

**JUSTICIABILITY
OF ECONOMIC
AND
SOCIAL RIGHTS
IN SERBIA**



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Belgrade, 2021

ISBN-978-86-900707-7-0

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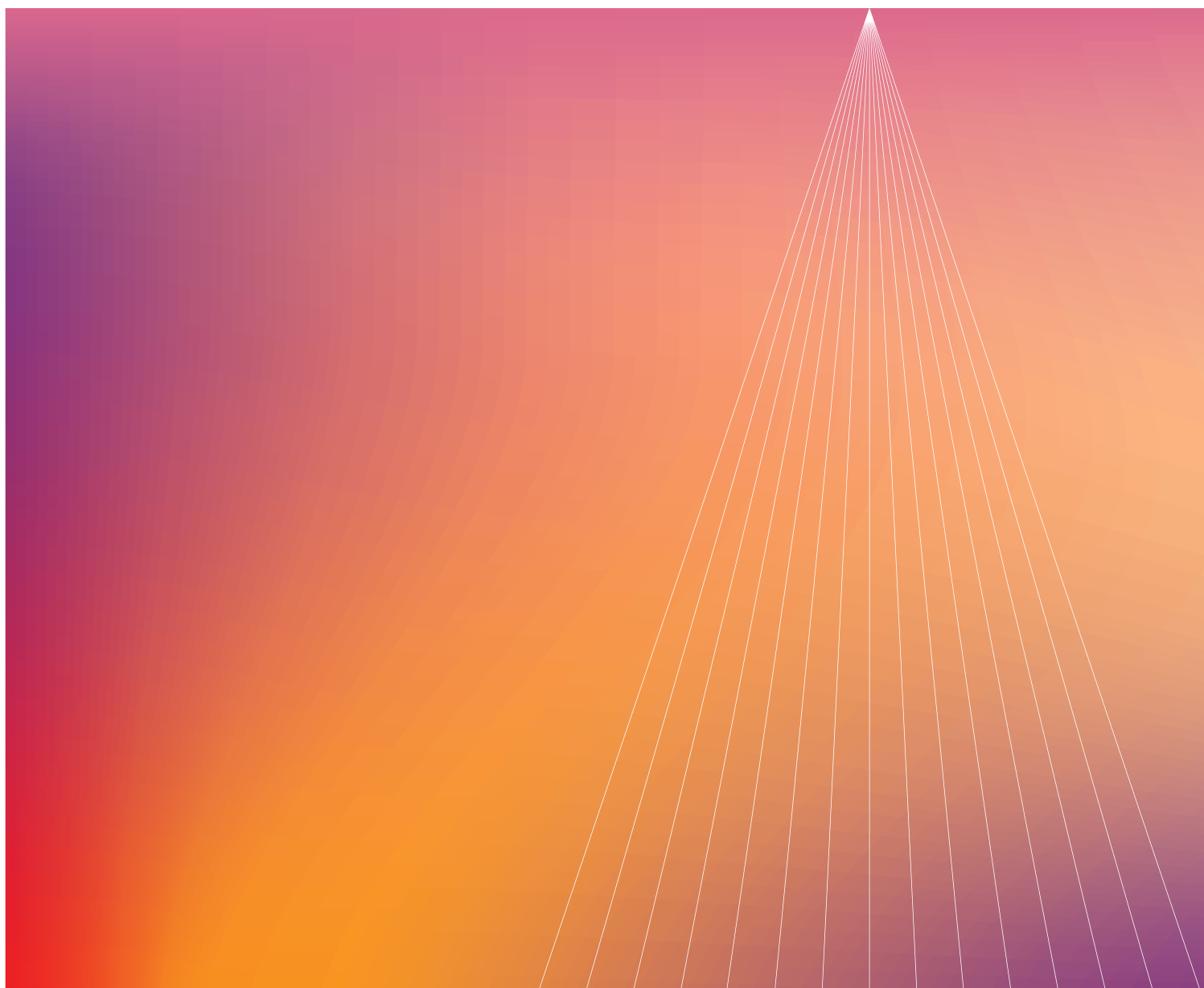
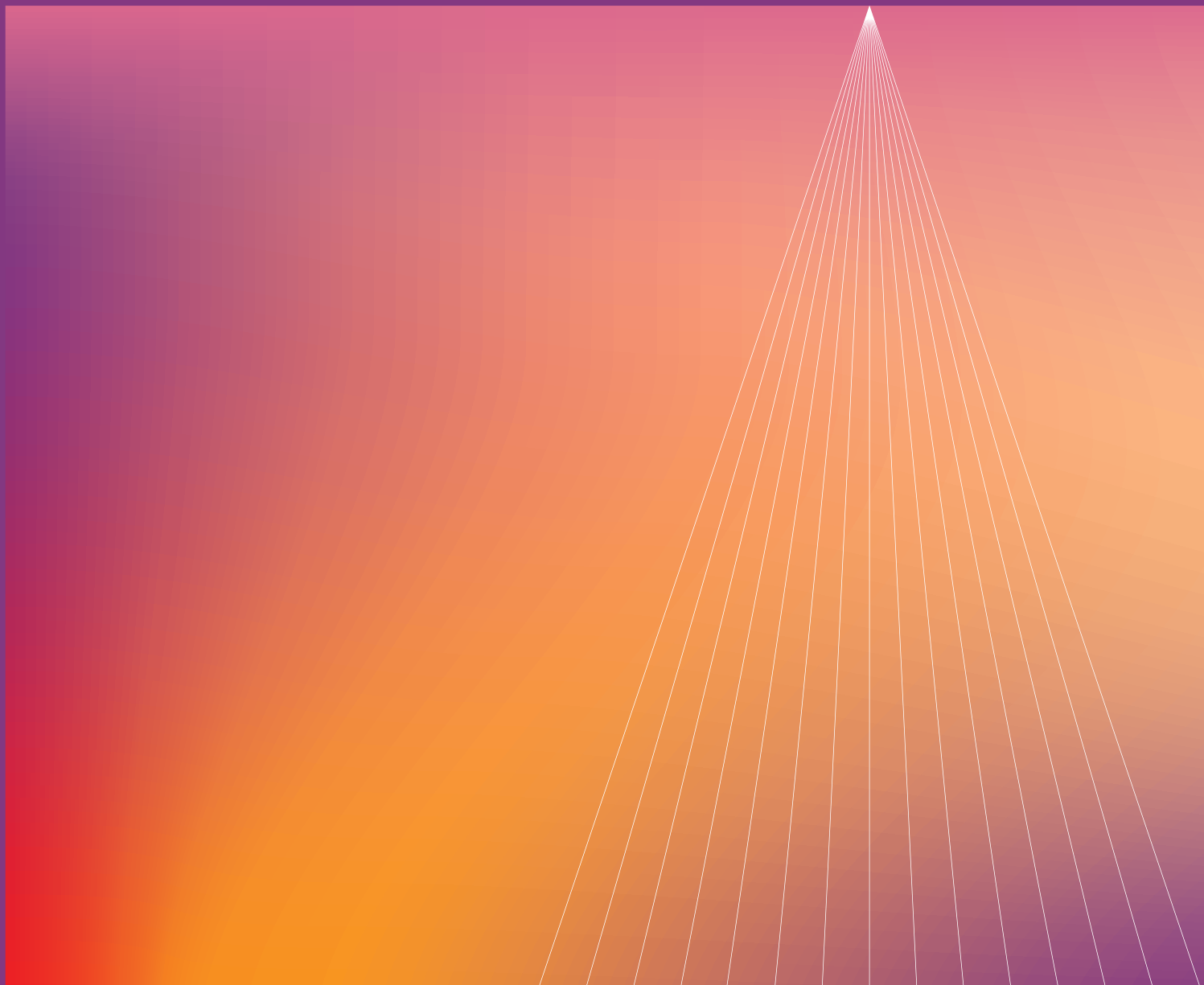


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Introduction

The issue of justiciability of economic and social rights is as old as the discussion about the nature of this generation of human rights. Although economic and social rights have been denied the character of the rights, stressing the fact that those are non-justiciable programmatic goals and political choices, the case law of courts in various countries around the world, concluding observations and other interpretive standards developed by the United Nation Committee on Economic, Social and Cultural Rights, the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and practice developed by the Committee in this respect are sufficient reasons to conclude that theoretical discussions on the justiciability of these rights often lag behind practical issues stemming from the implementation of provisions of the Covenant at the level of States Parties. Therefore, our intention is to present, through this analysis, basic issues regarding the status and justiciability of economic and social rights in Serbia, with special reference to the right to social protection, health care, work and housing. Given the growing number of citizens complaining of violations of various economic and social rights, we hope that this analysis will contribute to contemplating steps to improve the protection of economic and social rights in Serbia, especially from the perspective of considering the signing and ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

After a brief overview of the existing modalities of economic and social rights protection, the analysis examines the extent to which economic and social rights are guaranteed and protected in Serbia as well as shortcomings of the existing protection mechanisms. Starting from the identified shortcomings, the analysis points out the advantages that the ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights could have. Furthermore, the analysis compares the situation in Serbia with countries that can be described as more progressive when it comes to the justiciability of economic and social rights. The purpose of this comparison, as well as the overall analysis, is to examine the effectiveness and possibilities of improving the mechanisms for the protection of economic and social rights in Serbia.

Justiciability of Economic and Social Rights

The issue of justiciability is closely related to the provision of legal remedies; the need to provide legal remedies when rights are violated is highlighted in the Universal Declaration of Human Rights, which does not distinguish between civil and political rights, on the one hand, and social, economic and cultural rights, on the other hand, stipulating that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.¹

Providing legal remedies for violations of economic and social rights is associated with a number of difficulties, both due to the (often still unclear) status of these rights in the domestic law of different states, as well as due to the fact that exercising these rights requires significant resources, the distribution of which, according to some arguments, should remain outside the court jurisdiction, in accordance with the principle of separation of powers.²

Arguments in favor of non-justiciability of social and economic rights stress that these are neither real rights nor individual entitlements, but they rather represent guidelines and desirable goals for states, hence too vague to be achievable; moreover, by ruling on social and economic rights, the courts would encroach upon the executive and legislative powers.³ It is pointed out that social policy measures, regardless of whether they relate to the amount of social benefits, the adequacy of economic policy to reduce unemployment or other issues relevant to the exercise of socio-economic rights, fall within the domain of executive and legislative power, not the judiciary.⁴ Among the arguments against the justiciability of economic and social rights, the one that stands out states that in this way the scope for exercising the right to self-determination would be narrowed down.⁵ It is also stated that the judiciary does not have the democratic legitimacy, institutional capacity or expertise to decide on social policy issues and resource allocation.⁶

As practice shows, courts often use the above arguments to avoid adjudication in delicate and difficult cases.⁷ Similar arguments are also used by the Constitutional Court of Serbia, which, for

1 Article 8 of the Universal Declaration of Human Rights. For more details on remedies in international law and justiciability, see, for example, Katie Boyle & Edel Hughes, "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights", *The International Journal of Human Rights*, 2018, 22:1, 43-69, 49.

2 For more details on this and other arguments against justiciability of social and economic rights, as well as counterarguments and objections, see Olivier de Schutter, *International Human Rights Law, Cases, Materials, Commentary*, Cambridge University Press, 2010 740. Katie Boyle & Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit.

3 For more details on this topic and counterarguments, see, for example, Olivier de Schutter, *International Human Rights Law, Cases, Materials, Commentary*, Cambridge University Press, 2010, 742.

4 Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008.

5 Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, op. cit., 741.

6 Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit.; Katie Boyle and Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 50-51. L. Fuller, "The Forms and Limits of Adjudication", *Harvard Law Rev*, 1978, 353, Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act: Human Rights Law in Perspective*, Hart Publishing, 2007, 27.

7 Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 31.

example, in the decision to dismiss the initiative for assessment of the constitutionality of the law imposing pension cuts, refers to the principle of separation of powers and emphasizes: „The Constitutional Court stressed that, pursuant to Article 123 of the Constitution, the Government shall establish and pursue policy, and propose to the National Assembly adoption, amendments and termination of laws. The contested law was proposed and adopted as part of a package of measures aimed at public finance consolidation. *The issue of the public finance consolidation is primarily an economic issue, as well as the assessment of whether the overall measures have achieved it or not. Consideration of public finance and economic trends and outlooks falls within the scope of the executive power, and not the Constitutional Court, which cannot examine such considerations and assess whether they are substantiated or not, because it does not fall within its competence.*“⁸

With reference to the above statement that matters involving the allocation of resources should be left to the political authorities rather than to the courts, the Committee for Economic, Social and Cultural Rights stresses that while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications.⁹ Moreover, both civil and political rights require considerable resources and substantial judicial costs.¹⁰

It should also be borne in mind that allowing the courts to point out that certain issues in the field of social policy require new solutions is not the same as taking over the legislative role.¹¹ Contrary to the argument that deciding on economic and social rights represents an inadmissible review of executive and legislative decisions, such a role of courts is derived from the need to ensure that the rights of minorities or marginalized groups are not violated by decisions made by the majority.¹² The review of government actions in order to avoid human rights violations is legitimate both in the socio-economic domain, as well as in all other areas of executive and legislative power.¹³

In particular, courts are not required to *adopt* laws or policies, but to *review* them according to precisely defined criteria - in this case human (economic and social) rights.¹⁴ Although it is pointed out that the courts are not democratically elected representatives of the people and do

8 Decision of the Constitutional Court Iuz-48/2019 of 5/7/2019. However, it should be borne in mind that the principle of separation of powers was not the (only) reason for rejecting initiatives to assess the constitutionality of pension cuts. For more details, see the subtitle "Arbitrary Reduction of Pensions and Lack of an Effective Remedy."

9 Committee for Economic, Social and Cultural Rights, General Comment No. 9, para. 10.

10 See, for example, James Nickel, "Poverty and Rights", *The Philosophical Quarterly*, Vol. 55, No. 220, July 2005, 398-399.

11 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge, 2012, 208, 196.

12 Aoife Nolan et al., *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Belfast: Human Rights Consortium, March 2007), as cited in Katie Boyle, Edel Hughes, "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights", op. cit., 51. Committee for Economic, Social and Cultural Rights, General Comment No. 9, para 10.

13 Aoife Nolan et al., *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Belfast: Human Rights Consortium, March 2007), as cited in Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 51.

14 Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 34.

not have sufficient expertise to determine how much funds need to be allocated for exercising certain rights, the courts have jurisdiction to ensure that the legislator exercises its jurisdiction in accordance with the constitution.¹⁵ Instead of viewing the provision of judicial protection to victims of violations of economic and social rights as an usurpation of executive and legislative power, justiciability of economic and social rights could be seen as cooperation between different branches of government. The justiciability of social and economic rights may contribute to creation of a new model of cooperation between different branches of government and constitutionally based dialogue on how to ensure more effective respect for human rights.¹⁶ The review of the observance of these rights by the courts could lead to the creation of a system in which the issue of compliance with economic and social rights is dealt with equally by legislative, executive and judicial branch, holding each other accountable in case of violation of rights, whereby judicial protection is used as a last resort.¹⁷ If there is a sincere commitment to the protection of economic and social rights (and this is a key precondition for their justiciability), the separation of powers can be seen as dynamic and continuous cooperation and interaction between different branches of government, whereas all branches are – or should be – committed to the general goal of promoting socio-economic rights.¹⁸ Moreover, if there is a genuine will to ensure the protection of economic and social rights, to the same extent as civil and political rights – which shows that the needs and interests of all members of society, including the most marginalized, are equally taken into account – it is entirely feasible for courts to ensure the protection of such rights, without undermining the principle of separation of powers.¹⁹

Similar positions are expressed by judges of the Constitutional Court of Serbia in separate opinions attached to the decision related to the constitutional review of the regulation envisaging pension cuts in Serbia: “There is a point when the Constitutional Court must not remain silent and passive, and that is when the legislator exercises its broad competence contrary to the principles of the Constitution, unconstitutionally restricting the human and minority rights guaranteed by the Constitution.”²⁰ “The Constitutional Court is in a position to assess whether acts and actions taken by the legislature violate the constitution in force, which, therefore, must be adhere to, and whether the human rights guaranteed by that constitution have been violated. Therefore, when performing the constitutional function of protector of the constitutionality and legality of the current constitution and human rights guaranteed by it, the Constitutional Court must express the necessary and, depending on the circumstances of the case, indispensable criticism of acts of all other bodies, assessing their relationship with relevant norms contained in the Constitution and (...) impose sanctions for actions contrary to the constitution, which consist in striking down unconstitutional regulations.”²¹

15 Pius Langa, “Taking Dignity Seriously - Judicial Reflections on the Optional Protocol to the ICESCR”, *Nordisk Tidsskrift for Menneskerettigheter*, Vol. 27, Nr. 1, s. 29-38, 35. Tamaš Korhec, *Separate Opinion on the Constitutional Court Decision No. IUz-138/2016*.

16 Olivier de Schutter, *International Human Rights Law, Cases, Materials, Commentary*, op. cit., 742.

17 Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 57.

18 Paul O’Connel, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op. cit., 201.

19 *Ibid*, 208.

20 Tamaš Korhec, *Separate Opinion on the Constitutional Court Decision No. IUz-138/2016*.

21 Olivera Vučić, *Separate Opinion on the Constitutional Court Decision No. Iuz-531/2014 of 23 September 2015*.

There is no doubt that, despite all the arguments presented against the justiciability of economic and social rights, these rights are increasingly receiving protection before the courts. The number of decisions protecting various social rights is continuously growing and covers issues such as homelessness, forced eviction, health and social protection, water and medicine supply, malnutrition and the right to education.²² There are significant differences in the manner and efficiency of protection of economic and social rights in the legal systems of different countries. Despite these differences, examples of successful protection of economic and social rights are so widespread, that the key question is no longer whether judicial protection of economic and social rights can be provided, but to what extent this protection is currently available before the courts in various countries, and how this protection can be improved.²³

Difficulties related to exercising and protecting socio-economic rights cannot negate the very nature of rights and should not result in perceiving these rights as inferior to civil and political rights.²⁴ Finally, the indivisibility and interdependence of civil and political and socio-economic rights should be kept in mind. Thus, for example, freedom of expression or association does not mean much to starving individuals.²⁵

The justiciability of economic and social rights is not questioned by the Committee on Economic, Social and Cultural Rights, especially after the adoption of General Comment 9, which deepens some of the issues raised in General Comment 3²⁶, in which the Committee examines the legal nature of States Parties' Obligations under the Covenant. In its General Comment No. 9, the Committee points out that the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.²⁷ There are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.²⁸

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights.²⁹ This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.³⁰ The Committee has already made clear that it considers many of the provisions in the Covenant be capable of immediate implementation.

22 For more details, see Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 3.

23 *Ibid.*

24 Katie Boyle & Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 51. Pius Langa, *Taking Dignity Seriously - Judicial Reflections on the Optional Protocol to the ICESCR*, op. cit., 35.

25 Pius Langa, *Taking Dignity Seriously - Judicial Reflections on the Optional Protocol to the ICESCR*, op. cit., 35.

26 Committee for Economic, Social and Cultural Rights, General Comment No. 3.

27 Committee for Economic, Social and Cultural Rights, General Comment No. 9.

28 *Ibid.*, para. 9.

29 *Ibid.*

30 *Ibid.*, para. 10.

While the general approach of each legal system needs to be taken into account, in the great majority of systems, all Covenant rights contain at least some important dimensions of justiciability.³¹ The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.³²

Both the views of the Committee and the case law of the courts of different countries show that the issue of justiciability of economic and social rights refers much more to the possibility of improving the protection of these rights, rather than the principled possibility of providing such protection. Therefore, the next question is **how the protection of social and economic rights is ensured in practice and what characteristics legal remedies should have.**

In general, in terms of legal remedies, there are two key components or dimensions: first, in procedural terms, the existence of a remedy implies the availability of a procedure in which an individual who claims to be a victim of human rights violation has the opportunity to have his/her allegations on violation of rights heard and decided upon by courts, administrative or other competent bodies.³³ The second dimension of the legal remedy refers to the very outcome of these proceedings and provision of adequate redress for such violations.³⁴ An important component of legal remedies is the possibility to obtain compensation, to contribute to the condemnation of violations of rights, as well as to prevent future violations.³⁵ However, when it comes to economic and social rights, it should be borne in mind that effects to be expected from remedies are not always immediate and that court decisions relating to these rights are often given in the form of guidelines aimed at helping states to fulfill their obligations in the domain of social and economic rights.³⁶

In its General Comment No. 9, the Committee on Economic, Social and Cultural Rights points out that the right to an effective remedy does not always have to be a judicial remedy. Administrative measures will be sufficient in many cases, and these measures should be accessible, affordable, timely and effective.³⁷

31 *Ibid.*

32 *Ibid.* For more details on the role of institutions such as constitutional courts in protection of rights of minority and vulnerable groups, see Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, 145.

33 Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2005, as cited in Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*”, *op. cit.*, 49.

34 *Ibid.*

35 *Ibid.*

36 Pius Langa, *Taking Dignity Seriously - Judicial Reflections on the Optional Protocol to the ICESCR*, *op. cit.*, 32

37 Committee on Economic, Social and Cultural Rights, *General Comment no. 9 (The domestic application of the Covenant)*, para 9.

Models of Justiciability

Models of justiciability and procedures conducted in order to provide protection in case of violation of economic and social rights depend on the status these rights have in the specific legal system. Although the practice of states, i.e. the status of social and economic rights in the comparative law, varies greatly, there are several ways to protect social and economic rights in domestic constitutional orders:

1. direct and explicit guarantees of social and economic rights in the constitution;
2. justiciability in the form of guiding principles of state policy that are not directly applicable;
3. protection of social and economic rights as inseparable components of civil and political rights; and
4. protection of social and economic rights based on the prohibition of discrimination.³⁸

In the last few decades, there has been a noticeable trend of embedding economic and social rights in the constitutions.³⁹ Even among those countries that include economic and social rights in the catalog of human rights covered by the constitution, their status may differ. In some countries, especially in post-communist countries, the distinction between civil and political and economic and social rights is not drawn.⁴⁰ We often find a mixed approach in the constitutions, which implies that certain socio-economic rights are directly applicable and justiciable, while others are left to the discretion of the legislator and are not perceived as subjective rights, but as guiding principles and goals of the state in social policy. Thus, for example, in the Spanish Constitution there is a difference between “rights and freedoms” (guaranteed in Section II of the Constitution) and the “guiding principles of economic and social policy” (listed in Section III of the Constitution).⁴¹ The Irish Constitution also draws a distinction between fundamental rights and guiding principles of economic policy, which encompass most economic and social rights which are not justiciable before courts.⁴²

38 Not all models of justiciability of socio-economic rights will be analyzed in detail, nor will be listed. Only a few basic models that may be important for the Republic of Serbia will be briefly presented here. Moreover, since at least in theory the justiciability of socio-economic rights directly recognized and directly applicable does not generate major doubts, more attention will be paid here to models of justiciability based on civil and political rights or on non-discrimination. For more details on possible models of justiciability, see Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op. cit., 178; Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication*, op. cit., 137-199.

39 Malcolm Langford, *Judicial Review in National Courts: Recognition and Responsiveness*, in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, Oxford University Press, 2014, 419.

40 Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Second Edition, Springer, 2014.

41 *Ibid.*

42 *Ibid.*

From the aspect of protection of the rights of individuals, explicit protection of socio-economic rights in the constitutions is undoubtedly a more desirable option, which is more appropriate in order to provide those rights with the same level of protection as provided to civil and political rights. In some countries the constitution does not guarantee social and economic rights, but this does not have to be a (complete) obstacle to the justiciability of those rights. Judicial protection in such cases is most often provided by relying on the interdependence of social and economic and civil and political rights or by focusing on the prohibition of discrimination.

Economic and Social Rights as a Component of Civil and Political Rights

One of the models of justiciability of economic and social rights is the justiciability based on civil and political rights and the indivisibility of human rights. The indivisibility of human rights is very often emphasized in order to use civil and political rights guarantees to provide protection in cases of violations of economic and social rights in those legal systems where there are no social rights guarantees to which victims could invoke and seek judicial protection. In those national systems where direct access to justice for violations of economic and social rights is not provided, reliance on indivisibility remains crucial.⁴³ For example, in those countries where international treaties guaranteeing human rights are not an integral part of the domestic legal order, nor are they directly applicable, nor are there constitutional provisions or corresponding provisions in laws guaranteeing economic and social rights, judicial protection of those rights can be provided with reliance on civil and political rights.

The use of traditional political and civil rights to protect economic and social rights is not new. The right to life, the prohibition of torture, the right to respect for private and family life and the right to a fair trial and provisions on the prohibition of discrimination have been used with more or less success to access economic and social rights.⁴⁴ We find excellent examples of this way of justiciability of social rights in the practice of the Supreme Court of India. For example, although the Constitution of India does not provide for the legal protection of the right to health, the Supreme Court in that country ensured the protection of the right to health, by applying a broad definition of the right to life.⁴⁵ Also, according to the Supreme Court of India, an important component of the right to life is the right to own means of subsistence, without which the survival of every individual is endangered.⁴⁶ If the right to possess the means of subsistence were not treat-

43 Iona Cismas, *The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights* in Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law. Contemporary Issues and Challenges*, op. cit.

44 See, for example, Ellie Palmer, *Protecting Socio-Economic Rights through European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, *Erasmus Law Review*, Volume 2, Issue 4, 2009.

45 Supreme Court of India, *Bandhua Mukti Morcha v. Union Of India & Others*, 16 December 1983. Shivani Verma, *Justiciability of Economic, Social and Cultural Rights: Relevant Case Law*, The International Council on Human Rights Policy, Review Meeting, Rights and Responsibilities of Human Rights Organizations, 2005.

