commercial High School in the heart of Belgrade in March. The police identified them and filed a criminal report with the competent prosecution office. The graffiti “Death to Tsigans” were written on the homes of two Roma families in Zrenjanin in March and July. A group of youths “crashed” a birthday party in the Roma House in Čačak and inflicted serious stab wounds to four Roma youths. The incident in Čačak was preceded by a number of hate graffiti, assaults on Roma homes, the attack on the Roma House. Although they may not have been committed by the same perpetrators, they indicate a pattern of escalation of violence from verbal incidents to physical violence. Slobodan Nikolić was assaulted by three unidentified youths as he was riding on the Belgrade city bus No. 31. Witnesses of this incident, which occurred in May, said that the assailants were around 20 years old and had hit the boy on his head and body with their fists. They also hit on the head Nikola Vlahović, who came to his rescue. The hooligans fled and the victim was taken to hospital by the ambulance.

In June 2010, a group of residents of the Banat village of Jabuka organised protests that turned into violence and dissemination of hatred and intolerance against the Roma after a Roma minor was suspected of killing a non-Roma boy. The villagers stoned the homes of the Roma living in the village and demolished the property of the local Methodist church. The Roma stayed in their homes for over a month in fear of more violence and the police had to boost presence in the village round the clock. The Pančevo Higher Court in late June 2011 rendered a verdict against the

six defendants finding them guilty of inciting national, racial and religious hatred and sentencing four of them to five months of conditional imprisonment. The other two defendants, who were minors, were imposed the measure of mandatory attendance and completion of a secondary school. Given the gravity of the effects of the incidents, the sanctions pronounced against the accused can be qualified as disproportionately mild and inadequate.

4. Status of (Discrimination against) Specific Categories of the Population and Especially Vulnerable Groups

4.1. Homophobia and Discrimination against LGBT People

Homophobia and prejudices against LGBT people are still widespread in Serbia and frequently lead to the victimisation of both the LGBT population and those speaking up for their human rights. Organisations promoting the rights of LGBT people and protecting them have become increasingly active and visible, which has resulted in the improvement of the status of their members and LGBT people in larger urban communities, but the status of LGBT people in smaller communities remained precarious. The activities of these organisations have steadily increased the limelight on the homophobia in Serbia, both in the public sphere and in private life, where it has frequently led to domestic violence.

The prohibition of the Pride Parade scheduled for 2 October 2011 was the chief event regarding the rights of LGBT persons in Serbia in the year behind us. As opposed to the 2009 Parade, which was cancelled but not formally banned, the police in 2011 rendered a decision on the prohibition of the gathering. By deciding to prohibit the Pride Parade, the state violated fundamental human rights and demonstrated its inability to ensure the respect for the Constitution and the law and guarantee safety to all its citizens. The cancellation of the 2011 Parade amounted to another violation of the Constitution and international law. The organisers, who are again represented by the Belgrade Centre for Human Rights, filed an application with the ECtHR and a constitutional appeal with the Constitutional Court of Serbia.


124 Conclusions from the gathering Vulnerable Groups and Security Sector Reform: LGBT Case Study, held in the Belgrade Media Centre on 22 December 2011.

125 More on the events surrounding the prohibition of the 2011 Pride Parade in I.4.10.3.

126 The constitutional appeal is available in Serbian at www.bgcentar.org.rs.
The organisation of the 2011 Pride Parade was again accompanied by a number of inappropriate and homophobic statements of the state officials.\textsuperscript{127} The Commissioner for the Protection of Equality warned in her press release that the statements made by Jagodina mayor Dragan Marković about the Pride Parade violated the prohibition of discrimination and amounted to hate speech.\textsuperscript{128}

The state authorities are either unwilling or unable to efficiently suppress threats of violence for want of capacity or political will. Notably, not one criminal report was filed against anyone although the 2011 Pride Parade was banned because of security threats.\textsuperscript{129} Although cooperation with the Ministry of Internal Affairs improved to an extent in 2011, the members of the LGBT population do not have access to efficient and adequate judicial protection.\textsuperscript{130} An overview of the Gay Straight Alliance (GSA) Legal Department caseload shows that, in most of the cases, the courts had either not initiated any legal actions or have endlessly put off the completion of such cases; many of the judges have not been sensitised to rule on cases regarding LGBT persons.\textsuperscript{131} The state authorities’ actions have not contributed to the prevention of discriminatory conduct or encouraged the victims to turn to them for help.

None of the school curricula in Serbia comprise information on the rights of sexual minorities.\textsuperscript{132} Furthermore, high school textbooks are rife with explicitly discriminatory examples,\textsuperscript{133} and define homosexuality as a disease.\textsuperscript{134} In Serbia, 21\% of students surveyed admitted they had verbally attacked or threatened someone they thought was gay or “feminised”, while 13\% said they had actually helped beat them up. Some 60\% of the respondents held that violence against homosexual persons was always justified.\textsuperscript{135} This is why systemic changes have to be made

\textsuperscript{127} See the constitutional appeal of the organisers of the Pride Parade, paras. 77–81, available in Serbian at www.bgcentar.org.rs.
\textsuperscript{129} Information obtained pursuant to the Act on Free Access to Information of Public Importance from the First Basic Prosecution Office in Belgrade and the Republican Public Prosecution Office.
\textsuperscript{130} LGBT and Security Sector Reform, p. 9.
\textsuperscript{131} LGBT Population in Serbia, pp. 4–5.
\textsuperscript{132} LGBT Population in Serbia, pp. 7–8.
\textsuperscript{133} Recommendation of the Commissioner for Protection of Equality to the Ministry of Education and Science of the Republic of Serbia, the National Assembly, the National Education Council and the Education Improvement Bureau on the elimination of discriminatory content from teaching material and practices and the promotion of tolerance, respect for diversity and human rights, of 10 June 2011, available in Serbian at: http://www.ravnopravnost.gov.rs/lat/preporuke-OrganimaJavneVlasti.php?idKat=24.
\textsuperscript{135} Ibid. p. 114.
in textbooks at all education levels to halt the further enrooting of homophobia, prejudice and stereotypes, as well as the reproduction of falsehoods and ignorance directed against the non-heterosexual population.

4.1.1. Specific Court Proceedings. – The Constitutional Court upheld the constitutional appeal filed by the organisers of the 2009 Pride Parade,136 who were represented by the BCHR, and found that the state authorities had violated the freedom of peaceful assembly of the appellants and their right to effective judicial protection by prohibiting the Pride Parade. The 2009 Pride Parade was not formally banned. The police issued a decision on “the change of venue” of the event, from the plateau in front of the College of Philosophy in the heart of Belgrade specified by the organisers, to an empty field in the Belgrade Ušće Park. The Constitutional Court confirmed that this amounted to a de facto prohibition of the Parade, because the Constitution and the Public Assembly Act do not allow the police to decide where a peaceful assembly is to take place instead of the organisers. The Constitutional Court also confirmed that the appellants had been deprived of the right to effective judicial protection against the violations of their human rights by the executive branch because of the way in which the poorly worded and unreasoned decision on “change of venue” was adopted and delivered to the organisers of the assembly personally by the Prime Minister only 24 hours before the parade was to start.137

The Belgrade Higher Court in 2011 rendered the first judgment in Serbia in a case of hate speech against the LGBT population pursuant to Article 11 of the Anti-Discrimination Act and Article 38 of the Public Information Act. The Court upheld the GSA lawsuit against the daily Press and found that the texts – readers’ comments to the article “I’ll be a Gay Icon” published on the daily’s website Press online on 2 July 2009 constituted hate speech against the LGBT population and that Press had acted discriminatorily against this population by allowing the posting of such comments on its website. The Court also set a temporary measure in accordance with Article 44 of the Anti-Discrimination Act and prohibited the publication of the impugned comments on Press’ website and ordered the defendant to publish the judgment in its entirety, without any comments or delay and at its own expense, but it rejected the appellants’ compensation claim. The GSA is not entirely happy


with the judgment, because it took the Court nearly two years to render it although such cases are reviewed in summary proceedings. 138

The First Basic Court in Belgrade rendered a first-instance judgment finding Dragan Marković aka Palma, the Jagodina Mayor and leader of the parliamentary political party United Serbia and until recently a deputy in the National Assembly, guilty of grave discrimination against the LGBT population pursuant to Articles 11, 12, 13 and 21 of the Anti-Discrimination Act. The GSA sued Marković for giving the following statement: “In the view of United Serbia and in my personal view – we are against any assembly at which homosexuals demonstrate on Belgrade streets and want to portray something sick as something normal”. The Court prohibited him from committing such discrimination again and ordered him to compensate the GSA for the court expenses it had sustained. 139

4.1.2. Violence against LGBT Persons. – The research conducted by the Public Policy Research Centre, entitled LGBT People and the Security Sector in Serbia, 140 indicates that the feelings of LGBT people that their physical safety and security are threatened in the streets and at public venues generally depend on the political context and social events, e.g. they increase at the time of the Pride Parade when media give more room to the advocates of homophobic attitudes and actors urging violence against the LGBT population. Indeed, the attacks on LGBT persons gained in frequency after the decision to prohibit the Pride Parade was rendered, as the organisations focusing on the promotion and protection of the rights of this vulnerable group warned in their public statements. However, LGBT people are by and large still reluctant to report violent incidents against them given that they cannot predict how the competent state authorities will react.

A. Ž. (24) was severely injured in the heart of Belgrade when she was attacked with a knife. The victim was wearing Pride Parade symbols when she was assaulted. One of her three attackers kept on asking her whether she was a lesbian. 141

M. P. (26) was first verbally and then physically assaulted by three young men in the night of 25/26 November and none of the bystanders reacted. Two of the attackers fled in the 10 minutes it took the police to arrive at the scene. The third perpetrator was questioned and taken in to the police station but only a misdemeanour report was filed against him. 142

140 LGBT and Security Sector Reform, pp. 23–35.
4.2. National and Religious Minorities

4.2.1. Census and National Minorities. – Serbia conducted a census of the population, households and dwellings in the territory of the Republic from 1 to 15 October 2011. Only the initial census results were published by the end of the reporting period. The results on the ethnic breakdown of the population will be successively published in the latter half of 2012.143 The Statistical Office of the Republic of Serbia (SORS) said that the ethnic breakdown, religion and native language data would be available in June 2012 (with the exception of data regarding the ethnic Albanians living in the Preševo Valley).144 The census results are extremely important for many reasons; as regards minorities, they facilitate the systematic monitoring of the complex demographic and socio-economic changes and the comparison of the current and past census results. They are also a useful source for analysing demographic, economic, ethnic, education and many other features of Serbia’s population.

The Assembly of Albanian councillors in Preševo, Bujanovac and Medveđa called on the Albanians to boycott the census in early September 2011. The boycott impacted on the implementation of the census in the municipalities of Preševo and Bujanovac, and, to an extent, in the municipality of Medveđa. According to the municipal census committees in Preševo and Bujanovac, most Albanians, both the citizens and census takers, boycotted the census. The main reason for the boycott of the census in Preševo was the impossibility of registering the thousands of Valley residents, who had moved to Kosovo after 1999 or were temporarily working in EU member-states.145 The census was also boycotted because there were not enough Albanian census takers (23 of the 71 trained census takers in the Preševo municipality) and because the original census form was printed in the Serbian language and in the Cyrillic script. The SORS, however, explained that the data processing programme could operate in only one language. The SORS had prepared multi-lingual census collections of questions with the census forms in nine languages, which the census takers were to use if the citizens did not understand some of the questions.

The Bosniak National Council Presidency also called on the Bosniaks to boycott the census but this call did not significantly impact on the citizens.

The National Council of the Hungarian National Minority actively participated in monitoring the preparations for and implementation of the census, advocating

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144 The ethnic breakdown of the population of Serbia according to the 2002 census: Serbs – 82.8%, Hungarians – 3.9%, Bosniaks – 1.8%, Roma – 1.4%, Yugoslavs – 1.1%, Montenegrins – 0.9%, Croats – 0.9%, Slovaks – 0.8%, 0.8% – Albanians, 0.5% Vlachs, 0.5% – Rumanians, Macedonians – 0.4%, Bulgarians – 0.3%, Bunjevci – 0.3%, Ruthenians – 0.2% and around 4,000 Germans and other minorities.
145 Danas, 15/16 October 2011, p. 8.
the involvement of a sufficient number of ethnic Hungarian census takers and the use of the multi-lingual collections of questions in addition to the original census forms in the Serbian language and Cyrillic script. After reviewing a complaint by the Hungarian National Council, the Vojvodina Ombudsman issued a recommendation to the SORS in which it noted that the SORS had not taken all the necessary measures to ensure that a sufficient number of instructors and census takers speaking Hungarian were in place in the areas inhabited by a sufficient percentage of persons belonging to the Hungarian minority set out in the law for the official use of Hungarian as a minority language.146

4.2.2. National Councils of National Minorities. – Serbia has a satisfactory legal framework providing protection to national minorities. The elections of the members of the minority National Councils were conducted in 2010. Sixteen national minorities (Albanian, Ashkali, Bosniak, Bulgarian, Bunjevci, Czech, Egyptian, Greek, Hungarian, German, Roma, Romanian, Ruthenian, Slovak, Ukrainian and Vlach) satisfied the requirements for directly electing their national councils. Persons belonging to the Croatian, Macedonian and Slovene national minorities elected their national council members via electoral assemblies. Eighteen of the 19 minorities set up their national councils after the elections. Only the Bosniak National Council remained unconstituted.147 Since the National Council of the Bosniak National Minority recognised by the Ministry for Human and Minority Rights, Public Administration and Local Self-Government was not set up in 2010, the Ministry scheduled fresh elections of the Council members for 17 April 2011. The Minister of Human Rights, Public Administration and Local Self-Government Milan Marković called off the elections in March 2011 under the explanation that the tensions created by the 2010 elections had to be defused and that more time was needed to agree on the election procedure and rules.148 Although the possibility of holding the elections was mentioned several more times, the process of establishing the Bosniak council was halted after the representatives of the Bosniak entities that ran in the 2010 elections failed to agree on the date of the elections. The Minister is of the view that the state, as well as the Sandžak political and religious leaders, bear their share of responsibility for the impasse.

Since the elections of the Bosniak Council were not held in 2011, the Bosniaks are now represented by two National Councils in cultural and educational affairs: the “old” caretaker Bosniak National Council (BNV) headed by deputy Esad Džudžević since 11 November 2011, and the unrecognised Bosniak Council – Peo-

147 More in the 2010 Report, II.2.2.5.2.
ple’s Council of Sandžak established by the Bosniak Cultural Community council members with the support of two council members from the Bosniak Revival and headed by Dr. Mevlud Dudić.

4.2.3. Status of Bosniaks in Serbia. – Bosniaks had two ministers in the Serbian Government in 2011: Sulejman Ugljanin, a Minister without Portfolio and president of the Party of Democratic Action of Sandžak and Rasim Ljajić, Labour and Social Policy Minister and president of the Sandžak Democratic Party. There are eight Bosniak deputies in the National Assembly. However, Bosniaks are underrepresented in the state administration authorities in Sandžak, where this national minority accounts for the majority population. According to the Second Report on Serbia of the European Commission against Racism and Intolerance (ECRI) published in May 2011, only 30% of the police are Bosniaks in the city of Novi Pazar, whilst this group constitutes 85% of the population in that city. The Commissioner for Protection of Equality issued a recommendation to the MIA in March 2011 calling on it to take all the necessary measures without delay to ensure that the composition of the local police units reflects the ethnic breakdown of the population. Out of the 60 employees at the Novi Pazar fire brigade, only 3 are Bosniaks. Furthermore, the judges and public prosecutors and deputy public prosecutors in Novi Pazar are not from the Sandžak region. Moreover, there is a high unemployment rate in Novi Pazar and its infrastructure lacks solid road and electricity networks.

The year behind us was marked also by tensions between the Novi Pazar-based Islamic Community in Serbia led by Mufti Muamer Zukorlić, who considers Bosnia his spiritual home, and the Belgrade-based Islamic Community of Serbia headed by Reis-l-ulema Adem Zilkić, which enjoys the support of the Government, although secular authorities ought to be neutral with respect to any dissent within religious communities. An agreement between these two religious communities has not been reached yet. The situation in Sandžak has further been complicated by the fact that it is difficult to draw a distinction between the political and religious goals and interests of the religious communities, which has resulted in a situation in which the religious community has practically been mobilising the electoral will of the Bosniak citizens.

The Bosniak Academy of Arts and Sciences was established in June 2011. Its Founding Act was signed by Islamic Community in Serbia leader Mufti Muamer Zukorlić, the Reis of the Bosnia-Herzegovina Islamic Community Mustafa Cerić and a number of professors living in Sarajevo, Skopje and Novi Pazar. The Serbian Education and Science Minister, however, is of the view that the Academy

is illegal. Given that it was established by religious leaders, BNV chairman Esad Džudžević underlined that its constitution was an attempt to “clericalise” Bosniaks in Sandžak.\(^{151}\)

The BNV filed a number of complaints with the Commissioner for Protection of Equality in 2011. With respect to its complaint against the Priboj municipality, the Commissioner found that the municipal authorities had failed to take measures to introduce the Latin alphabet and the Bosnian language into official use on an equal footing with the Serbian language and Cyrillic script, although over 15% of the population in the municipality are Bosniaks and established that the municipality had discriminated against them on grounds of nationality.\(^{152}\) The Novi Pazar City Administration heeded the recommendation of the Protector of Citizens and ensured that the residents obtain their birth, death and marriage certificates on bilingual forms, i.e. in Serbian and Bosnian.

The BNV Chairman in November wrote to the Serbian President, Prime Minister and Assembly Speaker demanding that the staff of police, prosecution offices, the judiciary and penitentiaries be vetted for the political terror Bosniaks in Sandžak had suffered in the 1990s. He called on officials to ensure that the breakdown of the staff in the police, prosecution offices and courts in all the municipalities inhabited by Bosniaks reflect the ethnic breakdown in these municipalities and that those Bosniaks expelled or displaced from the Priboj municipality in the 1991–1999 period be allowed to return. Džudžević set a 60-day deadline for the authorities to take efficient measures to ensure the realisation of the Bosniaks rights in his letter or else the BNV would call on the Bosniak political representatives to withdraw from the National Assembly and the Government of the Republic of Serbia.

4.2.4. Vojvodina Hungarians. – The National Council of the Hungarian National Minority (Magyar Nemzeti Tanács) was extremely active in 2011, particularly with respect to issues regarding the official use of the Hungarian language and education and science in the language of this minority. The National Council was established after the adoption of the Act on National Councils of National Minorities\(^ {153}\) in 2009 and the first elections of the national council members in 2010. It is chaired by Dr. Tamas Korhecz.\(^ {154}\) The Council in 2011 established a Consultancy Committee for the Civil Sector as a temporary body.

\(^{151}\) Politika, 11 June 2011, p. 4.


\(^{153}\) Sl. glasnik RS, 72/09.

\(^{154}\) The Hungarian National Council has powers in six fields and has established the following committees: Primary and Secondary Education Committee, the High Education and Science Committee, the Culture Committee, the Official Use of Languages and Scripts Committee, the Information Committee and the Youth Committee. It established a Consultative Committee for the Civil Sector in 2011. The National Council Administration is the executive authority of the
In 2011, the Hungarian National Council focused primarily on advancing the official use of the Hungarian language and alphabet in practice, pursuant to the Act on the Official Use of Languages and Scripts.\footnote{Sl. glasnik RS, 45/91.} This Act allows the official use of a language and alphabet of a minority traditionally living in the territory of a specific self-government on an equal footing with the other languages. The Hungarian National Council in 2011 advocated the use of the Hungarian language and alphabet in judicial and administrative proceedings, in communication with the public authorities, the use of the Hungarian language on ballots and election material, in proceedings for obtaining official documents, official records and personal data collections and for the recognition of the documents issued in Hungarian. The Council particularly vigorously advocated the introduction of multilingual birth, death and marriage certificates, i.e. that the data be published in Serbian and Hungarian. In the view of Deputy Vojvodina Ombudsman Eva Vukašinović, issuance of such certificates only in the Serbian language and Cyrillic script to persons belonging to minorities amounts to violations of their constitutional rights.\footnote{See Discrimination against Minority Languages at the website of the Novi Sad Radio 021 in Serbian: http://www.021.rs/Info/Srbija/Diskriminacija-manjinskih-jezika.html.}

The Hungarian National Council invested a lot of energy in 2011 in preserving the minority classes in schools across Vojvodina with the aim of ensuring that ethnic Hungarian pupils complete primary school in their native language. Its actions included organising a school bus for pupils in the nearby villages and an integration programme teaching non-Hungarians the language of their ethnic Hungarian neighbours.

Pursuant to the Act on National Councils of National Minorities, the Hungarian National Council rendered a decision in May 2011 to partly take over the founding rights over 13 Vojvodina institutions of particular significance to the preservation, promotion and development of cultural uniqueness and the preservation of the national identity of the Hungarian national minority, i.e. of institutions of particular significance to the Vojvodina Hungarians. Unfortunately, many local self-government units failed to amend the founding acts of these institutions, prompting the Vojvodina Ombudsman to appeal on them to as soon as possible take steps to that effect and warning them that they would be found in violation of minority rights unless they did.

The Hungarian National Council adopted its Media Strategy in November 2011. Under the Strategy, steps are to be taken to considerably improve the quality and professionalism of the Hungarian language media.

The public’s attention focused on the debate on the new Property Restitution and Compensation Act in October 2011.\footnote{Sl. glasnik RS, 72/11.} Namely, the deputies of the Alliance of Council. More information on the work, structure and powers of the National Council of the Hungarian National Minority is available in Hungarian and Serbian at: http://www.mnt.org.rs/.
Vojvodina Hungarians (SVM) in the state Assembly were revolted by a provision in Article 5 of the Act under which individuals who had been members of the occupying forces in the territory of the Republic of Serbia in WWII and their heirs, are not entitled to restitution or compensation. This in practice means that persons who were serving the army during the war at the time part of the state was under foreign occupation cannot exercise this right. In the view of the SVM deputies, this provision directly violates the principle of individual criminal accountability and introduces the principle of collective responsibility which has been abandoned in the rest of the world. The SVM deputies qualified the Act as controversial per se because it departed from the presumption that Hungarians were a Fascist nation that had committed crimes. The Rehabilitation Act that was adopted soon afterwards eliminated most of the shortcomings in the Restitution Act because it specifies that only members of the occupying forces that had occupied parts of Serbia during WWII and members of quisling formations who had committed or participated in the commission of war crimes as established during rehabilitation proceedings are not entitled to rehabilitation and restitution.