46 *Olga Tellis b. Bombay Municipal Corporation (BMC)*: Shivani Verma, *Justiciability of Economic, Social and Cultural Rights: Relevant Case Law*, op. cit., 3.

ed as an integral part of the constitutionally guaranteed right to life, complete deprivation of the means of subsistence would be the easiest way to take someone's life.⁴⁷

The Irish Constitution draws a distinction between fundamental rights and guiding principles of economic policy, which encompass most economic and social rights that are not justiciable before courts. Therefore, in order to provide constitutional protection in the event of a violation of economic and social rights, citizens must primarily rely on civil and political rights, including the right to equality.⁴⁸

This modality may also be crucial for individuals whose socio-economic rights have been violated and whose states have not ratified the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "Covenant"; "ICESCR"), nor have they provided an adequate domestic remedy, but have ratified other instruments (regional or universal) that provide for judicial or quasi-judicial protection of civil or political rights. Thus, for example, in the case law of the European Court of Human Rights (hereinafter referred to as the "European Court", "ECHR"), **a breach of the right to life** can be determined due to the failure to provide adequate and timely medical care.⁴⁹ The European Court took a position that Article 2 guaranteeing the right to life impose on the State the obligation not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. These principles apply also to the area of public health.⁵⁰ It cannot be excluded that the acts and omissions of the authorities in the context of public health policies may, in certain circumstances, engage responsibility under Article 2 of the Covenant.⁵¹

When it comes to the case law of the European Court, special attention should be paid to cases related to prison conditions. In situations where individuals are completely under state control, Articles 2, 3 and 8 of the European Convention may impose an obligation on the state to provide basic medicines or conditions that are consistent with the need to preserve the physical and mental integrity of vulnerable persons.⁵² Thus, in the case of *Mandić and Jović v. Slovenia*, it is argued that the conditions in the Ljubljana prison had been such as to have resulted in a violation of Articles 3 and 8 of the Convention, as well as Article 13, because no effective remedy had been provided to rectify such a situation.⁵³ The government pointed out that there was a plan to replace the prison in Ljubljana with a new prison, but that the completion of that project depended on financial resources.⁵⁴ The Court agreed that solving the problem of prison cell overcrowding could require significant financial resources, but stressed that the lack of financial resources could not in principle justify prison conditions that were so poor as to raise the issue of compli-

47 *Ibid.*

48 Equal Rights Trust, *Economic and Social Rights in Courtroom: A Litigator's Guide to Using Equality and Non-discrimination Strategies to Advance Economic and Social Rights*, London, December 2014, 14.

49 See, for example, ECHR, *Senturk v. Turkey*, Application no. 13423/09, Judgment of 9 April 2013:

50 *Senturk v. Turkey*, para. 79.

51 *Ibid.* In the case of petitions relating to health care, although the Court recognizes relevance to Article 2, in such cases it is more inclined to rule based on Article 3, or even Article 8. For more details, see Ellie Palmer, *Protecting Socio-Economic Rights through European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, *op. cit.*

52 For more details, see Ellie Palmer, *Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*.

53 ECHR, *Mandić and Jović v. Slovenia*, Application no. 5774/10 and 5985/10, Judgment of 20 October 2011.

54 *Ibid.*, para 9.

ance with Article 3 of the Convention and that states must organize their prison system so as to ensure respect for the dignity of prisoners, regardless of financial and logistical difficulties.⁵⁵ A similar conclusion was made by the European Court in the case of *Kalashnikov v. Russia* stressing that the states cannot justify inhumane treatment of prisoners by lack of funds.⁵⁶ Cases like these show that the European Court of Human Rights can also deal with the consequences of economic decisions of states.⁵⁷

Therefore, even states that have not ratified the Optional Protocol to the Covenant can easily face a review of their actions and decisions relating to social and economic rights, which may carry a greater stigma if the applicants are forced to protect their social and economic rights based on, for example, the right to life or the prohibition of racial discrimination or the prohibition of torture.

Article 6 of the European Convention on Human Rights i.e., **right to a fair trial**, can also be important for social and economic rights. The right to a fair administrative procedure is often perceived as the most important way to protect the social and economic rights of the vulnerable and marginalized people.⁵⁸ In the case law of the Constitutional Court of Serbia, reliance on the right to a fair trial and trial within a reasonable time is important in proceedings related to the exercise of social rights, despite explicit constitutional guarantees of social and economic rights. The case law of the Constitutional Court of Colombia points out that the state must ensure efficient exercise of the right to social benefits, as well as that the introduction of excessively complicated procedures and conditions for exercising the right represents an unjustified and unacceptable obstacle to enjoying the right to social protection.⁵⁹

In the United States of America as well (despite the often negative attitude of the US towards the recognition of social and economic rights, both domestically and internationally)⁶⁰, the Supreme Court found that a body that abolishes social benefits arbitrarily and abruptly can violate the right to a fair trial. Namely, in the case of *Goldberg v. Kelly*, before the Supreme Court a question was posed whether the termination of financial aid, without prior hearing of the recipients of that financial aid, constitutes a violation of the right to a fair trial.⁶¹ The court found a violation and held that states must afford public aid recipients a pre-termination evidentiary hearing before discontinuing their aid.⁶² Stressing that social benefits are statutory entitlements, not mere privileges, the Court weighed welfare recipients' need for procedural due process against the competing considerations of the possible harm they might suffer from discontinuation and the government's

55 *Ibid*, para 126.

56 ECHR, *Kalashnikov v. Russia*, petition no. 47095/99, judgement of 5 July 2002. For more details, see, for example, I. Krstić, T. Marinković, *European Human Rights Law*, op. cit., 132.

57 However, it should be borne in mind that the Court's approach to the scope of the State's obligation to ensure the exercise of social and economic rights differs outside the context of prison conditions when individuals are not under the full control of the State. For more details, see Ellie Palmer, *Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, op. cit.

58 Ellie Palmer, *Protecting Socio-Economic Rights through European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, op. cit., 420.

59 Jackie Dugard, Bruce Porter, Daniela Ikawa, Lilian Chenwi (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing, 2020, 106.

60 For more details see, for example, Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act: Human Rights Law in Perspective*, Hart Publishing, 2007, 17.

61 Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 16.

62 *Goldberg v. Kelly*, available at: www.oyez.org/cases/1969/62.

interest in summary adjudication. The Court concluded that state interests in conserving administrative costs are not sufficient to override the interests of social assistance beneficiaries in procedural due process that include the right to a fair trial.⁶³

It is beneficial to examine the example of Germany. The German Constitution does not guarantee all social and economic rights, but provides for **the right to human dignity**, which the Constitutional Court interpreted in such a way that based on the right to human dignity, minimum standards can be established for each individual social right.⁶⁴ Thanks to the synergy between the constitutionally guaranteed right to human dignity and the guiding principle of the welfare state, as of 1960, the German Constitutional Court determined that the state shall provide each person with the financial conditions necessary for his physical existence and minimum participation in social, cultural and political life.⁶⁵ According to this interpretation, the amount of social benefits must be such to satisfy the subsistence minimum.

Although we see numerous successful examples of the justiciability of economic and social rights based on civil rights, such protection is still only partial, uncertain and cannot fully compensate for the justiciability of economic and social rights. Protection may be lacking in those cases where social rights cannot be closely linked to civil rights.⁶⁶ Above all, this approach does not protect the essential interests related to social rights, and the protection of the most vulnerable individuals depends on the creativity, innovation and discretion of the courts.⁶⁷

Protection of Social and Economic Rights based on the Principle of Equality and Non-discrimination

Access to social rights is often denied not because of insufficient resources, but because of the violation of the principle of equality. Therefore, reliance on anti-discrimination provisions can also be crucial for the protection of vulnerable groups who are denied access to certain social and economic rights.

The prohibition of discrimination in access to economic and social rights stems not only from instruments dedicated to the protection of those rights, but also from instruments primarily dedicated to civil and political rights, such as the ECHR and the International Covenant on Civil and Political Rights. Thus, Article 14 of the ECHR is applicable not only to rights which the State is obliged to secure under the Covenant, but also to all those rights which the State voluntarily recognizes and which fall within the general scope of application of any article of the Covenant.⁶⁸

⁶³ Ibid.

⁶⁴ Malcolm Langford, *Judicial Review in National Courts: Recognition and Responsiveness*, in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, op.cit., 421.

⁶⁵ Ibid.

⁶⁶ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op.cit., 180.

⁶⁷ Ibid.

⁶⁸ Ivana Krstić, Tanasije Marinković, *European Human Rights Law*, Council of Europe, Belgrade, 2016, 98.

Article 26 of the Covenant on Civil and Political Rights also requires that all legislation be non-discriminatory and that its application be extended to social and economic rights.⁶⁹ This has been clearly confirmed in practice, as the right to equal enjoyment of the right to social security has been protected before the UN Human Rights Committee since the 1980s.⁷⁰

When it comes to national courts, **the Constitutional Court of the Republic of South Africa** has had the opportunity to examine whether the exclusion of foreigners from certain social benefits constitutes discrimination. This is the Khosa case⁷¹, which concerned the exclusion of permanent residents from a number of social security rights. The applicant argued that it is inconsistent with the state's obligations under Section 27 of the Constitution, which provides access to social security to *everyone*, as well as the right to equality. Citizenship is cited as the ground for discrimination.⁷² The Court concluded that the reference to "everyone" in Section 27 shall be interpreted to include non-citizens.⁷³ However, given the limited resources and the fact that it would be unaffordable to provide social benefits to all residing in the territory of the state, the court did not consider whether it was allowed to draw the distinction between all non-citizens, including foreigners with temporary residence and migrants without regulated status, but examined whether it was reasonable to draw a distinction between citizens and foreigners with permanent residence.⁷⁴ It was concluded that the position of permanent residents is largely equal to the position of citizens and that therefore their exclusion from social benefits is unjustified.⁷⁵ In contrast, the Constitutional Court of Serbia has taken the position that the complete exclusion of foreigners (even those with permanent residence in Serbia) from certain financial benefits is in accordance with the Constitution.⁷⁶

The right to non-discrimination and equality is particularly important in the context of the right to social protection and social security, as certain risks that may lead to social vulnerability arise only in certain groups (such as, for example, pregnant women) or among marginalized groups, that are otherwise at greatest risk of being in need of social assistance.⁷⁷

Therefore, the right to equality can also serve as a very important mechanism on the basis of which vulnerable and marginalized groups can seek protection of their economic and social rights.⁷⁸ However, similarly to protection based on the interdependence of human rights, if the

69 HRC, *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987).

70 See, for example, HRC, *Broeks v. the Netherlands*. Jackie Dugard, Bruce Porter, Daniela Ikawa, Lilian Chenwi (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, op. cit., 100.

71 South African Constitutional Court Case: *Khosa and Others v. The Minister of Social Development and Others* 2004 (6) SA 505 (CC)

72 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op. cit., 62-64.

73 Ibid.

74 Ibid.

75 Ibid.

76 Decision of the Constitutional Court 104/2014 of 01 October 2014 and assessment of constitutionality of the Law on Financial Support to Families with Children (Official Gazette of RS, Nos. 16/02, 11/05 and 107/09). For more information, see the subsection "Social Protection and Social Insurance".

77 Malcolm Langford and Jeff A. King, *Committee on Economic, Social and Cultural Rights: Past, Present and Future*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 507.

78 Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication*, op. cit., 151.

justiciability of economic and social rights is reduced to cases in which discrimination can be established as well, this can bring sporadic victories, but it cannot achieve comprehensive and adequate protection of social and economic rights.⁷⁹ Although the case law of both domestic and international judicial and quasi-judicial mechanisms shows that both presented models of indirect justiciability of social and economic rights (based on the interdependence of human rights and non-discrimination) are useful, it is desirable that the constitutions protect economic and social rights explicitly.

Legal Remedies and Mechanisms for Protection of Economic and Social Rights

In addition to the question regarding the status of social and economic rights and whether and to what extent they are included in the constitutions and legal orders of different states, it is important to examine in what procedures their protection can be sought. The proclamation of human rights, no matter how important, will not have a great impact on vulnerable individuals if those rights are not justiciable. In order to be justiciable, in addition to the explicit recognition of those rights, it is necessary for the legal system to provide adequate legal remedies and control mechanisms suitable for determining violations of those rights and obligations that states have in connection with their exercise.⁸⁰

Although the case law of different countries differs in this segment as well, several approaches can be observed. Protection, for example, can be provided through (abstract) judicial review of the constitutionality of regulations (both ex-ante and/or ex-post review), as well as through judgements in individual cases of violation of rights (individual protection of people whose rights have been violated). Constitutional courts, where they exist, are usually not part of the regular judicial system (as is the case in Serbia) but represent special institutions in charge of protecting constitutionality. Constitutional review differs significantly from the usual judicial function of law enforcement.⁸¹ By implementing the constitutional review, the above courts do not prosecute natural persons and legal entities, but decide on laws and general legal acts that violate the constitution.⁸² However, the constitutional courts are often entrusted with conducting proceedings aimed at protecting specific human rights, and in that sense they can be seen as the last effective legal remedy within the national legal system. The inclusion of constitutional courts in the direct protection of constitutionally guaranteed rights, primarily through the proceedings based on constitutional complaint or petitions, bring constitutional courts closer to regular courts.⁸³

79 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op. cit., 180.

80 Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Second Edition, Cambridge University Press, 2006, 95.

81 Ratko Marković, *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Petnaesto izdanje, 2011, 540.

82 Bosa Nenadić, *Ustavni sud Republike Srbije u svetlu Ustava iz 2006. godine*, op. cit.

83 Bosa Nenadić, „O nekim aspektima odnosa ustavnih i redovnih sudova“, *Uloga i značaj ustavnog suda u očuvanju vladavine prava*, Ustavni sud Republike Srbije, Beograd, 2013, 71.

We find both of these types of protection (judicial review and direct protection of individual human rights) in Colombia, for example, and the case law of the Colombian Constitutional Court regarding specific, individual cases of violation of social and economic rights and the way the court interpreted the Constitution to provide protection of rights that are not explicitly stated in the Constitution deserve special attention.

Constitutional Court Protection in Individual Cases of Violation of Economic and Social Rights – Colombia

The Colombian Constitution provides for a mechanism of judicial protection (“tutela”), thanks to which a person who considers that his/her basic rights guaranteed by the Constitution have been violated can immediately turn to any court.⁸⁴ All rulings issued by the courts in these proceedings are forwarded to the Constitutional Court and subject to review before the Constitutional Court.⁸⁵ If the need arises, the Constitutional Court may combine several related procedures in order to overcome certain systemic problems and obstacles that, for example, affect large number of vulnerable individuals.⁸⁶ In the practice so far, the Constitutional Court of Colombia has pointed out, *inter alia*, that the progressive realization of economic and social rights shall not be interpreted in such a way to render the state’s obligations completely meaningless, recalling that the fact that these rights are explicitly recognized in the Constitution implies that the state shall envisage at least an action plan for the implementation of the said rights.⁸⁷ Moreover, the Colombian Constitutional Court stressed that with regard to rights where there is an obligation of progressive realization, such nature of obligation cannot justify failure to take measures in order to fully exercise those rights; moreover, retrogressive measures in exercising those rights (or allocating resources for their implementation) are *prima facie* contrary to the Constitution.⁸⁸

The Colombian Constitutional Court has developed **a concept of “fundamental rights by connection”**, which refers to socio-economic rights that are embedded in the rights defined as fundamental in the Constitution, in such a way that lack of their direct protection would imply violation of and threat to fundamental rights.⁸⁹ Similar to the German Constitutional Court and the already mentioned concept of “Existenzminimum”, a concept has been developed in Colombia, according to which everyone has the right to the minimum conditions necessary for living in dignity.⁹⁰ Although the Court notes that such a right is not explicitly stated in the Constitution, it considers that it can be developed on the basis of the right to life and the right to health, work

84 For more details, see Magdalena Sepulveda, *Colombia: The Constitutional Court’s Role in Addressing Social Injustice*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008, 144 ff.

85 Ibid.

86 Magdalena Sepulveda, *Colombia: The Constitutional Court’s Role in Addressing Social Injustice*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op.cit.

87 Ibid.

88 Ibid.

89 Ibid.

90 Ibid.

and social protection.⁹¹ The Court considers that in cases of extreme urgency, when the existence of an individual and his family is in danger, it is possible to submit a request for protection as a form of urgent measure in order to exercise socio-economic rights.⁹² The Court recognizes that, if individuals in a state of extreme vulnerability were left without timely protection, they could be left without the means deemed necessary for life, as a result of which their dignity would also be violated.⁹³ Therefore, timely judicial protection is needed in such cases. The Court has applied this concept in cases of denial of maternity benefits, pensions or salaries, if these benefits are the only income available to individuals or families.⁹⁴ Although, in principle, *tutela* would not be applicable if other means were available (such as labor or administrative disputes), the Colombian Constitutional Court considers it unacceptable to procrastinate in providing a remedy for individuals who are already at high risk.⁹⁵

Constitutional (Normative) Review

Review of the constitutionality (abstract judicial review) of regulations is also important for the protection of economic and social rights. It is mainly about the power of constitutional courts to assess whether a certain law is in accordance with the constitution or ratified international treaties, or whether bylaws are in accordance with the constitution, laws or ratified international treaties. It can be an opportunity to challenge measures and regulations that affect the exercise of economic and social rights if they are not in compliance with the Constitution. In some countries, such as many former communist countries, Germany, Italy and Spain, courts that doubt the constitutionality of the regulation that should be applied in a specific case, are obliged to suspend the proceedings and address their constitutional query to the Constitutional Court.⁹⁶ In other countries, including Serbia, abstract judicial review of regulations before the Constitutional Court is also envisaged, but without the above obligation of other courts to initiate constitutional review procedures.⁹⁷ On the other hand, the Constitutional Court in Serbia, as well as in Hungary and Albania, may initiate constitutional review on its own initiative.⁹⁸ The power of courts to abrogate regulations that are not in accordance with the Constitution, including regulations that are contrary to guaranteed human rights, exists in both Canada⁹⁹ and the United States of America, and judicial review includes the power to abrogate regulations

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.

96 Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, op. cit., 13-14.

97 Ibid, 14. Although there is no obligation of other courts in Serbia to initiate constitutional review, such a possibility is provided pursuant to Article 63 of the Law on the Constitutional Court which reads: "If during a procedure before a court of general or special jurisdiction the issue of compliance of law or other general act with the Constitution, generally accepted rules of international law, ratified international agreements or law, is raised, the court shall, if it finds that the issue has grounds, adjourn the procedure and initiate a procedure for assessing the constitutionality or legality of that act before the Constitutional Court". No data on the application of this provision in practice are available.

98 W. Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, op. cit., 19.

99 Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 57

to the extent in which those regulations are in breach of the Constitution.¹⁰⁰ It should be borne in mind that, unlike, for example, the Constitutional Court of Serbia, which always performs abstract review of constitutionality, the constitutional review performed by courts in some other countries (e.g. in the US) is concrete, i.e. it arises from specific legal cases.

The extent to which this power of the courts can prove crucial for the exercise of economic and social rights is very well illustrated by the practice of the Constitutional Court of **Latvia**. The Covenant on Economic, Social and Cultural Rights has been incorporated into the Latvian Constitution, and on several occasions the Constitutional Court has had the opportunity to decide on the right to social protection.¹⁰¹ It is also visible that, by reviewing the regulations introduced in order to meet the conditions related to loans granted by the International Monetary Fund and European Union in 2009, the Court found that the adopted regulations violated the rights of individuals to social security and the rule of law, as well as that the legislator adopted the measures too quickly, without carefully considering the existing alternatives.¹⁰² The decisions and positions taken by the Constitutional Court of **Lithuania** regarding the restriction of pensions deserve attention. Very clear limits have been imposed on the legislator regarding possible interference with the enjoyment of social rights: it is not allowed for the reduction of pensions to last longer than one budget year; the legislator shall reassess the economic situation for each fiscal year, re-decide on possible reduction of social benefits, and ensure compensation to pensioners whose pensions are reduced due to economic and financial crises.¹⁰³ The extent to which this doctrine is important for the protection of economic and social rights becomes clearer if we look at how pensions were cut in the Republic of Serbia, where the reduction of pensions lasted for four years (from 2014 to 2018) without questioning whether this measure was still justified; moreover, no compensation was provided for reduced pension amounts. The Constitutional Court of Serbia has considered the initiatives of the constitutionality of the law introducing pensions cuts twice, but unlike the Lithuanian court, it did not set any restrictions for the legislative power regarding the reduction of pensions.¹⁰⁴ On the other hand, the clearly developed doctrine of the Lithuanian court regarding the possibility of limiting pensions illustrates the extent to which this type of judicial review can be important for the protection of economic and social rights and how constitutional courts can give clear guidelines to the legislature when it comes to limiting economic and social rights in the context of the financial crisis and austerity measures.

The Constitutional Court of **Portugal** has also repeatedly addressed the constitutionality of measures that limited various social benefits or introduced taxes in the context of the financial crisis, conditions for obtaining financial assistance and related austerity mea-

100 Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-Economic Rights* in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 50.

101 For more details, see Malcolm Langford, *Judicial Review in National Courts: Recognition and Responsiveness*, in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, op.cit., 438.

102 Ibid.

103 For more details see Tom Birmontiene, *The Challenges Faced by the Constitutional Court of Lithuania during the Global Economic Crisis*, Collection of Papers, Faculty of Law, Niš, No. 69, 2015, available at: <https://www.researchgate.net/publication/282458669> *The challenges faced by the Constitutional Court of Lithuania during the global economic crisis*.

104 For more details, see the subsection „Arbitrary Reduction of Pensions and Lack of Effective Legal Protection“.

asures. Although not all of these initiatives resulted in the establishment of unconstitutionality,¹⁰⁵ the reasoning of the decisions shows the sensitivity of the court both for the need to ensure the effective exercise of economic and social rights, as well as for arguments of the state that guided it in restricting those rights; above all these decisions provide guidelines on when such restrictions are considered disproportionate and contrary to the principle of equality.¹⁰⁶ For example, the Court did not consider unconstitutional increase in tax rates, reduction of income exempted from taxation or introduction of an additional personal income tax, because it concluded that the state adhered to progressiveness in taxation, since the part of income exempted from taxation is proportionally higher at lower income, and the tax rate that applies to higher income is also higher.¹⁰⁷ Despite the negative outcome, the decision of the Constitutional Court, examining the 2013 tax reform, instructs that it is necessary to take into account the fairness of taxation.¹⁰⁸ Furthermore, the Constitutional Court of Portugal concluded that the pension system reform was unconstitutional because it was undermining the right to the subsistence minimum necessary for living in dignity.¹⁰⁹ Provisions related to the reduction of the unemployment benefit and salary compensation during absence from work due to temporary incapacity of work, were also found unconstitutional due to the violation of the principle of proportionality and impact on the most vulnerable.¹¹⁰

Examples such as those found in the case law of constitutional courts of Portugal, Latvia and Lithuania show that the constitutional review, although not omnipotent, can be a very useful tool for protecting economic and social rights of the most vulnerable in countries where constitutional courts show sufficient sensitivity towards legislative and executive powers and limited resources, as well as the towards rights and interests of vulnerable groups and the need to prevent unjustified interference with the enjoyment of social and economic rights. In this way, the courts can ensure the substantial and in practice visible effects of constitutionally guaranteed rights and, at the same time, provide clear guidance and indicate boundaries to the legislature regarding restriction of rights. Conversely, without the active role of courts and other institutions responsible for the implementation of human rights, the potential of constitutional guarantees of social rights may remain without adequate practical effect.

In **Finland** there is *ex-post* judicial review of adopted regulations, as well as *ex-ante* review of the regulations to be adopted (conducted by the parliament and not by the courts). Having in mind

105 For example, it was determined that the temporary reduction of wages and overtime pay and the introduction of the solidarity tax on pensions were not implemented contrary to the Constitution. For more details, see, for example, Igor Vila, "Constitutional Court Protection of Economic and Social Rights in Times of Economic Crisis", *Pravni zapisi, Union University Law School Review*, God. V, br. 1, 2014, 74.

106 See Sally-Anne Way, Nicholas Luisiani and Ignacio Saiz, *Economic and Social Right in the „Great Recession“ – Towards a Human-Rights-Centered Economic Policy in Times of Crisis* in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, op. cit., 94.

107 Igor Vila, *Constitutional Court Protection of Economic and Social Rights during the Economic Crisis*, op.cit., 74.

108 Portugal Constitutional Court (Tribunal Constitucional), 5 April 2013; Ruling 66-B/2012, 31 December 2012; Sally-Anne Way, Nicholas Luisiani and Ignacio Saiz, *Economic and Social Right in the „Great Recession“ – Towards a Human-Rights-Centered Economic Policy in Times of Crisis* in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, Oxford University Press, 2014, 94.

109 Ibid.

110 Igor Vila, *Constitutional Court Protection of Economic and Social Rights during the Economic Crisis*, op.cit., 73.

advantages of preventive over remedial measures, it is useful to examine the *ex-ante* review of the compliance with the constitution, as a type of protection of socio-economic rights, as well as the obligation of *ex-ante* socioeconomic assessment, which exist in some countries.

Ex-Ante Review

Careful examination of regulations to be adopted is the easiest way to prevent avoidable human rights violations. As already mentioned, **Finland** applies this type of review and it is conducted by the Constitutional Law Committee of the Parliament, which performs a detailed review of every regulation that needs to be adopted, in order to ensure compliance with human rights standards. Decisions of this Committee, including those relating to socio-economic rights, shall be binding on the Parliament.¹¹¹ This type of *ex-ante* review of regulations could prevent or reduce the likelihood of the adoption of regulations that violate basic human rights.¹¹² However, if this is not prevented with the help of the *ex-ante* review, the Constitutional Court conducts a subsequent assessment of the constitutionality of the regulations. In **Sweden**, there is a similar type of review before the adoption of regulations.¹¹³ **France** is particular since it used to have only *ex-ante* judicial review for a long period of time.¹¹⁴ Amendments to the French Constitution in 2008 introduced the possibility of *ex-post* judicial review, but *ex-ante* judicial review is still dominant in that country¹¹⁵. In **Serbia**, there is a mixed system of judicial review of the constitutionality of laws and bylaws – *ex-post* review of regulations that have already been adopted, as well as *ex-ante* review – before the regulation is adopted,¹¹⁶ whereas *ex-post* review of constitutionality has far greater practical importance.

A role similar to that of the Constitutional Law Committee in the Finnish Parliament has been entrusted to the Joint Committee on Human Rights in the Parliament of Great Britain. However, unlike the Finnish Constitution, social and economic rights in the United Kingdom are not explicitly recognized by the constitution, and thus reduce the possibilities for preventing the adoption of regulations that undermine socio-economic rights.¹¹⁷ Above all, unlike *ex-ante* review in Finland, in the United Kingdom the recommendations of the Committee conducting the *ex-ante* review are not binding.¹¹⁸

111 Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 53.

112 Ibid.

113 Ibid.

114 Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, op. cit., 102.

115 See Article. 60-61 of the 1958 French Constitution with 2008 Amendments, available at: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en.

116 Pursuant to Article 169 of the Constitution, at request of at least one third of members of the Parliament, the Constitutional Court shall be obliged to assess constitutionality of the law which has been passed but has still not been promulgated by a decree within seven days. For more details, see Bosa Nenadić, "Peculiarities of the Review of the Constitutionality of Laws in the Republic of Serbia", *Collection of Papers, Faculty of Law, Niš*, No. 49, 2007, 59-87.

117 Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 53. It should be taken in consideration that the Great Britain does not have a codified constitution i.e. it does not have a constitution in the formal sense (in the form of a single constitutional document).

118 Ibid.

In **Wales**, the obligation of each public authority to assess the effects of its acts on vulnerable socio-economic groups has been in force since March 2021.¹¹⁹ The aim of this obligation (“socio-economic duty”) is to reduce inequalities in education, health, housing and other issues related to social and economic inequalities.¹²⁰ In the background of the introduction of this duty of public authorities during the adoption of strategic acts is the awareness that socioeconomic inequalities affect all aspects of life, from health, through educational achievements, to life expectancy. In **Scotland**, a similar obligation of *ex-ante* review („Fairer Scotland Duty”) has been applied since April 2018.¹²¹ There is a possibility of introduction of this duty for the rest of the UK as well, based on the 2010 Equality Act, but there is still no readiness for that.¹²² In Wales, for example, this duty of public authorities has so far influenced the suspension of the decision to close certain local services, and has helped them to overcome the difficulties caused by budget cuts so that the reduction has the least impact on the most socio-economically vulnerable groups.¹²³

Following the example of this solution from the Great Britain Equality Law, **the impact assessment of regulations or public policy on the observance of the principle of equality for the most economically vulnerable persons or groups of persons has recently been introduced in Serbia as well.** Namely, Article 7 of the Law on Amendments to the Law on Prohibition of Discrimination¹²⁴ added a new provision that reads:

„When preparing a new regulation or public policy of importance for the realization of the rights of socio-economically vulnerable persons or groups of persons, the public authority shall conduct the impact assessment of a regulation or policy in which it shall assess their compliance with the principle of equality. The impact assessment shall contain in particular: 1) comprehensive description of the situation in the area subject to the regulation with special reference to socio-economically vulnerable persons and groups of persons; 2) assessment of necessity and proportionality of intended changes to the regulation from the aspect of the principles of equality and rights of socio-economically vulnerable persons and groups of persons; 3) risk assessment in terms of rights, obligations and legally-based interests of persons and groups of persons referred to in paragraph 3 of this Article” (socio-economically vulnerable persons and groups of persons).¹²⁵

119 The Socio-Economic Duty, Explanatory Memorandum to the Equality Act 2010 (Authorities subject to a duty regarding Socio-economic Inequalities) (Wales) Regulations 2021, 9 February 2021.

120 Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 56.

121 Elaine Wilson Smith, Diego Garcia Rodriguez, June Brawner, *Evaluating the Socio-Economic Duty in Scotland and Wales*, Equality and Human Rights Commission, March 2021.

122 Ibid, 6. Katie Boyle, Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, op. cit., 56.

123 Elaine Wilson Smith, Diego Garcia Rodriguez, June Brawner, *Evaluating the Socio-Economic Duty in Scotland and Wales*, op.cit., 26.

124 Official Gazette of RS, No. 52/2021.

125 See Article 7 of the Law on Amendments to the Law on Prohibition of Discrimination. See also A 11 – Initiative for Economic and Social Rights, *Proposals for Amendments to the Law on Prohibition of Discrimination – proposal for introduction of the socio-economic assessment and statement of reasons*.

Assessing the impact of regulations or public policies on compliance with the principle of equality of the most economically vulnerable persons or groups of persons is a very positive novelty and a new legal institute introduced by the Law on Prohibition of Discrimination¹²⁶ that responds to the well-documented practice of sectoral laws that contain provisions that put socio-economically vulnerable people in an unequal position in relation to other citizens.¹²⁷

The introduction of an impact assessment obligation can help public authorities to take particular account of the impact that a regulation or public policy will have on the most vulnerable citizens once enacted. At the same time, the introduction of this obligation could prevent or reduce the number of situations in which the effects of regulations are such that they put those who are already most vulnerable in a less favorable position.¹²⁸ Moreover, this obligation could affect the reduction of inequality in various areas of social life and the operationalization of the principle of equality.¹²⁹

The impact assessment of the regulations on socio-economically vulnerable persons or groups of persons is based on comparative law, in particular Section I of the United Kingdom Equality Law, which prescribes a similar provision.¹³⁰

Even before passing the amendments to the Law on Prohibition of Discrimination, independent institutions for the protection of human rights in Serbia had the authority to give an opinion on provisions of draft laws and other regulations concerning discrimination¹³¹ and protection of citizens' rights¹³². However, in practice it often happened that these opinions were not taken into account when preparing or adopting regulations. The above problem is illustrated by the example of the Law on Financial Support to Families with Children¹³³. Due to the fact that proposals made by the Commissioner for Protection of Equality were not accepted, the law with numerous discriminatory provisions was adopted, which is why after its adoption the Commissioner submitted a proposal for assessing the constitutionality of certain provisions, and in December 2020, the Constitutional Court determined the unconstitutionality of several disputed provision.¹³⁴ The example of the Law on Financial Support to Families with Children shows that the introduction of the obligation of *ex-ante* assessment of impact to the socio-economically vulnerable persons could improve the review of legislation prior to enactment. This could also contribute to giving greater importance to opinions by independent institutions on the proposed regulations and,

126 For more details, see A 11 – Initiative for Economic and Social Rights, *Proposals for Amendments to the Law on Prohibition of Discrimination – proposal for introduction of the socio-economic assessment and statement of reasons*, available at: https://www.a11initiative.org/wp-content/uploads/2021/02/Predlozi-za-izmene-i-dopune-ZZD_Inicijativa-A11_24022021-converted.pdf.

127 A11 Initiative, *Proposals for Amendments to the Law on Prohibition of Discrimination*, op.cit.

128 Ibid.

129 Ibid.

130 Ibid.

131 Article 33, paragraph 1, item 7 of the Law on Prohibition of Discrimination prescribes that the Commissioner, *inter alia*, monitors the implementation of laws and other regulations, initiates the adoption of or amendments to regulations aimed at implementing and developing protection against discrimination and provides opinions concerning the provisions of draft laws and other regulations pertaining to the prohibition of discrimination.

132 See Article 18 of the Law on the Protector of Citizens of Serbia (Official Gazette of RS, Nos. 79/2005 and 54/2007).

133 Official Gazette of RS, Nos. 113/2017, 50/2018, 46/2021 – CC Decision, 51/2021 – CC Decision, 53/2021 – CC Decision and 66/2021.

134 A11 Initiative, *Proposals for Amendments to the Law on Prohibition of Discrimination*, pg. 8.

above all, to reducing chances of adopting regulations that violate the principle of equality and endanger the socio-economic rights of the most vulnerable.

It should be noted that independent institutions for the protection of human rights in Serbia, in addition to contribution to the *ex-ante* review of regulations, can also contribute to the protection of socio-economic regulations in individual cases of investigation of violations, as well as by submitting proposals initiating judicial review of laws and other regulations.

International Mechanisms for the Protection of Social and Economic Rights

The legal justiciability of socio-economic rights can also be ensured by accepting international mechanisms that, directly or indirectly, deal with the protection of social and economic rights. When it comes to exercising rights in practice, the ability of individuals to file complaints about violations of their rights with specialized international bodies that monitor the implementation of human rights treaties is essential to the rights enshrined in treaties dedicated to the protection of those rights.¹³⁵

It has been pointed out that social rights manage to gain protection before bodies that are primarily committed to the protection of civil and political rights, such as the ECtHR and the UN Human Rights Committee.

Reliance on the International Convention on the Elimination of All Forms of Racial Discrimination and the proceedings before the Committee on the Elimination of All Forms of Racial Discrimination, which oversees the implementation of that Convention, may also be important for the protection of socio-economic rights. This is confirmed, for example, by the case of *L.R. et al. v. Slovakia*, which found that a local city council had violated a prohibition of discrimination by abandoning construction of affordable housing for Roma following a protest by the local population. It was determined that the right of the applicants to housing on an equal basis, protected by Article 5(e)(III) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 11 of the International Covenant on Economic, Social and Cultural Rights was violated.¹³⁶

The European Social Charter and the European Committee of Social Rights established by that Charter were given an important role in the promotion and protection of social rights following the adoption of the Protocol to the Charter, which provides for a system of collective complaints. The Protocol provides an opportunity for non-governmental organizations in consultative status with the Council of Europe and organizations of workers and employers to seek to establish that certain regulations or practices of a State are not in conformity with its obligations under the

¹³⁵ Md Al Ifran Hossain Mollah, *Assessment into Feasibility of Ratifying the OP-ICESCR from the Context of Justiciability of Economic, Social and Cultural Rights in Bangladesh*, *International Human Rights Law Review*, Brill Nijhof, 9(2020), 118-134, 125.

¹³⁶ Committee on the Elimination of Racial Discrimination, *L.R. et al. vs. Slovakia*, Petition No. 31/2003, pg. 10.7, CERD/C/66/D/31/2003).

Charter.¹³⁷ The most specific feature of the collective complaints procedure, which distinguishes it from most similar dispute resolution mechanisms, is that collective redress complainants do not have to exhaust domestic remedies beforehand. This innovative solution is explained by the fact that this procedure is not intended to correct the consequences of violations of the rights and obligations under the Charter in one individual case - on the contrary, individual complaints cannot be submitted.¹³⁸

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "Covenant"; "ICESCR") is of a particular importance for social and economic rights. The International Covenant on Economic, Social and Cultural Rights is a human rights treaty that entered into force in 1976 and contains guarantees of human rights such as fair working conditions, the right to an adequate standard of living, the right to education; the supervision of implementation is entrusted to the Committee on Economic, Social and Cultural Rights.¹³⁹ The Optional Protocol to the Covenant is an instrument adopted on 10 December 2008 that allows individuals or groups to submit complaints to the Committee on Economic, Social and Cultural Rights when they consider that their Covenant enshrined rights have been violated and they have exhausted all available domestic remedies.¹⁴⁰

What is particularly important to note with the Optional Protocol is that this additional treaty finally "corrects" the systemic failure in the field of protection of economic and social rights under the auspices of the United Nations, and finally resolves the issue of economic and social rights at the level of international human rights law. In addition to protection in individual cases, ratification of this instrument can contribute to the improvement of the normative framework for the protection of economic, social and cultural rights, as well as to the improvement of the work of institutions, domestic judicial and administrative bodies responsible for human rights protection.¹⁴¹ With regard to the handling of individual complaints, in addition to recommendations aimed at remedying violations in a particular case, the Committee may, inter alia, make general recommendations to the State aimed at correcting the circumstances which led to the violation. Moreover, the Committee may recommend to the State a set of measures to assist it in implementing

137 According to the Additional Protocol to the European Social Charter providing for a system of collective complaints, the following organizations are entitled to submit complaints: international organizations of employers and trade unions, taking part in work of the Committee, in line with Article 27, paragraph 2 of the Charter (European Trade Union Confederation (ETUC), BUSINESSEUROPE (former UNICE) and International Organization of Employers (IOE), other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee, as well as representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint. Moreover, any Contracting State may also declare that it recognizes the right of any other representative national non-governmental organization which has particular competence in the matters governed by the Charter, to lodge complaints against it. See Articles 1 and 2 of the Additional Protocol to the Charter providing for a system of collective complaints. For more details, see for example Olivier de Schutter, *International Human Rights Law, Cases, Materials, Commentary*, op. cit. 914-920.

138 Ibid.

139 For more details on operations and latest activities of the Committee, see Committee on Economic, Social and Cultural Rights, *2020 Yearbook of the Committee on Economic, Social and Cultural Rights*, August 2021.

140 For more details see A 11 – Initiative for Economic and Social Rights, *What Do the Signing and Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Bring Us*, available at: https://www.a11initiative.org/wp-content/uploads/2019/06/S%CC%8Cta-nam-donose-potpisivanje-i-ratifikacija-Opcionog-protokola-uz-Me%C4%91unardni-pakt-o-ekonomskim-socijalnim-i-kulturnim-pravima_final.pdf.

141 Ibid.

the recommendations, with a particular focus on measures that do not require significant allocations of financial resources, whereas States Parties still have the possibility to adopt their own, alternative measures.¹⁴² The Committee may also impose temporary measures, which in cases of possible occurrence of irreparable consequences for the exercise of rights, temporarily suspend the implementation of a certain act or action, until the end of the procedure or the cessation of the risk of irreparable consequences. Finally, Article 14 of the Optional Protocol allows the Committee, in agreement with the State Party, to seek the expert and technical support of the United Nations experts and bodies in resolving issues related to the realization of the economic, social and cultural rights of its citizens, providing support for the progressive exercise of these rights.¹⁴³

The experience of the countries that have signed and ratified the Optional Protocol so far shows that accession to this international agreement has a number of positive effects to the realization and protection of economic and social rights. Thus, for example, after the first decisions of the Committee regarding the procedures of forced evictions carried out during the mortgage crisis, the legal framework was improved in Spain, so that domestic regulations could respond to at least some of the systemic inconsistencies with provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁴⁴ Justiciability at the international level and the possibility of recourse to international judicial and quasi-judicial bodies is not a substitute (nor is it intended as a substitute) for the justiciability of socio-economic rights in domestic law, but it can have a very positive impact on national justiciability systems and this is one of the key advantages of the accession to international instruments, such as the Optional Protocol to the Covenant on Economic, Social and Cultural Rights.

142 For more details, see Committee on Economic, Social and Cultural Rights, Statement, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to The Covenant*, UN. doc. E/C.12/2007/1, 10 May 2007, §13.

143 A 11 Initiative for Economic and Social Rights, *What Do the Signing and Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Bring Us?*, pg. 5.

144 Ibid, 4.

Status and Protection of Economic and Social Rights in Serbia

The following section will analyze the status of socio-economic rights in Serbia, mechanisms for the protection of these rights, legal remedies in the domestic legal system and international mechanisms Serbia has acceded to. In addition to proclaiming guarantees of socio-economic rights and introducing mechanisms for their protection, the question of the extent to which courts and other bodies entrusted with the protection of human rights are ready to perform their role in a way that leads to full enjoyment of socio-economic rights is also important. Although very important, lists of socio-economic rights and remedies are not the only indicators of a true degree of protection. Practice shows that the incorporation of guarantees of social and economic rights into the constitution does not result in their automatic protection, just as their complete exclusion from the constitution does not prevent individual states from establishing progressive social policies.¹⁴⁵ Therefore, after a brief review of the domestic legal framework, special attention will be paid to protection mechanisms in practice, in the areas of labor rights, the right to social protection and social insurance, health care and housing.

Serbian legal framework

The Constitution of the Republic of Serbia stipulates that the Republic of Serbia is based on the rule of law and social justice, human and minority rights and freedoms (Article 1) and that the rule of law is achieved through constitutional guarantees of human and minority rights, separation of powers, independent judiciary and obedience to the Constitution and Law (Article 3).

The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws (Article 18, paragraph 1). The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right (Article 18, paragraph 2).

Provisions 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 (Article 18, paragraph 3).

Among the economic and social rights that are explicitly listed in the Constitution are the right to property (Article 58), the right to work (Article 60), the right to strike (Article 61), health care

¹⁴⁵ See Andras Sajó, "Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court" in Roberto Gargarella, Pilar Domingo and Theunix Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate, 2006, 87.

(Article 68), social protection (Article 69), pension insurance (Article 70), the right to education (Article 71), freedom of scientific and artistic creation (Article 73), healthy environment (Article 75). The Constitution explicitly provides for the rights of the child (Article 64) and special protection of the family, mother, single parent and child (Article 66).

Moreover, the Constitution stipulates that everyone shall have the right to judicial protection when any of their human or minority rights guaranteed by the Constitution have been violated or denied, they shall also have the right to elimination of consequences arising from the violation (Article 22), and that everyone shall have the right to equal legal protection, without discrimination (Article 21, paragraph 2). The Constitution explicitly provides that everyone shall have the right to an appeal or other legal remedy against any decision on rights, obligations or lawful interests (Article 36), and that equal protection of rights before courts and other state bodies, entities exercising public powers and bodies of the autonomous province or local self-government shall be guaranteed (Article 36, paragraph 2). In terms of the protection of (economic and social) rights, Article 198, paragraph 2 of the Constitution envisages that legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceeding, if other form of court protection has not been stipulated by the Law.

It is important that the listed protection mechanisms and legal remedies for the protection of human rights be provided for in the Constitution, in order to remain outside the reach of the legislator and to exclude the possibility of abolishing or reducing the degree of their protection by ordinary laws.¹⁴⁶

It is also noticeable that the Constitution explicitly refers to economic and social rights, but without mentioning the right to housing. However, in the Republic of Serbia, in accordance with the monistic theory that views international and national law as a single system, international treaties are automatically considered part of the national law.¹⁴⁷ Thus, the Constitution stipulates that human and minority rights, guaranteed by generally accepted rules of international law and ratified international treaties, are directly applicable.¹⁴⁸ This implies that the courts directly apply and can invoke, *inter alia*, the Covenant on Economic, Social and Cultural Rights, including the right to housing. However, this does not happen in practice, not only in relation to the right to housing but also in relation to those rights under the Covenant that are explicitly stated in the Constitution. Even after two consecutive requests by the CESCR, Serbia was not able to explicitly cite in its reports on the implementation of the International Covenant on Economic, Social and Cultural Rights any case in which the Covenant was directly applied.¹⁴⁹ Instead, in the Third Periodic Report on the implementation of the Covenant, Serbia stated that upon providing protection in cases of violation of economic, social and cultural rights, national courts primarily address the national legislation where Covenant provisions have been

¹⁴⁶ Ratko Marković, *Constitutional Law*, op. cit., 485.

¹⁴⁷ Milenko Kreća, *International Public Law*, 2010, 69-74.

¹⁴⁸ For more details, see also Slobodan Beljanski et al, *Relation of the Constitutional Court and the Judicial Authority – Status and Prospects*, Cepriis, Belgrade 2019.

¹⁴⁹ A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 8.

implemented; however, there were decisions claiming that the protection is also provided based on the Covenant provisions.¹⁵⁰

When it comes to **human rights protection proceedings**, this function primarily belongs to courts of general and special jurisdiction, and the Constitution specifically establishes the right to judicial protection for anyone whose human or minority rights have been violated or denied, as well as the right to a remedy.¹⁵¹

A special role in the protection of human rights belongs to the Constitutional Court, due to its "Constitutionally established function of guardian of the Constitution and guarantor of human rights and freedoms."¹⁵² The Constitutional Court has the position and competencies that are characteristic of the European model of judicial review of constitutionality.¹⁵³ The Constitutional Court is entrusted with the constitutional review of regulations, as well as deciding on constitutional complaints due to human rights violations.¹⁵⁴

Constitutional (normative) review includes reviews of the constitutionality of legislation - reviews of the constitutionality of laws and all other general acts in the legal order of the Republic of Serbia, as well as reviews of the legality of all general by-law regulations.¹⁵⁵ These proceedings may be instituted by state bodies, bodies of territorial autonomy or local self-government, as well as by at least 25 deputies and the Constitutional Court.¹⁵⁶ Furthermore, any legal or natural person shall have the right to an *initiative to institute a proceeding of assessing* the constitutionality and legality.¹⁵⁷ However, the submission of the initiative for the assessment of constitutionality and legality does not guarantee the initiation of the review procedure; the latter is initiated by a *proposal of the authorized proponent or decision to initiate the procedure*.¹⁵⁸ By conducting the *ex-post* review, the Constitutional Court „eliminates“ unconstitutional laws and other general acts, i.e. regulations that are not in compliance with the Constitution.¹⁵⁹ In addition to the subsequent review of the constitutionality of general acts, the Constitutional Court has been entrusted with

150 Third Periodic Report submitted by the Republic of Serbia on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paragraph 4, available at: <https://docstore.ohchr.org/SelfServices/FileHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW54MWm13CZ4%2bVqIQ1kU7YRzwVhwBtDioXlo2YDaaJGQ%2fH-jsl7H7pbfx1zL3SKjOkh7b71aTPLM%2bqhvmUGgBoaju%2fJMBQm2uPAFdIH%2bJvJLt>. See also, Platform of Organizations for Cooperation with UN Human Rights Mechanisms, *Joint Submission to the UN Committee on Economic, Social and Cultural Rights on List of Issues for the Third Periodic Report of the Republic of Serbia*, 2018.

151 For more details, see Slobodan Beljanski et al, *Relation of the Constitutional Court and the Judicial Authority – Status and Prospects*, op.cit.

152 Ibid, 54.

153 Ibid.

154 Ibid. See also, Stevan Lilić, *Is a Constitutional Complaint an Effective Remedy for a Trial within a Reasonable Time?*, Records of the Faculty of Law, Belgrade LV, 2/2007.

155 Bosa Nenadić, "The Constitutional Court of the Republic of Serbia in Light of the 2006 Constitution", *Revus*, 11/2009.

156 Article 168 of the Constitution of RS. For additional details see Jelena Jerinić, *Possibilities of judicial control of administrative acts in the legal system of the Republic of Serbia*, 2020, 6.

157 Ibid.

158 The Constitutional Court assesses whether there are grounds for initiating proceedings, i.e. whether the reasons stated in the initiative support the claim that there are grounds for initiating proceedings. *Ibid*. See also article 50 and 53 paragraph 1 and 2 of the Law on Constitutional Court, as well as A 11 – Inicijativa za ekonomska i socijalna prava, *Predlozi za izmene i dopune Zakona o zabrani diskriminacije*, op. cit., 6.

159 B. Nenadić, „The Constitutional Court of the Republic of Serbia in Light of the 2006 Constitution“, op. cit.

the authority to assess the constitutionality of a law before its entry into force.¹⁶⁰ When it comes to the consequences of the decisions of the Constitutional Court on the unconstitutionality of a certain general act or its provisions on individual acts based on unconstitutional regulations, anyone whose right has been violated by such an individual act has the right to request the competent body to amend that individual act.¹⁶¹ If it is determined that the revision of an individual act cannot rectify the consequences resulting from the implementation of an unconstitutional general act, the Constitutional Court may order the consequences rectified by restitution, indemnification, or otherwise.¹⁶²

A constitutional complaint may be lodged against individual acts or actions of state bodies or organizations entrusted with public authority, which violate or deny human, or minority rights and freedoms guaranteed by the Constitution if other legal remedies for their protection have been exhausted or not provided.¹⁶³ The procedure before the Constitutional Court is regulated by the Law on the Constitutional Court¹⁶⁴.

Constitutional complaint is upheld or denied as unfounded by a decision. When the Constitutional Court finds that the challenged individual act or action violates or denies a human or minority right or freedom guaranteed by the Constitution, it may annul that individual act, prohibit the continuation of such actions or order taking other measures or actions aimed at elimination of harmful consequences of the violation or denial of guaranteed rights and freedoms and determine the manner of just satisfaction for the complainant. In a decision upholding a constitutional complaint, the Constitutional Court shall also decide on the request of the complainant for compensation of pecuniary and non-pecuniary damage, where such request has been made.¹⁶⁵

In principle, when deciding on constitutional complaints, the Constitutional Court does not act as an appellate court, which determines and eliminates any shortcomings or errors in the court decision, but primarily intervenes only if the interpretation and application of rights in a court decision are contrary to the Constitution or constitutionally guaranteed rights.¹⁶⁶

It is important to point out that the Constitution itself does not draw a distinction between human rights, i.e. between civil and political rights, on the one hand, and socio-economic rights, on the other. Also, in accordance with the views of the Constitutional Court, **a constitutional complaint protects all human and minority rights and freedoms, individual and collective, guaranteed by the Constitution, regardless of their systematic place in the Constitution and regardless of whether they are explicitly enshrined in the Constitution or implemented in the constitutional system by ratified international treaties.**¹⁶⁷ However, it is usually stated that exercising

160 Ibid. Pursuant to Article 169 of the Constitution, at the request of at least one third of deputies, the Constitutional Court shall be obliged within seven days to assess constitutionality of the law which has been passed but has still not been promulgated by a decree.

161 Article 61 of the Law on Constitutional Court.

162 Article 62 of the Law on Constitutional Court.

163 Article 170 of the Constitution of RS.

164 Official Gazette of RS, Nos. 109/2007, 99/2011, 18/2013 – CC Decision, 103/2015 and 40/2015 – other law.

165 Article 89 of the Law on Constitutional Court.

166 Dragan Stojanović, *The Constitutional Court in Light of Interpretive Decisions in Judicial Reviews*, Records of the Faculty of Law of Niš, No. 72, LV, 2016, 39.

167 Positions of the Constitutional Court relating to the procedure of preliminary examination of the constitutional complaint taken at the regular sessions of 30 October 2008 and 2 April 2009.

of most economic and social rights is prescribed by law. Therefore, the content of social rights, conditions and assumptions for their enjoyment, acquisition and termination are prescribed by law, but this does not mean that they cannot enjoy judicial protection, including direct constitutional protection through a constitutional complaint.¹⁶⁸ **Regardless of the fact that the content of social rights in the Constitution of the Republic of Serbia is more vague compared to the content of civil and political rights and that the manner of their realization is prescribed by law, they still have the rank of constitutionally guaranteed rights, not ordinary program principles.**¹⁶⁹ This implies that the above rights, in addition to regular judicial protection, can also be protected by a constitutional complaint, by the Constitutional Court, which is confirmed by the practice of the Constitutional Court.¹⁷⁰ To understand better the relationship between the constitutional court review and the legislature, it is useful to refer to the position taken by the Constitutional Court regarding legal gaps, according to which the role of that court in reviewing regulations is purely “negative” and does not imply the role of filling legislative gaps.¹⁷¹ Instead, upon completion of the procedure, the Constitutional Court sometimes resorted to a kind of dialogue with the National Assembly, pointing out controversial issues related to the application of certain laws or the need to amend or supplement existing regulations in a certain way.¹⁷² Although this type of advisory (instead of control) role in legislation is criticized sometimes,¹⁷³ this dialogue between the constitutional and legislative authorities could be important in the field of socio-economic rights, where in addition to merely identifying non-compliance with laws, dialogue on possible systemic measures and long-term solutions can be more useful for the continuous improvement of the protection of socio-economic rights.¹⁷⁴

It can be concluded that the Constitution in Serbia explicitly provides for several rights in the field of social security, education, health care and the right to work. The right to housing (and the right to an adequate standard of living) is not explicitly recognized by the Constitution but it provides for the direct application of human rights guaranteed by generally accepted rules of international law and ratified international treaties, including the Covenant on Economic, Social and Cultural Rights and rights guaranteed by that instrument. When it comes to judicial **protection in indi-**

168 See Dragan M. Stojanović, *Separate Opinion on the Decision of the Constitutional Court in the Case Iuz-531/2014* (Official Gazette of RS, No. 88/15).