Several inter-ethnic incidents between Serbs and Hungarians were registered in 2011. The police prevented the verbal incidents between two extremist organisations, Obraz and 64 Counties, from escalating into physical showdowns in the Vojvodina municipality of Temerin in October. Temerin Mayor Andras Gusztan and Vojvodina Assembly Speaker Sandor Egeresi vehemently condemned this and all similar ethnically motivated attacks, noting the “huge efforts have been invested in improving the relations and promoting tolerance in the Temerin municipality” and adding that isolated incidents and individuals should not be allowed to undermine the good relations between the persons belonging to the ethnic communities in Vojvodina.

4.2.5. Albanian National Minority. – The European Commission against Racism and Intolerance (ECRI) recommended that the Serbian authorities take all the necessary measures against all forms of discrimination against the Albanian minority, particularly in Preševo, Bujanovac and Medveđa and take measures to reduce the high unemployment rate among Albanians in Preševo, Bujanovac and Medveđa. More than 70% of economically active people are unemployed in the region and are leaving their homes in search of better employment opportunities. Moreover, Albanians remain underrepresented in the judiciary and in state owned institutions in the

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159 Sl. glasnik RS, 92/11.
160 “Police Prevent Clash between Obraz and 64 Counties”, Blic, 3 October, p. 16 and “Restitution of Hate”, NIN, 13 October, pp. 18–19.
region. The MIA advertised a call for the training of 50 policemen – 20 in Preševo, 20 in Bujanovac and 10 in Medveđa in 2011. The police minister approved the applications of 21 candidates; 18 began the training, while the Coordination Body of the Government of the Republic of Serbia for the Municipalities of Preševo, Bujanovac and Medveđa organised a Serbian language course for the remaining three candidates. The Customs Administration also advertised vacancies (24 candidates were employed) as did the Tax Administration (which hired 9 candidates). All the job holders have to speak Serbian. With the financial assistance of the Coordination Body the NGO International Human Centre organised a Serbian language course attended by 78 high-schoolers from Preševo, Bujanovac and Medveđa. The Coordination Body in 2011 invested over 220 million dinars in infrastructural projects in the Bujanovac, Preševo and Medveđa municipalities to empower their economies. Thirteen youths, six Serb and 7 Albanian, won the scholarships for studying at the Novi Sad University. An intensive Serbian language course was organised for the successful applicants who did not know Serbian.

As ECRI noted, “(t)he lack of opportunities for Albanians students to access higher education, especially in the Albanian language, in Southern Serbia remains a problem. Most Albanians want to go to a university where courses are held in their own language, which is why they prefer to study in Priština in Kosovo, or Tirana in Albania. However, Serbia does not recognise university diplomas issued by the authorities of Kosovo. Moreover, Albanian primary and secondary-school students have no textbooks in their mother-tongue.” The Coordination Body facilitated the provision of 1000 primers for Albanian first-graders in 2011. The ECRI qualified as a good start the opening of departments of the law and economy faculties in Medveđa and of the faculty of economics in Bujanovac, but underlined that the authorities should consider opening full faculty Albanian language universities in the region since not everybody wishes to study those subjects.

A large number of gendarmes are deployed in Serbia because, in the view of the Minister of Internal Affairs, there are risks of organised crime, trafficking in humans, weapons and drugs across the “administrative” crossings which the multi-ethnic police members are unable to control without adequate equipment.

4.2.6. Religious Minorities. – The European Commission against Racism and Intolerance recommended in 2011 that the Serbian authorities assert the principle of the separation of the state and the church more forcefully and promote a society in which everyone fully enjoys freedom of thought, conscience and religion as enshrined in Article 9 of the European Convention on Human Rights. ECRI regretted that attackers on “non-traditional” regional communities were reportedly usually charged with violating public order, instead of – where appropriate – the more serious charge of inciting or exacerbating national, racial, or religious hatred – which carries higher penalties than public order charges. Although media portrayal of religious minorities has improved, attacks on “non-traditional” religious communities reportedly continue with claims that they are in the pay of foreign intelligence
agencies. ECRI had also received reports that government officials have criticised minority religious groups by using pejorative terms such as “sects”, “satanists” and “deviants”.

During an attempt to profess their religion and hand out pamphlets in a small town in Serbia in 2008, the members of Jehovah’s Witnesses were verbally and physically assaulted by a Serbian Orthodox priest, who threatened to call on the townsfolk to expel them unless they left the parish. The injured parties launched private criminal proceedings against the priest, whom the court acquitted. The Committee of Human Rights Lawyers filed a constitutional appeal of the judgment on behalf of Jehovah’s Witnesses with the Constitutional Court in 2011.

In its first report, the ECRI strongly recommended that the Republic of Serbia criminalise the public denial, trivialisation, justification or condoning of the Holocaust as well as the public dissemination or public distribution, production or storage aimed at public dissemination or public distribution of written, pictorial or other antisemitic Anti-semitic publications, including the Protocols of the Elders of Zion, which are freely sold in Serbia. Antisemitic acts have also been reported to ECRI, including the desecration of Jewish tombs, antisemitic posters in Belgrade and Smederevo and the breaking of windows at the synagogue in Novi Sad.

No efforts or activities on the part of the Serbian authorities and aimed at promoting the idea of a multi-confessional society have been noticed in 2011.

4.3. Status of Persons with Disabilities

Most people with disabilities experience some form of discrimination on a daily basis despite the major normative changes in the field of protecting the fundamental human rights of persons with disabilities made in the past few years, from the adoption of the Act on the Prevention of Discrimination against Persons with Disabilities162 and the Strategy for Improving the Status of Persons with Disabilities in 2006 to the ratification of the UN Convention on the Rights of Persons with Disabilities in 2009 and, more recently, the adoption of regulations on social protection, education and employment aligning them with the human rights standards enshrined in the UN Convention.

No visible headway has been made in ensuring access to all, although the Act on the Prevention of Discrimination against Persons with Disabilities163 lays down

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162 Sl glasnik RS, 33/06.
163 The Act, inter alia, obligates state authorities to ensure access to public services and facilities to persons with disabilities and prohibits discrimination in specific fields, such as employment, health and education (Arts. 11-31). Articles 32-38 are particularly important because they impose positive obligations on state and local authorities to take special measures to encourage the equality of persons with disabilities. The Act allows for the submission of lawsuits in which persons with disabilities may seek protection from discrimination. The plaintiffs may seek a prohibition of the act of discrimination or its recurrence, the performance of an action eliminat-
that the refusal to adjust public facilities and ensure access to public space and technically adapt the facilities to ensure the provision of services to beneficiaries with disabilities and the refusal to make reasonable adjustments of the workplace\textsuperscript{164} to satisfy the needs of workers with disabilities shall amount to discrimination.

The inaccessibility of public facilities and services has been one of the main causes of inequality between persons with disabilities and those without them. The greatest share of responsibility for this state of affairs falls on the public authorities. Many public facilities are still inaccessible and the citizens cannot satisfy even their basic needs. The problem is even greater in smaller communities. Accessibility of schools, police buildings and correctional institutions, as well as public transportation stations and vehicles is still extremely poor. Access to outpatient health clinics, hospitals, theatres and museums, post offices and commercial and sports facilities, is somewhat better.\textsuperscript{165} Physical barriers, as well as obstacles to accessing information and communication and the undeveloped personal assistance system have prevented persons with disabilities from satisfying their basic needs and exercising their fundamental human rights on an equal footing with the other citizens.

The implementation of the new legislation on social protection gained somewhat in intensity in 2011 after the adoption of the by-laws on welfare allowances.\textsuperscript{166} The provisions directly governing the rights of persons with disabilities (Art. 40 (1 (3)) of the Welfare Act\textsuperscript{167}) have not been elaborated by subsidiary legislation yet and the development of the social services system is still mostly initiated by the civil sector\textsuperscript{168} on an ad hoc basis. Furthermore, there is no sustainable system of services that the local self-governments are entrusted with under the Act. The initial steps have been made by private social service providers extending assistance to persons with disabilities.\textsuperscript{169} The launched cooperation on projects between them and the local self-governments is also encouraging, although the number of beneficiaries of these services is still quite limited in practice.\textsuperscript{170}

\textsuperscript{164} Adjustment not involving unreasonable expenses for the employer, which is assessed in each specific case

\textsuperscript{165} Closed to People with Disabilities, NIN – special supplement, 21 April 2011, p. 10

\textsuperscript{166} More is available on the website of the Labour and Social Policy Ministry http://www.minrzs.gov.rs/cms/sr/component/content/article/89/292-2011-06-02-11-40-20

\textsuperscript{167} Sl. glasnik RS, 24/11.

\textsuperscript{168} See, e.g. information about the Centre for Society Orientation project at: http://servisipodrske.cod.rs/.

\textsuperscript{169} The Welfare Act provides for the plurality of service providers and equates the conditions that public, private and non-government service providers need to fulfil by requiring that all of them be licenced and fulfil minimum quality standards, particularly with respect to community services.

\textsuperscript{170} Free Personal Assistant Services Soon, Danas, 24 January 2011, p. 15; Čačak Funding Personal Assistants, RTS website available in Serbian at: http://www.rts.rs/page/stories/st/story/57/Srbija+danas/876706/%C4%B8u%C4%B8Duk+finansira+personalne+asistente.html.
Employment of persons with disabilities gained in topicality in 2011 with the more active enforcement of the new, modern law on employment of persons with disabilities, which governs this field in an entirely new fashion and which is the product of the tendency to include a large number of persons with disabilities in the open labour market. Although this law suffers from major shortcomings and its enforcement has encountered serious problems, the recruitment of persons with disabilities has increased and the media have been devoting more and more attention to this topic.

The quite courageous and pro-inclusive Act on the Basis of the Education System was elaborated by a number of by-laws in the year behind us. The draft Adult Education Act, to be adopted soon, is to ensure that a large number of persons with disabilities, who had not acquired the appropriate or the desired formal education get a “second chance” to further their knowledge and obtain formal recognition of their education.

The Committee for the Rights of Persons with Disabilities will not be reviewing Serbia’s initial report at its April 2012 session on the implementation of the UN Convention on the Rights of Persons with Disabilities, because the state had failed to fulfil its first obligation under the Convention and submit such a report within two years from the day of ratification. The report was being finalised in late 2011. Its planning and drafting was transparent and open and involved civil society organisations, as stipulated by the Convention.
Human rights defenders focusing on helping persons with disabilities are of the view that the prejudices against them and their stigmatisation have been abating, albeit very slowly, given the lack of sensitisation of the media, lack of knowledge of disability issues and widespread use of pejorative terminology disrespectful of the dignity of all people.

The exclusion of a large number of people with intellectual and mental disabilities from most walks of life still poses the greatest problem and amounts to the additional discrimination of this entire group within the discriminated population. Inadequate regulations and the even less adequate practice of depriving them of their legal capacity, which lead to the deprivation and segregation of persons with disabilities placed in neuropsychiatric and social protection institutions, amount to violations of the fundamental human rights of a large number of citizens. The state authorities have not yet recognised the efforts and initiatives of the non-government sector and the independent regulatory authorities geared at reforming the social and mental health protection systems and the advantages of the contemporary models aimed at improving the inclusion of people with disabilities and supporting them to live independent lives over the policy of segregating them under the guise of protecting them.

4.3.1. Discrimination against Persons with Psychological and Intellectual Difficulties. – This category of citizens is one of the most vulnerable groups of society and has grave difficulties improving its status in society due to social exclusion, inadequate legislation and widespread prejudice. Discrimination occurs frequently in legal capacity deprivation proceedings, in which persons with psychological and intellectual difficulties are often deprived of most of their human rights or have the realisation of these rights placed under the control of others by decisions rendered in summary court proceedings that do not respect the main guarantees of a fair trial. These persons are usually deprived of their rights to vote and be elected, marry, work, associate, choose their residence, et al.

In the case of Salontaji-Drobnjak v. Serbia, the ECtHR found a number of omissions of the state authorities and shortcomings in the national legislation governing the deprivation of legal capacity, e.g. it established that applicable domestic


180 Much of the discrimination in the past may have been caused by legislative stereotyping which prohibits the individualised evaluation of the capacities and needs of persons being deprived of their legal capacity. See the ECtHR judgment in the case of Alajos Kiss v. Hungary, ECHR, App. No. 38832/06 (2010), para. 42.

legislation did not seem to provide for a periodical judicial reassessment of the applicant’s condition and that social work centres had excessive powers.

The BCHR and the Mental Disability Rights Initiative of Serbia conducted a research of the courts’ case law on the deprivation and restoration of legal capacity and the extension and termination of parental custody (after reaching the age of majority) in Serbia. The research, which involved the analysis of over 1000 court judgments rendered between 2008 and 2010, showed that the vast majority of persons deprived of legal capacity had not had a fair trial.

Furthermore, only two of the analysed cases regarded the restoration of legal capacity, which was reinstated automatically by the motions to restore it, while all the others regarded the deprivation of legal capacity and extension of parental custody. In only 15 of the perused cases (1.5%) was the motion for the deprivation of legal capacity rejected (in seven due to violations of procedural rules). The analysis also led to the conclusion that the courts rarely, in only 6.8% of the cases, ruled on a partial deprivation of legal capacity, which the law also provides for. In them, the court deprived the persons of legal capacity only in specific areas, e.g. with respect to medical treatment or disposition of money or property.

The research indicated the link between institutionalisation (in a health or social protection institution) and the deprivation of legal capacity. Over half (57%) of all people deprived of legal capacity had at one point been institutionalised or were institutionalised during the proceedings, 4% of them by force.

The court proceedings for the deprivation of legal capacity or extension of parental custody warrant the greatest criticisms. The courts did not question (in at least 87% of the cases) or even establish visual contact (in at least 84% of the cases) with the persons whose legal capacity they were ruling on. The large percentage of cases in which the individuals’ guardians or representatives did not oppose the motion also points to the ineffectiveness of their legal representation, which can be linked to the fact that in 28% of the cases, the guardians, in this case the social work centres, played a dual role – they filed the motions for depriving their wards of legal capacity and acted as their guardians. The ECtHR established a standard regarding the exercise of rights enshrined in the Convention under which “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”. The fact that most people who had been deprived of their legal capacity had temporary guardians, but that only a few of them opposed the motions, should be viewed in that light. The inequality of those proposing the

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182 Extension of parental custody is equal to deprivation of legal capacity both in terms of procedure and legal effects.
183 The ECtHR highlighted that it was indispensable for the judge to have at least a brief visual contact with the applicant, and preferably to question him. See the case of Shtukaturov v. Russia, ECHR, 44009/05 (2008), para. 73.
deprivation of legal capacity and those opposing it also demonstrates the lack of equality of arms\(^\text{185}\) between the parties to the proceedings.

The research also showed that the reasonings of the judgments were imprecise. In some cases, it was unclear on what other facts apart from a medical diagnosis had the court based its conclusion that a person was incapable of looking after his/her own rights and interests or those of others.\(^\text{186}\) Court experts often list the persons’ features which can in no way constitute grounds for depriving them of legal capacity; on the other hand, they rarely provide specific examples showing the causal link between a person’s conduct and how s/he endangers his/her own rights and interests and/or those of other people. The role of the court experts is in that sense quite problematic because they appear to be exceeding their powers and rendering conclusions on the legal capacity of the people in question and not just communicating their findings and opinions on their “mental condition and reasoning abilities”.

4.4. Victims of Smuggling and Trafficking in Humans or Human Organs

Media, government and NGO reports indicate that the fight against human trafficking has somewhat improved in Serbia in 2011. The enforcement of the laws is, however, still perceived as problematic.

According to the 2011 annual report of the US State Department Office to Monitor and Combat Trafficking in Persons,\(^\text{187}\) Serbia is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labour. The Report states that children, including ethnic Roma, continue to be exploited in the commercial sex trade, subjected to involuntary servitude while in forced marriage, or forced to engage in street begging and that most of the identified victims are Serbian citizens. It notes that Serbian citizens remain vulnerable to forced labour in third countries, but that foreign victims may be subjected to forced labour in Serbia as well. Although they noted the improvements, particularly with respect to the state’s capacities to help the victims, the authors of the Report were in 2011 again critical towards the practical enforcement of the regulations.\(^\text{188}\)

\(^{185}\) In the context of civil proceedings, the ECtHR concluded that the “equality of arms” implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage \emph{vis-à-vis} his opponent (See the case of \textit{Dombo Beheer B. V. v. The Netherlands}, ECtHR, App. No. 14448/88 (1993), para. 33.

\(^{186}\) The right to a reasoned court decision is an integral part of the right to a fair trial. See the case \textit{Ruiz Torija v. Spain}, ECtHR, App. No. 18390/91 (1994), para. 29.


\(^{188}\) Comprehensive assistance and support to the victims cannot be adequately implemented in the absence of any or sufficient financial support, which means that institutionalised funding
Serbia was again ranked as a Tier 2 country, i.e., among countries that have worked on suppressing human trafficking but need to invest additional efforts and adopt new measures to that aim.

In its Analytical Report, the European Commission noted that specific satisfactory headway had been made but that Serbia still had not established a specific monitoring mechanism in this field and that cooperation with and support to civil society needed to be improved.

A number of suspected traffickers were arrested in 2011, mostly in the vicinity of Belgrade, and in Vojvodina and South Serbia. Most of the suspects were Serbs, and their victims had been exposed to sexual and labour exploitation and forced to beg. In some cases, the parents or relatives of the exploited children knew and/or consented to their exploitation.

For comprehensive assistance and rehabilitation must be ensured. Furthermore, the authors of the Report recommend that Serbia improve implementation of victim identification procedures to ensure that potential trafficking victims are proactively identified by front-line responders throughout Serbia, increase personnel and resources allocated to the government’s victim protection agency and increase training for social workers, police, and other front-line responders to continue to improve identification and referral of trafficking victims. The Report also notes that there are no specialised services or shelters for children or adult male victims of trafficking. The problem of adequate and standardised collection of data and exchange of information among the state institutions and NGOs assisting trafficking victims remains unresolved. Like in the previous years, the authors of the Report said that sex and labour trafficking offenders, including complicit officials who facilitate trafficking, had to be vigorously prosecuted, convicted, and punished. They also noted again that the Serbian government’s refusal to cooperate directly with the Republic of Kosovo government continued to hamper Serbia’s efforts to investigate and prosecute some transnational trafficking.


190 NGOs involved in anti-trafficking activities and protecting trafficking victims have had problems funding their activities and their engagement still largely depends on the support of international donors.


There are no updated or reliable data on the number of children begging in Serbia, but estimates are that there is over 1000 of them. The surveys of child begging conducted in 2011 identified a series of problems. For instance, they established that the police directorates in Vojvodina had practically no records on child beggars and that over 70% of the Vojvodina social work centres did not keep separate records on such children. The Vojvodina Deputy Ombudsman said that the competent authorities were aware that the number of cases acted on was small, but that “the police and social work centres lack the funds and staff to process every case”. On the other hand, the “working hours of the social work centres simply prevent the staff from physically going into the field in the afternoons or on weekends”. Apart from the fact that it is difficult to establish even an approximate number of children involved in begging, the data collected during the survey in Vojvodina demonstrate that neither the social work centres nor the police monitor what happens to the children after they complete their procedures. Similar problems were identified in the survey conducted at the state level.200 The Deputy Protector of Citizens said a draft law on the rights of the child, which would introduce the concept of child victim and govern its legal status, would be submitted to the National Assembly for adoption.

The media ran a number of stories on the trafficking of workers from Serbia for forced labour in Chechnya in October 2011. A group of 43 workers left Serbia for forced labour in Chechnya in October 2011.200 A group of 43 workers left Serbia for forced labour in Chechnya in October 2011.

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194 The surveys Child Begging in Vojvodina (2011) and Child Begging in the Republic of Serbia (2011) were conducted within a project implemented in the West Balkan region by the state and regional Ombudsman institutions, members of the SEE Children’s Ombudspersons’ Network. The Belgrade-based Centre of Youth Integration also partook in the surveys in Serbia, which were supported by Save the Children Norway. More on the surveys is available in Serbian at the websites of the Vojvodina Ombudsman and the Protector of Citizens.
195 “Novi Sad Children Beggars”, Peščanik, 19 November 2011.
197 “Asked whether they knew where children registered by the police ended up after the proceedings, around half of the respondents in the police did not reply, while nearly one third claimed that they went back to the streets. The responses that came from the social work centres were similar: nearly one third said that these children were sent back into the streets, as many said that they were taken care of, while nearly one third did not reply to the question.” Novi Sad Children Beggars, Peščanik, 19 November 2011.
198 That the exact number of child beggars cannot even be presumed given the specific features of this phenomenon and the fact that there are no records or a single methodology for registering this phenomenon, nor consensus among experts what child begging actually entails; that this is why no planned, well-conceived and expedient measures exist; that the measures that are applied target the effects, not the causes and are implemented on an ad hoc basis; that the existing legal framework partly recognises child beggars as victims of exploitation, abuse and neglect and simultaneously criminalises them and subjects them to a system of repressive measures, etc.
200 “Drove Construction Workers from Serbia as Slaves to Chechnya”, Blic, 13 October, “They Forced Us to Dig out Bombs, Starved and Threatened Us”, Press, 14 October 2011, “Sima Ser-
bia for Russia in July. Sixteen of them managed to escape in September and return to Serbia, while search for the other 27 men continued. The event prompted NGO ASTRA to point out the shortcomings in the practice of the competent institutions in Serbia with respect to combatting labour exploitation.201

Simple Internet search shows that there is a supply and demand for human organs both in Serbia and the region.202 Those willing to sell their organs usually say they resorted to this drastic move because they cannot make ends meet otherwise.203 This demonstrates not only the citizens’ awareness of the existence of the black market of human organs but also the depth of poverty in specific parts of the country.

As far as the criminal prosecution of suspected human traffickers is concerned, representatives of the civil sector emphasised that, in the past few years, “no operative treatment has been initiated which the Prosecutor for Organized Crime would qualify as a human trafficking offence committed by an organized criminal group”. They also voiced concern over the insufficient engagement of the competent authorities in uncovering cases of organised criminal groups which sell and exploit Serbia’s citizens in foreign countries and their focus on internal trafficking. Furthermore, “(A)lthough this is highly profitable crime, until today no trafficker had to face permanent confiscation of criminal assets, while no victim won compensation through a final and enforceable judgment”.204

State authorities did make steps towards improving the status of the victims in 2011. The City of Belgrade gave a donation of circa 40,000 EUR in February to help the urgent accommodation of the victims,205 and the Justice and Labour and Social Policy Ministers in November signed an agreement “under which the Directorate managing seized property will allow for the use of the temporarily seized

201 “Trafficking in human beings in Serbia is still seen solely in the context of sexual exploitation, neglecting all other forms. Although an increasing number of labor exploitation cases is registered every year, where our citizens are exploited in construction sites in foreign countries, support and assistance programs for them do not exist and the assessment of workers’ security when they return to Serbia is never done. Preventive activities aimed at reducing recruitment for labor exploitation are not carried out... Although the police as a rule collect many statements from workers and on that basis file criminal reports, the number of indictments for human trafficking for labor exploitation is negligible.” ASTRA Press Release on the occasion of 18 October European Anti Trafficking Day, ASTRA, http://www.astra.org.rs/eng/?p=925.