169 D. Stojanović, *Separate Opinion on the Decision of the Constitutional Court in the Case Iuz-531/2014*. Although the RS Constitution leaves it to the legislator to regulate the manner of exercising rights, this should be distinguished from situations where the constitutions explicitly separate socio-economic rights from civil and political ones and provide that certain social rights can be claimed only within the scope of the laws enacted to implement these rights; that is the case, for example, with Article 41 of the Constitution of the Czech Republic, as well as the Constitution of the Slovak Republic. Such provisions should not be equated with the provisions of those constitutions that only specify that practical details regarding exercising of rights will be regulated by law, as is the case in Serbia. For more details see Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, op. cit., pg. 264-265. The Constitutions of the Czech Republic and Slovak Republic are available at: constitute.org.

170 Ibid.

171 Dragan Stojanović, *The Constitutional Court in Light of Interpretive Decisions in Judicial Reviews*, Records of the Faculty of Law of Niš.

172 Ibid.

173 Ibid.

174 About the importance of such a dialog, see Malcolm Langford, *Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, op.cit., 32.

vidual cases, in addition to **regular judicial protection**,¹⁷⁵ the protection of human rights in the procedure of **constitutional complaints** before the Constitutional Court is also envisaged. The Constitutional Court is also entrusted with the assessment of the conformity of general acts, laws and ratified international treaties with the Constitution (**ex-post judicial review of general acts; ex-post abstract review of regulations**). Serbia has recently introduced an obligation for public authorities to assess the impact of regulations or public policy on compliance with the principle of equality for the most economically vulnerable persons or groups of persons; as of 2006, at least in theory, the Constitutional Court is entitled to assess the constitutionality of laws in certain cases even before they enter into force (**ex-ante review**).

Although it is not about judicial protection, **independent human rights institutions** also have powers that can contribute to more effective protection of socio-economic rights. Thus, for example, the Commissioner for the Protection of Equality and the Protector of Citizens, in addition to the authority to act on complaints in individual cases,¹⁷⁶ have the authority to give opinion on the provisions of regulations relevant to human rights and equality, to submit proposals for constitutional review of general acts, as well as to submit an initiative for the adoption or amendment to regulations that are important for the realization of human rights, including the prohibition of discrimination.¹⁷⁷

When it comes to **protection mechanisms at the international or regional level**, the citizens of Serbia do not have access to any international body specialized in the protection of economic, social and cultural rights.¹⁷⁸ Serbia is a party to the ECHR,¹⁷⁸ and has accepted the possibility of submitting individual petitions to the UN Human Rights Committee, the Committee on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of All Forms of Racial Discrimination, which offers certain, but limited, opportunities for the protection of social and economic rights. However, Serbia has not accepted two protection mechanisms specialized in these rights: the system of collective complaints before the European Committee of Social Rights, nor the possibility of submitting individual petitions to the UN Committee on Economic, Social and Cultural Rights.

Finally, it should be pointed out that reading the list of guaranteed rights and envisaged legal remedies gives an important insight, but not the whole picture of the true degree of protection of those rights. Therefore, it is necessary to look at how social and economic rights are protected in practice.

¹⁷⁵ In practice, the provisions of the Law on Obligations (Official Gazette of the SFRY, No. 29/78, 39/85, 45/89 – CC Decision and 57/89, Official Gazette of SRJ, No. 31/93, Official Gazette of SCG, No. 1/2003 – Constitutional Charter and Official Gazette of RS, No. 18/2020) prove to be particularly useful in terms of compensation for damages; provisions of Article 218 of the Law on Obligations which stipulates that whoever pays for expenses or does something else for another person, which otherwise is a statutory duty of such other person, shall be entitled to claim recovery from such person, as well as provisions of Articles 210 and 214 of the Law on Obligations.

¹⁷⁶ Two thirds of complaints filed with the Commissioner for the Protection of Equality refer to economic and social rights, and among the complaints that citizens submit to the Protector of Citizens, by far the largest number are those related to economic and social rights. See A 11 – Initiative for Economic and Social Rights, *Second-Class Rights op. cit.*, 7. See also, Wojciech Sadurski, *Rights Before Courts – A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, op. cit. .

¹⁷⁷ See Article 18 of the Law on Protector of Citizens and Article 31 of the Law on Prohibition on Discrimination.

¹⁷⁸ A 11 – Initiative for Economic and Social Rights, *Second-Class Rights, op. cit.*

Protection of Social and Economic Rights in Practice

Right to Work

The Constitution of the Republic of Serbia guarantees the right to work, in line with the law.¹⁷⁹ The Constitution guarantees everyone the right to choose his/her occupation freely,¹⁸⁰ and all work places shall be available to everyone under equal conditions.¹⁸¹ Other rights related to work and labor relations were also proclaimed, including the right to protection at work, limited working hours, paid annual leave, fair compensation for work and legal protection in case of termination of employment.¹⁸² The Constitution also stipulates that women, youth and the disabled are provided with special protection at work and special working conditions, in accordance with the law,¹⁸³ and guarantees the right to strike.¹⁸⁴

A mere observation of the text of the Constitution leads to the conclusion that the Constitution of Serbia guarantees numerous rights in the field of labor,¹⁸⁵ and based on a review of legal solutions, it is noticeable that judicial and extrajudicial mechanisms for the protection of these rights are available. However, the actual level of protection and access to these rights gives a more pessimistic picture, which does not necessarily change for the better, neither in terms of the functioning of that protection in practice, nor in terms of the legal framework governing the exercise and protection of workers' rights.

In principle, the legal justiciability of labor rights is the least controversial of all socio-economic rights.¹⁸⁶ Article 60, paragraph 4 of the Constitution explicitly mentions judicial protection of workers' rights (in case of termination of employment) The Labor Law ¹⁸⁷ is a basic regulation in this area that regulates in more detail the exercise and protection of rights, obligations and responsibilities stemming from employment, i.e. on the basis of work. In case of violation of rights, protection can be obtained firstly in the procedure of **consensual settling**

179 Article 60, paragraph 1 of the Constitution.

180 Article 60, paragraph 2 of the Constitution.

181 Article 60, paragraph 3 of the Constitution.

182 For the full list, see Article 60, paragraph 4 of the Constitution.

183 Article 40, paragraph 5 of the Constitution.

184 Article 61 of the Constitution.

185 For example, by comparing the Constitution of RS with the constitutions of majority of former communist countries, it can be concluded that the Constitution of RS belongs to a group of constitutions that are the most generous when it comes to labor rights, while guaranteeing limited rights in the field of health care and social security. Wojciech Sadurski, *Rights Before Courts, A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe, Second Edition*, op. cit., 263.

186 A similar situation exists in comparative law. See, also Christian Courtis, "Argentina: Some Promising Signs" in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit.

187 Official Gazette of RS, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – CC Decision, 113/2017 and 95/2018 – authentic interpretation.

of disputed issues.¹⁸⁸ Moreover, the Labor Law envisages that the **labor inspection** monitors the implementation of the law, other employment-related regulations, general acts and employment contracts, which regulate the rights, obligations and responsibilities of employees.¹⁸⁹

Apart from extrajudicial form of protection of labor rights, **judicial protection of rights** is also envisaged, i.e. the possibility of initiating proceedings before a competent court, within a preclusive period of 60 days.¹⁹⁰ Finally, the Criminal Code also provides for **the criminal law aspect of protection of rights based on labor and social insurance;**¹⁹¹ for example, non-payment of wages or non-payment of contributions is considered to be a criminal offense.

The Labor Law also stipulates that the labor inspector submits **a request for initiation of a misdemeanor procedure** if it finds that the employer has violated the law or other regulations governing labor relations and application for compulsory social insurance.¹⁹²

Judicial protection of the rights of persons working outside an employment relationship is not specifically regulated, so they only have **the possibility of initiating a general lawsuit to determine damage compensation**, in accordance with the rules of the Law on Obligations.¹⁹³

Apparently, the availability of either judicial (through labor disputes or through ordinary litigations for damage compensation, based on the Law on Obligations), or extra-judiciary protection of labor rights (through labor inspection and peaceful settlement of disputes) is not questionable. In addition, criminal-legal aspect of the protection of labor and social insurance rights is provided, as well. However, in practice there is a discrepancy between the number and status of rights to work in the Constitution and laws and their enjoyment and the position of workers in practice.

Namely, **the criminal aspect of protection of rights based on labor and social insurance has so far been negligible.**¹⁹⁴ Prosecutors very rarely decide to prosecute

188 Article 194 of the Labor Law prescribes that a bylaw or employment contract may stipulate the procedure for consensual resolution of disputed issues between the employer and employee. The disputed issues shall be resolved by an arbiter. There are general and special regimes of this legal protection: general (which refers to all disputes about rights, obligations and responsibilities from employment regulated by the Labor Law) and special regime (which refers to disputes about termination of employment contract and minimum wage regulated by the Law on Peaceful Labor Dispute Resolution). For more details, see Zoran M. Ivošević, Milan Z. Ivošević, *Comments to the Labor Law*, Second amended edition, Official Gazette, Belgrade 2007, 194, ff.

189 Article 268 of the Labor Law. Detailed authorizations and actions of the labor inspection are prescribed in Articles 268a, 268b and 269 of the Labor Law.

190 Article 195 of the Labor Law envisages that employee or trade union authorized by the employee may initiate legal proceedings before a competent court against a decision violating the employee's right or upon becoming aware of violation of such right. The legal proceedings may be initiated 30 days after the decision has been served or upon becoming aware of violation of such right at the latest.

191 Article 163 of the Criminal Code (Official Gazette of RS, No. 85/2005...35/2019) regulates that whoever deliberately fails to comply with law or other regulations, collective agreement and other general acts on labor rights and on special protection of young persons, women and disabled persons at work, or on social insurance rights and thereby deprives or restricts another's guaranteed right, shall be punished with a fine or imprisonment up to two years.

192 Article 270 of the Labor Law.

193 Official Gazette of SFRY, No. 29/78, 39/85, 45/89 – CC Decision and 57/89, Official Gazette of SRY, No. 31/93, Official Gazette of SCG, No. 1/2003 – Constitutional Charter and Official Gazette of RS, No. 18/2020. See Bojan Urdarević et al, *Analysis of the Situation of Economic and Social Rights in the Republic of Serbia: Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Center for Dignified Work, Beograd, 2019, 76.

194 Vera Kusovac, *Special Protection Against Termination of Employment Contract*, op. cit., 34.

criminal charges received for violations of employment rights, even in cases of systematic violations of workers' rights.¹⁹⁵ **The number of labor inspectors is insufficient**, therefore violating Article 10 of the ILO Labor Inspection Convention; the problem is lack of technical equipment, and even **cases of corruption¹⁹⁶ or self-limitation or narrowing of competences** of the labor inspection.¹⁹⁷ Misdemeanor courts (to which labor inspectors can submit a request for initiation of misdemeanor proceedings) are faced with **large backlog** and discontinuation of proceedings as a result of the expiry of statute of limitations due to considerable volume of work, and other reasons, as well.¹⁹⁸

Labor **disputes before ordinary courts often last for several years**, which is extremely unfavorable for the worker, as a weaker party in the procedure.¹⁹⁹ The excessive length of labor disputes is also evidenced by the decisions of the Constitutional Court which established a violation of the right to a trial within a reasonable time in labor disputes.²⁰⁰ Due to the inefficient handling of labor disputes, **the advantages (and necessity) of introducing specialized labor courts** are increasingly being suggested and stressed.²⁰¹

A particular problem is that changes in legislation discourage workers from seeking judicial protection and lead to further reduction in the quality of judicial protection, both by limiting the possibility of initiating court protection proceedings and by **shortening the deadlines for initiating labor disputes**.²⁰² The 2014 Law on Amendments to the Labor Law²⁰³ shortened that deadline from 90 to 60 days; moreover, workers

195 So far, no one has been convicted of committing the criminal offense for violation of labor rights and social insurance rights, even in conditions of complete and intentional squandering of the property of state-owned companies. Mario Reljanović, Peščanik, available at: <https://pescanik.net/izobicajavanje-radnog-prava/>.

196 Vera Kusovac, *Special Protection Against Termination of Employment Contract*, op. cit.

197 For example, although labor inspectors are responsible for supervising the application of contract of performing temporary and occasional jobs and there are numerous examples when the labor inspection intervened in case of seasonal workers, there is often self-limitation of inspection jurisdictions only to employees. This practice is used very often by inspectors in cases with a certain political connotation, especially in cases of employers with the privileged status of a foreign investor. Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Belgrade, Centre for Dignified Work, Belgrade, 2019, 69.

198 Vera Kusovac, *Special Protection Against Termination of Employment Contract*, op. cit., 33.

199 Center for Democracy Foundation, Red Alarm, 2020. See, for example, Danas, *An Eight-Year Long Urgent Court Proceeding*, 11 July 2017. Labor disputes often last for ten years. Vera Kusovac, *Special Protection Against Termination of Employment Contract*, op. cit.

200 For example, the Constitutional Court found a violation of the right to a trial within a reasonable time due to the fact that the labor dispute lasted over eight years, and the proceeding was still pending before the first instance court (Decision of the Constitutional Court of Serbia, UŽ.365 / 08 of 5 November 2009), as well as in the procedure in which the labor dispute lasted for nine years (Decision of the Constitutional Court of Serbia UŽ. 743/08 of 16 December 2010). The Constitutional Court especially emphasizes that a labor dispute is urgent *ratione materiae*, and that, due to the importance of labor rights, both in national legislation, as well as in the practice of European institutions, there is an obligation for courts to act promptly in labor disputes.

201 See for example, Mario Reljanović, *Alternative Labor Legislation*, and Radoje R. Brkić, *Labor Legislation, Manual for Taking the Bar Exam*, Second amended edition, Projuris, Belgrade, 2005, 80-81.

202 The possibility of initiating the procedure of judicial protection of workers was reduced in 2014 by removing the institute of "forced dismissal" from the Labor Law. Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, op. cit.

203 *Official Gazette of RS*, No. 75/2014.

were insufficiently informed about it.²⁰⁴ The stated deadline is preclusive and by missing it, the right to file a lawsuit for protection of labor rights is lost, and lawsuits that are filed after the expiration of this deadline are dismissed as untimely.²⁰⁵

Although the effectiveness of the rights protection of the employed population is warring, the situation is even more difficult when it comes to people with **contract of performing temporary and occasional jobs**. Provisions of the Law on Obligations apply to the above workers and the protection of individual rights related to participation in the work process remains inaccessible to them.²⁰⁶ For example, in the case of termination of the contract on temporary and occasional jobs, the person cannot ask the court to be returned to work, but only to determine whether the termination caused him/her some damage and whether he/she is entitled to compensation.²⁰⁷ The Law on Obligations is not sufficient to provide protection, nor to regulate the specifics of employment in these regimes, which indicates the need to equalize the position of people provided with contract of performing temporary and periodical jobs with employees, in terms of protection of rights under various employment contracts.²⁰⁸

It is also necessary to examine the **undeclared work**, i.e. factual work, without an employment contract, which is one of the most difficult and very common forms of labor exploitation.²⁰⁹ Unlike persons with contract of performing temporary and occasional jobs, in the case of undeclared work, there is no contract on employment or other form of work engagement, although the undeclared worker may initiate a labor dispute and request the establishment of the employment relationship. Namely, the Labor Law envisages a quality solution according to which a person who works without a legal basis, and his/her work contains all the features of an employment relationship, is considered employed for an indefinite period of time.²¹⁰ It is a fiction of the existence of an employment relationship, according to which it shall be deemed that the employee has entered into labor relation for indefinite term on the day he/she has assumed started to work.²¹¹ The legal fiction rule in terms of the existence of an employment contract was introduced by the legislator in order to prevent abuses on the labor market and eliminate the so-called undeclared work (factual work).²¹² This legal fiction allows an employment relationship to be established without concluding

204 Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, op. cit.

205 Decisions of the Supreme Court of Cassation, Rev2. 2540/19 of 29 January 2020, Rev2. 279/20 of 12 February 2020, Rev2. 2945/19 of 17 October 2019 and Rev2. 2946/19 of 25 October 2019, are among numerous cases in which workers' lawsuits were dismissed as untimely, due the 60-day preclusive deadline for initiating a dispute.

206 Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, op. cit., 76.

207 Ibid.

208 Ibid.

209 For more details see Mario Reljanović, *Alternative Labor Legislation*, 46, ff.

210 Article 32, paragraph 2 of the Labor Law. See Mario Reljanović, *Alternative Labor Legislation*, 46.

211 Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, op. cit., 77.

212 Supreme Court of Cassation, Rev2. 3177/17 of 31 October 2018.

a written contract.²¹³ For its application, it is enough that the worker started working and it shall be deemed that the employee has entered into labor relation on the day he/she has assumed work; and this rule applies to all types of employment.²¹⁴ However, the problem arises when such a status needs to be proven in court, and this most often occurs when disputed situations occur, such as injuries at work.²¹⁵

The following section will briefly present the relevant jurisprudence in this area, including the jurisprudence of the Constitutional Court that deal, *inter alia*, with decisions related to undeclared work, *a priori* waiver of rights based on work, downsizing, and cuts in wages in the public sector, gender discrimination, reduction of protection in connection with injuries at work and occupational diseases.

Public Sector Downsizing

When it comes to the jurisprudence in the field of labor rights, a particular attention deserves the decision of the Constitutional Court related to the assessment of the constitutionality of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector,²¹⁶ which was passed in the context of the economic crisis and austerity measures. Certain provisions of that law were declared unconstitutional due to inconsistency with Article 21 of the Constitution and due to discrimination against women. Namely, Articles 20-22 of the above Law stipulates conditions for termination of employment due to fulfillment of conditions for old-age pension, according to which an employee in the public sector terminates employment during the application of the Law when he/she reaches the age and length of insurance prescribed by law for retirement, independently from the regulations governing his employment status.

A number of initiatives were submitted to the Constitutional Court challenging these provisions, stating that the provision of this Article *abolished the women right to choose when to apply for the old-age pension* determined in the Law on Pension and Disability Insurance, i.e. created *an obligation* for women employed in the public sector, to retire earlier than men.²¹⁷ In the opinion of the proponents, this makes Article 20 of the Law

213 Supreme Court of Cassation d, Rev2. 3177/17 of 31 October 2018.

214 Ibid.

215 For example, that was the situation in the procedure which was also decided by the Supreme Court of Cassation in which it was a plaintiff who actually performed work for four years, without a concluded employment contract, until he suffered an injury at work. Supreme Court of Cassation, Rev2. 3177/17 date 31 October 2018. See also Bojan Urdarević et al, *Analysis of the State of Economic and Social Rights in the Republic of Serbia – Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, op. cit., 77, and Mario Reljanović, *Alternative Labor Legislation*, 46.

216 Official Gazette of RS, No. 68/15.

217 Protector of Citizens and Commissioner for Protection of Equality - Proposal for Constitutional Review of Provisions of Article 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector; Constitutional Court of Serbia, luz-244/2015. See Ž. Albanze, Commentary to the Decision of the Constitutional Court according to which the provisions of Article 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector are not in accordance with the Constitution, 8 October 2016.

contrary to Article 21 of the Constitution, which prohibits discrimination on any grounds, and the said provision affects only women employed in the public sector and thus constitutes discrimination against women.²¹⁸

The Constitutional Court reiterated the constitutional competencies of the legislator and his authority to regulate the system in the field of labor relations, especially when it comes to employees whose salaries and wages are financed from the budget (public revenues), and the fact that the legislator has the authority to prescribe various legal measures aimed at public sector optimization, which includes reducing the number of employees and prescribing various downsizing schemes.²¹⁹ However, the Constitutional Court assessed that **prescribing the legal requirement for termination of employment when reaching certain years of age, which applies only to women employed in the public sector, and indirectly converting one legal right (right to old-age pension under more favorable conditions in terms of reaching certain years of age) into the grounds for termination of employment, contrary to the principle of prohibition of discrimination guaranteed by the Constitution, both direct and indirect discrimination based on any grounds, including on the gender grounds.**²²⁰ The Constitutional Court also found that the disputed legal solution was indirectly in contradiction with the provision of Article 60, paragraph 3 of the Constitution, which guaranteed the availability of all jobs to all under equal conditions.²²¹

Challenging the above provision is also an example of successful cooperation of independent institutions for the protection of human rights aimed at protecting socio-economic rights, since the Commissioner for the Protection of Equality and the Protector of Citizens jointly submitted a proposal to initiate proceedings to review the constitutionality of Art. 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector.²²²

However, it should be borne in mind that the disputed provision of the Law on the Manner of Determining the Maximum Number of Employees was not the only provision of that regulation that negatively affected the position of women, and that it particularly affected hard-to-employ women and women subject to multiple discrimination.²²³

Similar to the limitation of the number of employees in the public sector, due to the lack of *ex-ante* gender impact assessment, the reduction of salaries in the public sector has hit women harder since they make up the majority of employees in the sector - almost 80% of employees in centers for social work are women, over 70% in the education system and about 70% in the judiciary.²²⁴ Despite presented fact, the Constitutional Court rejected the initiative to assess the constitution-

218 Protector of Citizens and Commissioner for Protection of Equality - Proposal for Constitutional Review of the Provisions of Article 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector; Constitutional Court of Serbia, Iuz-244/2015.

219 Constitutional Court of Serbia, Iuz-244/2015.

220 Ibid.

221 Ibid.

222 Protector of Citizens and Commissioner for Protection of Equality - Proposal for Constitutional Review of Provisions of Article 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector.

223 This is illustrated by the example of the Institute of Oncology and Radiology of Serbia, which in 2015 fired 20 women who were engaged in cleaning and food serving services. For more details, see FemPlatz and A 11 Initiative for Economic and Social Rights, *The Impact of Economic Reform Policies on Women`s Human Rights*, Submission to the Independent Expert on Foreign Debt and Human Rights Mr. Huan Pablo Bohoslavsky, April 2018, 3, ff.

224 Ibid

ality of the Law on Temporary Reduction of Salaries, i.e. Salaries, Net Salaries and Other Receipts in the State Administration and the Public Sector.²²⁵ The Constitutional Court stressed that “for the adoption of the disputed Law there was a particularly important, one could even say qualified public interest, which was reflected in the need to preserve the stability of the economic system in the global economic crisis, meet state obligations and ensure smooth performance of all state functions and tasks.”²²⁶ The initiative for the assessment of the Law on Reduction of Net Salaries in the Public Sector has had the same outcome.²²⁷

Reduction of Salaries in the Public Sector

The decision of the Constitutional Court on the constitutionality of the reduction of salaries in the public sector requires special consideration due to numerous shortcomings, which include the highly economic and financial character of the decision which obviously dominates when compared with constitutional and legal segment of the statement of reasons. Moreover, there is also the fact that attention was not paid to the legislator’s failure to define duration of the “temporary” reduction as well as the fact that the Constitutional Court avoided to analyze potential discriminatory and non-selective character of the Law on Reduction of Net Salaries in the Public Sector.²²⁸

As for the striking economic and financial character of the statement of reasons of the decision of the Constitutional Court, as it is pointed out in one of the separate opinions published with that decision, it is indisputable that economic and financial arguments are of great importance, but they should rather be a part of the statement of reasons of the specific proposed legislation.²²⁹ Such arguments can be very important and convincing in the parliamentary debate when explaining the law and can serve as an explanation to the public, especially to those citizens whose income is subject to the reduction; however, such arguments should not be so conspicuous and should not have a distinct dominant place in the statement of reasons accompanying the Constitutional Court decision.²³⁰ The decision of the Constitutional Court would primarily have to be based on constitutional and legal arguments, but **the Constitutional Court dealt to a disproportionately large extent with economic and financial issues when compared to constitutional and legal reasoning.**²³¹

Initiatives to assess the constitutionality of the Law on Reduction of Net Salaries in the Public Sector were submitted during the validity of that Law; during the procedure before the court, the disputed Law ceased to be valid. This is another problem noticeable in the practice of the Constitutional Court

²²⁵ Official Gazette of RS, No. 31/09.

²²⁶ Constitutional Court of Serbia, Iuz-97/09 of 17 January 2013.

²²⁷ Official Gazette of RS, No. 108/13.

²²⁸ For more details on the shortcomings of the aforementioned decision of the Constitutional Court, see, for example, Milan Škulić, *Separate Opinion on the Constitutional Court Decision No. IUz-138/2016*, and Tamaš Korhec, *Separate Opinion on the Constitutional Court Decision No. Iuz-138/2016*.

²²⁹ Milan Škulić, *Separate Opinion on the Constitutional Court Decision No. IUz-138/2016*.

²³⁰ Ibid.

²³¹ Ibid.

when it comes to judicial review procedures – deciding on general acts related to economic and social rights is delayed for too long, and (as in this case) it happens that decision-making is approached only after the disputed regulations cease to apply. This raises the question of whether judicial review can be considered an effective and timely tool of protecting socio-economic rights.

Bearing in mind that among the arguments in favor of non-justiciability of socio-economic rights, the most common are those that rely on the principle of separation of powers, unjustified interference of courts in the allocation of resources and ignorance of judges in complex economic and financial issues, it would be beneficial to examine one of the separate opinions on the decision of the Constitutional Court in this procedure, which shows that it is not only the authority, but also the duty of the Constitutional Court not to remain silent and passive in cases when the legislator fails to comply with principles of the Constitution.²³² The same opinion points out that the duty of judges of the Constitutional Court is to interpret and protect the principles of the Constitution and to protect human rights, and that in the said case the Constitutional Court failed to protect the principle of the Constitution on the unity of the legal order (that has an important role in interpreting and practice of the Constitutional Court), because the disputed Law on Reduction of Net Salaries in the Public Sector introduced a special personal income tax into the legal system of the Republic of Serbia contrary to the provisions of the systemic law which regulates the matter of taxation of citizens' income.²³³

Impairment of Protection in Connection with Injuries at Work

The Law on Amendments to the Law on Health Insurance²³⁴ reduced the protection in connection with injuries at work. These changes stipulate those commuting accidents, as well as occupational diseases, are not considered injuries at work.²³⁵ Previously, injuries at work were determined in accordance with the regulations on pension and disability insurance, which provided that injuries at work shall cover commuting accidents. Those provisions of the Health Insurance Law were challenged before the Constitutional Court, which found that they were not in accordance with the Constitution and ratified international treaties.²³⁶ The Constitutional Court reminded that the state, by ratifying the Convention of the International Labor Organization No. 121

232 In his separate opinion, judge Tamaš Korhec states, *inter alia*, that „ we, the judges of the Constitutional Court, do not have the knowledge, expertise and skills, much less democratic legitimacy and capacity to judge the justification, effectiveness or suitability (celishodnost) of our country's tax policy or various measures to reduce the budget deficit introduced by law by the National Assembly. We are not entitled to decide instead of democratically elected representatives of the people whether a legal rule is of good quality, whether it effectively serves the achievement of the declared goal. (...) The responsibility lies with the democratically elected representatives of the citizens (...). However, there is a point where the Constitutional Court must not remain silent and passive, when the legislator exercises his broad competence contrary to the principles of the Constitution, unconstitutionally limiting the human and minority rights guaranteed by the Constitution“. Tamaš Korhec, *Separate Opinion on the Decision of the Constitutional Court No. IUz-138/2016*.

233 Ibid.

234 Official Gazette of RS, No. 57/11.

235 Article 33, paragraph 5 of the Health Insurance Law. For more details on this decision, see also Igor Vila, *Constitutional Court Protection of Economic and Social Rights in Times of Economic Crisis*, op. cit.

236 Constitutional Court of Serbia, Iuz-314/2011, decision of 18 October 2012, Official Gazette of RS, No. 110/12.

on benefits in case of commuting accidents and occupational diseases, undertook to prescribe a definition of accidents at work that will contain conditions in which an accident can be considered a commuting accident,²³⁷ and that the disputed provision of the Health Insurance Law contrary to the provisions of the Convention, prescribes that occupational injuries do not include occupational diseases and commuting accidents.²³⁸ The Constitutional Court assessed that **the disputed provision was inconsistent with the ILO Convention, and thus with the provisions of Article 194 para. 4 and 5 of the Constitution, which stipulates that ratified international agreements and generally accepted rules of international law shall be part of the legal system of the Republic of Serbia and that laws and other general acts shall not be in conflict with the ratified international treaties.**²³⁹ This decision is an example of limiting retrogressive measures – a measures that will inevitably mean a step backwards in the enjoyment of economic and social rights. However, this decision does not mention the Covenant, nor the obligations that, according to the Committee on Economic, Social and Cultural Rights, states have if they resort to the adoption of such measures.²⁴⁰ This is also a missed opportunity to start building interpretive standards that are specifically related to economic and social rights, and that could be used in similar situations in the future, through the court practice. Deciding on very similar issues, the Constitutional Court of Argentina, unlike the Constitutional Court of Serbia, did not miss the opportunity to emphasize that the reduction of the right to compensation for injuries at work is contrary to the ban on retrogressive measures and to cite relevant provisions of the Covenant on Economic, Social and Cultural Rights.²⁴¹

Decisions on Constitutional Complaints

Discrimination

When it comes to decisions on constitutional complaints, **the only decision²⁴² of the Constitutional Court which established a violation of the prohibition of discrimination refers precisely to discrimination in the field of work.**

In December 2014, **S.A.** filed a constitutional complaint against the judgments of the Supreme Court of Cassation, the Court of Appeal in Novi Sad and the Basic Court in Kikinda, for violating

²³⁷ See Article 7, paragraph 1, of the ILO Convention No. 121 on employment injury benefits.

²³⁸ Constitutional Court of Serbia, luz-314/2011, decision of 18 October 2012.

²³⁹ Ibid.

²⁴⁰ See Committee on Economic, Social and Cultural Rights, An evaluation of the obligation to take steps to the “maximum of available resources” under an Optional Protocol to the Covenant, statement of 10 May 2007. . Namely, in the case of retrogressive measures, it is up to the states to prove that the decisions to adopt those measures have been taken after careful consideration. The assessment whether states comply with obligations when adopting retrogressive measures is based on the assessment of all rights guaranteed in individual states and maximum use of available resources. For more details see also A 11 – Initiative for Economic and Social Rights, *Second Class Rights*, op. cit., 10.

²⁴¹ For more details see Christian Courtis, “Argentina: Some Promising Signs” in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 169.

²⁴² The decisions of the Constitutional Court, which were published in the case law database on the official website of that court until 1 July 2021, were analyzed.

the principles of non-discrimination, the right to a fair trial and the right to equal protection of rights.²⁴³ The constitutional complaint stated, *inter alia*, that the complainant had been the victim of obvious discrimination, given that her employment with the defendant had not been extended for another 12 months although that was the obligation under a contract with the National Employment Service (hereinafter referred to as the “NES”) after professional training, only because she was on maternity leave. This fact undoubtedly arises from the report sent by the defendant to the NES, in which the complainant was classified as an employee whose employment was not extended due to pregnancy.²⁴⁴ The Constitutional Court upheld the constitutional complaint and found a violation of the right to a fair trial and the principles of non-discrimination.

What is particularly concerning in this case is that the discrimination was committed by an employer to whom the state, through the NES, provided employment subsidies, *inter alia*, for the employment of the complainant, and who had a contractual obligation to provide trainees (including the complainant) after the traineeship with the fixed-term contract for at least 12 months.²⁴⁵

It is worrying that neither the first-instance nor the second-instance court, nor the Supreme Court of Cassation considered the allegations of discrimination, despite a written report from which it was clear that the employment was not extended due to pregnancy (the fact that the complainant was on maternity leave was stated as the only reason for non-renewal of the contract). This omission made by the competent courts – to consider allegations of discrimination – was also a key reason why the Constitutional Court found a violation of the right to a fair trial.²⁴⁶

Impossibility to Waive the Right to Fair Remuneration for Work

It is important to examine the constitutional complaint filed by **J.S.** in which the Constitutional Court confirmed that the employee cannot waive the rights guaranteed by Article 60 paragraph 4 of the Constitution, including the right to fair remuneration, regardless of the concluded

²⁴³ Constitutional Court of Serbia, UŽ-8760/2014, decision of 9 November 2016.

²⁴⁴ Ibid.

²⁴⁵ Moreover, this was not the only case of non-extension of employment due to pregnancy with the same employer in relation to workers for whom he received employment subsidies from the NES. Namely, the applicant was one of the 72 trainees who completed the internship with the defendant, of which the defendant concluded employment contracts with 63 for a period of another 12 months. According to the previously mentioned report sent by the defendant to the NES, six trainees were not hired after completing their internship due to failure to achieve work results during professional training, and three trainees (among them the complainant) due to the fact that during the training, they left for maternity leave. Constitutional Court of Serbia, UŽ-8760/2014.

²⁴⁶ The Constitutional Court in particular emphasized that the impugned judgments did not contain statement of reasons meeting the standard of a fair trial even in relation to the allegations submitted by the complainant during the civil proceedings indicating discrimination. Constitutional Court of Serbia, UŽ-8760/2014.

extra-judicial settlement with the employer.²⁴⁷ This decision is especially important if we take into account the practice of individual employers who require employees to sign statements waiving in advance the rights they have under the law.²⁴⁸ A similar message was given by the decision of the Constitutional Court in the procedure related to the agreement of employees with the employer who, after their employment was terminated due to redundancy, agreed to be paid a smaller amount than the one they were entitled to, i.e. to be paid the minimum wage instead of the amount of wages owed.²⁴⁹ The Constitutional Court firstly stated that contracts and agreements that are, *inter alia*, contrary to public policies, of which the Constitution is an integral part, are null and void. Moreover, it stressed the position of the relevant courts and the fact that by concluding disputed contracts, employees had waived their right to receive due salaries, i.e. that the debt was released, in compliance with the Law on Obligations.²⁵⁰ The Constitutional Court concluded that such a position of relevant courts represent an arbitrary law application and that such a position was contrary to the guaranteed right to work under Article 60 para. 4. of the Constitution, which, *inter alia*, guarantees the right to fair remuneration for work, that cannot be waived.²⁵¹

Undeclared Work and Determining the Existence of an Employment Relation

The decision of the Constitutional Court regarding the constitutional complaint of **S.Š.**, which referred to the procedure for determining the existence of an employment relation, shows that even in the case of the existence of quality normative solutions, their application in practice can be associated with numerous difficulties.

In the period from October 1994 to December 2006, S.Š. worked at the defendant's gas station as

247 UŽ-2524-2009. That constitutional complaint referred to the unpaid salaries, vacation allowance and unpaid contributions for pension and disability insurance. For the above reasons, the complainant filed a constitutional complaint against the employer, and then concluded an extra-judicial settlement. The second-instance court concluded that the complainant waived his/her right to claims he/she had against the employer by concluding the extra-judicial settlement. However, the Constitutional Court concluded that such a legal position of the second instance court was contrary to the provision of Article 60 paragraph 4 of the Constitution and that the employee could not waive the rights guaranteed by that provision, including the right to fair remuneration. Since the employer failed to pay the salary to the complainant, although he had such an obligation, and since the right to payment of pension and disability insurance contributions corresponds to the right to salary payment, the Constitutional Court concluded that the appellate court *de facto* deprived the complainant of the right to payment of pension and disability insurance contributions, therefore of rights stemming from mandatory social insurance the complainant is entitled to. It was established that the complainant's rights to a fair trial, fair compensation for work and social protection referred to in Article 69, paragraph 2 of the Constitution were violated.

248 Such a practice is also present in terms of specially protected categories of employees. See Vera Kusovac, *Special Protection Against Termination of Employment Contract*, *op. cit.*

249 Constitutional Court of Serbia, Decision UŽ-2477-2013 of 8 October 2015. See also Milica Mladenović, *Constitutional Court Protection of the Right to Work in the Republic of Serbia*, University of Niš, Faculty of Law, Niš, 2017, 49.

250 Constitutional Court of Serbia, Decision UŽ-2477-2013.

251 *Ibid.*

a cleaner.²⁵² Having in mind the obligation of the employer to conclude an employment contract before the employee actually assumes work, without concluding such a contract, S. Š. considered that she had established an employment relationship with the employer under the law for indefinite term and pointed out that the competent courts wrongly concluded that the employer had not expressed a willingness to conclude an employment contract with her, since the willingness is evidenced not only by concluding an employment contract, but also by enabling the worker to work.²⁵³ The Constitutional Court rejected her constitutional complaint, pointing out, *inter alia*, "that she was working without the knowledge of the employer, she was a part-time cleaning lady, which is a position that was not envisaged in the job systematization act", „that the salary was paid not by the employer but by gas station staff who were not authorized to conclude an employment agreement with the complainant; therefore it could not be concluded that the complainant was a full-time employee".²⁵⁴ Finally, the Constitutional Court emphasized that the complainant started working at the defendant without legally entering into labor relation (without public announcement of a vacancy and without concluding a written contract²⁵⁵) and concluded: **"Without the knowledge of the defendant's manager, the complainant worked as a cleaner at the defendant's gas station, although such a job was not systematized at all by the defendant's relevant act."** As a reminder, that period lasted for more than 12 years. Since all the acting courts, including the Supreme Court of Cassation, gave credence to the defendant's allegations that the *plaintiff had been working at the gas station for more than 12 years without the knowledge of the gas station manager*, it is not difficult to conclude what are difficulties faced by undeclared workers trying to prove the existence of undeclared work, in order to determine the existence of an employment relation. It is obviously and probably superfluous to emphasize how such decisions can encourage labor exploitation and discourage workers from trying to seek protection of their rights, despite the existence of adequate normative solutions.

Social Protection and Social Insurance

Article 69 of the Constitution stipulates that citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence, shall have the right to social protection the provision of which is based on social justice, humanity and respect of human dignity. In terms of the social insurance, the Constitution of the

252 Constitutional Court of Serbia, UŽ-1784-2009. The decision of the Constitutional Court points out that the disputed judgment of the Supreme Court of Cassation established that during that period, the defendant did not submit to the plaintiff any written decision on employment, contract, annex or decision on the use of annual leave, that during the disputed period the plaintiff worked every day, part-time; that the salary for the plaintiff was paid by the gas station staff from their own funds and paid directly twice a month in the amount of 3,000 dinars; that such a situation lasted until December 2006, when inspectors visited the gas station; since that moment, the plaintiff no longer came to work; the job of the cleaner at the gas station was not systematized.

253 Constitutional Court of Serbia, UŽ-1784-2009.

254 Ibid.

255 Article 32, para. 3 of the Labor Law has introduced the fiction of the existence of employment in cases of undeclared work precisely because of labor exploitation and abuse that take place without an employment contract, and it is at least surprising that the Constitutional Court cites the lack of a written employment contract as a reason justifying the rejection of this constitutional complaint.

Republic of Serbia regulates that the employees shall have the right to salary compensation in case of temporary inability to work, as well as the right to temporary unemployment benefit in accordance with the law (Article 69, paragraph 3); in terms of the pension insurance, the Republic of Serbia shall see to economic security of the pensioners (Article 70).²⁵⁶

Procedures and conditions for exercising certain rights in the field of social protection are regulated in more detail, primarily by the Law on Social Protection.²⁵⁷

The Law on Social Protection states that the right to various types of financial support is exercised in order to ensure the subsistence minimum,²⁵⁸ and the Constitution, stating the right to social protection, speaks of citizens that require welfare for the purpose of overcoming social and existential difficulties and *creating conditions to provide subsistence*; it explicitly states that the social protection is provided based on social justice principals and respect of human dignity.²⁵⁹ However, the amount of financial social assistance, which is the most important form of financial support for socially disadvantaged individuals, is not sufficient to meet basic needs and does not exceed the poverty line.²⁶⁰ The situation is further aggravated by interruptions in receiving financial social assistance, because according to the Law on Social Protection, a able bodied individual, i.e. a family in which the majority of members are able to work, is entitled to financial social assistance for up to nine months during a calendar year.²⁶¹ The Committee on Economic, Social and Cultural Rights has singled out these interruptions in the receipt of financial social assistance as one of the key problems that run counter to the obligations under Article 9 of the Covenant.²⁶² Citizens of Serbia who are left without the means necessary to meet the basic subsistence minimum or whose other rights contained in the Covenant have been violated, do not have the opportunity to submit petitions to this Committee in case of violation of Covenant rights, because Serbia has not ratified the Optional Protocol to the Covenant. The practice of the European Committee of Social Rights, which monitors the implementation of the European Social Charter, also shows that interruptions in the provision of financial assistance to the unemployed are contrary to the provisions of the Charter.²⁶³ However, Serbia has not ratified the Additional Protocol to the European Social Charter establishing a system of Collective Complaints; accordingly, this mechanism for the protection of socio-economic rights remains inaccessible to the citizens of Serbia. There is no significant case law regarding the amount of financial social assistance or interruptions in receiving financial social assistance.

²⁵⁶ See Ratko Marković, *Constitutional Law, op. cit.*, 476.

²⁵⁷ Official Gazette of RS, 24/2011.

²⁵⁸ Article 5, paragraph 2 of the Law on Social Protection.

²⁵⁹ Article 69, paragraph 1 of the Constitution of the RS.

²⁶⁰ European Committee of Social Rights, Conclusions 2017 – Serbia – Article 13 Paragraph 1 – Adequate assistance for every person in need, available at: <http://hudoc.esc.coe.int/eng?i=2017/def/SRB/13/1/EN>.

²⁶¹ Article 85, paragraph 3 of the Law on Social Protection.

²⁶² Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Serbia, 10 July 2014.

²⁶³ In the proceedings of the *European Roma Rights Centre v. Bulgaria* (complaint no. 48/2008), the European Committee of Social Rights determined that by amending the Law on Social Protection and rendering social assistance benefits intended for the unemployed able-bodied beneficiaries limited in time, Bulgaria has violated provisions of the European Social Charter regarding the right to social protection. See, for example, A 11 – Initiative for Economic and Social Rights, *Comments to the Draft Law on Amendment to the Social Protection Law*, 2019, available at: <https://www.a11initiative.org/wp-content/uploads/2021/02/Komentari-na-Nacrt-zakona-o-izmenama-i-dopunama-Zakona-o-socijalnoj-za%C5%A1titi.pdf>.

In the data base of the Constitutional Court case law, out of 39 published decisions on constitutional complaints regarding the violation of Article 69 of the Constitution dealing with social protection and social insurance, only in one case a violation of rights was established – in all other cases, constitutional complaints were rejected.²⁶⁴ In the case in which the violation of the rights in the field of social protection was established, it was a violation of Article 69, paragraph 2, which refers to the rights of employees and their families to social security and insurance.²⁶⁵ In constitutional complaints proceedings before the Constitutional Court, no violation of Article 69 paragraph 1 of the Constitution and right to social protection guaranteed to citizens and families who are left without conditions for meeting basic living needs has been established.

However, the Constitutional Court dealt with these rights indirectly, when deciding on violations of other rights, primarily the right to a trial within a reasonable time or the right to a fair trial. In one of such decisions, the constitutional complaint referred to the procedure for exercising the right to financial social assistance before the Center for Social Work “Solidarity” in Pančevo, which lasted five and a half years, due to which the Constitutional Court found a violation of the right to a trial within a reasonable time.²⁶⁶ Namely, the constitutional complainant, V.Č., applied in October 2011, for financial social assistance, which he described as a request for “approval of permanent social assistance for basic living needs.” The letter of the Center for Social Work “Solidarity” in Pančevo, which was submitted to the Constitutional Court, states that “the applicant’s request for exercising the right to financial social assistance has not been decided upon, with the explanation that the complainant was ‘contacted’ after the application was submitted in order to fill in the application form for the financial social assistance and submit the necessary documentation, but that the applicant did not respond to that, for which reason it was stated that the applicant never submitted the application in question.”²⁶⁷ The Constitutional Court pointed out that the competent body was obliged to decide on the applicant’s request formally, i.e. to make a decision on the application and submit it to the applicant.²⁶⁸

In the above proceeding, the Constitutional Court pointed out the existential importance of the right to financial social assistance. When deciding whether the proceedings lasted unreasonably long, the Constitutional Court pointed out that the constitutional complainant had a legitimate interest in having his application decided upon efficiently and that the decision in the administrative matter in question was of existential importance for the constitutional complainant, taking into consideration the nature of right decided upon.²⁶⁹ However, there was no consideration as to whether there had been a violation of the right to social protection. As the Constitutional Court points out, neither in the constitutional complaint nor in the supplement to the complaint did the applicant state the indication of human rights which he believes were violated; but “it follows from the allegations of the constitutional complaint that

²⁶⁴ Data base of the Constitutional Court case law, available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/>. Decisions issued until 1 July 2021 have been analyzed.

²⁶⁵ This decision is presented in the sub-section “Right to Work”, in the context of the right to fair compensation, so it will not be analyzed here.

²⁶⁶ UŽ- 5337/2015.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

the applicant considers his right to a trial within a reasonable time was violated by actions taken by Pančevo Center for Social Work”, and the Constitutional Court found a violation of the said right and upheld the constitutional complaint.²⁷⁰

No compensation for non-pecuniary damage was awarded in this procedure. The Court’s reasoning was that the constitutional complainant did not seek compensation for non-pecuniary damage, but pointed out that the actions of the first-instance administrative body “caused damage in the form of physical pain caused by prolonged starvation and pain caused by various humiliations ...”²⁷¹ Therefore, the Constitutional Court determined that upholding the constitutional complaint, establishing the violation of the right to trial within a reasonable time, as well as ordering the competent authorities to take all measures to complete the procedure as soon as possible, represent a sufficient form of fair satisfaction of the complainant.²⁷²

Despite the fact that the constitutional complaint was upheld, this procedure reveals several shortcomings when it comes to the right to social protection and legal remedies in case of violation of that right. These shortcomings become more visible if the analyzed procedure is compared with the case law of the Colombian Constitutional Court, which considers that individuals who are in a state of extreme vulnerability and could be left without the minimum conditions for dignified life must be provided with timely judicial protection; they may request that this protection be provided to them, as a form of urgent measure for the exercise of economic and social rights.²⁷³ The Court has applied this concept in cases where individuals are at risk of being left without any income.²⁷⁴ Going back to the Serbian situation, socially vulnerable individuals who are left without the means necessary for life do not have similar timely and effective protection at their disposal.²⁷⁵ In the case of the procedure before the CSW “Solidarity” we see that such a situation can last longer than five years. Partial protection was provided only after the conditions for filing a constitutional complaint for violation of the right to a trial within a reasonable time were met. However, having in mind the importance of this right, which, according to the Serbian Constitutional Court, has existential significance, relying on a constitutional complaint for violation of the right to a trial within a reasonable time cannot be considered timely and effective protection.²⁷⁶ Apart from the fact that such access to justice can be considered belated, such protection is also incomplete, since, besides considering the violation of the right to a trial within a

270 Ibid.

271 UŽ-5337/2015. Pursuant to Article 85, para. 1 of the Law on Constitutional Court, the constitutional complaint shall contain, *inter alia*, the amount and basis for compensation of material or immaterial damages, where compensation is required, while paragraph 3 specifies that the compensation claim may only be set simultaneously with filing of a constitutional complaint.

272 UŽ-5337/2015.

273 For more details on this topic and the concept of „related fundamental rights” in the case law of the Colombian Constitutional Court see, Magdalena Sepulveda, *Colombia: The Constitutional Court’s Role in Addressing Social Injustice*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit.

274 Ibid.

275 It is necessary to keep in mind that mechanisms such as appeals and appeals on grounds of administrative silence are not sufficient, especially if there is a possibility to annul decisions and remit the case in administrative proceedings for an unlimited number of times, which is why procedures in simple matters of existential importance to individuals last for several years.

276 This becomes even clearer given that it would take several years before a constitutional complaint could be filed for a violation of the right to a trial within a reasonable time.

reasonable time, there is no consideration of the violation of the right to social protection. Namely, due to systemic problems in administrative proceedings, which are reflected in the unlimited possibilities of the second instance administrative body to remit the case to a lower instance, the parties in these proceedings often cannot exhaust legal remedies in order to satisfy the conditions for filing a constitutional complaint.²⁷⁷ In such situations, the Constitutional Court confines itself to considering whether the proceedings were unreasonably long (and whether there was a violation of the right to a trial within a reasonable time), without considering whether there was a violation of the right in question.²⁷⁸ However, regarding the constitutional complaint concerning the failure of SWC Solidarity in Pančevo to act, the consideration of the violation of the right to social protection was omitted because the applicant did not explicitly state that right in the constitutional complaint - apparently due to his ignorance and because he did not have the right to adequate legal aid. The fact that this is a ignorant party is illustrated by the fact that the financial social allowance application was marked incorrectly and that no compensation was requested. These circumstances also indicate the extent to which the **protection of socio-economic rights and access to justice in the event of a violation of these rights depend on the existence of an effective system of free legal aid**. At the time when V.Č. submitted the application for the financial social assistance, Serbia was only at the beginning of the ten-year process of adopting the Law on Free Legal Aid, and it is still far from establishing an efficient system of free legal aid.²⁷⁹

Bearing in mind that the decision on the constitutional complaint related to the procedure before the CSW "Solidarity" Pančevo completely failed to consider the violation of the right to social protection, that after five and a half years of inability of a socially vulnerable individual to exercise the right to the financial social assistance – suffered hunger and various humiliations - "fair satisfaction" was reduced to a violation of the right to a trial within a reasonable time, this case clearly indicates why the protection of socio-economic rights based on civil rights brings only sporadic and partial results, and above all, why it is crucial to ensure effective and timely protection of socio-economic rights, as well as adequate free legal aid in these proceedings. From the point of view of protection of the right to social protection, the significance of the decision on the constitutional complaint of V.Č. boils down to the allegations of the Constitutional Court that the procedure for exercising the right to financial social assistance cannot be terminated by contacting the applicants, but that a written decision is required.

The problems that may arise in exercising the rights in the field of social protection are illustrated by **the case of J.S.** For over five years, a final decision on the application for financial social assistance was not made. During that time, seven first-instance decisions and seven decisions

277 For more details see Milijana Trifković, "Violation of the Right to a Trial within a Reasonable Time Before Administrative Bodies", *Annals of the Faculty of Law in Belgrade*, 2017, vol. 65, no. 3, 188-206.

278 See, for example, UŽ-3887/2011. The Constitutional Court found a violation of the right to a fair trial but considered that the request to establish violation of the right to social protection and rights referred to in Article 66 of the Constitution, referring to special protection of the family, mother of a single parent and child, was premature since the procedure was still ongoing.

279 See A 11 – Initiative for Economic and Social Rights, *Implementation of the Law on Free Legal Aid from the Perspective of Internally Displaced Persons*, 2020 and Praxis, *Law on Free Legal Aid – First Year of the Implementation: Have the Goals Been Achieved?*, 2020. For more details on the importance of the free legal aid for exercising social and economic rights, see Andrea Durbach, *The Right to Legal Aid in Social Rights Litigation* in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 59-75.

of the second-instance body that returned the case to the first-instance procedure were made.²⁸⁰ As a result, for five years the complainant could not exercise the right, which was “existentially important because it concerns assessment on eligibility for financial social assistance in order to meet the basic living needs of the complainant and her family.”²⁸¹ The Constitutional Court found a violation of the right to a trial within a reasonable time and established the right to compensation of 300 euros. There was no consideration of the violation of the right to social protection in this procedure. This procedure also illustrates difficulties that may arise due to the fact that there is no effective legal remedy that could prevent socially vulnerable persons from being left without means of subsistence for years due to ineffective actions by the administration. One of the key problems is the fact that **in administrative proceedings - in which most of the rights in the field of social protection are exercised - there is no legal remedy suitable for speeding up the proceedings.**²⁸² Protection based on a constitutional complaint and violation of the right to a trial within a reasonable time cannot be considered sufficient or timely, bearing in mind that such protection can be sought only after several years of proceedings, during which time vulnerable individuals and families may be left without the necessary income to satisfy basic needs and living in dignity. These examples show the importance of the position taken by the Constitutional Court of Colombia in such situations, stating that it is necessary to urgently provide protection to vulnerable individuals who are at risk of being left without any income.