202 The number of ads with specific data (phone number or address) of a person offering or looking for a specific human organ is not negligible.

203 “Was Selling His Kidney, Got a Job”, Vesti online, 5 February, 2011.


205 City Assisting Fight against Human Trafficking, City of Belgrade website, 17 February 2011.
building as a safe house of human trafficking victims”

On the other hand, BCHR did not find any information that any victim was compensated for the violation of her rights in 2011. The practice of not compensating the victims sounds even more ominous in light of the fact that available data show that persons under 18 (children) account for around 40% of the victims identified to date.

A number of events were held in October 2011 to alert to the problem of human trafficking. Although the representatives of the competent institutions have been investing visible efforts, the number of preventive activities funded solely from the state budget is negligible.

A major campaign was launched in cooperation with the Austrian and Hungarian police in November. It resulted in the arrest of 17 Serbian nationals suspected of smuggling several hundred citizens of Afghanistan, Libya, Pakistan, Somalia, Sudan and Tunis towards Western Europe for a large sum of money. The number of reports on human smuggling via the Republic of Serbia towards Western Europe has been on the rise every year.

4.5. Legally Invisible People

A large number of people were not registered in the birth registers when they were born. This is why they formally do not have a legal personality and are thus unable to exercise their fundamental human rights or obtain citizenship. A person without a recognised legal personality is not only at risk because s/he is not recognised as a human being. The threats to his/her rights are much more serious because some other, extremely important rights, such as the rights to health insur-

207 Several hundred human trafficking victims have been identified in the 12 years Serbia has been fighting this crime. Only a few of the victims won compensation, none of it commensurate to the gravity of the violations of their rights.
209 A considerable number of activities were held for the fourth year running to mark 18 October European Anti Trafficking Day.
211 Representatives of state authorities have been launching initiatives, attending the events and even taken part in organising them.
212 “Seventeen People Arrested for Smuggling”, B92, 22 November 2011, “Boxing Ace’s Father was Smuggling People”, Kurir, 23 November 2011.
ance, welfare, work, participation in public and political life, as well as many other
ing the rights derive from this one. Furthermore, there are many people who cannot register
their permanent places of residence because they live in informal settlements; they
thus cannot be issued ID cards which they must have to register the birth of their
children. There are at least 2000 people living in such settlements. Most of them
are Roma, many of whom had been displaced from Kosovo by force and had not
been registered upon birth at all. Practical problems arise when children of par-
ents without birth certificates (legally invisible people) or children whose mothers
abandoned them are to be registered. Adults who do not know their parents’ data or
do not know when and where they were born also have problems registering. The
practical enforcement of the procedure for reviewing requests for the subsequent
entry into the birth registries lacks uniformity and the procedures take an unjustifi-
ably long time.

Nearly all UN treaty bodies highlight the extremely precarious and dis-
criminatory status of legally invisible people in their recommendations to Serbia
after reviewing its reports. The Human Rights Committee and the Committee on
Economic, Social and Cultural Rights recommended that Serbia facilitate the pro-
cedure for obtaining personal documents (particularly for people who had never
been registered or who had never been issued personal documents). The Commit-
tee on the Elimination of Racial Discrimination expressed its “concern about the
problem of legally invisible persons, who are according to reports, mostly Roma,
Ashkali and Egyptian, and it is also concerned by the enduring vulnerability faced
by returnees and internally displaced persons. In particular, it is concerned that
members of the Roma minority face difficulties and discrimination due to their
lack of personal identification documents and birth certificates which puts them at
risk of statelessness and affects the exercise of their rights. The Committee called
on the state to carry out the necessary measures, including legal amendments, to
ensure that all persons lacking the required personal documents have access to
registration and the necessary documents to exercise their rights. It in particular
recommended that Serbia carry out campaigns to increase awareness of the im-
portance of registration among the Roma, Ashkali and Egyptian population. In
addition, the Committee recommended that the State party increase the safeguards
against statelessness.

In addition, there have been cases that even persons granted Serbian citizen-
ship have not been entered in the relevant records. A number of people lost their
citizenship due to the conflicts in Kosovo in 1999, when the registry books were
destroyed, disappeared or became unavailable. Furthermore, a number of people
lost their citizenship after the disintegration of the SFRY or acquired the citizenship
of their former republics in which they no longer live.

213 More on the status of these people in Still No Solution for Legally Invisible People in Serbia,
Praxis, Belgrade, 2011.
4.6. Asylum seekers

Serbia, which is a country of transit for numerous irregular migrants, mostly those from African and Middle East countries heading towards West Europe, has in the past years witnessed a steady increase in the number of both irregular migrants and asylum applications. As many as 3132 people applied for asylum in 2011 alone.

The Asylum Centres in Banja Koviča and Bogovađa are charged with accommodating asylum-seekers until final decisions on their applications are rendered. The Centres are in the jurisdiction of the Commissariat for Refugees and funded from the Serbian state budget. The Banja Koviča Centre can accommodate up to 85 and the Bogovađa Centre up to 150 people and the living conditions in both Centres can be qualified as satisfactory. The Centre residents are free to leave and enter the Centres. The relevant by-laws governing in detail their work have been enacted. The capacity of these Centres does not satisfy the current needs for accommodation and between 30 and 150 of the recorded asylum seekers remain unaccommodated every day. A third Asylum Centre with a much greater capacity was scheduled to open in 2012.

Asylum seekers are entitled to legal aid free of charge. In 2011, this aid was provided by the NGO Asylum Protection Center (APC). All legal aid and translation/interpretation costs of both this NGO and the Asylum Office were covered solely by the UNHCR. No funds have been allocated either for translation/interpretation or legal aid in the Serbian budget, although these obligations are laid down in the Act.

215 UNHCR Office in Serbia.
216 Rulebook on Medical Examinations of Asylum Seekers upon Arrival at the Asylum Centre (Sl. glasnik RS, 93/08); Rulebook on Accommodation Conditions and the Provision of Fundamental Living Conditions in the Asylum Centres (Sl. glasnik RS, 31/08); Rulebook on Social Assistance to Persons Seeking or Granted Asylum (Sl. glasnik RS, 44/08); Rulebook on the Content and Keeping of Records on Persons Accommodated in Asylum Centres (Sl. glasnik RS, 31/08); Rulebook on Asylum Centre House Rules (Sl. glasnik RS, 31/08).
217 Data obtained during the visit to the Centre in Banja Koviča on 21 December 2011.
218 The Government of Serbia earmarked around 800,000 EUR in the 2011 budget to address the problem of the accommodation of asylum seekers, but the Commissariat for Refugees was unable to identify an adequate site for the new centre. Source: Consultative meeting: Towards Serbia’s Europeanisation – Monitoring of the Asylum and Readmission Policies and Practices in the Republic of Serbia, organised by NGO Group 484 and held on 12 December 2011; Sixfold Increase in Number of Asylum Seekers in Serbia, Tanjug, 18 December 2011, available in Serbian at: http://www.tanjug.rs/novosti/27488/sest-puta-povecan-broj-trazilaca-azila-u-srbiji.htm.
219 The BCHR will be providing legal aid to asylum seekers in Serbia as UNHCR’s partner as of 2012.
To date, five people, one Iraqi, three Ethiopian and one Somali nationals, have been approved subsidiary protection and none have been granted the status of refugee.\textsuperscript{220} The Asylum Act does not specify a deadline within which a decision on an asylum application must be rendered, wherefore the 60-day deadline laid down in the General Administrative Procedure Act is applied. Given that this 60-day deadline is reckoned from the day the asylum application is submitted, it does not encompass the periods of entry into record and registration, which may take a very long time in practice.\textsuperscript{221}

In 2011, the Asylum Office ruled on the merits of only two asylum applications (and rejected both of them), while it dismissed all the other applications, mostly invoking paragraph 1 (6) of Article 33 of the Asylum Act, i.e. that the asylum seeker had come from a country Serbia considers safe.

Unaccompanied underage asylum seekers are upon entry into records accommodated in special units\textsuperscript{222} within the Institutions for Children and Adolescents in Belgrade\textsuperscript{223} and Niš. The Belgrade Institution can accommodate 12 and the Niš Institution 10 underage asylum seekers. Neither the Belgrade nor the Niš institutions have the capacity to take in unaccompanied girls. According to the data the two centres provided, 69 unaccompanied underage asylum seekers were recorded in 2011.\textsuperscript{224} The competent social centres award the minors guardians and they are accommodated in the Asylum Centres in Banja Koviljača and Bogovada after registration.

None of the funds at the disposal of the Belgrade Institution were initially designated for funding a unit for the accommodation of underage aliens. Not once have funds in the budget been allocated to establish and equip such a unit and fund its work since the decision on the establishment of the centre was adopted, where-

\textsuperscript{220} Most asylum seekers leave Serbia before a decision on their application is rendered, which MIA statistics present as cases in which decisions had been rendered.

\textsuperscript{221} As opposed to Banja Koviljača, there is no permanent Asylum Office representative in Bogovada, which is why there is a large number of asylum seekers, who have been entered into the records and have been waiting for registration for months. During the BCHR’s visit to Bogovada on 21 December 2011, for instance, there were around 80 people who had been waiting for registration since mid-October. The MIA does not have a mobile unit which would register the asylum seekers, wherefore all asylum seekers are taken to the nearest police station, which additionally protracts the procedure and increases the costs.

\textsuperscript{222} Decision on the Network of Social Protection Institutions, Government of the Republic of Serbia (\textit{Sl. glasnik RS}, 51/08).

\textsuperscript{223} Known as Vasa Stajić.

\textsuperscript{224} The data regard the 1 January – 15 December 2011 period and were obtained from the Belgrade and Niš Institutions pursuant to the Act on Free Access to Information of Public Importance. They do not coincide with the data obtained from the competent social centres. The MIA, on the other hand, does not keep separate records of unaccompanied minors; its records show that a total of 652 minors, 471 male and 181 female, had sought asylum in the 1 January–30 November 2012 period.
fore the Institution’s management has been reallocating the funds initially designated for the other work units.225

As opposed to the open regimes in the Asylum Centres in Banja Koviljača and Bogovađa, the freedom of movement of underage asylum seekers accommodated in the Belgrade Institution is restricted.

4.6.1. The Attitude of the Local Population toward Asylum Seekers and Migrants. – According to unofficial assessments, asylum seekers and other migrants staying in Banja Koviljača spend around 30,000 EUR every day on accommodation, food and other staples, which suits many residents of this spa. However, asylum seekers and other aliens usually residing as irregular migrants in this town were the targets of assaults, beatings and thefts in 2011; nearly 500 misdemeanour and criminal reports were filed against the perpetrators of the offences. As far as offences committed by asylum seekers are concerned, two criminal reports were filed against two Iraqis who had clashed among themselves. The police also arrested an Afghani national suspected of rape.226

This incident provoked a series of racist reactions and protests of the local population, which culminated when the vast majority of parents decided not to let their children go to school under the Banja Koviljača Asylum Centre was dislocated.227 The Government of Serbia set up a commission to address the problems of the migrants in Banja Koviljača and adopted a set of measures to be implemented. This ended all the protests. The measures include increased police checks and filing of criminal reports against landlords illegally renting accommodation to the migrants.228

The state is under the obligation to take specific measures to provide asylum seekers with adequate accommodation, as well as to effectively investigate all attacks on migrants in the territory of Serbia resulting in the discrimination and actively strive to reduce tensions and xenophobia and eliminate all forms of racism or discrimination.229

4.7. Status of Returnees Under Readmission Agreements

After the European Union abolished visas for Serbia’s citizens in 2009, there was an increase in the number of Serbia’s citizens who legally and illegally left Serbia and applied for asylum in EU states, particularly in Sweden and Germany.\(^{230}\) This led the leaders of the EU member states to issue an extremely serious warning to Serbia in 2011 that they would consider temporarily suspending the visa free regime unless appropriate measures for addressing this problem were undertaken.\(^{231}\) The Government of Serbia to that end established a Commission for Monitoring Visa Free Travel to the EU. Compared to 17,715 asylum applications filed by Serbia’s citizens in 2010, the number of asylum seekers from Serbia fell to around 7,500 in 2011, indicating the effectiveness of the measures, involving changes in the EU member-states’ asylum procedures and those undertaken by the Serbian Commission.\(^{232}\)

There are no reliable, up-to-date and comprehensive statistics and analyses of the real and perceived number of the returnees to Serbia, their needs, socio-economic status, demographic features, etc.\(^{233}\) According to MIA data, 4254 people were returned in 2010\(^{234}\) and another 3222 in 2011\(^{235}\) under the readmission agreements. Ballpark estimates are that another 80,000–100,000 citizens are yet to be returned to Serbia.\(^{236}\)

The returnees comprise people who had lived for years in the countries they had been returned from as well as many others incorrectly using or intentionally abusing the asylum system after the visas for travel to EU states were lifted. Most of the returnees belong to the most vulnerable minorities, usually the Roma. Roma returnees account for an especially vulnerable group within the Roma population.

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\(^{233}\) Challenges of Forced Migration in Serbia, Grupa 484, Belgrade, 2011, p. 61.

\(^{234}\) “Decisively against False Asylum Seekers”, RTS, 4 May 2011, available at: http://www.rts.rs/page/stories/sr/story/9/Politika/886022/Odlu%C4%8Dno+protiv+la%C5%BEnih+azilanata.html.


due to the fact that they had spent years abroad, do not know how the country functions and are, for the most part, poor.237

The level of awareness of returnees of their rights and how to exercise them leaves a lot to be desired. Seldom do they know which institution to contact, which documents they need in order to submit different requests and what their rights are in certain procedures. Lack of knowledge on the part of employees in the competent institutions about the actions aimed at returnee integration, and absence of sensitivity for the specific status of the returnees have also significantly exacerbated the situation.238 The measures that must be taken without delay to improve the status of returnees to Serbia entail, inter alia, increasing the accommodation capacities, reducing unemployment by organising training and employment assistance programmes and the strengthening of the social care system.239

5. Separation of the Church and the State

5.1. Understanding the Relationship between the State and the Church – Secularity or Neutrality

Reflections on the link between the principles of a secular state and the realisation of specific human rights (such as the freedom of religion, freedom of expression and association, freedom from forms of discrimination stemming from religious teachings) suggest that the strict separation of the state from the church is the only way to fully realise religious and other civil freedoms.

Secularism essentially entails the absence of interference on the part of the secular authorities in religious issues and the absence of religious engagement in the conduct of state affairs. Therefore, secularism, in the sense in which it is used in this Report, entails the institutional separation of religious organisations and their representatives from the state institutions and their representatives. This dividing line has not, however, been universally established. Different societies have different views of what constitutes “interference” of the secular authorities in religious issues and what constitutes undue “religious engagement” in the state sphere. This is why a distinction is often drawn between “hard” and “soft” secularisms which, although very different in their approaches to separating religion from the state, are still “secularism”, as opposed to the “absence of secularism”.

The common opinion is that the ECHR does not opt for secularism as the only acceptable model of a relationship between the state and church in a democratic society. Many states had state religions at the time the ECHR was adopted and it would be difficult to imagine the adoption of a document prohibiting such a practice with the consent of e.g. the United Kingdom, Sweden, Norway or Denmark. The European Commission for Human Rights also confirmed that the ECHR did not prohibit state religions in the case of *Darby v. Sweden*.241

A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual’s freedom of religion.242

Therefore, every individual state has a large scope of discretion in governing its relations with the churches and religious communities. This discretion, however, has its limits, which may at times suggest that the ECHR, or, more precisely, the ECtHR, which is charged with ensuring compliance with the ECHR, favours the principle of secularism. Namely, the ECtHR developed the so-called “principle of neutrality” as it was establishing the limits of the states’ discretion in defining their relationships with various religious communities and churches. Under this principle, the state is a “neutral and impartial organiser of the exercise of various religions, faiths and beliefs”, and “this role is conducive to public order, religious harmony and tolerance in a democratic society”.243

The ECtHR has never provided a systematic explanation of what the principle of neutrality actually entails, but there are no doubts that it does not entail a prohibition of the establishment of a state religion,244 provision of financial assistance to religious communities,245 integration of religious instruction in the school curricula246 and the presence of religious symbols in the public space.247 However, although the ECtHR allows all these “interventions” of the state in the religious sphere and gives the states a broad scope of discretion in undertaking such activities, this discretion is not unlimited. There is, for instance, absolutely no doubt that the

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240 All these states had state religions at the time the ECHR was adopted. With the exception of Sweden, all of them still do.
242 Ibid.
establishment of a theocratic order would amount to a violation of Article 9 of the ECHR. Furthermore, the state cannot impose a “church tax” to fund the religious affairs of a specific religious community that has to be paid also by those who are not members of that community. The ECHR, on the other hand, does not prohibit states from assisting the religious communities in raising funds from the believers through the tax system, or from collecting taxes to cover the costs of the affairs of “public authorities” in the event the state delegated some of those affairs to the religious communities (e.g. keeping birth/marriage/death registers, maintenance of burial-grounds, etc). Although states are allowed to give financial aid to the religious communities, even if that entails that a specific religious community receives a much greater share of aid than the other ones, the aid must be proportionate to the number of believers of each religious community. The ECHR does not prohibit religious instruction in state schools, but it does set clear limits:

“The second sentence of Article 2 (P1–2) implies ... that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.”

The ECHR does not in principle specify what approach to neutrality the state should take – positive neutrality, under which the states actively support religious communities on an equal footing, or passive neutrality, under which the states have practically no attitude towards the religious communities. The ECtHR will support both approaches as long as the limits of neutrality are not violated.

As the ECtHR’s Grand Chamber interpreted, secularism is merely one of the many “philosophical convictions” that must be treated equally as all other religious or philosophical convictions. A state’s neutrality towards various religious and philosophical convictions is, on the other hand, a principle arising from Article 9 of the ECHR. Many have criticised this quite strained understanding of secularism, which is a constitutional principle and not one of the options in a state basing its relationship with the religious communities on secularism, and which inevitably comprises the principle of neutrality. Nevertheless, the only legally correct response in the current circumstances is that the ECHR does not require the existence of a secular state.

253 Kjeldsen v. Denmark, ECmHR, App. No. 5095/71; 5920/72; 5926/72 (1976), para. 53.
5.2. Secularism in Serbia – General

Serbia is a secular state, at least nominally. Article 11 of the Constitution of the Republic of Serbia enshrines the principle of the secularity of the state and prohibits the establishment of a state or mandatory religion. Accordingly, no law, including the Act on Churches and Religious Communities, provides for the establishment of a state or mandatory religion. The classification of the various churches and religious communities into traditional, confessional and others has not in itself violated the principle of secularity of the state, although it may have violated the principle of neutrality and the principle of equality of the religious organisations.

In general, priests, monks, imams and other religious officials do not hold any state offices in the Republic of Serbia. The only, albeit significant, exception is Serbian Orthodox Church Bishop Porfirije Perić, who has chaired the Republican Broadcasting Agency (RBA) Council throughout 2011 as well. Bishop Porfirije’s public office, in addition to his religious one, is an extremely important one and it is difficult to imagine any other office in the state administration, save in the Ministry of Religions and the Diaspora, where the dominant church or religious community would have a greater interest in actively participating in the decision making and which would afford it with greater visibility. To recall, the RBA is charged with issuing broadcasting licences, setting the programme requirements for the production and broadcasting of programmes and the rules binding on broadcasters, overseeing the work of the broadcasters and taking specific measures against the broadcasters. By providing the representatives of religious communities, specifically a senior representative of the Serbian Orthodox Church, with the opportunity to take part in the design of media policies and rules binding on broadcasters, the legislator has created room for giving preference to a specific religion and its almost unlimited propagation via the mass media. The Serbian Orthodox Church has at the same time been given the opportunity to directly influence decisions preventing any “critical and impartial” discourse of Orthodox Christianity or the work of the Church.

Chapter 6 of the Instructions on the Broadcasters’ Code of Conduct, which lay down a series of bans with the aim of governing the “treatment of religion and religious programmes”, corroborates that the above problems are not purely theoretical ones. The Instructions, namely, prohibit discriminatory and degrading treatment of recognised churches and religious communities and ridiculing or insulting the symbols and teachings of the traditional churches and religious communities. The Code also introduces quotas for coverage of traditional and recognised religious

254 More in I.4.8.2.
255 See: http://www.rra.org.rs.
256 Sl. glasnik RS, 63/07.
257 To recall, Article 10 of the Act on Churches and Religious Communities lists the traditional churches and religious communities, and differentiates between them and confessional and recognised churches and religious communities.
communities and churches which must be proportionate to the number of their believers and abide with the principle of affirmative action. The Code prohibits proselytism, which, of course, suits the largest church and those religious communities with a stronger “base of believers” in Serbia, but definitely does not suit the smaller religious communities and churches. To recall, the ECHR does not allow for the prohibition of proselytism.\textsuperscript{258} Finally, the Code binds broadcasters to distinguish between “traditional and recognised churches and religious communities”, on the one hand and “sects” on the other, whereby it categorises all unregistered church communities under “sects”. “Sects” shall not be provided with any airtime unless they are the object of “an analysis of social processes” which smacks of the communist-era euphemism “analysis of degenerative developments in society” et al.

Therefore, it can safely be said that the engagement of Bishop Porfirije in the RBA has had practical consequences. Even if the Bishop’s participation in the Agency’s work and his chairmanship of the Council have not been playing a crucial role in reality, his mere presence gives rise to doubts about the impact the Serbian Orthodox Church has had on the design of the RBA’s policies.