When it comes to constitutional complaints in which the violation of the right to social protection referred to in Article 69, paragraph 1 of the Constitution is invoked, it is useful to examine two constitutional complaints related to the failure to recognize the right to the caregiver allowance. In the first case, the constitutional complainant was a child with autism and brain damage, and according to the constitutional complainant and the reasoning of the Administrative Court’s decision, his medical records showed that he was unable to take care of himself due to his illness and that caregiver was required.²⁸³ Since the illness and condition suffered by the constitutional complainant were not explicitly recognized in the regulations in force at the time of filing the constitutional complaint and regulating entitlement to the caregivers allowance, the Administrative Court rejected the lawsuit filed for the purpose of annulling the first-instance decision which did not grant the complainant the right to the caregiver allowance.²⁸⁴

The complainant pointed out that the interpretation of the Administrative Court and the “blind application of a legal norm” on the basis of which the complainant could not be granted the right to the caregiver allowance was discriminatory, because the complainant’s factual situation and the fact that without the help of another person he was not able to perform basic life activities was neglected; pursuant to bylaw regulation, persons with disabilities are not entitled to an increased, and often not even to a basic caregiver allowance, although they are not able to take

280 UŽ-6193-2013.

281 Ibid.

282 Unlike the parties to court proceedings, who may file an objection to expedite the proceedings, the parties to administrative proceedings do not have a legal remedy suitable for expediting the proceedings, unless the proceedings are brought before the Administrative Court, and only in relation to the length of the proceedings before the Administrative Court. See Milijana Trifković, “Violation of the right to a trial within a reasonable time before administrative bodies”, op. cit., 194.

283 UŽ-2697/2011.

284 Ibid.

care of themselves and they need help of another person; the Administrative Court was requested to decide on the merits and rule in full jurisdiction, so that “this legal gap would be bridged by practice”, which the court failed to do.²⁸⁵ The Constitutional Court also did not want to bridge the said gap. According to the assessment of the Constitutional Court, “the challenged judgment is based on the provisions that were valid at the time of deciding on the complainant’s request and which could not be interpreted more broadly in the manner requested by the complainant. Namely, *the fact that the complainant needs the assistance of another person to perform daily needs is not a sufficient basis for recognizing the right to the allowance for the assistance of another person if statutory requirements are not met(...)*”

The constitutional complainant stressed that, *inter alia*, his right to special protection of families and children with disabilities, guaranteed under Article 66, para. 1 and 3 of the Constitution was violated. However, the Constitutional Court pointed out that the conditions for exercising the right to the caregiver allowance apply equally to all those persons who need help and care to meet basic living needs, and that therefore this type of social protection is not associated with Article 66, para 1 and 3 of the Constitution, which, *inter alia*, guarantees special protection to children with mental or physical disabilities.²⁸⁶

In another similar proceedings, the complainant was a child born with cerebral palsy, unable to feed herself, maintain personal hygiene, and take care of herself in any way.²⁸⁷ After the application for caregiver allowance as well as the complaint and lawsuit submitted to the Administrative Court were rejected, she filed a constitutional complaint. In this case, the Constitutional Court found that *the fact that the complainant needed the assistance of another person to perform her daily living needs was not a sufficient basis for recognizing the right to the caregiver allowance if statutory requirements are not met.*²⁸⁸

The fact that in the proceedings on constitutional complaints no violation of Article 69 para. 1 of the Constitution and the rights to social protection of individuals and families who are left without means of subsistence was determined, can be explained by circumstances beyond the control of the Constitutional Court, such as unavailability of free legal aid, impossibility to exhaust legal remedies due to systemic problems in administrative proceedings, failure to produce evidence, insufficient number of constitutional complaints concerning those rights. However, on several occasions the Constitutional Court has had the opportunity to decide on issues of importance for the exercise of rights in the field of social protection by conducting constitutional review of legislation; when it comes to court performance in exercising this task, unsatisfactory outcomes can certainly be attributed to the Constitutional Court, as well. Analysis of (in)action of the Constitutional Court regarding initiatives for assessing the constitutionality of acts pertinent to social rights, especially in the context of economic crisis, financial consolidation and austerity measures, leads to the conclusion that the court tendentiously avoids deciding on these initiatives or decides upon these matters only when the disputed regulations

²⁸⁵ Ibid.

²⁸⁶ UŽ-2697/2011.

²⁸⁷ UŽ-3408/2011.

²⁸⁸ UŽ-2697/2011.

cease to apply.²⁸⁹ This is confirmed by the example of the **Decree on Social Inclusion Measures for Recipients of Financial Social Assistance** passed in 2014, which under the threat of loss or reduction of financial social assistance, imposes obligations on vulnerable citizens that discriminate against them and violate their dignity. The above Decree, contrary to the prohibition of forced labor and discrimination, under the threat of reduction or abolition of financial social assistance, stipulates the obligation of social assistance beneficiaries to “earn” the received social assistance.²⁹⁰ Due to the introduction of these discriminatory provisions, at the end of 2014 the Protector of Citizens and several civil society organizations requested the Constitutional Court to assess constitutionality of the disputable Decree.²⁹¹ Almost seven years have passed since, and the Constitutional Court have not yet passed the decision regarding the said initiatives and proposal for assessment of constitutionality.

An example of inadequate action is also lack of ruling in the case of an initiative for assessment of constitutionality of Article 25 of the Law on Financial Support for Families with Children. In 2018, A 11 – Initiative for Economic and Social Rights submitted to the Constitutional Court an initiative to assess the constitutionality of that Article because it introduced conditions for exercising right to the parental allowance discriminating Roma children.²⁹² The Constitutional Court has not yet ruled on that initiative. Some initiatives important for access to socio-economic rights in other areas, despite sending a rush note, have been waiting for six years to be resolved.²⁹³ Therefore, apart from the lack of timely and effective protection in individual cases of denial of social protection rights, for years the judicial review of general acts has not proved to be an effective mechanism of abolishing regulations in the field of social protection that are not in compliance with the prohibition of discrimination affecting enjoyment of social rights of a large number of the most vulnerable citizens.

In May 2021, the Constitutional Court ruled that several provisions of the Law on Financial Support to Families with Children were unconstitutional, including a provision that provided that the right to salary compensation due to absence from work (for special child care) could not be exercised for a child who is entitled to the caregiver allowance, as a result of which the parents of children with disabilities were put in a worse position and had to choose between these two options.²⁹⁴

It is also useful to mention the decision of the Constitutional Court regarding the initiative for assessing the constitutionality of the prior version of the Law on Financial Support to Families with Children, which **denied the right to parental allowance to children whose mothers are foreign citizens**. Therefore, the Commissioner for the Protection of Equality submitted a propos-

289 A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 17, 23 and 37. On long delays in the proceedings before the Constitutional Court see also Violeta Beširević, “Governing without judges”: The politics of the Constitutional Court in Serbia, *International Journal of Constitutional Law*, 2014.

290 A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit. 14 and 17.

291 Ibid.

292 Ibid, 15-17.

293 This happened, for example, with the initiative for assessing the constitutionality of the Law on Property Taxes, which was submitted in 2014. For more details see subtitle “Housing”.

294 Decision of the Constitutional Court of RS No. Iuz-266/2017 determining that provisions of Article 12, para. 7 of the Law on Financial Support to Families with Children (Official Gazette of RS, No. 113/17 and 50/18) is not in compliance with the Constitution.

al for the assessment of constitutionality and legality of Article 14 of the said Law.²⁹⁵ The disputed article of the Law foresaw that the right to parental allowance could be exercised by the mother if she fulfilled certain conditions, among which was the condition to have the citizenship of the Republic of Serbia. The final beneficiaries of this allowance are children, although the Law states that the right to parental allowance is exercised by the mother, while the father can exercise this right only in exceptional cases, prescribed in Article 14, paragraph 7 of the Law (if the mother is not alive, if she has abandoned the child or if she is not able to take immediate care of the child for justified reasons). By denying this financial support to children whose mothers are foreign citizens, those children are placed in an unequal position in relation to other children, whose mothers have citizenship, and as a consequence, those children are unjustifiably denied the right to parental allowance based on the personal status of the family member or mother's citizenship.²⁹⁶

The Constitutional Court rejected the proposals for determining the unconstitutionality of this provision, provided that the provision of Article 14 para. 7 of the Law is interpreted and applied in such a way that the right to parental allowance, if other conditions are met, can be exercised by the father of the child if the mother is not a citizen of the Republic of Serbia. The court pointed out that the parental allowance, by its nature, is not primarily a measure of a social character, but an instrument of population policy, and that the goal of its introduction is to increase the birth rate of one's own population.²⁹⁷ Since such population policy measures are financed by public revenues i.e. from the budget, the Constitutional Court determined that **prescribing citizenship of the Republic of Serbia, as one of the conditions for exercising the right to parental allowance, either on the mother's side or on the father's side, is not inconsistent with the Constitution.**²⁹⁸

However, bearing in mind that parental allowance is primarily aimed at improving the conditions for meeting the basic needs of the child, the Constitutional Court concluded that it is justified to indicate that the condition of citizenship of the mother, as the primary holder of parental allowance, can indirectly disadvantage children from mixed marriages, as beneficiaries of the right.²⁹⁹ The court considered that this problem could be overcome by interpreting that a mother who does not have Serbian citizenship was objectively prevented from taking immediate care of the child, and that in that case the right to parental allowance could be exercised by the child's father, if he meets other requirements.

Even if we disregard the innovation resorted to by the Court in order to avoid finding the contested provision unconstitutional, and ECtHR rulings which show that it is necessary to present very serious reasons for the difference in treatment based solely on nationality are set aside,³⁰⁰ it is still disput-

295 The Commissioner for the Protection of Equality submitted a proposal for the assessment of the constitutionality and legality of Article 14, para. 1 of the Law on Financial Support to Families with Children (Official Gazette of RS, No. 16/2002, 115/2005 and 107/2009) emphasizing, *inter alia*, that conditioning the exercise of the right to parental allowance by mother's citizenship is contrary to the prohibition of discrimination under Article 21 of the Constitution. The proposal is available at: <http://ravnopravnost.gov.rs/rs/predlog-za-ocenu-ustavnosti-i-zakonitosti-zakona-o-finansijskoj-podrsци-porodici-sa-decom/>

296 Commissioner for the Protection of Equality, *Proposal for the Assessment of the Constitutionality and Legality of Article 14, para. 1 of the Law on Financial Support to Families with Children.*

297 Iuz-104/2014.

298 Ibid.

299 Ibid.

300 See, for example, ECtHR; *Andrejeva v. Latvia*, Application No. 55707/00, Judgment of 18 February 2009, § 87. See also, Separate opinion in the case no. IUz-40/2012 (Constitutional Court of RS).

able that the Court did not draw any distinction between foreigners and foreigners with permanent residence. This seems especially unjustified if we keep in mind that the Law on Financial Support to Families with Children prescribes that, among other conditions, the mother applying for parental allowance must have residence in the Republic of Serbia and exercise the right to health insurance through the Republic Health Insurance Fund (hereinafter referred to as the "RHIF"). Looking again at the decision in the *Khosa* case, we see that the Constitutional Court of the Republic of South Africa took into account limited resources and did not consider whether a distinction was allowed between all non-citizens and nationals, but limited itself to examining whether it was reasonable drawing the distinction between nationals and permanent residents and concluded that the position of permanent residents was largely equalized to that of domestic nationals, and that therefore their exclusion from certain material benefits was unjustified.³⁰¹ In the light of that decision, and especially having in mind that the Law on Financial Support to Families with Children prescribes that the mother applicant for parental allowance must also have a residence and exercise the right to health insurance through the RHIF, the condition regarding Serbian citizenship seems unjustified; **unjustified is also the failure of the Constitutional Court to draw distinction between foreigners and foreigners with permanent residence in Serbia.** Above all, when it comes to permanently residing foreigners who "exercise the right to health insurance through the RHIF" (which is also one of the conditions for exercising the right to parental allowance), there is no doubt that they personally, or someone else through whom they exercise the right to health insurance, also contribute to public revenues and budget funds,³⁰² which the court was primarily guided by when it concluded that prescribing citizenship of the Republic of Serbia, as one of the conditions for exercising the right to parental allowance, either on the mother's or father's side, is not inconsistent with the Constitution.

When the new Law on Financial Support to Families with Children was adopted³⁰³, under the influence of the aforementioned decision of the Constitutional Court, exceptions in which the father can apply for parental allowance were expanded, and the new Law explicitly provides that the father can exercise this right if the mother is a foreign citizen, meaning that the interpretation according to which (for the purpose of exercising the right to parental allowance) the mother who is a foreign citizen was objectively prevented from taking care of the child is not required anymore. Furthermore, the new Law provides that the parental allowance can be exercised by a mother who is a foreign citizen and has the status of a permanent resident, provided that the child was born in Serbia. However, children whose mothers are undocumented or domestic citizens without permanent residence and ID card, are still denied the right to parental allowance.³⁰⁴

One of the problems in the field of social protection, especially when it comes to the coverage of socially vulnerable individuals with financial social assistance, is the means test. Individuals owning more than the basic living space (which is one room per household member) and 0.5

301 South African Constitutional Court Case: *Khosa and Others v. The Minister of Social Development and Others* 2004 (6) SA 505 (CC). Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, op. cit., 62-64.

302 See Separate opinion in the case no. IUz-40/2012.

303 *Official Gazette of RS*, 113/2017, 50/2018, 46/2021 – CC Decision, 51-2021 – CC Decision and 53/2021 – CC Decision and 66/2021.

304 Please note that this sentence was corrected on 21 December 2021, regarding eligibility for parental allowance of children of foreigners with permanent residence permit, because the original version of the publication referred to the conditions from the Law on Financial Support for Families with Children which ceased to be valid on July 1, 2018.

hectares of agricultural land are not entitled to financial social assistance, unless this property is mortgaged.³⁰⁵ This law does not recognize the difference between land of different quality, that is, land categorization, and treats equally valuable land and almost unusable plots in mountainous areas.³⁰⁶ In addition, a large number of internally displaced persons from Kosovo live in Serbia, and some of them cannot use or rent property they own in Kosovo.

The Constitutional Court also had an opportunity to review the restriction regarding the means test for exercising the right to financial social assistance; it dismissed the initiative to assess the constitutionality of the provisions of the Law on Social Protection, which condition the exercise of the right to financial social allowance by the fact that the individual, i.e. the family does not own immovable property - land.³⁰⁷

The Constitutional Court found that the disputed provisions of the Law do not go beyond the constitutional framework established by the provision of Article 69, paragraph 1 of the Constitution, to which the initiative proponent referred to.³⁰⁸ Finally, **the Constitutional Court pointed out that it is not competent to assess the suitability (celishodnost) of certain legal solutions; therefore the determination as to which criteria and conditions will be prescribed for the exercise of a certain right in the field of social protection is up to the legislator.**³⁰⁹

Arbitrary Reduction of Pensions and Lack of Effective Protection

In October 2014, the Law on Temporary Regulation of the Method of Payment of Pensions was passed³¹⁰, as one of the most important measures aimed at reduction of budget deficit of the Republic of Serbia.³¹¹ The law prescribes progressive reduction of pensions for all pensioners whose pensions exceeded 208 euro; the cutback affected around 40% of pensioners in the Republic of Serbia. Despite the fact that these pensions are contributory benefits and that entitlement to this benefit is linked with the payment of contributions which pensioners were paying throughout their years of service, no compensation mechanism was established. Reductions of pensions were introduced *ex lege*, automatically. No legal remedy was provided

305 Slobodan Cvejić, *Analysis of the Situation and Proposed Activities for an Adequate and Accessible Minimum Income Program in Serbia*, SeConS, 2015.

306 Ibid.

307 The Constitutional Court dismissed the initiative to initiate a procedure for assessing the constitutionality of the provisions of Article 82, paragraph 1, item 1 and paragraph 2 of the Law on Social Protection, which prescribe that the right to financial social assistance may be exercised by an individual or family if there is no other real estate, except for housing that meets the needs of the individual, i.e. family and land up to 0.5 hectares (Article 82, paragraph 1, item 1); that the right to financial social assistance can also be exercised by an individual incapable of work, i.e. a family whose members are all incapable of work, if in addition to housing that meets the needs of the family they have land up to one hectare (Article 82, paragraph 2). Decision of the Constitutional Court of Serbia, No. 183/12 od 4.10.2012.

308 Decision of the Constitutional Court of Serbia, U.br. 183/12 od 4.10.2012.

309 Ibid.

310 Official gazette of RS, No. 116/2014 and 99/2016.

311 For more details on reduction of pensions and the proceedings conducted before the Constitutional Court regarding the reduction of pensions, see also A 11 - Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit.

for.³¹² Moreover, pension cuts were introduced unselectively, without considering individual circumstances of each case and impact of this reduction on enjoyment of other rights.³¹³

Since reduction of pensions was introduced by the law, as a general measure, without issuing individual decisions subjectable to judicial or administrative review, pensioners were denied the right to legal remedy. This is in contradiction with the requirement that the withdrawal, reduction or suspension of benefits should be subject to due process and obligation to provide access to effective judicial or other appropriate remedies and adequate reparation.³¹⁴

As there was no right to legal remedies in individual cases, initiatives for assessment of constitutionality of the Law were submitted to the Constitutional Court.³¹⁵ In October 2015, the Constitutional Court passed a ruling dismissing the initiatives.³¹⁶ Later, when budget deficit was reduced and dozens of new initiatives for assessment of constitutionality of the Law submitted, the Constitutional Court was avoiding to issue a decision for more than three years i.e. as long as the Law remained in force. Two judges of the Constitutional Court expressed their opinion and pointed out that the court was avoiding ruling on the initiatives submitted later, with no reasonable explanation.³¹⁷

The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of the existing social security coverage.³¹⁸ The fact that pension cuts in Serbia lasted for four years, without periodical reviews to determine if reductions were still justified, necessary and proportionate, imposes a conclusion that these restrictions were arbitrary and unreasonable. Several separate opinions submitted along with the decision of the Constitutional Court on the constitutionality of pension reduction indicate numerous shortcomings of the said decision. Since these shortcomings mainly reflect the key shortcomings of the overall system of protection of socio-economic rights in Serbia, they deserve special consideration.

Just by reading the statement of reasons of the Decision of the Constitutional Court, the fundamental correlation with the text of the explanation of the Proposed Disputed Law becomes noticeable, as well as the fact that the Constitutional Court found itself in an inappropriate role of a legislative collaborator.³¹⁹ It was also pointed out that by proceeding in the case of

312 For this topic, see, for example, the separate opinion of Judge Dragan M. Stojanović regarding the decision of the Constitutional Court in the case IUz-531/2014.

313 It is useful to examine the case law of the Supreme Court of Argentina, which in the case of *Sanchez*, which referred to the adjustment of pensions to inflation, clearly emphasized the connection between the amount of pensions and the right to food, housing, health and the right to adequate living standards of retired workers. Christian Courtis, *Argentina: Some Promising Signs* in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., 170.

314 UN Committee on Economic, Social and Cultural Rights, Right to Social Security (Art. 9) (Thirty-ninth Session, 2007), UN Doc. E/C/12/GC/19 (2008).

315 For more details see, Separate opinion of Judge Bose Nenadić on the Decision of the Constitutional Court in the case IUz-531/2014.

316 Constitutional Court, Decision on dismissing the initiative, IUz-531/2014.

317 Constitutional Court, Decision on the suspension of the constitutionality assessment procedure, IUz-351/2015. See, Concurring separate opinion of the judge Tamaš Korhec and Separate opinion of the judge Milan Škulić on the Decision of the Constitutional Court No. IUz-351/2015.

318 UN Committee on Economic, Social and Cultural Rights, Right to Social Security (Art. 9) (Thirty-ninth Session, 2007), UN Doc. E/C/12/GC/19 (2008).

319 Olivera Vučić, Separate opinion on the Decision on the Constitutional Court IUz-531/2014 of 23 September 2015.

challenging the disputed Law, the Constitutional Court was the least concerned with answering the basic question - whether the disputed Law was unconstitutional.³²⁰ To a much greater extent, the court dealt with the issue of the suitability of passing that Law and justification for the adoption. For example, the Constitutional Court assessed that "in the period of the economic crisis affecting the payment of pensions, mainly financed by the Republic of Serbia, it was necessary to pass the disputed law; the disputed legal measures are aimed at generating savings in the pension system that should ensure its long-term sustainability and as such they were adopted in the general and public interest."³²¹ Assessing the adoption of such a law as necessary, **the Constitutional Court did not resolve the issue of its conformity with the Constitution, and provided rather political than legal answer.**³²²

This case represents a **missed chance for the Constitutional Court to establish doctrinal positions regarding the constitutional review of laws enacted during the economic crisis that restrict social rights and thus render its future conduct more efficient and consistent.**³²³ Several separate opinions also stressed that the comparative constitutional judiciary has created a real doctrine on the limits of the legislative power in restricting rights in the field of social protection, with a special emphasis on the doctrine of the Lithuanian Constitutional Court.³²⁴ In the decision of the Constitutional Court of Serbia, on the other hand, there are no such interpretative positions that would set firm, sufficiently certain obstacles to arbitrary legislative interventions in human rights guaranteed by the Constitution.³²⁵

Instead, with the decisions on the constitutionality of pensions cuts, as pointed out in several separate opinions, the Constitutional Court left the legislator complete freedom to limit social and economic rights at its discretion. With this attitude towards the issue of pensions cuts, the Constitutional Court established a legal and legitimate possibility for the authorities to reach for funds from legally earned pensions whenever they find it socially justifiable, due to economically bad circumstances and reduce them according to a formula that would suit that particular situation.³²⁶ The statement of reasons to the Constitutional Court decision on the constitutionality of the Law on Temporary Regulation of the Method of Payment of Pensions was more aimed at justifying, undoubtedly from a neoliberal point of view, this legal measure, than responding to the requirements of the rule of law, social justice, development of objective constitutional law and protection of human rights from excessive legislation.³²⁷ Not only did the decision of the Constitutional Court fail to provide effective protection of the constitutionally guaranteed rights acquired through work, but it also gave almost blank support to the executive branch to encroach on basic human rights unjustifiably.³²⁸

320 Ibid.

321 Ibid.

322 Ibid.

323 Bosa Nenadić, Separate Opinion on the Decision on the Constitutional Court Iuz-531/2014.

324 Ibid; Dragan M. Stojanović, Separate opinion on the Decision on the Constitutional Court Iuz-531/2014

325 Dragan M. Stojanović, Separate opinion on the Decision on the Constitutional Court Iuz-531/2014.

326 Olivera Vučić, Separate opinion on the Decision on the Constitutional Court IUz-531/2014.

327 Dragan M. Stojanović, Separate opinion on the Decision on the Constitutional Court Iuz-531/2014.

328 Ibid. See also Slobodan Beljanski et al, *Relation between the Constitutional Court and Judiciary – Current State and Prospects*, op. cit., 41.

Nature of the Right to Pensions

The position of the Constitutional Court on the character of the right to pension deserves special attention, since it can lead to important conclusions about the nature and status of other (primarily social) rights, the content of which is not explicitly regulated by the Constitution but is left to the legislator. The views of the Constitutional Court on the nature of the right to pension reveal inconsistencies. The Constitutional Court has made significant efforts to prove that in Serbia only the right to pension is guaranteed, and not to a certain pension amount.³²⁹ In this regard, it is particularly useful to refer to the following segments of the separate opinion of Dragan M. Stojanović:

„The reasoning of the decision fails to show the meaning the Constitutional Court gives to the key legal categories in this case – right to pension and undertaken legal measure.

The right to pension is explained through an unusual and extremely dubious structure. The starting point is the fact that pension insurance is a right guaranteed by the Constitution; however, this statement is immediately annulled by stating that it has no substance, because allegedly the Constitution does not determine it even in the most general way. The conclusion is that the right to pension cannot be considered a constitutional right, but that it is a right established by law. The most important legal consequence of this position is that the right to pension can be shaped by law at the free discretion of the legislator and can even be abolished.

It is our opinion that pension insurance is guaranteed by the Constitution, at the core of which is the right to pension, assets acquired through prior work. It would be absurd to assume that there can be pension insurance without an individual right to pension.

*(...) As with other rights guaranteed by the Constitution, the nature of which requires it or it is explicitly provided by the Constitution, which are, therefore, relatively indefinite in content, the law always prescribes the manner of exercising rights, including the right to pension. This means **that the right to pension belongs to constitutionally guaranteed rights regulated by law** (...).*

The claim repeated for several times in the statement of reasons to the decision stating that the Constitution does not guarantee the right to pension of a certain amount is not entirely true. The only thing that is true is that there is no explicit constitutional norm about that. The right to pension is a constitutionally

³²⁹ Olivera Vučić, Separate opinion on the Decision on the Constitutional Court IUz-531/2014 of 23 September 2015.

guaranteed right, essence, intended goal and core of pension insurance, the amount of which is determined in accordance with the conditions prescribed by law. The amount of a specific pension is logically related to the very institute of pension, it is immanent to the very concept of pension, which always implies periodic material benefits of a certain amount. Can there be a pension without the decision on its recognition determining its amount?"³³⁰

The Constitutional Court seems to have considered that the answer to this question is affirmative and has also made considerable efforts to prove that only the right to pension is guaranteed in Serbia, and not the right to a certain amount of pension.³³¹

The essential problem with the Constitutional Court's overly complex, unsustainable and inconsistent approach in trying to prove that the right to pension is guaranteed, but not the right to a certain amount of pension, is the fact that it resorts to such approach to justify an outcome that apparently has already been chosen– to dismiss the initiative on constitutional assessment.³³²

Therefore, it is not surprising that one of the separate opinions in this case points out that **this is not the first time that with its approach to the submitted initiatives and the hundreds of thousands of citizens affected, the Constitutional Court decided to be loyal to the legislator, and not to the Constitution itself as a measure of its judgment.**³³³

Health Care

Article 68 of the Constitution of the Republic of Serbia protects the right to health care and guarantees the right to protection of their mental and physical health to everyone, stipulating, *inter alia*, that the health care is regulated by the law. Paragraph 2 of the same Article sets that health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law. Namely, the Constitution protects and guarantees right to health care in the manner and under the conditions prescribed by law.³³⁴

Provisions referred to in Article 68 of the Constitution do not determine the right to a specific type and scope of health care, but the legislator is authorized to enact laws regulating health insurance, health care and establishment of health care funds.³³⁵ However, when the legislator enacts laws in the field of health insurance, it shall provide that those ensure the right of each individual

³³⁰ Dragan M. Stojanović, *Separate opinion on the Decision on the Constitutional Court IUz-531/2014*

³³¹ See also, Separate opinion of Olivera Vučić, *Separate opinion on the Decision on the Constitutional Court IUz-531/2014 of 23 September 2015.*

³³² This and any other way of reasoning of judges sometimes serves to justify the choices that judges have already made in advance. See Opinion of Bedjaoui to ICJ, *Marshall Islands v. UK*; Ingo Venzke, „Public Interests in the International Court of Justice – A Comparison between Nuclear Arms Race (2016) and South West Africa (1966)“, *American Journal of International Law*, 2017, 73.