Secularism can be violated in another way as well. Namely, states have been known to delegate the performance of specific public affairs to the state churches, which, as noted above, is not in contravention of the ECHR. Since Serbia has opted for being a secular state, delegating the performance of public affairs to a church or religious community would be in contravention of the Constitution. The situation on the ground is in that respect largely in accordance with the constitutional norm on the secularity of the state and churches and religious communities do not perform any public affairs. They are not authorised to marry people (such marriages are not recognised by the state) or divorce them (such divorces do not have secular legal effect), register deaths or births, look after burial grounds, etc. There are, however, developments which give rise to doubts in this respect as well. Namely, although the decisions of church authorities have no effect in the secular legal order, Article 7 of the Act on Churches and Religious Communities lays down that the state shall assist the churches and religious communities in the enforcement of their decisions and judgments at their request. Such assistance is provided in the absence of any procedure for recognising these decisions in the secular system, which should precede any engagement of the state apparatus both according to ECtHR case law\textsuperscript{259} and common sense. For instance, the state apparatus was asked to assist the expulsion of the followers of disrobed Serbian Orthodox Bishop of Raška and Prizren Artemije from the churches and monasteries they had usurped pursuant to a decision and appeal of the Serbian Orthodox Church Synod although the state did not first have insight in the Church decisions.\textsuperscript{260}

\textsuperscript{259} Pellegrini v. Italy, ECmHR, App. No. 30882/96 (2001).
Although the proclamation of specific churches and religious communities as “traditional” ones does not violate the principle of the secularity of the state (given that none of them were declared a state church), the state of Serbia has put both itself and these religious communities in an awkward position by “canonising” them in secular law. Namely, the state now recognises seven traditional religious communities, not based on the state they were in at the time the Act was adopted, but on the state they were in at the time some other laws were adopted in the 19th and early 20th centuries. To maintain the harmony of reality and the law, the state now has an active interest in maintaining the integrity of these churches and religious communities. This forces (or, better said, entitles) it to interfere in inter-religious relations and take sides in internal clashes within the religious communities, which is in contravention of ECtHR’s case law. The best illustration of this is the years-long rift in the Islamic Community and the frequent undue interferences by the state in its relations which can, on the one hand, be explained by the state’s interest to protect the traditional religious community recognised by the law, and, on the other hand, by the evident political interests clearly motivating the state to support one of the factions. The state has taken a similar, albeit more rigorous approach to the protection of the interests of the Serbian Orthodox Church, another traditional church, which is best exemplified by its refusal to register the Romanian Orthodox Church and the Montenegrin Orthodox Church, although it is under the obligation to do so under the ECHR. The fact that the Ministry of Religions and the Diaspora has upheld only five, dismissed as many as 10 and rejected one requests for registration in the 2009–2011 period is also quite telling. Although the principle of the secularity of the state is only indirectly violated by such moves, there can be no doubt that they have violated the principle of neutrality.

It can be concluded that Serbia largely satisfies the secularity criteria but that it faces serious problems in the enforcement of that principle. Although these problems are not so grave to qualify Serbia as a clerical or anti-secular state, they undoubtedly contribute to the fact that the relations between the state and church are viewed with greater vigilance. The principle of secularity is ultimately not critical from the legal point of view; however, from the socio-political point of view, a secular system has its advantages, particularly in a multi-confessional society, burdened by historical tensions between religious groups, like the one in Serbia. Violation of the principle of neutrality is, on the other hand, unlawful and, as demonstrated above, often occurs in practice due to the fluid relations between the churches, religious communities and the state. Furthermore, neutrality has potentially been

261 See Articles 11–15 of the Act on Churches and Religious Communities.
violated in some other areas as well, particularly in the fields of financial aid to churches and religious instruction.

5.3. Principle of Neutrality and Problems in Serbia

The Act on Churches and Religious Communities allows the state to provide material assistance to churches and religious communities. Serbia has thus clearly opted for the model of active or positive neutrality, which in itself is not in contravention of its international obligations. Under the Act, the state may provide the churches and communities with several forms of assistance. First, it may provide them with direct financial assistance from the state budget. Second, it may assist them by subsidising the pension, social and health insurance of the members of the clergy and religious workers. Third, the law allows for exempting the churches and religious communities from paying taxes. Fourth, verified religious schools are entitled to funding from the state budget proportionate to the number of believers. The Act also envisages subsidies for the cultural and scientific institutions of churches and religious communities.

The principle of neutrality does not, of course, prohibit such a practice as long as it is applied, at least approximately, proportionately to the size of the religious community and the number of its believers. Given that the vast majority of Serbia’s citizens are Orthodox, at least declaratively, the considerably greater nominal material assistance to this church is not in contravention of the ECHR per se.

Data published by the Ministry of Religions and the Diaspora demonstrate that the Serbian Orthodox Church and its clergy were awarded huge funds on various grounds in 2011. There is no doubt, for instance, that the 50 million dinars of aid to priests and monks in Kosovo were allocated to this church alone. Another 143 million dinars were spent on the protection of cultural, religious and national identity; given the way this clause was phrased, it can be assumed that most of these funds also went to the Serbian Orthodox Church. Ninety-two million dinars were spent to subsidise the pension and disability insurance of priests and religious workers in 2011, but it would be impossible to break down the funds by the churches. Namely, the Ministry of Religions did not think that providing the breakdown of the financial assistance by the religious communities was relevant to the oversight of its work in the realisation of religious communities.

265 Art. 28 (2).
266 Art. 29 (2 and 3).
267 Art. 30.
268 Art. 36 (2).
269 Art. 44.
270 Information Booklet on the Ministry of Religions and the Diaspora.
271 Ibid.
The Pension and Disability Insurance Fund said it would begin subsiding 50% of the pension and disability insurance of the members of the clergy and religious workers as of 2012. According to the Fund, 1,976 priests and religious workers of various churches and religious communities, 1,677 of whom belong to the Serbian Orthodox Church, were receiving their pensions from this Fund. All in all, even if the funds for old age and disability pensions, as well as the 120 million RSD allocated for the construction and restoration of the temples, are proportionately distributed among the churches and religious communities, the 193 million RSD which are almost certainly designated for the Serbian Orthodox Church in addition to the funds for the pensions and temples, is a sum that by far exceeds the principle of proportionality and can on no account be qualified as abidance by the principle of neutrality. Violation of the principle of neutrality is all the more apparent if one recalls that unregistered religious communities are not entitled to state financial aid.

Churches and religious communities are also exempted from paying taxes. Traditional and other confessional and registered churches and religious communities are exempted from paying property tax, but only traditional churches and religious communities are exempted from paying the VAT. Confessional and registered religious communities have to pay the VAT like all other tax payers. Unregistered religious communities, of course, pay taxes although not as legal persons, given that they lack legal subjectivity, but through their representatives.

All this demonstrates the unequal status of the churches and religious communities with respect to material assistance and the obvious violation of the principle of neutrality in favour of the traditional churches and religious communities, particularly the Serbian Orthodox Church. Favouring the traditional religious communities over others is also apparent in the organisation of religious instruction in state school, which is exclusively reserved for traditional churches and religious communities. Other churches and religious communities do not have access to public schools.

All of the above leads to the impression that Serbia has exceeded the limits of discretion in the sphere of religious freedoms in practice and that it has been violating the principle of neutrality, and thus Article 9 of the ECHR, in many areas.

6. Status of Media and Journalists

Assessments of the media situation in Serbia vary significantly. The US organisation Freedom House ranked Serbia 72nd on a list of 196 countries, classifying it as a country with partly free media. On the other hand, according to Belgrade

273 Art. 12 (1 (3)), Property Tax Act.
274 Art. 55, VAT Act.
press reports, the European Federation of Journalists said that it was alarmed by the erosion of freedom of expression in Serbia. The EFJ expressed concern about constant political and economic pressures on journalists and their lack of trade union rights and qualified as unacceptable that three investigative journalists in Serbia had to live under 24-hour police protection and that others suffered attacks while judges were lenient with their assailants.276

The media in Serbia are not in a precarious situation only because of the economic crisis, but also because their rights are jeopardised both by their owners and the state, leaders of the Association of Journalists of Serbia (UNS), the Independent Association of Journalists of Serbia (NUNS), representatives of the Council of Europe, and the European Parliament assessed at the Annual Assembly of the European Federation of Journalists in Belgrade in mid-July. They voiced concern over the situation in the media in the region and emphasised that the safety and security of the media journalists were under threat and that investigative reporting was being obstructed.277

In September 2011, the Government of the Republic of Serbia adopted the Strategy for the Development of the Public Information System until 2016 (Media Strategy),278 which defines the role of the state in the public information system, the status and role of media outlets in a democratic society and devotes particular attention to the transparency of ownership and prohibition of ownership concentration. The Media Strategy had been prepared for over a year and the media and press associations were involved in its design. Several international organisations (European Commission, Council of Europe and OSCE) provided consultancy and other assistance to the preparation of the Strategy.

6.1. Role of the State and Media Ownership

The key novelty in the Strategy is the prohibition of state ownership over media, which paves the way for privatising the state-owned media. The state is to withdraw from the media within two years. Media outlets may not be founded by the state, a province or a local self-government, or an institution, company or another legal person fully or partly owned by the state or fully or mostly funded from public revenues. The state may found national, provincial and regional public service broadcasters to ensure that public interests for receiving information are served. The state may also found a media outlet in Serbian to serve the needs of the popula-


tion in Kosovo and Metohija, and specific outlets communicating information on the work of state authorities and public companies (e.g. Internet portal, Assembly channel, Official Gazette and bulletins). The Strategy allows National Councils of National Minorities to found both electronic and print media.

On the other hand, the Strategy envisages an increase in the number of public service broadcasters from two to eight, although both the European Commission and media associations were against this solution. The state’s argument that it was its duty to ensure that citizens had an outlet informing them about the developments in the region was countered by the experts, who perceived the establishment of the regional public broadcasters as the authorities’ attempt to preserve and even increase their influence on the media. The question of how these new outlets would be funded arose, given the lack of funding for the existing public broadcasters. RTV Vojvodina, for instance, has been leasing its offices since 1999, when its building was destroyed during the 1999 air strikes.

In its Report on Pressures on and Control of Media in Serbia, the Anti-Corruption Council noted the lack of transparency of media funding from the state budget which state institutions spend on advertising and media campaigns due to the absence of data on the budget funds spent on the media. The same applies to funds channelled through the Culture Ministry and the Vojvodina Provincial Secretariat for Culture. A coalition of press and media associations (NUNS, UNS, the Independent Association of Vojvodina Journalists (NDNV), the Association of Independent Electronic Media (ANEM) and Local Press) sharply protested in late 2011 against the way in which the Government planned to implement its decision on the allocation of 368 million dinars for the media, given that it was not planning on allocating the funds in accordance with public interests or to worthy projects, but directly to the media funded from the budget, above all the public news agency Tanjug. The coalition claimed that this decision was in violation of the principles enshrined in the Media Strategy and the equality of the media and would result in unfair competition.

Apart from the state Radio Television of Serbia (RTS) and RTV Vojvodina, the Strategy envisages the establishment of six regional public service broadcasters – in Belgrade, Kragujevac, Niš, Novi Pazar, Zaječar and Užice.

ANEM, Press Release, 10 December 2011.


The Council established that the following have spent the most funds: Telekom Serbia, the Environment and Spatial Planning Ministry, the Economy and Regional Development Ministry, the Health Ministry, the Agriculture, Forestry and Water Management Ministry and the Privatisation Agency.

In the view of the Anti-Corruption Council, marketing and production agencies have controlled the advertising market for years and thus indirectly exerted significant control over the media. What is particularly concerning in its view, is that most of these agencies are owned by party activists or persons related to them. The state has also been funding the media. The Council data show that around 40 million EUR are allocated every year by the state authorities for placing ads and information about their work. This sum accounts for a quarter of the overall media revenues and constitutes a powerful mechanism for pressuring the media. Media associations share this view. The NUNS chairman said in early December that the state played a central role in the impoverished Serbian media market, because it annually spent 40 million of the total 175 million EUR spent on marketing. The Anti-Corruption Council recommended the urgent adoption of a law clearly and transparently governing this matter and ensuring that state authorities deal directly with the media, without going through middlemen agencies.

The Media Strategy devotes particular attention to media ownership and specifies that data on owners shall be public and transparent. The Anti-Corruption Council noted in its report the problem of non-transparent media ownership. It said that its research demonstrated that there were a number of media in Serbia owned by foreign legal persons originating from countries where it is prohibited or impossible to establish the origin of the founding capital under the national regulations, although this is prohibited by the law. The real owners of 18 of the 30 most influential outlets in Serbia remained unknown.

A case of non-transparent media ownership started to unravel in July 2011, when the Central Securities Depository and Clearing House (CSD) ordered businessman Milan Beko, who owns 62.42% of the shares in the daily Večernje novosti, to comply with the law and either buy the other shares or sell the difference between the permitted 25% and his 62.42% of the shares. The CSD also restricted his right of management to 25% of the shares.

In reaction to media reports that the daily Kurir may purchase Westdeutsche Allgemeine Zeitung’s shares in the dailies Politika, Večernje novosti and Dnevnik, a deputy of the Liberal Democratic Party (LDP) in the National Assembly said that Kurir would do that with the money it would get from the state media assistance crisis fund and that the ruling Democratic Party (DS) was behind Kurir’s ambitions. This allegation was not proven but it did cause quite a stir on the public stage. On the other hand, Politika’s representatives said that the WAZ shares could not be sold without offering them to Politika, as the co-owner, first. No such offer was made.
6.2. **Privatisation Results and the Financial Situation of the Media and the Journalists**

Media’s financial problems caused by bad privatisation decisions and non-transparency of media ownership and exacerbated by the economic crisis have had a chilling effect on the financial status of journalists. Under the 2001 Privatisation Act, 109 outlets were to have been privatised by the end of 2007. Only 56 of them were privatised, but 18 of 56 the privatisation contracts were subsequently broken off. The privatisation of 37 outlets was suspended due to the collision between the Local Self-Government Act or the Capital City Act with the media laws; nine outlets were unable to find buyers at auctions and seven were shut down. The fact that the sale of newspapers dropped by 3.32% in the first half of 2011 also testifies to their financial problems. Media employers have ignored the proposal in the media collective agreement under which they should help the media workers preserve their rights. Media workers earn less than the state average. Their employers have been known not to pay out their salaries for months, sometimes even a year, wherefore journalists often stage strikes.

Researches conducted by the Centre for Media and the Belgrade University Political Sciences College generally assess the socio-economic status of media workers in Serbia as unfavourable. Loss of autonomy and strong pressures on media workers are highlighted as the other two chief problems they face. Nearly 60% of the journalists in Serbia fear that they will lose their jobs, while over 20% would immediately change professions if they were offered a better job.

Pirate radio and TV stations continued undermining the media stage in 2011. According to the data published in the Media Strategy, a total of 455 broadcasting licences were issued by 1 August 2011 and there were another 56 pirate TV and radio stations in the air, although 160 such broadcasters had already been shut down by the authorities. The danger pirate broadcasters pose is exemplified by the pirate radio station Bos in the Belgrade suburb of Surčin, where the Belgrade Airport is located. He was arrested in October after disregarding the order to stop broadcasting his programme because it was interfering in the communication between the control tower and the pilots.

6.3. **Media and Professionalism**

Some media in Serbia do not abide by the professional and ethical standards laid down in the Code of Journalists of Serbia, the Public Information Act and other

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288 Sl. glasnik RS, 38/01, 18/03, 45/05 and 123/07.
289 Danas, 6 July 2011, p. 5 and 19 August, p. 4.
290 Politika, 4 and 20 May 2011, pp. 9 and 8.
292 Blic, 27 October 2011, p. 15.
regulations. They most often violate the prohibition of discrimination, regulations protecting minors from pornographic and other inappropriate content, the protection of privacy and the presumption of innocence. The programmes broadcast by TV stations are much criticised. Estimates are that 97% of the programmes are not recommended for children under 12. Furthermore, many of the broadcasters misrate their programmes. According to a survey conducted by the Positive Centre for Digital Media, 61% of the respondents think that fewer politicians should appear in TV newscasts while 63% think that the newscasts should broadcast more good news stories. Two-thirds of the respondents were of the view that the TV stations should broadcast more educational programmes, while one-third said that they would like to watch more documentaries.

The first self-regulatory body within the media sector – the Press Council – was established in 2010. The Council decisions are to ensure the more consistent application of professional standards and indirectly the Public Information Act, and consequently lead to fewer trials against media for violating this Act. The Council, rallying representatives of media and press associations, is charged with monitoring the print media’s abidance by the press code of conduct and reviewing complaints filed by individuals and institutions against specific print media content. It is also tasked with organising training in the implementation of the code of conduct and boosting the reputation of the media. The Council is charged with mediating between the injured parties and the editorial offices and issuing public warnings in case ethical standards are breached. Three members of the Complaints Review Commission represent the public.

In late October 2011, the Press Council Complaints Review Commission rendered its first decisions, on two complaints against articles published in the daily Press and the weekly NIN. It found that the Press article had violated the complainant’s right to privacy. Under the regulations, the daily is under the obligation to publish the Council’s decision. The Commission rejected the complaint filed by former Health Minister Tomica Milosavljević against NiN and explained that the article on the scandal surrounding the purchase of the swine flu vaccines during his term of office “regarded the political, not the civil personality of the complainant”.

The Republican Broadcasting Agency (RBA) was forced to react in late October 2011 when one of Kopernikus’ three cable channels started broadcasting news “edited” by the Serbian Progressive Party (SNS). Member of the SNS Main Board Zoran Bašanović had rented eight hours of airtime a day on this channel for one year. SNS leader Tomislav Nikolić said that his party had nothing to do with any of the media, but the RBA warned that parties were allowed to rent airtime on radio and TV stations only during election campaigns, because they were not registered

293 Danas, 10 October 2011, p. IV.
294 More on the work of the Press Council is available in Serbian at: http://www.savetzastamptu.rs.
for programme production and that it decided to put Kopernikus under round the clock surveillance.  

The RTS Management Board in May apologised to the residents of Serbia and the neighbouring countries who had been “insulted, libelled or exposed to content which would today amount to hate speech” in its programmes during the 1990s. The press associations welcomed the move, although they qualified it as late, and recalled that the Independent Association of Journalists of Serbia in 2009 filed criminal reports against unidentified media workers accusing them of organising and encouraging the commission of genocide and war crimes.

Professional standards are often violated in the numerous reality shows broadcast on several TV stations. These violations prompted RBA to order TV stations Pink and Happy to delete all content from the reality shows Dvor and Parovi detrimental to the development of minors and violating the dignity of persons and issued binding instructions under which programmes not suitable for children under 18 may be broadcast only from midnight to 6 am.

Quite a few TV stations in Serbia have systematically been violating the Advertising Act. The RBA stated that RTS alone violated this law 2,475 times in 2010 and criticised it for not airing more programmes for children and culture and science programmes. The RBA qualified the work of the courts as slow, stating that only several of the 8000 reports it filed for media violations of the Advertising Act in 2010 had been reviewed. It also said that the Advertising Act was violated 2,123 times in the first half of 2011, which was much less than in the same period in 2010.

The media professional code of conduct was violated in 2011 also with respect to the protection of minors and privacy. Furthermore, some media resorted to hate speech. For instance, they published a letter by Islamic activist Aida Rašljanin, which was full of insults against NGO activist Aida Ćorović in Novi Pazar. Commissioner for the Protection of Equality Nevena Petrušić also qualified Rašljanin’s reply to Ćorović in the daily Danas as “hate speech”. The daily Večernje novosti published large unscrambled photographs of a four-year-old boy.

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297 Blic and Danas, 24 May 2011, pp. 9 and 5, Kurir, 25 May, p. 3 and NIN, 26 May, p. 31.
298 More on the NUNS initiative to analyse the conduct of journalists during the wars in the former Yugoslavia in the 2010 Report II.2.8.5.
299 Sl. glasnik RS, 17/11.
301 Večernje novosti, 10 August 2011, p. 4.
303 More in the article entitled Aida Rašljanin Writes to Tadić, Blic, available in Serbian at: http://www.blic.rs/Vesti/Politika/237934/Aida-Rasljanin-pisala-Tadicu.
who was gravely injured when his parents committed suicide, while the daily Kurir published an unscrambled photograph of an underage girl from Kuršumlija who had gotten lost.

The courts rendered judgments finding the media in violation of the professional code of conduct. The Higher Court in Belgrade rendered a first-instance judgment finding that the readers’ comments of the LGBT population published on the website of the daily Press incited hate and violence against this population. It prohibited the publication of the comments and ordered Press to publish its judgment in its entirety at its own expense.

6.4. Trials of and Pressures against Journalists

NUNS data show that the judiciary prosecuted only 17 of the 212 physical or verbal attacks on journalists in Serbia in the past four years, and that most of the perpetrators had been charged with misdemeanours. Journalists were the subject of death threats and physical assaults in 2011 as well. Two Tanjug journalists were beaten up and their camera was broken at the Kosovo administrative crossing Jarinje, where they were covering the protests of the Kosovo Serbs. Radio Free Europe’s reporter from Šabac was assaulted in October. That same month, unidentified perpetrators pelted with stones the offices of TV Prima in Bajina Bašta and damaged the company car.

6.4.1. Specific Court Trials. – Some court judgments rendered in 2011 confirmed the belief that perpetrators who attack journalists can count on lenient sentences. The First Basic Court in Belgrade, for instance, in May sentenced the main defendant who had attacked TV B92 cameraman Boško Branković, breaking his leg and his camera, to 10 months of house prison, while the two men who aided

304 *Večernje novosti*, 9, 11 and 13 December 2011.
305 *Kurir*, 26 November 2011, p. 15.
308 It is impossible to list all the articles reporting on the attacks. Herewith a short list of those that reported on death threats to TV B92 journalists (*Politika*, 9 April, p. 9), the journalist working the daily Sportski žurnal in Novi Pazar (*Danas*, 23 September, p. 3), the journalist of Novi Pazar Regional TV (*Beta*, 17 October), Večernje novosti and BETA agency journalists (*Danas*, 9 April, p. 4), Danas correspondents in Novi Pazar and Vranje (*Danas*, 21 October, p. 7, and 8–9 October, p. 6), the journalists of the daily Alo (*Blic*, 31 October, p. 11), a Pravda journalist (UNS press release, 3 November), Politika’s journalist in Jagodina (*Tanjug*, 18 October), journalists of the tabloid Kurir (*Kurir*, 27 March, p. 3, 1 April, p. 6, 12 May, p. 10, 20 May, p. 7, 8 June, p. 17, 15 August, p. 11, 5 September, p. 18 and 20 November, p. 12) and many others.
311 *Politika*, 18 October 2011, p. 9.
and abetted him were sentenced to 6 i.e. 4 months’ imprisonment respectively if they committed another crime in the following three years. The press associations protested against the mild penalties, recalling that the man who incurred light bodily injuries to MP Velimir Ilić was convicted to two years’ imprisonment. The case is now in the appellate court.

In its review of the first-instance judgment convicting the two men, who had attacked Vreme columnist Teofil Pančić, to three months in jail (below the legal minimum) in which the first-instance court explained that it was unable to conclude beyond reasonable doubt that the attackers had been aware that they were assaulting a journalist, the Appellate Court upheld the appeal of the prosecutor emphasising that the first-instance court had attached excessive importance to the mitigating circumstances and rendered a final judgment convicting each of the offenders to one-year imprisonment.

The Appellate Court in Belgrade in July overturned a first-instance judgment against one of the leaders of the Partizan fan clubs who had been found guilty of violent conduct and endangering the safety of TV B92 journalist Brankica Stanković. He was initially convicted to 16 months’ imprisonment, but the Appellate Court found that the first-instance court had not found beyond reasonable doubt that he had committed the crimes he was charged with – hitting the effigy of the journalist and chanting “You’re as poisonous as a snake, you’ll fare like Ćuruvija”.