³³³ Olivera Vučić, *Separate opinion on the Decision on the Constitutional Court IUz-531/2014 od 23. 9. 2015.*

³³⁴ See, for example, Constitutional Court of RS, UŽ-443/2008.

³³⁵ See, for example, Constitutional Court of RS, UŽ-133/2007.

to protection of physical and mental health, without discrimination.³³⁶

The jurisprudence regarding the right to health is largely reduced to procedures related to rights from the health insurance, conditions for acquiring the status of the insured person, access to medicines, medical-technical aids and reimbursement of costs of medical services. **Judicial protection in the field of health care mainly represents the protection of the rights of insured persons, while the protection of the rights of vulnerable persons and groups who remain outside the health insurance system is lacking, even in those cases when they would have the right to be covered by mandatory health insurance.**

In order to look at efficiency of legal remedies in this field, provisions of the Law on Health Care³³⁷ and the Law on Health Insurance are of particular importance,³³⁸ which single out particularly sensitive categories and groups of the population exposed to increased risk of diseases, and it is envisaged that their health care be provided through the mandatory health insurance. Roma belong to the category of vulnerable citizens due to the fact that for "traditional way of living" they do not have temporary or permanent residence registered.³³⁹

Roma without Permanent or Temporary Residence

The Law on Health Insurance singled out persons of Roma nationality who "due to their traditional way of life do not have permanent or temporary residence" as a special category of insured persons if they are not entitled to health insurance in other ways nor as the insured family members. Exploring these provisions is of particular importance for two reasons: firstly, due to the particularly difficult position of members of the Roma national minority when it comes to the right to health and access to health care.³⁴⁰ In addition, the example of health insurance for Roma without permanent or temporary residence is a kind of paradigm of shortcomings when it comes to access to socio-economic rights for vulnerable groups. Neither the complaint to the Constitutional Court nor the Protector of Citizens could ensure that a quality legal solution comes to life in practice.

In 2005, the Law on Health Insurance recognizes Roma without temporary or permanent residence as a separate category of the insured persons. In practice due to the lack of harmonization of by-law regulation with the Law on Health Insurance, there was only a short period of time, from July 2010 to March 2012 that those people were able to register for health insurance without

336 Ibid.

337 Official Gazette of RS, no. 25/2019

338 Official Gazette of RS, no. 25/2019

339 See Article 11, para. 1, item 11 of the Law on Health Care and Article 16, para. 1, item 11 of the Law on Health Insurance.

340 Observations of the Committee on the Rights of the Child of February 2017 well illustrate the situation regarding the right to health and access to health care for marginalized groups in Serbia. The Committee on the Rights of the Child has expressed particular concern about the situation of Roma mothers and children, as particularly vulnerable groups who continue to face limited access to adequate health care, resulting in high mortality rates, premature births and low immunization rates against childhood infectious diseases. For more details see A 11 - Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit.

permanent or temporary residence registration.³⁴¹ Except in that short period, the provisions of the Law on Health Insurance were constantly derogated by by-laws, that, contrary to the law, imposed obligation on Roma to submit a registration of temporary residence (before 2010), or registration of permanent residence at the address of the center for social work (since 2012). In order to provide this vulnerable category of the population with access to health care, it was only necessary to consistently apply the provisions of the law. Therefore, it is useful to refer to the procedures conducted in order to annul the provisions of bylaws that are in conflict with the provisions of the Law on Health Insurance, and which apply to Roma without permanent or temporary residence.

Initiative for assessing the legality of Article 6 of the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance - temporary success

In February 2010, the non-governmental organization Praxis submitted to the Constitutional Court an initiative to assess the legality of the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance (hereinafter referred to as the "Rulebook"), which contrary to the Law on Health Insurance, required possession of registration of temporary residence for Roma who "due to their traditional way of life" do not have temporary or permanent residence registered, and who, therefore, are recognized by the legislator as a particular category of the insured persons.³⁴² After the Constitutional Court submitted the initiative for response and opinion to the Republic Health Insurance Fund (RHIF) amended the Rulebook and that act was harmonized with the Law; instead of the registered temporary residence, it became sufficient to submit a statement that the applicant is of Roma origin and a statement of the actual address of residence.³⁴³ Hundreds of Roma received health booklets for the first time in that period.³⁴⁴ However, applying for health insurance in this simplified way was possible only until March 2012. Namely, after the new Law on Temporary and Permanent Residence of Citizens was passed in 2011, the Republic Health Insurance Fund forwarded instructions to its branches stating that persons of Roma nationality, if not provided with the permanent or temporary residence, shall enclose proof of registration of permanent residence at the address of the center for social work.³⁴⁵ Instead of the Rulebook, the HIF branches started to refer to another bylaw, which was never harmonized with the Law.³⁴⁶

341 For more details see Praxis, *Contribution to Social Inclusion and Combating Discrimination of the Marginalized Population in Serbia*, 21-24.

342 The condition regarding the residence registration when applying for health insurance for Roma was first provided in Article 6, para. 1, item 11 of the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance passed in 2006. The 2006 Rulebook ceased to be valid on March 10, 2010. The new Rulebook was passed on March 2, and Article 7, para. 1, item 11 retained the same requirement in terms of necessary evidence and way of exercising the right to health insurance for individuals of Roma ethnicity. Praxis, *Contribution to Social Inclusion*, 22.

343 Ibid. The initiative for assessment of constitutionality was rejected because meanwhile the disputed provision of the Rulebook has been harmonized with the Law on Health Insurance.

344 Ibid.

345 Act of the Republic Health Insurance Fund, no. 450-576/13 of 05 February 2013. Praxis, *Contribution to Social Inclusion*, 22-23.

346 Decree on the Content, Form and Manner of Submitting a Single Application for Compulsory Social Insurance, Uniform Methodological Principles and Uniform System of Codes for Entering Data into a Single Database of the Central Registry of Compulsory Social Insurance– hereinafter referred to as the "Decree". For more details see Praxis, *Contribution to Social Inclusion and Combat against Discrimination of Marginalized Population in Serbia*.

Thus, again, only on the basis of another bylaw, Roma without permanent or temporary residence were denied access to health insurance, in a manner contrary to the Law on Health Insurance. Addressing the Protector of Citizens did not bring any changes in practice either, despite the fact that irregularities were established, and it was concluded that bylaws, contrary to the law, deny Roma the right to health insurance when they cannot submit residence registration.³⁴⁷ Therefore, a new initiative was submitted to the Constitutional Court to assess the legality of the latter bylaw (Decree).³⁴⁸

A new attempt to challenge bylaws before the Constitutional Court

Another by-law (Decree) that prevented Roma without temporary or permanent residence from registering for health insurance was challenged before the Constitutional Court. After the submission of the initiative for the assessment of legality, the Decree was changed by stipulating that persons of Roma nationality, who “due to the traditional way of life” do not have temporary or permanent residence, shall support their application for health insurance with the proof of permanent residence registration at the address of the center for social work.³⁴⁹ The enacting authority, the Government of the Republic of Serbia, explained in its statement to the Constitutional Court that the disputed provision of the Decree was amended, introducing a registration of permanent residence at the address of the center for social work as necessary evidence for Roma.³⁵⁰ Therefore, **Roma without permanent or temporary residence, now instead of registering their temporary residence, need to submit - certificate of permanent residence.** In this way, in the opinion of the Government, the harmonization with the provision of Article 11 of the Law on Temporary and Permanent Residence was done, prescribing that a citizen who cannot register residence on other basis, can register residence at the address of the center for social work. This circumstance – that in the meantime the Law on Temporary and Permanent Residence was passed, and that the Government considered that the disputed Decree was harmonized with the Law on Temporary and Permanent Residence, was sufficient for the Constitutional Court to suspend the procedure for assessing the legality of the disputed Decree. It was simply concluded that „bearing in mind that during the proceedings before the Constitutional Court, the disputed provision was amended by stipulating that a Roma person acquires the status of an insured person on the basis of (...) registration of the permanent residence at the address of the Center for Social Work, the Constitutional Court concluded that in this way the disputed provision was harmonized with the law.”³⁵¹ The Constitutional Court completely ignored the circumstance that the initiative for assessing legality referred to the incompatibility of the disputed bylaw with the Law on Health Insurance.

The basic question to which the Constitutional Court should have answered is the fol-

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid. See item 8 of the Section 2.1. List of evidence on the basis of which the status of the insured is determined, as well as changes and deregistration, which is an integral part of the Decree. Namely, Article 11 of the Law on Temporary and Permanent Residence of Citizens, passed in 2011 prescribed that person who cannot register their permanent residence in a regular manner may have their permanent residence determined at the address of the center for social work.

³⁵⁰ Constitutional Court, IUo.245/2012 of 25 March 2014.

³⁵¹ Ibid.

lowing: since the Law on Health Insurance singled out Roma without temporary or permanent residence as a special category of insured persons, is the Decree requiring those people to submit evidence they cannot submit (temporary or permanent residence) in compliance with the law. This question remained unanswered, and as a result many Roma were left without health insurance and continue to face numerous difficulties in their registration procedures.³⁵²

These judicial review procedures send a devastating message. There is no effective remedy to protect the right to health care of members of a highly vulnerable group even in “clear” and undisputed cases, in which no overly progressive role of the Constitutional Court was required, nor encroaching on the competence of the legislator– it was only necessary to abrogate from the legal system acts that were in obvious contradiction with acts of higher legal force – which is one of the basic competencies of the Constitutional Court. The only provision in the Law on Health Insurance and the Law on Health Care that sought to facilitate access to health care for Roma has no practical significance and serves as a reminder of the lack of effective institutions and remedies to facilitate access to rights for vulnerable groups, at least in cases where those rights are explicitly prescribed by law.

Narrowing Down the List of Drugs and Medical Aids Prescribed and Issued by the Mandatory Insurance

Among positive decisions on initiatives for the assessment of constitutionality is the decision which determined the unconstitutionality of the provisions of the Rulebook on the List of Prescription Drugs Issued at the Expense of Compulsory Health Insurance.³⁵³ Restrictions were introduced for certain drugs from the list in relation to the age of the insured person, which is considered to be contrary to the provisions of Article 21 of the Constitution of RS, which explicitly prescribes the prohibition of discrimination on any grounds, including age. The Constitutional Court concluded that the disputed provisions of the Rulebook place **one category of insured persons, without valid medical reasons, only on the basis of personal characteristics, in an unequal position** in relation to other insured persons, because they are denied the right to medicines and thus the right to adequate health care, as a constitutionally guaranteed right. It was also established that **the disputed provisions of the Rulebook also violated Articles 23 and 27 of the Law on Prohibition of Discrimination**, which prohibit discrimination against persons on the basis of age, and it exists especially if a person or group of persons is unjustifiably denied access due to their personal characteristics, unjustifiably denied health services and if special conditions for the provision of health services that are not justified by medical reasons are set.³⁵⁴

³⁵² See, for example, Protector of Citizens, *Special Report on Reproductive Health of Roma Women*, 2017, 11. See also Praxis, *Analysis of the Procedure for Determining the Date and Place of Birth and for the Exercise of Rights to Citizenship and Registration of Permanent Residence*, Belgrade, December 2017, pg. 28–32, and A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 21.

³⁵³ Official Gazette of RS, No. 53/2011.

³⁵⁴ Constitutional Court of Serbia, IUo-515/2011 of 27 June 2013.

In previous practice, the Constitutional Court also had the opportunity to rule on the justification of prescribing conditions according to which age is one of the indications for prescribing medical-technical aids. However, in that case it stressed that **medical technical aids belong to the domain of the medical profession, which the Constitutional Court is not competent to evaluate.**³⁵⁵ The Constitutional Court concluded that the HIF is authorized to determine the indications necessary for the use of medical-technical aids by a general act, and thus to determine that age is one of the indications for prescribing a certain aid. The disputed provision, in the opinion of the Court, does not violate the principle of equality of citizens referred to in Article 13 of the Constitution, because that principle refers to equality in rights, and not equality in the conditions and manner of exercising a particular right.³⁵⁶

Reimbursement of Health Care Costs

One of the problems in the field of health care is the **length of waiting time to health services.**³⁵⁷ Pursuant to the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance (hereinafter referred to as the "Rulebook"; "RMPERMHI"), health services that a health institution cannot provide within 30 days, insured persons can get in another (private) institution, and the costs can be reimbursed in a branch office of the Health Insurance Fund. However, this option does not exist for health services for which there is a **waiting list**. If the insured person uses health services for which there is a waiting list, the costs are borne by him/her and cannot be reimbursed by the mandatory health insurance.³⁵⁸ Waiting lists are determined, *inter alia*, for magnetic resonance imaging exams (MRI) and CT, that are often indispensable for timely and adequate diagnosis and prevention of health deterioration.³⁵⁹ This actually means that the **insured persons are forced to either bear the costs of these expensive diagnostic examinations themselves or to wait for months to perform this examination at the expense of the insurance, risking the worsening of the disease.**

Therefore, some courts have taken the position that in certain cases, when due to the nature of the illness, waiting for several months would endanger the health of the insured, the insured have the right to be reimbursed for the costs of these health services. Thus, in the procedure before the District Court in Novi Sad, it was determined that, when it is urgent and critical to perform an MRI examination, then the insured person has the right to an examination outside the waiting list, the RHIF is obliged to reimburse the costs of the examination and the com-

355 Decision of the Constitutional Court U. 55/2006, of 8 June 2006.

356 Ibid.

357 See, for example, Belgrade Center for Human Right, *Human Rights in Serbia*, 2017, 348–34.

358 Article 64, para. 5 of the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance.

359 See Article 64 of the Rulebook on Methods and Procedure of Exercising Rights to the Mandatory Health Insurance for the full list of services subject to the waiting list.

plainant had right to reimbursement of expenses.³⁶⁰ The District Court in Novi Sad concluded that the basis for payment of costs is not in the compensation of some damage suffered by the plaintiff, but in the **acquiring without grounds** on the part of the complainant, and therefore under Articles 210 and 214 of the Law on Obligations, they shall retribute it, along with the interests as of the acquiring date. It was pointed out that the allegations from the defendants' complaint that in accordance with RMPERMHI, the complainant demanded that she perform the examination outside the waiting list, were unfounded, and she also signed a statement accepting to bear costs of the examination herself. The second-instance court found that the doctor requested an MRI examination for a correct diagnosis, which is a condition for successful treatment and belongs to the corpus of the plaintiff's right to health care. The verdict also points out that the necessity of urgent realization of the said right is undoubtedly due to the nature of the plaintiff's illness and waiting for several months for an examination for precise analysis and differentiation of disease would endanger the plaintiff's health; the said provision of the Rulebook does not apply here nor does the statement on the form on personal cost bearing matter, because the plaintiff did not have the opportunity to choose.³⁶¹

In addition to the provisions on acquiring without grounds, the insured managed to exercise the right to reimbursement of health care costs without which their health would be endangered on the basis of **Article 218 of the Law on Obligations**, regulating that whoever pays for expenses or does something else for another person, which otherwise is a statutory duty of such other person, shall be entitled to claim recovery from such person.³⁶²

Proceedings before Independent Institutions for Protection of Human Rights

Although it is not a matter of judicial protection, proceedings before independent bodies for protection of human rights can be useful in many ways aimed at protecting economic and social rights. This is case not only in Serbia, but also in other countries, and especially in the context of

360 Ruling of the District Court of Novi Sad, Gž. 1400/06 of 10 May 2007. The complainant in that procedure was, due to the suspicion of a stroke, referred for an MRI examination. She signed a statement at the health institution stating that she was familiar with the waiting list, that her MRI scan was scheduled in eight months, and that she agreed to bear the costs of the MRI that will be provided immediately, without having to wait to the waiting list. The complainant paid the amount of 12,000 dinars for MRI and submitted a reimbursement request, which was rejected by the relevant HIF branch office; the complainant filed a lawsuit with the Basic Court in Novi Sad, which upheld the claim and determined the obligation to pay the plaintiff the stated amount of medical costs. Deciding on the appeal of the defendants, the District Court in Novi Sad determined that the first instance court determined the obligations to pay the plaintiff the stated amount of costs of magnetic resonance imaging correctly but concluded that this was a different legal basis from the one stated in the reasoning of the challenged verdict – acquiring without grounds, and not the damage compensation.

361 Ibid.

362 Judgment of the Supreme Court of Serbia, Rev. 1478/08 of 4 December 2008. The verdict pointed out that the plaintiff, as a health insured person, had the right to health care, given that it was a medically justified intervention. Specific medical material was rarely made at that time, and "waiting" would endanger the health. Having in mind the incurred expenditure, the plaintiff as an insured person in the sense of the provision of Article 218 of the Law on Obligations also has the right to reimbursement of the incurred expenditure by the defendant.

austerity measures and endangering economic and social rights by introducing other retrogressive measures.

The mandate of independent bodies for protection of human rights is often twofold - on the one hand, they control the legality and regularity of the work of public authorities, where they can also collect data on the negative effects of various decisions, public policies and economic policy measures. On the other hand, these institutions have the authority to submit initiatives to amend regulations and to improve the protection of human rights. Also, these bodies have the authority to give opinions on draft regulations and other acts, which provides additional space for action. Despite the fact that we cannot speak about justiciability in this domain, it is necessary to keep in mind important role that independent bodies for protection of human rights play in protecting economic and social rights, particularly when the judiciary is either insufficiently sensitive to address the issues of the impact of economic policy measures on the exercise of economic and social rights, or simply does not focus on interpretive standards dealing with the protection of economic and social rights of citizens.

When it comes to the right to health and health care, it would be important to examine the procedure before the Protector of Citizens, which referred to access to health care for mothers without documents. In the procedure of controlling the legality and regularity of the work of the Zemun Clinical Hospital Center in January 2015, the Protector of Citizens identified omissions in the work of that health institution; hospital unlawfully attempted to charge childbirth expenses to a Roma patient, that belongs to a particularly vulnerable group and has no health insurance card.³⁶³ During the conducted supervision, in addition to numerous omissions, discriminatory treatment of members of the Roma ethnic minority by the hospital staff was noted.³⁶⁴

This procedure resulted in several very useful recommendations, including the need for the health institution to inform the hospital staff in writing about the conditions under which health services are provided to patients belonging to particularly vulnerable groups, especially patients of the Roma national minority, children, pregnant women and new mothers, and a recommendation that the Zemun Clinical Hospital Center establish a procedure envisaging consultations with the competent authorities in a situation where it provides health care to a patient without health insurance belonging to a particularly vulnerable group, and inform the hospital staff in writing about this procedure.³⁶⁵

This recommendation had an undisputed benefit for the complainant, who faced the problem of paying excessive childbirth costs and was threatened that she would not be able to take the newborn out of the maternity ward if she did not pay the birth costs. The procedure of control of the regularity of work of the health institution was completed and the recommendation was made within four days from the day of submitting the complaint, which undoubtedly contributed to more efficient protection of the rights of the complainant. However, the systemic problem, which arises from the impossibility of applying for health insurance for pregnant women and

³⁶³ Protector of Citizens, Ref. No. 416 of 9 January 2015.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

mothers without documents, is still not solved.³⁶⁶ Moreover, the health institution itself, to which the Protector of Citizens sent recommendations on the manner of acting, failed to adhere to those recommendations.³⁶⁷

In particular, when it comes to reviewing individual complaints, the role of the Protector of Citizens is constantly declining, and handling complaints is increasingly inefficient, so there are examples in which complaint procedures have not been completed even after several years.³⁶⁸

The Commissioner for the Protection of Equality also issued opinions that were important for access to health care rights without discrimination.³⁶⁹ Although the Protector of Citizens could play a much more important role in the protection of socio-economic rights (because the mandate of the Commissioner for the Protection of Equality is focused on protection against discrimination), his influence in the protection of socio-economic rights is less and less visible, so addressing the Commissioner seem to be a more successful strategy, at least when it comes to the duration of complaints.³⁷⁰ The reduced scope of dealing with the economic and social rights of the Protector of Citizens is evidenced by the fact that the Subcommittee on Accreditation of the Global Alliance of National Human Rights Institutions (GANHRI), in its consideration of re-accreditation of the Protector of Citizens and retaining "A" status, in line with Paris Principles, raised the issue of insufficient activities of the Protector in relation to the protection of economic, social and cultural rights and the weaker response of institutions to recommendations in this area.³⁷¹

Housing

Although the Constitution of the Republic of Serbia does not explicitly guarantee the right to adequate housing, Article 18 of the Constitution stipulates that the Constitution guarantees, and as such, directly applies human and minority rights guaranteed by generally accepted rules of international law, ratified international treaties and laws. This was also pointed out

366 In February 2017, the Committee on the Rights of the Child also recommended to the Republic of Serbia to ensure availability and equal access to quality primary and specialized care for all children in the country, as well as to strengthen efforts to expand access to adequate health care, including prenatal care of uninsured pregnant women, but even that did not contribute to solving this problem. Committee on the Rights of the Child, *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC/C/SRB/CO/2-3, 7 March 2017, pg. 46.

367 A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 27.

368 A 11 – Initiative for Economic and Social Rights, *Second-Class Rights* and CRTA, *Joint Submission to the GANHRI Sub-Committee on Accreditation on the occasion of re-accreditation of Serbian NHRI*, 2019, available at: <https://www.a11initiative.org/wp-content/uploads/2021/01/Joint-Submission-to-the-GANHRI-Sub-Committee-on-Accreditation-on-the-occasion-of-re-accreditation-of-Serbian-NHRI-2.pdf>

369 Examples include denials of access to health services to internally displaced persons. See, for example, the Commissioner for the Protection of Equality, Opinion issued in the complaint procedure Ž. L. from M. against the Republic Health Insurance Fund, Branch Office for the City of Belgrade, Mladenovac Branch Office, due to discrimination based on the status of an internally displaced person, ref. no. 07-00-409/2013-02 of 23 September 2013.

370 Pursuant to Article 39 of the Law on Prohibition of Discrimination, the Commissioner for the Protection of Equality issues an opinion within 90 days from the day of filing the complaint, while the Law on the Protector of Citizens still does not provide a deadline for completion of proceedings, although, judging by the Draft Law on Amendments to the Law on Protection of Citizens, such a deadline will be introduced.

371 Global Alliance of National Human Rights Institutions (GANHRI), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), pg. 28, December 2020.

by the courts in decisions providing protection of the right to housing, mostly with reliance on Article 8 of the ECHR.³⁷²

For example, the Supreme Court of Cassation points out that the right to housing restricts the right of ownership of the co-owner of the apartment and that his request to evict the defendant from the apartment where the defendant lives for a long period of time is unfounded; by evicting her, she would become a homeless.³⁷³ The Supreme Court of Cassation stressed that the defendant has been living in the disputed apartment for almost 30 years, that it has not been proven that she can solve the housing issue in any other way, which all indicates permanent and strong ties between the defendant and the disputed apartment, which is why it can be considered her home in terms of Article 8, para. 1 of the European Convention, provisions of which are directly applicable on the basis of Article 16, para. 2 of the Constitution.³⁷⁴

In the procedure before the Court of Appeal in Belgrade, protection of the right to housing was provided, regardless of the legality of its construction, which was not resolved in a timely manner due to the failure of the defendant body and the defendant municipality.³⁷⁵ In another verdict of the Court of Appeal in Belgrade, it was determined that the right of the defendant to respect for home supersedes the right of the state to enjoy its property in full, because living in the disputed apartment is of existential importance for the defendant. Namely, her housing issue has not been resolved, and she has no other real estate, so as she has been living in the disputed apartment since 1999, that apartment is her home with which she has established a strong, real and lasting connection, reasonably believing that she has the right to live there until the final solution of her housing need. In such a situation, in the opinion of the second instance court, eviction request of the plaintiff as the owner of the apartment, was found unfounded, because living in the disputed apartment is of existential importance for the defendant, while the defendant's interest is exclusively material and disproportionate to the defendant's. Therefore, the appellate court considers that the defendant's right to respect for his home takes precedence over the state's right to enjoy his property in full.³⁷⁶

These judgments seem to give an optimistic picture regarding the protection of the right to housing. However, insight into other decisions of the same court (Court of Appeal in Belgrade), and above all, numerous eviction procedures of informal Roma settlements, whose residents did not even have the opportunity to receive judicial protection before the evictions were carried out,

372 See, for example, the judgment of the Supreme Court of Cassation, Rev. 336/17 of 25 January 2018, Judgment of the Court of Appeal in Belgrade, Gž 3240/20 of 17 June 2020, Judgment of the Court of Appeal in Belgrade, Gž 2495/18 of 8 November 2018.

373 Judgment of the Supreme Court of Cassation, Rev. 336/17 of 25 January 2018.

374 Ibid. In that procedure, the Supreme Court of Cassation also pointed out that the defendant was reasonably provided protection from eviction from the disputed apartment. Considering the age (71) of the defendant and number of years she was living in that apartment (less than 30), staying in the apartment is of existential importance. That interest of the defendant is opposed by the interest of the plaintiffs to exercise their right as co-owners; in addition, they own other parts of the building on the same address and on the same cadaster lot. The disputed apartment is a one-bedroom apartment, so by evicting the defendant, the plaintiffs would realize the co-ownership right on a relatively small area. On the other hand, due to the eviction, the defendant would become a homeless, since she does not have any other way to solve the housing problem. With such two opposing legal interests, the Supreme Court of Cassation is of the opinion that the right of the defendant to a home must enjoy legal protection in the specific case.

375 Ruling of the Court of Appeal in Belgrade, Gž. 3240/20 of 17 June 2020.

376 Ruling of the Court of Appeal in Belgrade, Gž. 2495/18 of 8 November 2018.

provides a clearer insight into numerous problems in the area of the right to housing and in protection mechanisms.