The greatest public furore was provoked by an indictment against a journalist of the Novi Sad Građanski list, who was accused of undermining the security of the Republic of Serbia. The daily had published a confidential report qualifying Serbia’s security situation as disastrous. After the press associations, the public and the Access to Information of Public Importance and Personal Data Protection Commissioner protested, the Republican Public Prosecutor Zagorka Dolovac issued guarantees that the indictment would be dismissed. This was confirmed also by the Prosecution Office spokesman Tomo Zorić, who, however, added that a new investigation into the case would be conducted.

A number of media and journalists were tried for libel and defamation in 2011 as well. The daily Danas was sentenced to pay a 942,000 fine because it damaged the reputation of several Požarevac policemen in an article it published in 2006, which was later picked up by two other dailies as well. The court decided to fine Danas, which can now seek that the other two dailies, which are formally insolvent, pay it their shares of the fine. Media experts qualified the judgment as censorship and a threat to Danas’ survival. In November, Danas’ correspondent in Novi Sad was fined 60,000 dinars for libel or two months in jail after a trial in which none

312 Vreme, 26 May 2011, p. 22.
313 Tanjug, 3 November 2011.
315 Danas, 4 April 2011, p. 4, Blic, 8 April, p. 9 and Vreme, 7 April, p. 5.
of the witnesses for the defence were heard and none of the evidence proposed by
the defence was presented.\textsuperscript{316} The trial of Čačak journalist Stojan Marković ended
more favourably for the defendant, after the Appellate Court in Kragujevac over-
turned the first-instance judgment fining the reporter for damaging the reputation of
MP Velimir Ilić.\textsuperscript{317}

It would be impossible to list all the trials against journalists in this section of
the Report but it needs to be mentioned that the tabloid Kurir claims that it has been
the target of the greatest number of libel and defamation suits. Several businessmen
and one bankruptcy manager have filed lawsuits seeking compensation from this
daily totalling over 210 million dinars. The daily qualified the astronomical claims
as pressures on its journalists “not to write the truth” and as attempts to force this
paper to shut down.\textsuperscript{318}

The assassins of journalists Dada Vujašinović, Slavko Ćuruvija and Milan
Pantić were not identified in 2011 although the authorities have been promising
for years that they would face justice.\textsuperscript{319} The Republican Public Prosecutor Zagorčka Dolovac said that there were indications that the evidence was intentionally
concealed in the investigation of Dada Vujašinović’s death and that it resembled
the case in which the State Security concealed the evidence in the investigation of
Slavko Ćuruvija’s death.\textsuperscript{320} Organised Crime Prosecutor Miljko Radosavljević said
that the Slavko Ćuruvija case would soon be resolved.\textsuperscript{321} The Belgrade daily Blic
published that Zemun Clan member Miloš Simović said that Ćuruvija had been
assassinated by former Security Service agent Miroslav Kurak, who now lives in
Tanzania.\textsuperscript{322} No new information about these assassinations was made public by the
end of the reporting period. The plaque commemorating Ćuruvija at the place where
he was assassinated was desecrated for the second time in May.

7. Open Issues Regarding the Financing of Political
Activities and Political Party Campaigns in Serbia

Specific legislative changes in Serbia made in 2011 were motivated by the
identified need to ensure the transparency of the financing and work of political
parties and to apply anti-corruption measures and positive solutions governing this
field in EU member states. Back in October 2010, the Group of States against Cor-

\textsuperscript{316} Danas, 2 November 2011, p. 5.
\textsuperscript{317} Politika, 26 July, p. 8.
\textsuperscript{318} Kurir, 19 and 20 April 2011, p. 6
\textsuperscript{319} More on the unresolved assassinations in the prior BCHR reports (1998–2010).
\textsuperscript{320} Danas and Blic, 8 April 2011, pp. 5 and 14.
\textsuperscript{321} Politika and Kurir, 11 August 2011, pp. 9 and 13.
\textsuperscript{322} Blic, 12 April 2011, p. 16.
ruption (GRECO) issued ten recommendations\textsuperscript{323} to Serbia regarding the financing of political parties. The National Assembly adopted and published the recommendations in December 2010 and set an 18-month period for their implementation.

With the aim of fulfilling these obligations, the National Assembly adopted, albeit with some delay (in June 2011) the new Act on the Financing of Political Activities,\textsuperscript{324} which includes some of the European Commission and the Venice Commission recommendations. Opinions on the quality and potential effectiveness of the novelties this law brings are divided, but there is apparently a consensus that this is a progressive law and that any shortcomings that emerge in practice can be rectified along the way.\textsuperscript{325} None of the advantages or any deficiencies of the new law could not come to the fore in 2011, but will definitely surface in 2012, when the parliamentary and local elections are to be held. Although there are no judgments or court interpretations pointing to the positive or negative aspects of the enforcement of this law in practice yet, some provisions already appear disputable. The following text provides an overview of these provisions.

As opposed to its predecessor, the new Act on the Financing of Political Activities permits political parties to take loans from banks and other financial organisations, which can be interpreted as meaning that they cannot take loans from natural persons or companies.\textsuperscript{326} Article 7 permits the following private sources of funding: “membership fees, donations, property-based revenues, inheritance, legacies” as well as loans from banks and other financial institutions. It can, therefore, be presumed, that loans from natural persons or companies are prohibited. On the other hand, it can be presumed that the likelihood of corruption and winning favourable loans is lesser when dealing with banks than with legal and natural persons. A party cannot repay its loan to a bank from revenues earned in routine activities, only from private sources. The parties must submit their contracts with the banks to the Anti-Corruption Agency, which shall then monitor and check from which sources the parties have been repaying their loans.

Taking a loan from a bank may prove problematic, particularly if it is approved at an interest rate below the going market rates, or if a party is given a longer payment period or if the bank writes the debt off. Written-off debts could be treated as donations. If a bank agrees to write a debt off, it becomes a donor, provided that it extended a loan not exceeding the donation threshold for legal persons and equalling 200 average wages. Taking a loan to fund an election campaign and its repayment in the coming years may also prove problematic, because at the

\textsuperscript{323} GRECO aims to ensure the transparency of the financing of political parties and other political entities and efficient oversight within an adequate legal framework allowing political entities to obtain funding, whilst respecting the restrictions preventing impermissible political influence. The recommendations are available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)3_Serbia_Two_EN.pdf.

\textsuperscript{324} \textit{Sl. glasnik RS}, 43/11.

\textsuperscript{325} More on the new Act on the Financing of Political Activities in I.4.14.4.1.

\textsuperscript{326} \textit{Danas}, 12 July 2011, p. 3.
moment the party submits its report on campaign funding sources report to the Anti-Corruption Agency, neither the public nor the Agency, which checks whether the parties have submitted all the data and their authenticity, do not have full insight in how the party covers the costs, i.e. who ultimately funded the campaign. This brings into question the effectiveness of the main intention of the law, to ensure transparency of party financing. Furthermore, it seems that the legislator has not governed the duration of loan repayments well, because it will be impossible to establish the precise loan conditions on the basis of the annual financial statements in case when the loan is to be repaid over a period of time exceeding one year. Under the Act, the Anti-Corruption Agency is to “fill the lacunae” by adopting additional regulations. Articles 27, 28 and 29 explicitly authorise the Agency to govern these issues. These Articles, which regard the submission of reports, commendably state that the Agency shall specify the content of these reports, wherefore it is unnecessary to amend the Act.

The Act does not eliminate all the possibilities allowing the political entities to circumvent their obligations, something they have habitually done in the past. For example, a donor can donate more money than the law allows by channelling it through third persons. The way in which oversight will be conducted in such cases will be crucial because by-laws cannot directly prevent such abuses. The Act speeds up the post festum control and allows the Agency to require reports from the parties during the campaigns and from other actors, such as their associates and marketing agencies. On the other hand, costs can also be monitored by comparing the parties’ reports with the costs established in the field.

Another form of abuse that may occur regards “siphoning” money from a public company managed by the officials of a specific party and its “laundering” through a private company or a person “close” to the party. Furthermore, funds of major donors can be “split up” into sums below the legal threshold and then donated from the personal accounts of the party “rank and file”.

Under Article 13 of the new Act “donation of funds to a political entity via a third party shall be prohibited”. This Article also prohibits “concealing the identity of the donor or the amount of the donation”. One of the ways by which the Agency will be able to control abidance by this provision is e.g. to compare the amounts of the donations with the reported amounts or the personal wealth of the registered donors.

The Act governs the monitoring of the election campaign in the following manner. Parties shall open separate campaign accounts which the Agency will be able to oversee. The Agency is to engage volunteers who will monitor the campaigns in the field and follow every detail of the campaigns and then compare their findings with the reports submitted by the parties. The mechanism for uncovering abuse in this area is two-fold and involves auditing of the expenditures of the public.

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327 Danas, 26 September 2011, p. 3.
companies, which are potential sources of illegal funding, and the control of the financing of parties starting from monitoring their expenses and taking into account information or suspicions about legal violations indicated by the businessmen or the party members themselves. The Anti-Corruption Agency and the public prosecutors are to react to suspicions of funding machinations during the election campaigns and the only way to check the data in the reports on the funding is to compare them with the independent monitoring data. Article 32 (4) of the Act entitles the Agency to require of the state, provincial and local authorities, banks and legal and natural persons funding or providing services in the name and on the behalf of political entities to furnish all the data the Agency needs to perform the duties set out in this Act. Therefore, the Agency can always supplement its findings with all the data available to state authorities and e.g. the media, printing companies and others involved in financial transactions with parties during campaigns.

The political parties in Serbia have another avenue by which they can obtain funds which is beyond the remit of the Anti-Corruption Agency and which may render its efforts meaningless to an extent. Namely, parties can obtain additional funding for their campaigns also through non-government organisations. This possibility allows them to circumvent the strict rules in the new Act on the Financing of Political Activities. The Act on Associations still allows political parties in Serbia to establish non-government organisations, although GRECO had on several occasions qualified this possibility as very problematic. The Act did not incorporate three of the ten GRECO recommendations, notably the ones regarding oversight over the use of public funds and in-kind donations, independent external auditing and the possibility of controlling not only the parties, but all other institutions or authorities linked to the parties or under their control as well.

One problem highlighted at the public debate of the Draft Act is the overlap of jurisdictions of the State Audit Institution (SAI) and the Anti-Corruption Agency, the potential hierarchy between these two independent institutions and the autonomy of the two independent regulatory authorities with respect to specific responsibilities and mandates in this field. Namely, the draft law entitled the Anti-Corruption Agency to ask the State Audit Institution to audit a political entity’s reports in accordance with the law after its control of the entity’s financial reports. An amendment involving the deletion of this provision was proposed; its submitter was of the view that it entitled the Agency to determine which entities the SAI should audit, which would undermine the independence and autonomy of the latter. The provision, however, stayed in the Act. A kind of compromise was made and the next paragraph, under which “the SAI shall act on the audit request and notify the Agency of the audit”, was deleted. The only paragraph that remained in the final version of this Article (Art. 34) specifies that a request for audit may be submitted

in accordance with the law governing the jurisdiction of the State Audit Institution. This change does not fully address the concerns of the submitter of the amendment, who argued that there can be no hierarchical relations between the independent and autonomous regulatory authorities established by the National Assembly. Nor does it fully safeguard the independence of the SAI as the supreme authority auditing public funds, which shall autonomously decide on who shall be audited, the subject and scope of the audit and the time of the audit”.

This “overlap of jurisdictions” appears to be one of the motives (or excuses) that prompted the State Audit Institution to decide not to audit the political parties’ financial reports in 2011 and to announce the “possibility” of including political parties in its regular audit programme in 2012. The Chairman of the SAI Council specified that these audits could not be conducted due to SAI’s lack of office space and human resources. The head of Transparency Serbia, Vladimir Goati, however, voiced the view that the new Act on the Financing of Political Activities unfortunately did not set the maximum amount a political party can spend in an election campaign and that the parties avoided penalties for the failure to submit their 2010 funding reports because the law was adopted with delay.

It remains to be seen what the effects of the enforcement of this Act will be and whether it will improve the transparency of the financing of the political entities and thus lead to less corruption.

8. Human Rights Defenders

The realisation of one of the main rights enshrined in Article 9 (1) of the UN Declaration on human rights defenders, which states that “(I)n the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights”, was not adequately ensured by the Serbian state authorities in 2011. Like in the previous years, little has been done and little will has been demonstrated to quell the animosity against human rights defenders in a state in which expressions of hate against them were until recently publicly voiced even from the parliament...
Pressures on human rights defenders are now more subtle and exerted mostly by non-state actors, but the responsibility for the failure to punish those threatening and attacking human rights defenders can be attributed only to the state.

A Government strategy on human rights defenders, which should be designed and drafted in cooperation with the civil society, should focus on the special protection of human rights defenders. This suggestion was made at a conference of the representatives of the state and NGO sectors, the independent regulatory authorities and media in Belgrade in late 2011.\(^{335}\) In the view of the participants, the proposed strategy has to envisage the establishment of a central point (an authority or body) within the government that will promote the status of human rights defendants, provide continuous training in human rights and gender equality for judges, prosecutors and police officers, enable and encourage the monitoring of court trials by human rights defendants, ensure and facilitate the holding of all peaceful protests by human rights defendants and, notably, ensure much more rapid, efficient and transparent investigations into and prosecution of threats and attacks on human rights defenders with the aim of creating a safe environment for human rights defenders in Serbia.

After the physical assaults on LGBT persons in the latter half of 2011, in which some of them sustained physical injuries, and after the prohibition of the Pride Parade, the representatives of the most active organisations protecting the human rights of this population in Serbia staged a protest in front of the Government building and in the talks that ensued with the government representatives called for urgent amendments to the Criminal Code and the introduction of the institute of hate crimes, which would allow for stricter penalties against perpetrators of crimes motivated by hate on grounds of sexual orientation or other grounds.\(^{336}\) Attackers on human rights defenders have gone unpunished despite some improvements of the criminal law in 2009. The public prosecutors have not initiated any proceedings against anyone for violating the anti-discrimination provisions protecting human rights defenders from threats to their safety because they advocated the respect for equality of man (Art. 387 (2), CC).

LGBT activists are still threatened on a daily basis and their physical safety is under grave risk. LGBT persons and activists defenders are the targets of most hate messages and threats against members of marginalised groups and their defenders. A number of homophobic messages were written in 2011 on the façade of the Novi Sad Youth Centre CK 13,\(^{337}\) the offices of which were frequently attacked throughout the year.\(^{338}\)


\(^{336}\) More on these events on the Gay Straight Alliance website: [www.gsa.org.rs](http://www.gsa.org.rs).

\(^{337}\) This Novi Sad institution/organisation organises cultural activities, lectures and encourages debates on nationalism, xenophobia, far right extremism and Fascism.

Female human rights defenders have been perceived as the most vulnerable targets of attacks that are additionally motivated by gender discrimination and hate. Such threats and assaults continued in 2011 as well. An eminent human rights defender from Novi Pazar was given police protection after her article was published in the daily Danas339 and she received threats,340 while another eminent defender from the same city, who was also threatened a number of times, initiated civil proceedings for a number of libels against her and her human rights organisation and demanded that the local paper “Sandžak Press” publish her denial. The legal team of the human rights organisation Committee of Human Rights Lawyers YUCOM in March filed four criminal reports on behalf of the NGO Women in Black for the physical assaults and threats to the lives and property of the activists of this organisation and invoked violations of Articles 387 and 344 of the Criminal Code (incriminating racial and other discrimination and violent conduct respectively).341 YUCOM filed another criminal report in July against unidentified perpetrators who opened a profile on Facebook “Halt Mental Violence – Ban Women in Black” on which they published open calls to violence and the killing of the activists of this NGO.342

Activists of the NGOs Women in Black and the Regional Minority Centre were taken in by the police (and subsequently released) twice while they were peacefully protesting against the unlawful evictions in New Belgrade and the Belgrade suburb of Banovo Brdo in October because they were allegedly obstructing the officials from performing their duties i.e. obstructing justice.343 One cannot rule out that the defenders will again be detained if they protest against the forced evictions, the number of which has been growing constantly since the authorities have drawn up a long list of illegal settlements that are to be torn down.

The websites of some human rights organisations, such as YUCOM and the Gay Straight Alliance, were hacked in 2011. These organisations filed criminal reports but had not received any information about the investigations undertaken by the end of the reporting period.

Human rights defenders do not play a major role in the design of policies given the lack of communication between the Government and parliament, on the one hand, and the NGOs, on the other, when it comes to the drafting of the new laws, and the lack of will among the top state leaders to embrace the human rights culture and uphold the suggestions of the civil society organisations to that end. The only headway made in this respect was the introduction of the institute of public

341 Information obtained from the Committee of Human Rights Lawyers YUCOM, which specialises in providing free legal assistance in human rights cases. One of YUCOM’s programmes focuses on the protection and legal representation of human rights defenders.
342 Ibid.
343 Ibid.
hearings in late 2010. There is, however, still no clear mechanism for involving human rights organisations in the drafting of the legal regulations.

The civil sector’s calls to abolish/amend the provisions of the CPA and CPC placing human rights organisations in an unequal position vis-à-vis lawyers and public legal aid units went unheeded at the time these two laws were being adopted. These provisions limit both the citizens’ right of access to justice, the equal protection of their rights before the courts and the right of representation. The Access to Justice Coalition, which rallies a number of renowned NGOs, issued a public statement in late November in which it listed the key views of the civil sector about these legislative changes. The Commissioner for the Protection of Equality also issued a statement criticising the impugned provisions. Apart from a general provision in Article 85 (1) specifying that only a lawyer may represent a party to civil proceedings, such a restriction is also envisaged in Article 177 of the CPA on free legal aid, which will be regulated in detail by a separate law. The Draft Legal Aid Act underwent a public debate in late 2011 and is to be adopted in 2012. Under this draft law, the so-called primary legal aid, i.e. the provision of initial or general legal information and initial legal advice will be available to everyone and with respect to all kinds of proceedings and such aid may be provided both by lawyers, state/local authorities and civic associations. However, only lawyers will be entitled to provide secondary legal aid, entailing the provision of specific legal advice, assistance in drafting submissions, mediation, defence and representation, which shall, under specific circumstances, be provided free of charge or the costs of which will be partially covered only upon the decision of a competent authority (the Justice Ministry, according to the draft). Civic associations and local self-government legal aid units will be able to represent the parties only in administrative proceedings under specific conditions. According to one of the alternatives of Article 23 of the draft law (providers of secondary legal aid), this form of legal aid may also be provided by law college legal clinics.

Media still frequently stigmatise human rights organisations and continuous efforts have to be invested in improving the journalists’ awareness of human rights and the social roles of the human rights defenders and in encouraging them to pub-

348 The text of the draft, the course of the public debate and various documents, including an overview of comparative legal practices are available in Serbian on the Justice Ministry website: http://www.mpravde.gov.rs/cr/news/vesti/besplatna-pravna-pomoci.html.
lish impartial and balanced information about the human rights defenders. Journalists, who can themselves often play the roles of human role defenders, have a special role in spreading the culture of human rights. The lack of initiative both in the civil and media sectors to coordinate and cooperate more closely in the realisation of this vital social role is, however, evident.349

The independent regulatory authorities have an affirmative attitude towards human rights defenders. They have closely cooperated on projects and seminars, issued joint statements and consulted on initiating court and other proceedings for protecting human rights. The establishment of special bodies/sectors within the independent institutions, which would focus on the protection of the rights of the human rights defenders and the improvement of their status, would significantly contribute to their safety and destigmatisation in society.

The financing of the activities of human rights defenders is still inconsistent and unsustainable because the state and local authorities do not have an interest in funding human rights organisations. According to data released in June, only 37% of the NGOs in Serbia had secured funds for their work in 2011, while one out of five had not secured funds to pursue their activities in 2012.350

Another unresolved problem related to funding the civil sector is the budget line used for funding non-government organisations and political, religious, sports and youth organisations (the so-called 481 Budget Line or Subsidies for Non-Government Organisations). The initiative to diversify this budget line launched in 2008 went unanswered again in 2011. The findings of a three-year research, conducted by the NGOs Centre for the Development of the Non-Profit Sector and Transparency Serbia and presented in May 2011, show that this budget line was abused in various ways to fund social work centres, museums, schools, libraries and police directorates (which are allocated funds from the state budget on other grounds), and even individuals and companies, including, for instance the construction company Branković, which also received 1.9 million dinars from the Infrastructure Ministry.351 One of the results of this project was the establishment of the first Internet database of the beneficiaries of funds from this budget line (the database, however, does not include all the public revenues allocated for these purposes because it does not include funds from local government budgets). The fact that such transparency was achieved on the website of a non-government organisation,352 and not, for in-

349 A conclusion reached at the above-mentioned conference on human rights defenders.
351 “Funded the Parties, the Church, Police, Museums and Schools”, Danas, 14 May 2011, p. 4.
352 Centre for the Development of the Non-Profit Sector – the database is available at: http://www.crnps.org.rs/nvobudzet.
stance, on the website of the Finance Ministry\textsuperscript{353} speaks for itself. The Government failed to adopt a decree laying down the clear criteria, conditions and procedure for allocating funds to civil associations by the end of 2011 although the new Act on Associations came into force in 2010. Such a decree would considerably help prevent the current political influences on the selection of civil society organisations that will be subsidised and lead to their destigmatisation given that incomplete and untrue information about the funding of NGOs (which would thus be transparent and easier to monitor) has frequently led to unwarranted accusations and prejudice against human rights defenders.

9. Overview of European Court of Human Rights Judgments Regarding Serbia

The number of applications against the Republic of Serbia filed with the European Court of Human Rights (ECtHR) continued growing in 2011 as well. According to data as of end October 2011, some 6,100 applications against Serbia were still pending before the ECtHR, whereby Serbia ranked seventh by the number of applications against it; it is preceded by Russia, Turkey, Ukraine, Romania, Italy and Poland, all of which have much bigger populations than Serbia.\textsuperscript{354} The ECtHR has to date rendered 61 judgments in cases against Serbia (finding it in violation of at least one provision of the ECHR in 54 cases); twelve of these judgments were delivered in 2011.\textsuperscript{355} Serbia’s Agent before the ECtHR reached settlement agreements in 77 cases in 2011; all but one, which claimed violations of Article 2 (right to life) and Article 3 (prohibition of torture, inhuman treatment and punishment) of the ECHR, regarded violations of the right to a fair trial (Article 6) and a total of 297,500 EUR were paid to compensate the applicants for non-pecuniary damages.\textsuperscript{356}

Most applications against Serbia are still filed over unreasonably long trials and the non-enforcement of the final verdicts rendered by the national courts.\textsuperscript{357}


\textsuperscript{354} The statistical data were accessed at: http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Chart_EN_31102011.pdf, and http://www.echr.coe.int/NR/rdonlyres/962F2571-2D85-4879-94CC-5D699E3F1A65/0/PCP_Serbia_en.pdf?.


\textsuperscript{356} Data obtained from the RS Justice Ministry pursuant to the Act on Free Access to Information of Public Importance.

There are several large groups of cases among the communicated applications that are based on similar facts. The ECtHR received around 1,500 applications claiming violations of the prohibition of discrimination and the incompatibility of national case law on payments to former army reservists, around 100 applications regarding the judicial reappointment procedure, while 6 cases concern claims by the applicants that their newborn babies had not died but were illegally trafficked for adoption.

The large number of applications Serbia’s citizens have filed with the Strasbourg Court indicates the numerous difficulties in protecting human rights before domestic courts, as well as the citizens’ mistrust of the national judicial authorities. Although the ECtHR case law has affected the development of case law in Serbia to an extent, it still cannot be asserted that the national courts have been applying the Convention adequately. Inappropriate reference to ECtHR judgments is a problem warranting particular attention as courts tend to invoke the Convention, but not the specific Court judgments and fail to provide the appropriate reasoning.

In order to cut down the number of applications lodged with and the pressures on the ECtHR and expand the influence of the ECHR in proceedings before domestic bodies, Serbia’s procedural law now includes provisions providing for the reopening of civil proceedings, in which a final decision had been rendered, on the motion of a party in the event it is able to invoke an ECtHR judgment establishing a violation of a human right if this may result in a more favourable decision. Such a provision is included also in the new criminal procedure legislation, which provides for the submission of a motion for the protection of legality in the event the ECtHR had found that a human right or freedom of a defendant or another participant in the proceedings enshrined in the ECHR had been violated by the final verdict or a decision rendered during the proceedings preceding its rendering. These provisions have not, however, been extensively applied in practice.

358 See Vučković v. Serbia, Application No. 17153/11.
359 See Jovanović v. Serbia, Application No. 21794/08.
361 Pursuant to Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, of 19 January 2000, available at: https://wcd.coe.int/ViewDoc.jsp?id=334147&Site=CM.
362 More in II.1.2.
363 Article 426 (11) of the Civil Procedure Act. The CPA applied until the end of 2011 had a similar provision in Article 422 (1 (10)).
364 Article 485 (3), Criminal Procedure Code.
365 Only two motions in which parties invoked these provisions were identified during the survey of case law conducted by the Belgrade Centre for Human Rights in 2011 and covering nearly all basic and higher courts in Serbia.
9.1. **Right to a Fair Trial (Article 6 of the ECHR)**

9.1.1. *Excessive length of criminal proceedings relating to a father’s failure to pay awarded child maintenance* – *Ristić v. Serbia*[^366] – During the criminal investigation against their father M.P, charged with the failure to pay child support, on 29 May 2003, the applicants sought the payment of accrued child maintenance in the capacity of injured parties. They complained about the duration of the criminal proceedings since the courts discontinued the proceedings on their claim because the prosecution had become time-barred. The ECtHR stated that the proceedings at issue were not particularly complex and that they involved issues of great importance to the applicants. The ECtHR also observed that the prosecution of the defendant became time-barred and that as a result it became impossible for the applicants to obtain a decision on their claim in the criminal proceedings because of the courts’ long delays and multiple adjournments of the hearings. The Court highlighted the fact that domestic courts should act with exceptional diligence in all child-related matters and that, while the domestic courts needed to protect the due process in respect of the defendant, they should also afford adequate protection to the victims, particularly where they happen to be young and vulnerable. The Court concluded on the basis of the available evidence that the judicial authorities were responsible for the delays in the proceedings, which came within the Court’s competence *ratione temporis* for a period of five years and seven months from 3 March 2004, the date when the Convention came into force in respect of Serbia, and that the length of the proceedings had failed to satisfy the reasonable time requirement. The ECtHR therefore found Serbia in violation of Article 6 (1) of the ECHR.

9.1.2. *Excessive length of family-related court proceedings* – *Veljkov v. Serbia*[^367] – The applicant has been fighting for custody of and support for her daughter born in 2002 before courts of the same instance for over five years. She complained that she had been unable to build a relationship with her daughter, who was living with her father, due to the excessive length of the proceedings and the non-enforcement of the interim orders issued in June and December 2006. In paragraph 88 of the judgment, the ECtHR listed the circumstances demonstrating the lack of due diligence of the domestic court – four hearings were adjourned for reasons related to the court’s internal organisation; it took over a year to join the actions lodged by both parties with the same end in one set of proceedings; it took more than a year and two months to decide on the interim custody order; it took a month and a half for the lower court Court to transmit the respondent’s appeal against the interim access order to the higher court in a pressing case like this; no substantive procedural steps were undertaken by the domestic courts, at least between 16 June and 19 December 2008, as well as between 9 December 2009 and 17 June 2010; the Government did

[^366]: Application No. 32181/08, judgment rendered on 18 January 2011.
[^367]: Application No. 32181/08, judgment rendered on 19 April 2011.
not provide any explanation as to the six-month delay caused by the court’s decision to change the medical institution which was to provide the expert report.

The ECtHR reiterated that cases like this one required special diligence in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life, and in particular exceptional diligence in dealing with cases where the impugned proceedings concerned a child custody dispute and found Serbia in violation of Article 6 (1) of the ECHR.

9.1.3. Non-enforcement of final judgments establishing the right to financial compensation for violations of work-related rights– Rašković and Milunović v. Serbia\(^{368}\) and Milunović and Čekrlić v. Serbia\(^{369}\) – In the case of Rašković and Milunović, the impugned final verdicts rendered by the domestic courts ordered their former employer (a socially owned company) to pay them specific amounts to compensate the incomes they were entitled to while they were on “compulsory paid leave”, the pension and health insurance contributions and the civil proceedings costs. The applicants also participated in the company Redundancy Programme.

With respect to the complaint of the violation of their right to property, the ECtHR referred to its previous judgments in similar cases\(^{370}\) and the case law of the Constitutional Court of Serbia\(^{371}\) which, in a case with significantly similar facts, established that mere participation in the redundancy programme could not be interpreted as giving up the rights arising from outstanding employment-related claims. The ECtHR therefore found that the domestic courts’ final judgments rendered in the applicants’ favour continued to represent a claim within the meaning of Article 1 of Protocol No. 1 to the Convention, while the prolonged failure of the Serbian authorities to enforce those judgments could not be seen as being in accordance with the domestic law and, consequently, found Serbia in breach of the ECHR.

The ECtHR found Serbia in violation of Article 6 (1), given that it found no reason to depart from its approach in similar cases since the debtor was comprised of state and socially-owned capital and the period of non-enforcement had lasted between three years and eleven months and six years and seven months. Pursuant to its case law, the ECtHR ordered the Government of Serbia to pay the applicants the sums awarded in the final judgments by domestic courts from its own funds.

Endeavouring to find a systemic solution in order to prevent further violations of the right to a fair trial in cases regarding the non-enforcement of judgments

\(^{368}\) Applications Nos. 1789/07 and 28058/07, judgment rendered on 31 May 2011.

\(^{369}\) Applications Nos. 3716/09 and 38051/09, Admissibility Decision of 17 May 2011.

\(^{370}\) Kačapor et al v. Serbia, Applications Nos. 2269/06, etc, judgment rendered on 15 January 2008; Crnišanin v. Serbia, Applications Nos. 35835/05, etc, judgment rendered on 13 January 2009; Grišević v. Serbia, Applications Nos. 16909/06, etc, judgment rendered on 21 July 2009.

against debtors – indebted socially-owned companies restructured within the privatisation process pursuant to a Privatisation Agency decision – and the fulfilment of the state’s obligation to adopt general measures regarding the amendments of the valid laws or case law, the Supreme Court of Cassation on 22 February 2011 adopted a legal opinion under which the enforcement proceedings related to work-related pecuniary claims which have been established by final court judgments, shall not be stayed even where the debtor is being restructured as part of the privatisation process and that the discontinued proceedings shall be resumed and completed.372

In its decision on the admissibility of the Milunović and Čekrlić application, the ECtHR reviewed the effectiveness of the constitutional appeal as a legal remedy in this type of cases. The ECtHR took into account the relevant provisions of the Constitution of the Republic of Serbia, the Constitutional Court Act, the Privatisation Act, the relevant case law of the domestic courts, notably the Constitutional Court, the Higher Court in Kragujevac judgments and the above mentioned Legal Opinion of the Supreme Court of Cassation of February 2011 and noted the apparent evolution in the domestic case law with respect to companies undergoing restructuring. The ECtHR commended Serbia’s attempt to comply with the its jurisprudence, but nevertheless concluded that it did not give effect to its specific requirement that the state itself should pay, from its own funds, the sums awarded by the final judgments in question.

The ECtHR did not accept the Government arguments that one of the applicants had never filed a constitutional appeal, while the other, after the Constitutional Court ruled in her favour, decided against filing a claim with the Compensation Commission and against initiating proceedings before civil courts, and declared their applications admissible. The ECtHR stated that, in such circumstances, it was clear that notwithstanding the fact 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, this particular avenue of redress could not be deemed effective as regards cases involving complaints such as the ones put forth by the applicants.373

9.1.4. Right to an impartial tribunal – Šorgić v. Republic of Serbia374 – This case regards a complaint about an alleged violation of the right to a fair trial in Article 6 of the ECHR due to the length of inheritance proceedings that ensued after the death of the applicant’s father. The proceedings were initiated in May 1995 and suspended from 14 June 1995 to 7 September 2010 due to the number of cases the


373 As it underlined in the above-mentioned decision, the ECtHR might in future cases reconsider its view as regards the remedy in question if there is clear evidence that the Constitutional Court has subsequently harmonised its approach with the Court’s relevant case law.

374 Application No. 34973/06, judgment rendered on 3 November 2011.
applicant and his stepmother brought against each other. Civil proceedings, initiated by a request for reopening the proceedings submitted by the applicant after the Supreme Court of Cassation rejected his appeal on the points of law, were under way. The first-instance court’s decisions on the requests for reopening the proceedings were twice quashed on appeal, wherefore the proceedings were still pending before the first-instance court. The inheritance proceedings were resumed on 7 September 2010, seemingly without further awaiting the outcome of the applicant’s request for reopening, which prompted the ECtHR to wonder why the inheritance court had not done so earlier, i.e. after the adoption of the Supreme Court’s decision of 20 April 2006. The ECtHR found Serbia in violation of the right to a fair trial in Article 6 (1) of the ECHR.

The applicant also complained about the composition of the court alleging partiality on the part of the judges ruling in parallel civil proceedings initiated against him by the wife of the deceased in 2000. The applicant noted that judges B and D took part in the adjudication of his case before the District Court and the Supreme Court on 24 March 2004 and 20 April 2006 respectively, although they had ruled in the same matter at lower instances. In applying the subjective test, the ECtHR noted that the applicant had not adduced any proof to rebut the presumption that the judges in question were impartial and the fact that they had not recused themselves from dealing with the civil suit at issue at second and third instance, following their earlier participation in the proceedings, did not constitute the required proof. However, in the view of the ECtHR, the objective test had not been satisfied in the specific case because both judge B and judge D took part in rendering decisions which relied on the same set of inter-related facts concerning the deceased’s complex relationship with his son and his wife, and since these disputes ended unfavourably for the applicant, legitimate doubts could be raised as to the lack of the judges’ impartiality, respectively, and, further, that such doubts could be considered as objectively justified. This led the ECtHR to conclude that Article 6 (1) had been violated also with respect to the “right to an impartial tribunal”.

9.1.5. Systemic problem of inconsistent domestic case law – Živić v. Serbia

The inconsistency of the domestic case law is another systemic problem Serbia has been facing. This application was lodged together with 18 other applications on the same matter, the authors of which had filed constitutional appeals with the Constitutional Court. The ECtHR has not reviewed the latter yet, possibly in order to see how the Constitutional Court’s case law on this matter will evolve.

375 Application No. 37204/08, judgment rendered on 13 September 2011.
376 Of all the state parties to the ECHR, only Serbia and Romania have been confronting this problem as a systemic one. See the judgment in the case of Rakić et al v. Serbia (No. 47460/07, of 5 October 2010).
The Government of the Republic of Serbia adopted two decisions, one in 2000 and one in 2003, doubling the salaries of employees living and working in Kosovo. On 31 January 2000, the Ministry of Internal Affairs (MIA) issued a decision stating that the police officers in question were entitled to have their salaries increased by between 2.5% and 4.5%, depending on the circumstances, and paid the applicant a salary increased pursuant to its decision and not that of the Government of Serbia. The applicant, Mr. Živić, a Kosovska Mitrovica police officer, complained that the decisions taken by the courts ruling on his claim for the payment of the difference between the salary increase received and that granted by the Government were not consistent with the other court decisions, i.e. that his claim was rejected, whilst many of his colleagues in a similar situation were successful in pursuing their claims, which were based on the same facts and concerned identical legal issues.

The ECtHR reiterated its view that whilst acknowledging that certain divergences in interpretation may be accepted as an inherent trait of any judicial system which, like the Serbian one, is based on a network of trial and appeal courts with authority over a certain territory, it noted that the conflicting interpretations in the applicants’ cases stemmed from the same jurisdiction and involved the inconsistent adjudication of claims brought by many persons in identical situations. All this created a state of continued uncertainty, which in turn must have reduced the public’s confidence in the judiciary. The Court found Serbia in breach of Article 6 of the ECHR on account of the profound and persistent judicial uncertainty which had not been remedied by the Supreme Court in a satisfactory manner.

9.1.6. Right of access to a court – Juhas Đurić v. Serbia378, Dobrić v. Serbia379 and Đokić v. Serbia.380 – The applicant in the Đurić case is a lawyer who complained of the fact that the competent court declared it did not have jurisdiction ratione materiae to consider his legal fee claim for services rendered to a suspect during his interrogation in a police station, which amounted to a violation of his right of access to a court and Article 6 (1) of the ECHR. Both the municipal court that rendered the first-instance decision and the district court that upheld it were of the view that that the fees in question were related to a preliminary criminal investigation, which was a specific kind of administrative proceedings, not a formal criminal procedure, and concluded that his claim was therefore not for the civil courts to determine.

The ECtHR found that it was not its task to decide which domestic court, civil or administrative, had jurisdiction to determine these claims on their merits and that the applicant had failed to provide domestic case-law to the effect that in any other case such as his own the civil courts had declared themselves competent ratione materiae.

378 Application No. 48155/06, judgment rendered on 7 June 2011.
379 Applications Nos. 2611/07 and 15276/07, judgment rendered on 21 June 2011.
380 Application No. 1005/08, judgment rendered on 20 December 2011.
materiae, whilst the respondent state had, for its part, produced jurisprudence indicating that the domestic judiciary has been willing to consider very diverse claims within an administrative disputes’ context, as well as to grant redress on the merits where appropriate. Based on all the facts at its disposal, the ECtHR concluded that the applicant had not been denied access to a court in the determination of his civil rights and obligations and, accordingly, that there had been no violation of Article 6 (1) of the ECHR.

A lawsuit was filed with the Novi Sad Municipal Court in 1986 against the applicants in the Dobrić case with respect to a real estate claim valued at four million “old dinars”. Following a redenomination of the Serbian currency, on 14 December 1998 the Municipal Court ruled in favour of the applicants and noted that the value of the dispute was now 50,000 “new dinars”. The District Court upheld the plaintiff’s appeal on 13 January 2005 and rendered a judgment partially in his favour. The applicants’ counsel filed an appeal on points of law. On 14 June 2006, the Supreme Court of Serbia rejected the appeal, stating that the applicants were not entitled to lodge it given that the value of the dispute in question was below 15,000 new dinars, the applicable statutory threshold. The court acknowledged that the parties had agreed that the value of the dispute should be 50,000 new dinars, but observed that there was no separate Municipal Court’s decision to this effect in the case file. The Supreme Court of Serbia was of the view that the relevant amount was four million “old dinars” as stated in the plaintiff’s original claim, which was clearly less than the 15,000 new dinars threshold under the relevant civil procedure rules.

The ECtHR was of the view that the Supreme Court had pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim pursued. The applicable statutory threshold was not a gratuitous interference with the applicants’ right of access to a court, but, rather, a legitimate and reasonable procedural requirement having regard to the very essence of the Supreme Court’s role, i.e. to deal only with matters of the requisite significance. Furthermore, the law fully entitled the Supreme Court to reject any appeal on points of law which it deemed inadmissible and it was not bound by the lower courts’ mere reference to the amount of 50,000 new dinars as the value of the dispute in question and it implicitly based the impugned decision on its prior binding opinion concerning the redenomination of the Serbian currency, including the deadline not complied with by the applicants. In such circumstances, the ECtHR did not find any reason to believe that the Supreme Court’s decision in the present case was arbitrary and, consequently, found no violation of the applicants’ right of access to court within the meaning of Article 6 (1) of the ECHR.

The applicant in the Đokić case is serving his sentence in the Niš penitentiary. In his application, he claimed that the criminal proceedings against him had not been fair because he had been denied access to the Supreme Court. In this case, the ECtHR established that it was clear that the applicant had clearly been entitled
to lodge an appeal on points of law within a month as of the date of receipt of the judgment rendered on appeal, which he had done through the prison authorities. The Supreme Court, however, mistakenly rejected the applicant’s appeal on points of law as belated, stating that it had been lodged on 5 July 2006 whereas, in fact, this was only the date when the Supreme Court itself had received the said appeal, whereby it violated Article 428 of the CPC and the right of access to a court under the ECHR. The ECtHR also underlined that it was not this Court’s task to determine what the actual outcome of the applicant’s appeal on points of law should have been had the Supreme Court accepted to consider it on its merits. It accordingly found a violation of Article 6 (1) with respect to the right of access to a court.

9.2. Rights to privacy and family life

9.2.1. Violation of the right to privacy by reading of the inmates’ correspondence – Milošević v. Serbia

This is a third judgment regarding “well-established case law” in which the ECtHR found a violation of Article 8 of the ECHR by the unlawful interference with the applicants’ correspondence by the prison authorities. The applicant was serving his sentence in the Niš penitentiary and a number of his letters to various institutions bore the prison stamp, as the ECtHR itself noted, although Mr. Milošević had not initially complained of this breach of his right. The ECtHR quoted its first judgment against Serbia on this same matter in the Stojanović case.

9.3. Prohibition of Torture

9.3.1. Non-investigation of torture allegations – Stanimirović v. Serbia

The applicant, who had been suspected of murder, was taken to a police station on 10 February 2001, where, after he was beaten up, he admitted he had taken part in the crime. He was taken before an investigating judge twice without his lawyer and he complained to the judge that he was ill-treated by the police, which had inflicted him grave head injuries. He retracted his confession when he was taken to the investigating judge in the presence of his lawyer on 16 March 2001. In his criminal report against unidentified police officers, he complained that he had been beaten with a baseball bat, punched repeatedly, given electric shocks to his genitals and

381 Application No. 32484/03, of 18 January 2011. A three-judge committee introduced under Protocol 14 to the Convention ruled on this case.

382 Application No. 34425/04, judgment rendered on 19 May 2009, see more in Report 2009, II.2.12. The CoE Committee of Ministers adopted Resolution CM/ResDH(2011)77 on three cases against the Republic of (Stojanović, Milošević and Jovančić) concluding that the Republic of Serbia full complied with its obligations laid down in the judgments. The Resolution is available at https://wcd.coe.int/ViewDoc.jsp?id=1799109&Site=DG4#P3960_246471

383 Application No. 26088/06.
subjected to death threats and asphyxiation. The prosecutor, however, did not initiate proceedings and on 24 September 2001 advised the applicant that he was entitled to start subsidiary prosecution within eight days. The court, which rendered a verdict finding him guilty of murder and convicting him to 40 years’ imprisonment, concluded that he had been beaten up in the police station and declared inadmissible the two statements he had given in the station, but declared admissible his three statements to the investigating judge.

The ECtHR reiterated that where a person made a credible assertion, as in this case, that he had suffered treatment contrary to Article 3 at the hands of state agents, that provision required by implication that there should be an effective official investigation and that the authorities had the obligation to act as soon as an official complaint has been lodged. In the present case, notwithstanding the fact that it was established at the applicant’s criminal trial that he had been ill-treated in February 2001 and the potential perpetrators were identified, no criminal investigation has been conducted, the ECtHR stated and found Serbia in violation of Article 3 of the ECHR.

The applicant also claimed a violation of his right to a fair hearing during his criminal trial and that the use of his confession before the investigating judge on 13, 14 and 19 February 2001 should be barred because he gave it due to the ill-treatment he had been exposed to in the police station. Without calling into question that the applicant had indeed been ill-treated by the police and that his statements made before the investigating judge had indeed been used at his criminal trial, the Government argued that this did not amount to a breach of Article 6 as those statements had not been the only evidence against the applicant. The ECtHR, however, underlined that particular considerations applied in respect of the use in criminal proceedings of evidence obtained in breach of Article 3 and that it has held that the admission of statements obtained as a result of torture or other ill-treatment as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair, irrespective of the probative value of the statements. The ECtHR noted that the domestic courts held that the applicant had been ill-treated at the Smederevo police station and did not admit in evidence the statements which he had made there on 10 and 17 February 2001, but that they had to bar the admission of the statements which the applicant had made before the investigating judge on 13, 14 and 19 February 2001. Medical reports confirmed that the applicant had indeed been brutally beaten up and the Government did not contest the veracity of the applicant’s allegation that he had also received electric shocks and been subjected to death threats and asphyxiation. In view of the seriousness of this ill-treatment as well as its proximity to the confession made before the investigating judge, the ECtHR saw no reason to doubt that the applicant did indeed make that confession in fear of further ill-treatment by the police and therefore as a result of his ill-treatment at Smederevo police station. The fact that the police were able to secure the applicant’s return to police custody and continue with his ill-treatment even after the
applicant had been committed to a remand prison proves that his fears were reason-
able. The ECtHR thus found Serbia in breach of Article 6 (1) of the ECHR.

10. Confrontation with the Past

Serbia in 2011 finally arrested and transferred to the ICTY Detention Unit Ratko Mladić, the former commander of the Bosnian Serb Army Main Staff, and Goran Hadžić, the erstwhile Prime Minister of the self-proclaimed Serb Autonomous Region of Slavonia, Baranja and Western Srem and President of the self-pro-
claimed Republic of Serb Krajina, whereby it made the last two fugitives accused of war crimes in Bosnia and Croatia respectively available to this court.

Ratko Mladić was arrested on 26 May in Lazarevo, a village near Zrenjanin, in his relative’s house, almost 16 years after the ICTY indicted him for genocide, crimes against humanity and war crimes.384 Serbian President Boris Tadić, who broke the news, said that the arrest was conducted by the Security Intelligence Agency (BIA) and the Ministry of Internal Affairs War Crime Unit.385 He qualified as “ridiculous” comments that the authorities had for years known where Mladić was hiding and said that it was by pure coincidence that the arrest occurred on the same day EU High Representative for Foreign Affairs and Security Policy Catherine Ashton was visiting Belgrade and just a few days before ICTY Prosecutor Serge Brammertz was to submit his regular report to the UN Security Council assessing Serbia’s cooperation with the ICTY, an assessment that was certain to considerably affect the EU decision to award Serbia the status of accession candidate, one of the chief goals declared by the Serbian authorities.386 In his speech before the UN Security Council, Brammertz thanked the Serbian authorities for arresting Mladić and qualified this as an excellent result, but recalled that Mladić had been hiding for 16 years, which raised troubling questions about how it was possible for this individual to elude the substantial resources of a state system for so many years. He also welcomed the Serbian Government’s statement that it would investigate and prosecute the networks that supported Ratko Mladić during his time in hiding and the Government’s expressed determination to expose and punish any state officials who assisted him.387 Although senior state officials said that investigations into who

384 The indictment against Ratko Mladić is available on the ICTY website, http://www.icty.org/
case/mladic/4.
&nav_id=74565.
386 See B92 pick-up of President Tadić’s interview to CNN in Serbian at http://www.b92.net/info/
vesti/index.php?yyyy=2011&mm=05&dd=26&nav_category=64&nav_id=514770.
Prosecutor/110606_proc_brammertz_un_sc_en.pdf.
had helped him hide would be conducted, both immediately after Mladić’s arrest and later as well, no specific headway was made in this respect until the end of the year, as Brammertz noted in his December address to the UNSC. Notably, Brammertz said that he saw “very little follow-through on this issue” during his November visit and added that the ICTY Office of the Prosecutor expected more to be done. In the meantime, the Belgrade Appellate Court overturned the judgment of 10 December 2010 acquitting four men indicted for aiding and abetting Mladić and dismissing charges against the other six indictees due to statutory limitations. The Appellate Court ordered a retrial of the whole group before a new judicial panel. The retrial opened in December 2011 and the panel ordered that Mladić testify via a video link. The opposition parties’ reactions to Mladić’s arrest were much milder than in 2008, when former Bosnian Serb President Radovan Karadžić was arrested. The only parliamentary party to condemn Mladić’s arrest was Vojislav Šešelj’s Serbian Radical Party (SRS). Serbian Progressive Party (SNS) President Tomislav Nikolić, who was Šešelj’s deputy and led a large street protest against Karadžić’s arrest in 2008, which resulted in serious clashes between the protesters and the police, did not condemn the arrest of the Bosnian Serb wartime leader. He said that the arrest came as a “complete surprise” and many questions remained unanswered. “We will see... there are many questions to be asked... who saw this man yesterday and recognized him. Did Serbia perhaps know all along where Mladić was, what made them decide to arrest him today,” Nikolić wondered, adding that Mladić was not “an ordinary man” and that “they never managed to present him as a criminal and evildoer”. On the day Mladić was arrested, extremist and nationalist organisations Obraz and Serbian Popular Movement Naši staged street protests in Belgrade and Novi Sad, which resulted in violence and conflicts with the police.

388 During Brammertz’s visit to Belgrade on 13 September, the Serbian President said investigations were under way on who had been aiding and abetting the fugitive ICTY indictees (see B92’s report at http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=09&dd=13&nav_id=76360), while Chairman of the National Council for Cooperation with the ICTY Rasim Ljajić stated before Brammertz’s next visit in November that the state authorities had reconstructed the movements of all ICTY indictees, which ought to help them identify the people who had helped them hide (see B92’s report at http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=11&dd=03&nav_id=77164).


392 SRS Vice-President Dragan Todorović qualified Mladić’s arrest as “one of the most difficult moments in Serbia’s history” and as an “abhorral act” and said that he was sure it would “not go unpunished” (Danas, 27 May, p. 5).


394 See in Serbian e.g. the article in Danas, 27 May 2011, p. 12 and the report on the protest in Belgrade in Blic (http://www.blic.rs/Vesti/Drustvo/256301/Nasilni-protesti-zbog-hapsenja-Mladica-u-Beogradu).
Only several hundred people attended these protests, but around 15,000 rallied at the one staged several days later by the SRS. These protesters, too, clashed with the police and scores of people (mostly policemen) were injured. Nearly 200 protesters, a quarter of them minors, were arrested. According to a public opinion survey conducted in May and published by the Office of the National Council for Cooperation with the ICTY, 51% respondents would not extradite Mladić to The Hague, 34% supported his arrest, while 40% considered him a hero.

The last ICTY indictee at large, Goran Hadžić, was arrested on 20 July on Mt. Fruska Gora, near the Krušedol Monastery. Serbian President Boris Tadić again said that the authorities had not known where this fugitive had been hiding. Serbian War Crimes Prosecutor and Coordinator of the Action Team that had been searching for the fugitive ICTY indictees Vladimir Vukčević said that Hadžić had been using an alias and a forged ID, that one other unnamed person who had aided and abetted him was arrested together with him and that he had kept in touch with only several people, including Serbian Orthodox Church priests. Although, as already mentioned, the state authorities were in possession of such information, no specific steps to criminally prosecute the people who had assisted the ICTY indictees in hiding were made by the end of 2011.

The Mladić and Hadžić arrests were the most significant and positive developments in 2011 in terms of confrontation with the past i.e. establishing the facts about the crimes committed during the wars in the former SFRY and the criminal prosecution of their perpetrators. None of the other major developments not only failed to contribute to the prosecution and punishment of the perpetrators, but revived conflicts between the governments in the region and undermined the cooperation between their judicial authorities as well. Relations between Bosnia-Herzegovina and Serbia had already deteriorated after the Serbian judicial authorities launched proceedings against Ilija Jurišić and Ejup Ganić for their alleged responsibility for the attacks on Yugoslav People’s Army (JNA) forces and killing of JNA troops in Tuzla and Sarajevo in 1992. Tensions deepened in 2011 when former Army of

395 See the report in Blic on http://www.blic.rs/Vesti/Politika/256813/Privedeno-179-demonstranata-povredjeno-11-gradjana-i-32-policajca.
397 See the report in Serbian on RFE’s website http://www.slobodnaevropa.org/content/uhapsen_goran_hadzic/24270938.html.
399 Jurišić, formerly a senior Bosnia-Herzegovina MIA officer, was accused by the Serbian War Crimes Prosecution Office of ordering an attack on the JNA 92nd Motorised Brigade that was withdrawing from Tuzla, in which at least 50 JNA soldiers were killed and at least 44 were wounded. Jurišić was found guilty and sentenced to 12 years’ imprisonment in the first instance, but the second-instance court quashed the judgment and ordered a retrial on 11 October 2010 and Jurišić was released from custody and returned to Bosnia-Herzegovina. The Appellate Court opened a hearing during the appeals review and heard the witnesses for the defence
Bosnia-Herzegovina General Jovan Divjak was arrested in Vienna pursuant to an arrest warrant Serbia issued against him on suspicion that he was to blame for the crimes against JNA troops in Sarajevo in 1992. Namely, Divjak was arrested on 3 March after the Serbian War Crimes Prosecution Office suspected him of attacking the JNA troops in Dobrovoljačka Street, Sarajevo, on 3 May 1992 (former Bosnia-Herzegovina Presidency Chairman Ejup Ganić is also suspected of this crime. He was taken into custody in London in 2010 but was not extradited to Serbia, because the British court found that the proceedings against him were initiated and conducted for political purposes and that there was not enough evidence to criminally prosecute Ganić). In its review of Serbia’s motion for extradition, the Korneuberg Court found that there were no guarantees that Divjak would have a fair trial in Belgrade. The Court, inter alia, took into account that there was no agreement on the exchange of evidence in war crimes cases between BiH and Serbia and that the Serbian institutions may be unable to access all evidence, notably witness testimonies, given that the alleged scene of the crime was outside Serbia. Furthermore, the Court also took into account the conclusion the ICTY Office of the Prosecutor reached upon on the motion of the Bosnian Serb Republic in 2003 that the evidence was not sufficient under international standards to provide reasonable grounds to believe that Divjak may have committed the crimes he was suspected of. Several thousand people rallied a number of times in support of General Divjak in Sarajevo whilst he was in custody. Dissatisfaction against the moves by the Serbian War Crimes Prosecution Office, perceived as a continuation of Serbia’s nationalist wartime policies, was voiced also by BiH politicians, with the exception of those in the
Bosnian Serb Republic. The War Crimes Prosecution Office’s activities led to new tensions between Croatia and Serbia in 2011 as well, which resulted in Croatia adopting a law hindering cooperation between the two states’ judicial authorities. Namely, Tihomir Purda, a Croatian national, who had taken part in the defence of Vukovar in 1991, was arrested in Bosnia-Herzegovina pursuant to an international arrest warrant on 6 January. Purda and two other Croatian citizens were suspected in Serbia of war crimes against wounded and ill people. The proceedings against them were launched by the former Military Court. While Purda was in custody, the War Crimes Prosecution Office asked the Republic of Croatia State Attorney’s Office to question a number of witnesses who were in Croatia. After they collected the statements of 14 witnesses from Serbia and 31 witnesses from Croatia, the Serbian war crimes prosecutors abandoned the criminal prosecution of all three suspects. They then said that none of the witnesses had accused the suspects and that the proceedings conducted by the army investigating authorities had not been in accordance with the legal war crimes prosecution standards. Croatian war veterans staged numerous protests during Purda’s nearly two months long custody, demanding of the Croatian Government and judiciary to protect Croatian citizens from persecution based on groundless accusations coming from Serbia. The protesters recalled that many accusations against Croatian citizens were based on confessions extorted from them while they were held captive in camps, some of which were located in Serbia. That was the case with Purda as well, as his admission to the crime whilst in captivity seemed to have been the main piece of evidence the Serbian judicial authorities based his guilt on. They also recalled that camps for Croatian POWs had been established in Serbia during the war in Croatia and that the POWs were gravely ill-treated and killed and that no one had ever been held accountable in Serbia for such treatment although twenty years have passed in the meantime. Indeed, this criticism of the Serbian judicial authorities is fully justified. There is no doubt that people captured in Croatia were being transferred to Serbia and held captive at least at the following locations: JNA farm at Stajićevo (at Zrenjanin), JNA facilities in Begejci (the Žitište Municipality, at Zrenjanin), in Sremska Mitrovica, Zrenjanin and Šid. Strong evidence indicating that the people held prisoner in these locations were subjected to inhumane treatment, grave physical and psychological ill-treatment, torture, hunger, beatings and rape sufficed for the ICTY.

405 See the statement to RFE in Serbian by Deputy War Crimes Prosecutor Bruno Vekarić (http://www.slobodnaevropa.org/content/purda_pustanje_na_slobodu_vukovar/2327767.html) and the War Crimes Prosecution Office press release (http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2011/S_2011_03_03_ENG.pdf).
406 See, e.g., the RFE report in Serbian http://www.slobodnaevropa.org/content/prosvjed_podrske_purdi_zbog_nerada_hrvatskih_vlasti/2290720.html.
407 See, e.g., the RFE report in Serbian http://www.slobodnaevropa.org/content/uverenje_o_purdni-noj_krivici_temelji_se_na_njegovom_priznanju/2311351.html.
to charge former Serbian and Yugoslav President Slobodan Milošević with crimes against humanity and grave violations of the Geneva Conventions, and for the Osijek State Prosecution Office to file charges on 4 April 2011 against former JNA officers, General Aleksandar Vasiljević and Lieutenant Colonel Miroslav Živanović, accusing them of crimes against civilians and prisoners of war. Given that the Croatian judiciary does not have access to either Vasiljević or Živanović, this indictment was communicated to Serbia in October 2011 pursuant to the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide signed in 2006. Serbia’s War Crimes Prosecution Office will review the available evidence and decide whether it is sufficient to launch proceedings against the two officers. On the other hand, the Serbian War Crimes Prosecution Office forwarded to the State Prosecution Office of the Republic of Croatia an indictment against Croatian Democratic Union (HDZ) Deputy President and Parliament Deputy Speaker Vladimir Šeks, former Croatian Minister of Internal Affairs Ivan Vekić, former MIA official and leader of the HDZ Vukovar branch office Tomislav Merčep, former Croatian Army officer Branimir Glavaš and another 40 people, whom it charged with genocide and war crimes against Serbs in Vukovar in 1991. Croatian Justice Minister Dražen Bošnjaković then said that the Serbian authorities asked their Croatian counterparts to forward the indictment to the indictees, but had failed to attach the required documentation or ask the Croatian judiciary to try them. The charges were raised back in 1992 by the then Army Prosecution Office in Belgrade. Since this Office was dissolved in the meantime, the indictment was taken over by the War Crimes Prosecution Office, which forwarded it to Croatia nineteen years later, pursuant to the bilateral agreement, and asked its Croatian colleagues to serve it to the indictees. The prosecution offices of both countries are aware that it is possible that the former army courts did not conduct proceedings in accordance with the fair trial principles, but had agreed to for-

408 See the Second Amended Indictment against Slobodan Milošević of 23 October 2002, paras. 63–66. http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-2ai020728e.htm. The indictment states that the Croatian and non-Serb population in the territories of the Independent Autonomous Region (SAO) of Slavonija, Baranja and Western Srem, SAO West Slavonia, SAO Krajina and the so-called “Dubrovnik Republic” had been unlawfully arrested, imprisoned and abused in numerous locations, including five locations in the territory of: Stajićevo (around 1,700 prisoners), Begejci (around 260 prisoners), Zrenjanin (the indictment says that scores of people were held prisoner in the JNA barracks in this town), Sremska Mitrovica (hundreds of prisoners) and Šid (around one hundred prisoners).

409 Vasiljević and Živanović are charged with crimes committed at the JNA farm in Begejci, Stajićevo, Sremska Mitrovica, Niš and Star Gradiška. The indictment states that several hundred civilians and Croatian army troops were kept prisoner and continuously exposed to physical and psychological ill-treatment, and that seven of them died. See the overview of Vukovar war crimes cases of the Croatian State Prosecution Office in Croatian, published on 17 November 2011, http://www.dorh.hr/PostupciVodeniZbog.

410 Ibid.

ward the cases to Croatia to review whether criminal prosecution of the perpetrators could continue in accordance with the 2006 agreement between the two prosecution offices. \(^{412}\) Notwithstanding, the delivery of the indictment against Šeks and the others prompted the Croatian Parliament to adopt the Act Invalidating Specific Legal Enactments of the Judicial Authorities of the Former JNA, Former SFRY and the Republic of Serbia on 21 October, not long before the parliamentary elections slated and held at the end of 2011. \(^{413}\) This Act declares null and void “all legal enactments of the former JNA, its judicial bodies, the judicial bodies of the former SFRY and the judicial bodies of the Republic of Serbia regarding the Fatherland War in the Republic of Croatia, and suspecting, indicting and/or convicting the nationals of the Republic of Croatia for crimes against values protected under international law... committed in the territory of the Republic of Croatia”. Exceptionally, enactments shall not be declared null and void “in the event the judicial bodies of the Republic of Croatia find that they satisfy the legal standards in the Republic of Croatia criminal law” (Art. 1 (2)). Art. 3 (2) of the Act states that the judicial authorities of the Republic of Croatia shall not act on requests for legal aid in criminal proceedings submitted by the judicial authorities of the Republic of Serbia “in the event that such actions would be in contravention of the legal order of the Republic of Croatia and damage its sovereignty and security”, which shall be assessed by the Justice Minister. The adoption of such a law was criticised both by Croatian Attorney General Mladen Bajić and Serbian War Crimes Prosecutor Vladimir Vukčević, who warned that it would hinder the two states’ cooperation in prosecution of war crimes and benefit only the war criminals. \(^{414}\) The Act was also sharply criticised by Croatian President Ivo Josipović, who suggested that Croatia and Serbia sign a serious international treaty which would prevent abuse of war crime prosecutions and ensure that no crime goes unpunished. \(^{415}\) At the end of 2011, he asked the Constitutional Court of the Republic of Croatia to review the constitutionality of the Act. \(^{416}\) ICTY Prosecutor Serge Brammertz also voiced his concerns about the Act and said that such moves would delay reconciliation and derail the rule of law. \(^{417}\) The Act was also criticised by President of the Social Democratic Party of Croatia Zoran

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\(^{413}\) Narodne novine, 124/11.

\(^{414}\) See Večernje novosti, 1 October, 2011, p. 2.

\(^{415}\) See the Croatian President’s statement in Croatian of 5 October 2011, http://www.predsjetnik.hr/05102015.

\(^{416}\) See the Croatian President’s statement in Croatian of 27 December 2011, http://www.predsjetnik.hr/27122012.

Milanović, who was appointed Prime Minister of Croatia after the December elections. He said in October that the law was “senseless” and that “it will not protect anyone” and called for addressing open issues regarding war crimes prosecutions in agreement with Serbia, through an inter-state agreement or consultations at the highest level, not through agreements between the prosecution offices, as has been the case so far. In any event, it remains to be seen to what extent the adoption of this law will affect the cooperation between the two states’ judiciaries, which had yielded good results thus far. The lawsuits Croatia and Serbia filed against each other with the International Court of Justice alleging violations of the Convention for the Prevention and Punishment of the Crime of Genocide were not withdrawn by the end of the reporting period, although there were indications in late 2010 that they might be.

Criminal prosecution of persons accused of war crimes has encountered serious obstacles in Serbia. The cooperation between the judicial authorities of Serbia and those of Croatia and, in particular, of Bosnia-Herzegovina has not benefited from the above-mentioned developments and complicated relations. It is on this cooperation that the effectiveness of the Serbian judicial authorities’ prosecution of war crimes rests to a great extent. Namely, cooperation with the judicial authorities in Croatia and Bosnia-Herzegovina is of crucial importance since the war crimes were as a rule committed outside Serbia and many witnesses are beyond the reach of the Serbian judiciary. As mentioned, the best cooperation has so far been achieved by the Croatian judicial authorities, which have ceded a number of cases to the Serbian War Crimes Prosecution Office and collected evidence at its request in the territory of Croatia, pursuant to the bilateral agreement between the two states’ prosecution offices. Since no such agreement has been signed with the Bosnia-Herzegovina prosecutors, the two countries have not ceded any cases to each other. Furthermore, the poorer relations between Serbia and Bosnia-Herzegovina undoubtedly cannot stimulate non-Serb witnesses of the crimes committed in BiH to testify before Serbia’s courts and cooperate with its War Crimes Prosecution Office. There have also been problems with hearing testimonies of witnesses living in Kosovo.

419 More on the two states’ cooperation in the prosecution of war crimes in the Report from 2006 to 2010.
422 Agreement on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, signed on 13 October 2006.
423 Humanitarian Law Fund Director Nataša Kandić, whose NGO provides assistance to war crime victims and assists the courts in collecting evidence spoke on this issue at a conference on war crimes held in Belgrade in September 2011 (see the press report in Serbian http://www.ennovine.com/srbija/srbija-tema/50962-Jedinica-zastravanje-svedoka.html). Representatives of
have not demonstrated the will to ensure effective criminal prosecution of those responsible for the war crimes. On the contrary, they have been directly obstructing the work of the judicial authorities. Namely, several war crime trial witnesses, who have been granted the status of protected witnesses, complained in 2011 that the MIA Witness Protection Unit officers were threatening them, harassing them and their families and trying to dissuade them from testifying. Two former and one current protected witnesses, former policemen, publicly spoke about how the Witness Protection Unit officers had threatened them, abused them and their families, seized their personal belongings and ID documents and tried to intimidate them and persuade them not to testify in various ways. As soon as they made their first statements about the crimes they personally witnessed, two of them were retired and one of them was dismissed, while the policemen suspected of war crimes in Kosovo based on their testimonies spent a short while in custody and were then released and even promoted. Two of the three witnesses are no longer in the witness protection programme. Zoran Rašković, one of the witnesses in the trial against men indicted for the crimes in the Kosovo village of Ćuška and a former member of the para-military unit Jackals, waived his right to keep his identity secret before he took the stand. He later talked about how the MIA officers, including those in the Witness Protection Unit, were pressuring him not to testify. Furthermore, the defendants threatened to kill him in the courtroom while he was testifying on the witness stand. The threatened witnesses say that they had reported the threats both to the MIA and other state authorities, including the War Crimes Prosecution Office, the Justice Ministry and the President of Serbia, but that no one reacted. Representatives of the War Crimes Prosecution Office confirmed that there were problems with witness protection. The Office Spokesman and Deputy War Crimes Prosecutor Bruno Vekarić said that the Office was of the view that the witness protection programme should be reformed and confirmed that several witnesses had...
complained to the Prosecution Office about how they were treated by the Witness Protection Unit officers, but that the Office could not take any steps in this regard because witness protection was within the remit of the MIA. The Council of Europe also discussed the problem of witness protection in Serbia. In early 2011, the CoE Parliamentary Assembly adopted a Resolution on protection of witnesses as a cornerstone for justice and reconciliation in the Balkans in which it called on the Serbian authorities to create and implement a procedure to organise the operation of the Witness Protection Unit, ensuring that it is established according to professional standards, with suitably qualified and trained staff, in order to ensure the impartial operation of the unit, free of political or other interference, and recommended the transfer of responsibility for the Witness Protection Unit to the Ministry of Justice, in order to avoid any conflict of interest between the members of this unit and the witnesses they are supposed to protect.428 The recommendation was reiterated by the CoE Human Rights Commissioner Thomas Hammarberg, who visited Serbia in June.429 In his report, he expressed serious concern by reports indicating that several members of the Witness Protection Unit were former members of the ‘red berets’, a unit whose members had allegedly committed war-related crimes in Croatia, Bosnia and Herzegovina and Kosovo. In this context he noted that there has not been a satisfactory vetting of police staff members in Serbia.430 He also said that he had during his visit been informed of incidents concerning inappropriate behaviour by some members of the Witness Protection Unit towards witnesses, which has occasionally resulted in witnesses changing their testimonies or simply deciding not to testify at all. Threats and intimidations targeting witnesses’ family members have also been reported.431 Hammarberg also said that the authorities he had met during his visit showed determination to improve the witness protection system by transferring the relevant competence to the Ministry of Justice. The Commissioner said he had been informed that the full transfer of this competence was planned to be completed in two years since it required the enhancement of national expertise and the allocation of significant financial resources. The Commissioner called on the authorities to take all necessary measures to make sure that adequate witness protection was provided during the transitional period.432 However, given that the witnesses publicly voiced their complaints about the work of the Witness Protection Unit after Hammerberg’s visit, we can only draw the conclusion that the authorities had not undertaken any serious measures to ensure that the witnesses are

430 Ibid, para. 21.
431 Ibid, para. 22.
432 Ibid, para. 23.
finally afforded proper protection instead of the threats and abuse they have been exposed to.

The criticisms of the work of the state authorities charged with war crimes prosecution in 2011 did not regard only witness protection. The Humanitarian Law Centre (HLC), an NGO documenting human rights violations during the armed conflicts in the former Yugoslavia (and thus also collecting evidence used in war crime trials) and providing the damaged parties i.e. crime victims legal aid in many proceedings, published its Reports on War Crime Trials in the Republic of Serbia in 2010, in which it voiced a number of criticisms about the work of the judicial authorities, including allegations of corruption within the War Crimes Prosecution Office and information on the abuse and intimidation of witnesses by the MIA Witness Protection Unit members.433 The text below will give an overview of the most important conclusions in the Reports and information in them and the reactions of the War Crimes Prosecution Office to HLC’s allegations.434 First, HLC states that most of the cases on trial before the War Crimes Department are those the War Crimes Prosecution Office received from the Croatian State Prosecution Office and that they are cases against small numbers of defendants mostly accused of crimes against small numbers of victims. Trials of such cases usually do not require much time and the judgments are rendered after trials lasting only several days.435 The HLC further states that the investigations initiated by the War Crimes Prosecution Office are very long, that the indictments filed in Kosovo war crimes cases are usually based on partial investigations, and that they “do not draw links between the events, the scenes and the offenders” and that the Prosecution Office is shielding senior police and army officers from criminal accountability.436 In response to these allegations, the War Crime Prosecution Office recalled that the “pre-trial proceedings and investigation are always fairly lengthy in complex cases due to the already well-known fact that witnesses and certain evidence are found in the territories of different countries or in the Autonomous Province of Kosovo, which makes the acquisition of evidence extremely difficult and complicated” and denied that it protected senior police and army officers. The Office said that “investigations are launched against such persons who can – on the basis of the evidence – be reasonably suspected of committing war crimes regardless of their respective positions”.437 Be that as it may, the fact is that


436 Ibid.

437 Ibid.
none of the war crime indictees charged in Serbia are senior army or police officers or holders of senior civilian state offices, although numerous crimes committed by the army, police or para-military forces clearly could not have been committed without their input. Of course, although it is true that some of the highest former army and police officers and state officials have been indicted by the ICTY, it is also true that (given the ICTY’s inability to prosecute large numbers of people), there are still many of them which can be reasonably suspected of having committed the crimes tried by the ICTY and the Belgrade Higher Court War Crimes Department on the basis of the facts established by the ICTY, which should suffice to launch criminal proceedings against them.438 However, in view of the difficulties encountered in proceedings against indictees who had held senior army or police posts (primarily the above mentioned intimidation of the witnesses and the lack of will among, above all, the police but also the army forces to tell the truth about the developments during the wars in the former SFRY, particularly in Kosovo439), it is difficult even to imagine that the Serbian judiciary would be capable of properly prosecuting and trying individuals who had held senior army and police offices at the time. It should particularly be borne in mind that Milošević’s former party spokesman Ivica Dačić is now the Minister of Internal Affairs and Deputy Prime Minister and that a considerable number of the Army of Serbia current command staff had taken part in the armed conflicts in Kosovo. Therefore, even though we cannot agree with the HLC claim that the War Crimes Prosecution Office is avoiding the prosecution of the topmost army and police officers, it can be concluded that the Serbian authorities are not prepared to confront the past and prosecute those most responsible for the grave crimes committed during the armed conflicts in the 1990s. Later in the report, the HLC states that the main hearings in war crimes trials last long, which is true, with the exception of the above-mentioned cases ceded by the Croatian judiciary, and that numerous witnesses in them are obviously giving false testimonies

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438 For instance, in the case of Šainović et al. (IT-05-87), the ICTY Trial Chamber concluded that apart from ICTY indictees Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević, Nebojša Pavković, Sreten Lukić, Vlastimir Đorđević and Vlajko Stojiljković, the former head of the state security Radomir Marković and police generals Obrad Stevanović and Dragan Ilić also took part in a joint criminal enterprise during the armed conflict in Kosovo within which numerous crimes against the Albanian population had been committed (see the Trial Chamber’s judgment at www.icty.org, para. 98). In the Martić case (IT-95-11), the ICTY established that, in addition to Martić and other ICTY indictees Slobodan Milošević, Radovan Karadžić, Ratko Mladić, Milan Babić, Vojislav Šešelj, Franko Simatović and Jovica Stanišić, the following also participated in the commission of the crimes, JNA officials Blagoje Adžić and Veljko Kadijević, former Serbian Minister of Internal Affairs Radmilo Bogdanović and Dragan Vasiljković, better known as Captain Dragan (see the Trial Chamber judgment at www.icty.org, para. 446).

439 Only a few witnesses willing to testify about crimes the forces controlled by the Serbian authorities committed in Kosovo have agreed to testify in war crime trials in Serbia. More in BCHR 2007, 2008, 2009 and 2010 Reports, particularly the sections on the Bytyqi Brothers and Suva Reka cases.
and that none of them had ever been prosecuted for perjury, which is also true.\footnote{More in BCHR 2008, 2009 and 2010 Reports and the publication Monitoring and Reporting on the Activities of State Institutions in Serbia in the Areas of Organised Crime, War Crimes, Discrimination and Domestic Violence, available in Serbian at http://www.bgcentar.org.rs/images/stories/Datoteke/monitoring%20i%20izvestavanje%20o%20aktivnostima%20pravnih%20institucija%20u%20srbiji%20pravni%20zlocini%20i%20nasilju%20i%20porodici%202010.pdf.} The HLC also drew attention to the mild penal policy and the inappropriate representation of the indictees, who are mostly represented by \textit{ex officio} counsellors, whose fees are covered with great delays, wherefore, in the view of the HLC, they do not do their job in the best interest of their clients.\footnote{Report on Trials for War Crimes and Ethnically Motivated Crimes in Serbia in 2010, paras. 1.9 and 1.10.} The most interesting part of the HLC Reports focuses on the War Crimes Prosecution Office’s actions in the case of five members of the erstwhile 37\textsuperscript{th} Detachment of the MIA Special Police Unit (SPU), suspected of crimes in several locations in Kosovo in 1998 and 1999. According to the HLC, which filed criminal reports against the suspects in March 2009, the above-mentioned witnesses in these proceedings (former policemen Jovan Golubović, Slobodan Stojanović and Bojan Zlatković) were continuously intimidat-ed and abused to revoke their statements incriminating the suspects for the crimes committed in Kosovo. The HLC Reports, which comprise detailed allegations by the witnesses on how they were abused and intimidated, go on to state that not only policemen, primarily Witness Protection Unit officers and the indictees, but Deputy War Crimes Prosecutor Dragoljub Stanković as well, tried to dissuade the witnesses from testifying.\footnote{Report on the Irregularities in War Crimes Proceedings in the Republic, para. 11.} The HLC also states that after the suspects were released from pre-trial detention, it received information from a number of sources that their release was facilitated by no other than Deputy Prosecutor Stanković after he accepted a large sum of money from suspect Radoslav Mitrović.\footnote{Ibid, para. 22.} The War Crimes Prosecu-tion Office sharply denied all these allegations, qualifying, inter alia, as a “lie and malicious defamation” that Stanković facilitated the suspects’ release from custody, since the decision to release them was taken not by him, but by another Deputy War Crimes Prosecutor, Nebojša Marković, who rendered the decision with the knowledge and consent of Prosecutor Vukčević. As mentioned, the Reports include detailed descriptions of abusive conduct by the MIA officers against the witnesses and their families aimed at intimidating them and dissuading them from testifying, and the list of institutions and people the witnesses reported the incidents to and asked for assistance, albeit without success.

No positive trends have been noticed in media reports on transitional justice topics either. Media insisting on establishing the accountability for crimes committed during the armed conflicts in the former Yugoslavia and responsibly and impartially
reporting on the topics boil down to the Internet portals E-novine (www.e-novine.com) and Peščanik (www.pescanik.net), Radio Free Europe and the weekly Vreme. Other media devote attention to this subject usually only if there is news about trials of crimes in which Serbs were the victims, such as the cases of Dobrovoljačka, Tihomir Purda or about investigations of crimes against Serbs in Kosovo, above all about the abductions of Serbs to harvest and traffic their organs. The print media do not devote much attention to war crimes trials conducted in Belgrade. TV stations devote even less time to such trials. Trials before the ICTY do not warrant much attention either, the only exception being the delayed broadcasts of the trial of SRS leader Vojislav Šešelj on the national public broadcaster RTS. Topics regarding grave human rights violations during the armed conflicts in Croatia, Bosnia-Herzegovina and Kosovo are avoided in the education system as well.444

10.1. The ICTY in 2011

The last two fugitive war crime indictees – Ratko Mladić and Goran Hadžić – were arrested in Serbia and transferred to the ICTY Detention Unit in 2011. The new ICTY President was appointed in late 2011. Judge Patrick Robinson from Jamaica was replaced by Theodor Meron, a US judge, who had been ICTY President from 2003 to 2005. Judge Carmel Agius from Malta was appointed Deputy President of the ICTY. The ICTY rendered first-instance judgments in three cases in 2011 (Đorđević, Gotovina et al and Perišić), and was conducting 15 proceedings against 38 indictees at the end of the year. Two persons indicted by the Tribunal were at the pre-trial stage, 16 persons in seven cases were on trial and 20 persons in six cases were in appeal proceedings. In his report to the UN Security Council on the implementation of the Completion Strategy,445 Meron said that it was anticipated that the first-instance judgments in all ongoing cases would be rendered during 2012, with the exception of the Karadžić case, in which the verdict would be rendered in 2014. He said all efforts would be invested to complete the first-instance trials of both Ratko Mladić and Goran Hadžić by end 2014, and that the appeals would be reviewed by the Residual Mechanism.446 In his presentation of the 18th Annual

444 The Education Improvement Bureau in June 2011 rendered a negative opinion about an 8th grade history textbook prepared by Belgrade College of Political Sciences Prof. Dr. Predrag Simić. Prof. Simić then said that it was rejected because of the chapter on Slobodan Milošević and the disintegration of Yugoslavia, which was perceived as “insufficiently pro-national and insufficiently pro-Serb”. See the B92 report in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2011&mm=06&dd=10&nav_category=12&nav_id=518073.


Report on ICTY’s performance to the UN General Assembly, judge Patrick Robinson said that the ICTY faced a major problem in retaining highly qualified and necessary staff who were moving on to safer jobs and asked the international community to help the ICTY retain the staff or find replacements. He said that staff attrition significantly affected the proceedings, leaving the remaining staff to shoulder unsustainably heavy burdens and would in the long-term pose a much greater financial burden on the international community. He also highlighted that the victims of the crimes had not been afforded any material compensation and proposed that a fund providing such compensation be established.

10.2. ICTY Judgments Rendered in 2011

Đorđević (IT–05–87/1.I). – On 23 February, the ICTY Trial Chamber found former Assistant Minister of the Interior and Chief of Police of Serbia Vlastimir Đorđević guilty of crimes against humanity and war crimes and convicted him to 27 years in jail. The Chamber concluded that, together with Slobodan Milošević, Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević, Nebojša Pavković, Sreten Lukić and other participants in the joint criminal enterprise, Đorđević participated in a widespread campaign of terror and violence against the Kosovo Albanian population in 1999, which involved deportations, murders, forced transfers and persecution. The Chamber concluded that the indictee’s involvement in the joint criminal enterprise was crucial to the success of the enterprise because he had the legal powers and effective control over the police in Kosovo, including the members of the regular and reserve police forces. It established that he was responsible for the death of at least 724 Kosovo Albanians killed by the Serbian forces in 13 municipalities. Most the victims were unarmed civilians, many of them women and children, who had not participated in the armed conflicts in any way. The evidence presented during the trial assured the judges that Đorđević had played a leading role in MIA’s efforts to cover up the killing of the Kosovo Albanians, whose bodies were transported out of Kosovo on at least eight occasions, mostly to Batajnica at Belgrade, but to Petrovo Selo and the Perućac Lake as well. The Chamber established that the transportation of the bodies from Kosovo had been organised by Đorđević in agreement with the then Minister of the Interior Vlajko Stojiljković, pursuant to an order issued by the then FRY President Slobodan Milošević.

Gotovina et al (IT–06–90). – The ICTY on 15 April 2011 rendered a first-instance judgment finding two Croatian generals, Ante Gotovina and Mladen Markač,
guilty and sentencing them to 24 and 18 years’ imprisonment respectively, and acquitting Ivan Čermak of crimes against humanity and war crimes committed by the Croatian forces during the military campaign Storm from July to September 1995. Gotovina and Markač were convicted for persecutions, deportation, plunder, wanton destruction, murder, inhumane acts after the Chamber established that they took part in a joint criminal enterprise the common purpose of which was the permanent removal of the Serb population from the Krajina region in Croatia. The Chamber said that the joint criminal enterprise was headed by the then Croatian President Franjo Tuđman and that the following senior officials also took part in it: the then Croatian Defence Minister Gojko Šušak and Tuđman’s close associate and army commander in chief Zvonimir Červenko. Čermak was acquitted because the Chamber found that he did not have effective control over Croatian army forces apart from over his subordinates, and that there was no evidence indicating that the latter had committed any crimes.

Perišić (IT–04–81). – Former Yugoslav Army chief of staff Momčilo Perišić was found guilty in a first-instance judgment on 6 September 2011 and convicted to 27 years in jail for crimes against humanity and war crimes in Bosnia-Herzegovina and Croatia. This is the first judgment finding an FRY official guilty of crimes in Bosnia-Herzegovina. The Trial Chamber established that the FRY Army under Perišić’s command provided extensive logistical assistance to the Bosnian Serb Army and the so-called Army of Serbian Krajina, which notably included vast quantities of infantry and artillery ammunition, fuel, spare parts, training and technical assistance, although Perišić was aware that these forces were conducting operations entailing grave crimes against civilians. Apart from finding Perišić guilty of aiding and abetting murders, inhumane acts, persecutions on political, racial or religious grounds, and attacks on civilians (during the siege of Sarajevo and in Srebrenica), the Trial Chamber also found him guilty of failing to punish his subordinates for their crimes of murder, attacks on civilians and injuring and wounding civilians during the rocket attacks on Zagreb on 2 and 3 May 1995 after it concluded that he had effective control over the perpetrators of these crimes and had not taken the “necessary and reasonable” measures to punish his subordinates.

10.3. War Crime Trials in Serbia

War crimes are tried in Serbia before the Belgrade Higher Court War Crimes Department in the first instance and before the Belgrade Appellate Court War Crimes Chamber in the second instance. The War Crimes Prosecution Office is charged with the prosecution of war crimes. In late 2011, three judgments against five people were being reviewed on appeal, while 12 trials of 65 people were un-

der way in the first instance. Six of these twelve trials were retrials ordered by the higher court. Twenty-one final verdicts convicting 49 and acquitting 10 indictees have been rendered since 2003, when the War Crimes Prosecution Office and the War Crimes Chamber of the then Belgrade District Court (whose cases were taken over by the Belgrade Higher Court War Crimes Department after the establishment of a new court network) were set up.
Appendix I

The Most Important Human Rights Treaties Binding on Serbia


- Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature and committed through computer systems, *Sl. glasnik RS*, 19/09.

- Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows, *Sl. glasnik RS (Međunarodni ugovori)*, 98/08.


- Agreement on Amending and Accessing the Central Europe Free Trade Agreement – CEFTA 2006.


- Convention against Discrimination in Education (UNESCO), *Sl. list SFRJ (Dodatak)*, 4/64.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ (Međunarodni ugovori)*, 9/91.

- Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.

- Convention Concerning Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *Sl. list SFRJ (Dodatak)*, 13/64.

- Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Sl. list SRJ (Međunarodni ugovori)*, 1/92 and *Sl. list SCG*, 11/05.
- Convention on the Elimination of All Forms of Discrimination against Women, Sl. list SFRJ (Međunarodni ugovori), 11/81.
- Convention on Environmental Impact Assessment in a Transboundary Context, Sl. glasnik RS, 102/07.
- Convention on the High Seas, Sl. list SFRJ (Dodatak), 1/86.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Sl. list SRJ (Međunarodni ugovori), 7/02 and 18/05.
- Convention on the Nationality of Married Women, Sl. list FNRJ (Dodatak), 7/58.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Sl. list SFRJ (Međunarodni ugovori), 50/70.
- Convention on Police Cooperation in South East Europe, Sl. glasnik RS, 70/07.
- Convention on the Political Rights of Women, Sl. list FNRJ (Dodatak), 7/54.
- Convention on the Preservation of Intangible Cultural Heritage, Sl. glasnik RS (Međunarodni ugovori), 1/10.
- Convention on the Protection and Promotion of Diversity of Cultural Expression, Sl. glasnik RS, 42/09.
- Convention Relating to the Status of Refugees, Sl. list FNRJ (Dodatak), 7/60.
- Convention Relating to the Status of Stateless Persons and Final Act of the UN Conference Relating to the Status of Stateless Persons, Sl. list FNRJ (Dodatak), 9/59 and 7/60 and Sl. list SFRJ (Dodatak), 2/64.
- Convention on the Rights of the Child, Sl. list SFRJ (Međunarodni ugovori), 15/90 and Sl. list SRJ (Međunarodni ugovori), 4/96 and 2/97.
- Convention on the Suppression of Trade in Adult Women, Sl. list FNRJ, 41/50.
- Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others, Sl. list FNRJ, 2/51.
- Criminal Law Convention on Corruption, Sl. list SCG (Međunarodni ugovori), 18/05.
- European Charter of Local Self-Government, Sl. glasnik RS, 70/07.
- European Convention on the International Validity of Criminal Judgments, with appendices, Sl. list SCG (Međunarodni ugovori), 18/05.
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- European Convention on Extradition with additional protocols, *Sl. list SRJ (Međunarodni ugovori)*, 10/01.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, *Sl. list SRJ (Međunarodni ugovori)*, 1/02.
- European Charter on Regional and Minority Languages, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- ILO Convention No. 3 Concerning Maternity Protection, *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 11 Concerning Right of Association (Agriculture), *Sl. novine of the Kingdom of Yugoslavia*, 44-XVI/30.
- ILO Convention No. 14 Concerning Weekly Rest (Industry), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 16 Concerning Medical Examination of Young Persons (Sea), *Sl. novine of the Kingdom of Serbs Croats and Slovenes*, 95–XXII/27.
- ILO Convention No. 17 Concerning Workmen’s Compensation (Accidents), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95–XXII/27.
- ILO Convention No. 18 Concerning Workmen’s Compensation (Occupational Diseases), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95–XXII/27.
- ILO Convention No. 19 Concerning Equality of Treatment (Accident Compensation), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95–XXII/27.
- ILO Convention No. 29 Concerning Forced Labour, *Sl. novine of the Kingdom of Yugoslavia*, 297/32.
– ILO Convention No. 81 Concerning Labour Inspection, Sl. list FNRJ (Addendum), 5/56.
– ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Sl. list FNRJ (Dodatak), 8/58.
– ILO Convention No. 89 Concerning Night Work of Women (revised), Sl. list FNRJ (Dodatak), 12/56.
– ILO Convention No. 90 Concerning Night Work of Young Persons in Industry (Revised) Sl. list FNRJ (Dodatak), 12/56.
– ILO Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), Sl. list SFRJ (Međunarodni ugovori), 7/67.
– ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, Sl. list FNRJ (Dodatak), 11/58.
– ILO Convention No. 100 Concerning Equal Remuneration, Sl. list FNRJ (Međunarodni ugovori), 11/52.
– ILO Convention No. 103 Concerning Maternity Protection (Revised), Sl. list FNRJ (Dodatak), 9/55.
– ILO Convention No. 105 Concerning Abolition of Forced Labour, Sl. list SRJ (Međunarodni ugovori), 13/02.
– ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), Sl. list FNRJ (Dodatak), 12/58.
– ILO Convention No. 109 Concerning Wages, Hours of Work and Manning (Sea), (Revised), Sl. list SFRJ (Međunarodni ugovori), 10/65.
– ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, Sl. list FNRJ (Dodatak), 3/61.
– ILO Convention No. 121 Concerning Employment Injury Benefits, Sl. list SFRJ (Međunarodni ugovori), 27/70.
– ILO Convention No. 122 Concerning Employment Policy, Sl. list SFRJ, 34/71.
– ILO Convention No. 129 Concerning Labour Inspection (Agriculture), Sl. list SFRJ (Međunarodni ugovori), 22/75.
– ILO Convention No. 131 Concerning Minimum Wage Fixing, Sl. list SFRJ (Međunarodni ugovori), 14/82.
– ILO Convention No. 132 Concerning Holidays with Pay Convention (Revised), Sl. list SFRJ (Međunarodni ugovori), 52/73.
– ILO Convention No. 135 Concerning Workers’ Representatives, Sl. list SFRJ (Međunarodni ugovori), 14/82.
– ILO Convention No. 138 Concerning Minimum Age for employment, Sl. list SFRJ (Međunarodni ugovori), 14/82.

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- ILO Convention No. 140 Concerning Paid Educational Leave, *Sl. list SFRJ (Međunarodni ugovori),* 14/82.
- ILO Convention No. 144 Concerning Tripartite Consultation (International Labour Standards), *Sl. list SCG (Međunarodni ugovori)*, 1/05.
- ILO Convention No. 155 Concerning Occupational Safety and Health, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 156 Concerning Workers with Family Responsibilities, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 161 Concerning Occupational Health Services Convention, *Sl. list SFRJ (Međunarodni ugovori)*, 14/89.
- ILO Convention No. 182 Concerning the Worst Forms of Child Labour, *Sl. list SRJ (Međunarodni ugovori)*, 2/03.
- ILO Convention No. 183 of the Maternity Protection, *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, 7/71.
- International Criminal Court Statute, *Sl. list SRJ (Međunarodni ugovori)*, 5/01.
- Kyoto Protocol to the UN Framework Convention on Climate Change, *Sl. glasnik RS*, 88/07.
- Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 16/05.
- Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- Second Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Sl. list FNRJ (Dodatak)*, 7/58.
- UN Convention Against Corruption, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- UN Convention for the Protection of All Persons from Enforced Disappearance, *Sl. glasnik RS (Međunarodni ugovori)*, 1/11.
- UN Convention on the Reduction of Statelessness, *Sl. glasnik RS (Međunarodni ugovori)*, 8/11.
Appendix II

Legislation in Serbia Concerning Human Rights and Mentioned in the Report

– Act on Abortion in Medical Facilities, *Sl. glasnik RS*, 16/95 and 101/05 – other law.
– Act on Administrative Disputes, *Sl. glasnik RS*, 111/09.
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– Act on the Restitution of Property to Churches and Religious Communities, *Sl. glasnik RS*, 46/06.
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