For example, the Court of Appeal in Belgrade annulled the first-instance verdict rejecting the plaintiff's request to evict the defendant from the workers' barracks where he had lived for many years, and which the first-instance court considered to be the defendant's home. By annulling the first-instance verdict, the Court of Appeal pointed out that **the disputed apartment could be considered his home "only in a situation in which it could be determined that the defendant has lived in the apartment for a longer period of time (over 20-30 years and longer)"** and that during that time the defendant established a substantial and permanent connection due to which the disputed apartment could be considered his home, that it is the only space in which the defendant can live, or that there is no way for the defendant to acquire another home or settle in another living space that could be used for housing.³⁷⁷ It is useful to refer here to the case law of the European Court on Human Rights in the case *Oneryildiz v. Turkey* which reiterates that the applicant was definitely deprived of his home,³⁷⁸ even though it was an illegal building built on state land, next to the landfill, where the applicant lived five years before the tragic event in which the building was destroyed. Notwithstanding the fact that the house had been built without a permit at the Istanbul landfill, the Court concluded that the building erected by the applicant and his stay in it with his family constituted a substantial economic interest and that the interest allowed by the authorities to exist in for a long period of time, represents property within the meaning of Article 1 of Protocol No. 1.³⁷⁹

The position of the Court of Appeal in Belgrade, according to which home protection can be provided only to those who live in a certain facility for over 20-30 years and longer, leaves without protection some of the most vulnerable citizens, such as beneficiaries of social housing who, due to the eviction, became homeless – social apartments were allocated to them precisely because of social and housing vulnerability and the inability to acquire another home in any other way – and who do not have effective protection against eviction, i.e. the right to housing.

This is also illustrated by the procedure for the eviction of **B.M.** from a social apartment in the Belgrade neighborhood of Kamendin, against whom the City of Belgrade filed a lawsuit for eviction due to untimely payment of bills. The Third Basic Court in Belgrade first rejected the claim of the City of Belgrade because, among other things, it determined the following: that the defendant and his wife live in that apartment, that their only income is financial social assistance of 9,795.00 dinars per month, while the monthly utility bill amounts to 11,118.00 dinars; that the defendant has a first-degree difficulties and obstacles for work, they were paying bills, when bills were not so high, they cannot afford to pay them since they are unemployed; that before moving into the social apartment they used to live in a "ruin" for 15 years, in an abandoned municipal house without windows and doors, they could not afford to pay *Infostan* utility bill because the medicines for the defendant and his wife cost 8,000 in total, that he lost subsidies for *Infostan* because he did not pay bill for one month. The Third Basic Court first determined that there was no doubt that the eviction of the defendant would lead to him being left without his home and that the right to

377 Ruling of the Court of Appeal in Belgrade, Gž. 1451/13 od 17 March 2016

378 ECtHR, *Oneryildiz v Turkey*, (Application no. 48939/99), Judgment of 18 June 2002, para. 147.

379 ECtHR, *Oneryildiz v Turkey*, (Application no. 48939/99) Judgment of 30 November 2004 (GC), para. 121.

housing referred to in Article 8, para 1 of the ECHR would be violated, especially having in mind the health condition of the defendant and the fact that his wife is seriously ill. The court also pointed out that the loss of a home is the most pronounced form of interference with the right to respect for one's home, protected by the ECHR and generally accepted rules of international law, confirmed by international treaties that are directly applicable, and that pursuant to Art. 16, para. 2 of the Constitution of RS, the Convention constitutes an integral part of the legal system of Serbia and is directly applicable, so the court is obliged to protect and provide judicial protection to all rights and freedoms guaranteed by the Convention. It was also stated that the court particularly assessed that by evicting the defendant and his wife from the apartment, they would be homeless and live on the street.³⁸⁰

However, this verdict was revoked by verdict of the Court of Appeal.³⁸¹ The Court of Appeal in Belgrade concluded that there is no place for the application of the ECHR because the right to housing is constituted by using a certain apartment for a longer period of time,³⁸² which establishes a permanent connection between the user of such an apartment and the apartment, as referred to in Article 8 of the ECHR, and it cannot be determined from the facts what is the established permanent connection of the defendant with the said apartment, having in mind that the defendant participated in the competition for the distribution of one of 1100 apartments, that the contract was a fixed-term contract, with the possibility of extension if the legal conditions are met. It follows from the facts that the defendant did not fulfill the obligations assumed by the contract, due to which his contract was not extended, terminated and eviction was ordered, „which is why reasons of the first instance court on the established right of the defendant to a home are unclear, especially with the reference of the first instance court to the illness of the defendant and his wife, considering that the existence of a possible illness does not establish the said right.“³⁸³ In the retrial, the Third Basic Court also upheld the lawsuit for eviction.³⁸⁴

From the mentioned decisions in the procedure for the eviction of B.M. from the settlement of Kamendin, it can be concluded that **the only income of the defendant is financial social assistance of 9,795.00 dinars per month, and that monthly *Infostan* utility bill alone amounts to 11,118.00 dinars**, so it is clear that the amount of financial social assistant is not enough to cover the costs of bills and medicines. Due to poverty, social housing beneficiaries who cannot afford to pay bills, are faced with the eviction lawsuits, and then run the risk of homelessness.³⁸⁵

380 Third Basic Court in Belgrade, 2P no. 43168/13 of 17 January 2017.

381 Court of Appeal in Belgrade, Gž 4772/17 of 30 August 2017.

382 Decision of the Court of Appeal in Belgrade, Gž. 1451/13 of 17 March 2016 indicates that that period shall last for 20-30 years and longer.

383 Court of Appeal in Belgrade, Gž 4772/17 of 30 August 2017.

384 Third Basic Court of Belgrade, 1p no. 5220/17 of 13 November 2017.

385 Kamendin is the largest social housing settlement in Serbia. Many families from that settlement are already threatened with forced eviction because the City of Belgrade, as the owner of the apartments, initiated or ended court proceedings for eviction against them, and while they are waiting for eviction, more than 60 families live without electricity. For more details see A 11 - Initiative for Economic and Social Rights, *More than 60 Families Are Without Electricity Supply, while the City Administration is Preparing for the Forced Evictions of the Socially Endangered*, 27 November 2020, available at: <https://www.a11initiative.org/vise-od-60-porodica-zivi-bez-struje-grad-sprema-prinudna-iseljenja-socijalno-ugrozenih/>.

Furthermore, B.S, a person with disabilities who lives in a social housing unit in Kamendin, was no longer able to pay bills on time. As a result, the City of Belgrade cancelled his lease agreement in 2013.³⁸⁶ **For more than eight years, B.S. conducted five different proceedings in which he tried to challenge the termination of the lease of the social apartment, but no legal remedy was suitable to provide a review of the decision to terminate the lease.**

The Constitutional Court, addressed by B.S. twice, dismissed his constitutional complaints and referred him to an administrative dispute.³⁸⁷ The administrative court upheld his lawsuit, and returned the case for a new procedure; that administrative procedure is still ongoing. The Constitutional Court pointed out that the violation of the right to a legal remedy and the possibility of appealing to the Constitutional Court would exist only if the Administrative Court rejected the lawsuit, stating that it was not an administrative matter, and that only in that case B.S. could file a constitutional complaint.³⁸⁸ The Administrative Court did not issue such a verdict - and therefore B.S. is not entitled to lodge constitutional appeal to the Constitutional Court again, and the administrative procedure has not been completed even after more than eight years. In the meantime, in parallel with that administrative procedure, the City of Belgrade has initiated civil proceedings against B.S., in which the lawsuit for eviction was upheld, complaint filed by B.S. rejected and verdict on the eviction issued, followed by the writ of execution and conclusion on eviction. The eviction, scheduled for February 2021 was suspended thanks to the interim measures of the ECtHR.³⁸⁹

There was no hearing organized nor was B.S. given the opportunity to explain the impossibility of paying the rent for a social apartment. In addition, the equality of the parties in the procedure is not ensured, because one of the parties in the lease agreement and the first-instance and second-instance administrative body are in fact the same body - the Belgrade City Administration. No judicial body in Serbia approved the suspensive effect of the appeal, but only the ECtHR did so in the procedure initiated under Rule 39 of the Court. Considering that the forced eviction of a person in an extremely vulnerable position would constitute a violation of the right to life and inhuman and degrading treatment, A 11 Initiative submitted **a request for interim measure** to the European Court of Human Rights seeking desistance of the execution of eviction.³⁹⁰ The interim measure was issued on the following day, whereby **the Government of the Republic of Serbia was ordered to abstain from executing the order of forced eviction** until 15 March 2021.³⁹¹ Subsequently, the measure was prolonged until 29 March 2021, and then indefinitely, until the state provides more precise information and guarantees regarding the provision of adequate alternative accommodation.

386 A 11 - Initiative for Economic and Social Rights, *European Court of Human Rights Orders Serbia to Temporarily Cease the Forced Eviction of B.S. from his Social Housing Accommodation*, 2 March 2021, available at: <https://www.a11initiative.org/evropski-sud-za-ljudska-prava-nalozio-srbiji-da-privremeno-obustavi-prinudno-iseljenje-b-s-iz-socijalnog-stana/>.

387 UŽ-110/2013.

388 Ibid.

389 A 11 - Initiative for Economic and Social Rights, *European Court of Human Rights Orders Serbia to Temporarily Cease the Forced Eviction of B.S. from his Social Housing Accommodation*, op.cit.

390 Ibid.

391 Ibid.

In addition to the numerous difficulties faced by social housing beneficiaries, the proceedings conducted by B.S. show that **there is no effective legal remedy in the domestic legal order that would enable the review of decisions on cancellation of the lease of social apartments, after which the beneficiaries of those apartments are threatened by homelessness**, and it turned out that appealing to the Constitutional Court had no effect. The Constitutional Court considered the constitutional complaints of the BS on two occasions, in 2013 and 2020, but in both cases concluded that the violation of the ECHR and constitutional rights had not yet occurred and referred the complainant to a remedy that was not appropriate to review the decision on the termination of the social apartment lease contract, nor to prevent the eviction that would result in his homelessness. In this context, it is useful to refer to the decision of the Committee on Economic, Social and Cultural Rights in the case of **Rosario Gómez-Limón Pardo v. Spain**, in which one of the two general recommendations made by the Committee to Spain was to provide a normative framework suitable to allow persons at risk of eviction, which could lead to violations of the Covenant's rights, to review eviction orders and examine the proportionality of the decision before the authorities.³⁹²

Here, it is useful to refer to the practice of the Administrative Court regarding the legal nature of the social housing lease contract and the possibility of suspension of eviction after filing an objection to the enforcement decisions. In the above case of eviction of the social apartment beneficiary, B.S, a request for suspension of the execution of eviction was submitted to the Administrative Court twice. For the first time, this was the case when a request for suspension of the eviction procedure was submitted *before filing a lawsuit*, in accordance with Art. 23. of the Law on Administrative Disputes³⁹³, and the second time, a request for suspension of the eviction procedure was submitted *alongside the lawsuit* against the second-instance decision on eviction. The first request for suspension, filed *before filing the lawsuit*, was dismissed by the decision of the Administrative Court with the explanation that "the decision of the Housing Commission of the Mayor of Belgrade ... was not made in an administrative matter, so it does not have the character of an administrative act as referred to in Article 3, para. 1 of the Law on Administrative Disputes and is not a final individual act which decides on a certain right or obligation of a natural or legal person".³⁹⁴ The second request for suspension of eviction procedure, which was submitted *alongside the lawsuit* against the second-instance decision on eviction, was dismissed as well.³⁹⁵ Such an approach is contrary to the previous practice of the Administrative Court taken in other cases related to the eviction of other social housing beneficiaries, who were in the same or very similar situation as B.S., and whose request for suspension was upheld.³⁹⁶ Because of this, B.S. filed a constitutional complaint with the Constitutional Court, pointing out that the described actions of the Administrative Court violated the right to equal protection of the right and the right to a fair trial. However, the Constitutional Court dismissed the constitutional complaint and stat-

392 Committee on Economic, Social and Cultural Rights, *Yearbook of the Committee on Economic, Social and Cultural Rights*, op.cit., 24.

393 Official Gazette of RS, No. 111/2009.

394 Administrative Court, Decision No. 1 Uo 196/12 of 15 November 2012.

395 Administrative Court, Decision No. 8 U 10038/13 of 26 June 2013.

396 For example, the Administrative Court upheld requests to suspend enforcement in cases no. 20 U 8645/2013 of 31 May 2012 and 21 U 8646/2013 of 31 May 2012.

ed that “the postponement of enforcement of the final administrative act is not a rule but an exception and is not a right of the plaintiff but a legal possibility”.³⁹⁷

Roma men and women are also one of the most vulnerable groups in terms of access to adequate housing. Residents of nearly 600 informal Roma settlements live in constant fear of forced evictions, in insecure and inhumane conditions, without access to basic services and human rights.³⁹⁸ In particular, the period from 2009 to 2012 was marked by a number of large-scale forced evictions which occurred in Belgrade, with residents affected by eviction procedures most often left without adequate protection of the right to housing.³⁹⁹

Among numerous shortcomings that marked the evictions in that period, *a very short eviction deadline set in the decision on the eviction or decision on demolition of Roma buildings from informal settlements* was observed; the deadline was usually between one and three days.⁴⁰⁰ On the other hand, *in cases of eviction from apartments, after the judicial procedure*, the Constitutional Court took the view that the 15-day eviction deadline was inappropriate because, according to the case law of the European Court of Human Rights, every person shall be given an appropriate deadline to move out of the apartment, if eviction is a consequence of a decision of a competent authority.⁴⁰¹ However, persons whose evictions were carried out in administrative proceedings (which was almost always the case with the inhabitants of informal settlements) did not even have the opportunity to obtain judicial protection before the evictions, so a period of three or only one day for eviction is particularly inappropriate in these cases.⁴⁰² Due to the extremely short eviction deadlines, judicial protection was generally provided only after the decision enforcement,⁴⁰³ and such delayed protection was often inadequate and, at best, resulted in compensation, without any guidelines that would be suitable to deter from future similar practice.

Evictions are often conducted without providing alternative accommodation,⁴⁰⁴ and it happened that alternative accommodation was provided only to a part of the residents affected by the eviction. However, in these cases, neither did the Constitutional Court, nor the Administrative Court, nor the bodies that conducted administrative proceedings for the enforcement of evictions, found that such a practice was contrary to the constitutional guarantees of human rights protection and ratified international treaties. Thus, in the process of evicting the informal settlement in Block 72 in New Belgrade, V.A, a displaced Roma woman from Kosovo tried to protect her right to adequate housing. From the New Belgrade Municipality, V.A. received a decision on

397 Administrative Court, Decision No, UŽ-6232/2013 of 11 July 2020.

398 A 11 – Initiative for Economic and Social Rights, *Report based on the questionnaire prepared by the special rapporteur on the right to adequate housing on the occasion of the preparation of her forthcoming report to the General Assembly on the issue of informal settlements and human rights*, Beograd, 2018, available at: <https://www.a11initiative.org/wp-content/uploads/2018/09/report-based-on-%20the-questionnaire-on-Informal-Settlements-and-Human%20Rights-15052018.pdf>.

399 Ibid.

400 Praxis, *Analysis of the Main Obstacles and Problems in Access of Roma to the Right to Adequate Housing*, Belgrade, 2012, 39. See also Marko Davinić, “Forced Eviction and Resettlement – Administrative and Legal Aspects”, *The Annals of the Faculty of Law in Belgrade*, 2013, 61(2), 149-165.

401 M. Davinić, “Forced Eviction and Resettlement - Administrative and Legal Aspects”, op. cit.

402 Ibid.

403 Praxis, *Analysis of the Main Obstacles and Problems in Access of Roma to the Right to Adequate Housing*, op. cit., 41.

404 Ibid. Marko Davinić, *Forced Eviction and Resettlement – Administrative and Legal Aspects*, op. cit.

the demolition of the building in which she used to live, and she and other 156 residents of the settlement were ordered to remove illegally erected buildings within one day - the barrack where she lived with her family since the end of the war in Kosovo. At the time she received the decision on demolition, V.A. was pregnant, and no alternative accommodation was offered to her, contrary to the provisions of Art. 11 of the International Covenant on Economic, Social and Cultural Rights. The appeal she filed with the second-instance body, as well as the subsequent lawsuit to the Administrative Court, did not bear fruit. When deciding, although no hearing was held, the above bodies did not take into account the provisions of the international agreement which constitute an integral part of the legal order in the Republic of Serbia, i.e. they observed the legality of decisions on demolition exclusively from the aspect of enforcing provisions of the Law on Planning and Construction.⁴⁰⁵ In the proceedings conducted based on the constitutional complaint filed by V.A. due to the violation of the right to equal legal protection without discrimination, the right to dignity and free development of personality, the right to a fair trial, the right to equal protection of rights and legal remedies, the right to property, and finally the right to adequate housing, the Constitutional Court rejected the constitutional complaint in the part relating to the violation of the right to a fair trial and the right to a legal remedy, while the remaining part was dismissed. It is particularly important to note that the Constitutional Court, in the part of its decision in which it deals with compliance with Article 11 of the International Covenant on Economic, Social and Cultural Rights found that "allegations of constitutional complaints that "public authorities were obliged to offer the complainant fair compensation for the demolished house" cannot be linked to the content of the obligations under the said provision of the International the Covenant on Economic, Social and Cultural Rights"⁴⁰⁶

Many of the mentioned shortcomings are illustrated by the resettlement of the informal settlement of **Belvil**. The deadline for eviction was three days, and alternative accommodation was provided only to residents who had registered permanent residence in Belgrade, while persons who had registered permanent residence outside Belgrade were sent to their place of residence. The action plan of the City of Belgrade for the resettlement of the informal settlement *Belvil* established that 257 families were registered in the settlement, and that the City of Belgrade took responsibility for the resettlement of 124 families, and they were mainly provided with alternative accommodation, while the remaining 133 families (428 persons) were sent to place where they had registered permanent residence; they were only provided with transport to their place of residence, without paying compensation for the destroyed buildings "given their small or no value."⁴⁰⁷ Among the above families, there were also five Roma families from Niš, that were accommodated in an abandoned warehouse, with the ceiling threatened to collapse.⁴⁰⁸ Two of these families, with the help of the European Roma Rights Center, tried to get judicial protection. Due to inadequate mechanisms for the protection of the right to housing, the emphasis was on the prohibition of discrimination. The verdict of the Court of Appeal in Belgrade established, *inter alia*, that **the City of Belgrade discriminated against plaintiffs on the basis of place of residence**

405 Official gazette of RS, No. 72/09 and 64/10 – CC Decision.

406 Constitutional Court, UŽ-6505/2013 of 17 April 2013.

407 Ruling of the Court of Appeal in Belgrade, GŽ-9580/18 of 14 May 2020.

408 Praxis, *Analysis of the Main Obstacles and Problems in Access of Roma to the Right to Adequate Housing*, op. cit., 51.

during the resettlement, which unfairly put them in an unequal position in relation to persons residing in Belgrade. The City of Belgrade paid the amount of 300,000.00 dinars to each plaintiff as a compensation for non-pecuniary damage for mental pain suffered due to violation of the right to sufficient living standard and right to respect for private and family life".⁴⁰⁹

The umbrella law in this field, **the Law on Housing and Building Maintenance**,⁴¹⁰ passed in 2016, provides to some extent better protection for the inhabitants of informal settlements, in those proceedings in which they face forced evictions.⁴¹¹ The current practice in conducting eviction and resettlement procedures of informal settlements on the basis of the new Law is scarce, but sufficient to confirm that **eviction procedures continue to be conducted in an illegal manner**.⁴¹² An interesting practice that differs from the one previously presented is the action of Zemun Municipality regarding the attempt to forcibly evict the informal settlement "Grmeč", where internally displaced Roma lived. Namely, in this procedure, after Zemun Municipality ordered Roma in this settlement to move out of the location where they have lived since internal displacement in 1999, YUCOM - Committee of Lawyers for Human Rights initiated proceedings before the European Court of Human Rights aimed at requesting interim measure pursuant to Rule 39 of the Court. After initiating the above procedure, but also initiating the review of legality by the Protector of Citizens⁴¹³ and obtaining the recommendation of the Commissioner for Protection of Equality⁴¹⁴, Zemun Municipality, on a basis of the Law on Ratification of the International Covenant on Economic, Social and Cultural rights, decided to suspend the inspection procedures until permanent accommodation is provided to the residents of this settlement. In the conclusions, Zemun Municipality stated the following:

*„Considering that the Republic of Serbia has ratified the International Covenant on Economic, Social and Cultural Rights, and that international treaties, ratified or confirmed by the legislative bodies of the states parties, supersede the law and bylaws in their legal force, and, that Article 11 provides the obligation of the States Parties to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, it has been decided as in the enacting clause of this Conclusion“.*⁴¹⁵

409 Ruling of the Court of Appeal in Belgrade, GŽ-9580/18 of 14 May 2020.

410 Official Gazette of RS, No. 104/2016.

411 The law, in the chapter entitled "Eviction and relocation", stipulates that evictions are carried out only when the settlement cannot be kept at the existing location. In addition, in cases of eviction, all residents of these settlements who do not own other real estate and who do not have sufficient funds for accommodation are provided with the right to relocation to adequate accommodation. The law also prescribes the procedure for making a decision on the necessity of relocation, which is preceded by consultations with residents affected by eviction and other procedural rules. For more details, see A 11 - Economic and Social Rights Initiative, *Second-Class Rights*, op. cit., 35, ff.

412 For example, the resettlement of Roma families from the settlements "Vinča Landfill" and "Vijadukt" was carried out with numerous shortcomings and non-compliance with regulations. For more details see *Independent Project Accountability Mechanism*, Annual Report 2020, 49, available at: <https://www.ebrd.com/ipam/ipam-annual-report-2020.pdf>. See also A 11 - Initiative for Economic and Social Rights, *Illegal Eviction of Inhabitants of the Settlement "Vijadukt" in Resnik*, 25 January 2021, available at: <https://www.a11initiative.org/nezakonito-sproveden-postupak-is-eljenja-stanovnika-naselja-vijadukt-u-resniku/>.

413 Protector of Citizens, communication no. 27702, of 17 July 2015.

414 Commissioner for Protection of Equality, *Proposed Measured for Achievement of Equality*, No. 07-00-365/2015-02 of 27 July 015.

415 City of Belgrade, Zemun Municipal Administration, Inspection Department, Construction Inspection, Conclusion, No. 356-333/2015, of 18 August 2015.

Another particularly vulnerable category of residents are **refugees and internally displaced persons**, and the analysis of their position in the field of housing returns to the question of how the procedures of judicial review of general acts take into account the needs and position of the most vulnerable citizens.

The position of both refugees and internally displaced persons and social housing beneficiaries is additionally aggravated by the obligation to pay property taxes; as of 2014, tenants of social housing, and housing for refugees and internally displaced persons became subject to payment of the above tax, if the tenancy agreement covers the period for more than a year.⁴¹⁶ **An initiative for review of the constitutionality of the said legal solution was submitted in 2015, but even after six years, the decision has not been passed.**⁴¹⁷

The housing vulnerability of refugees has been further exacerbated by discrimination in determining tax amounts. Tax relief in the form of a tax reduction of up to 50% - **the so-called tax credit granted to every taxpayer for the facility in which he lives, regardless of income - is not available to refugees**, regardless of the severity of the situation in which they find themselves.

An example of inadequate response to the problems of vulnerable groups in the field of housing is the decision of the Constitutional Court which dismissed the constitutional complaint of a refugee filed due to discrimination in setting the tax amount, with the explanation that the amount of 7,500 dinars does not represent a significant amount.⁴¹⁸ In addition to the fact that the amount that the Constitutional Court considers as an insignificant financial damage, almost completely corresponds to the monthly amount of financial social assistance in Serbia, which is expected to be sufficient for subsistence, many citizens are at risk of homelessness due to inability to pay bills in that amount. On the other hand, in this case it is especially important to note that the Constitutional Court has taken the position that the allegations and reasons of the constitutional complaint are *prima facie* such that they do not indicate the possibility of violation or denial of the indicated constitutional right. The Constitutional Court took this argument despite the fact that the constitutional complainant, in addition to the violation of the right to property under Art. 58 of the Constitution, pointed out in his constitutional complaint that the actions of the competent administrative bodies and the Administrative Court also violated the principle of prohibition of discrimination and guarantees of the right to fair trial. It remains unclear why the Constitutional Court failed to deal with violations of the principle of non-discrimination and the right to fair trial.⁴¹⁹

416 For more details see A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 37.

417 Ibid.

418 Constitutional Court of RS, UŽ-2102-2018.

419 The fact that this is not an oversight but a clearly taken position of the Constitutional Court can be corroborated by the decision of the Constitutional Court no. UŽ-2101/2019 of 11 September 2019 when the Constitutional Court took the same position, on the same legal issue that arose the following year when the constitutional complainant received a decision on the annual property tax.

Key Shortcomings of the Mechanism of Protection of Economic and Social Rights in Serbia

The analysis of the case law indicates a number of shortcomings in the functioning of the mechanism for the protection of social and economic rights in Serbia. It seems that the provisions and obligations of the Covenant have not been sufficiently implemented in practice, which is perhaps most clearly evidenced by the inability of the state to list at least one decision based on the provisions of the Covenant in its report to the Committee on Economic, Social and Cultural Rights.⁴²⁰

Even when it comes to decisions with positive outcome, the focus was on eliminating already caused damage, and not on eliminating future violations or systemic changes that would prevent such violations in a large number of (vulnerable) individuals. Even when violations of rights were found and damages awarded, there was a lack of adequate reasoning accompanying the decision; therefore, there was neither any impact of these actions on deterrence from future violations or on the position of individuals in a similar situation. It is also pointed out that in the last couple of years the quality of the reasoning and decisions of the Constitutional Court made on constitutional complaints has noticeably decreased.⁴²¹ The Constitutional Court invokes the jurisprudence of the European Court to legitimize, or sometimes only to embellish its decisions, but lacks the courage to take a step forward and recognize new human rights or accept new procedural mechanisms, as it used to do immediately after its establishment under the 2006 Constitution.⁴²²

There is also a tendentious avoidance of the Constitutional Court to engage in the assessment of regulations related to socio-economic rights which increase social inequalities, at least while these regulations are in force. Thus, the assessment of the constitutionality of the bylaw which affects the exercise of the right to financial social assistance, and which is criticized for the introduction of forced labor of beneficiaries of financial social assistance, has been waiting for almost seven years; the assessment of constitutionality of pension cuts and reduction of salaries in the public sector was performed only when the disputed laws ceased to be valid. Assessment of the constitutionality of the tax on the lease of social housing has been waiting for six years. Although the Constitutional Court initiated proceedings to review the constitutionality of numerous disputed provisions of the Law on Financial Support to Families with Children, based on submitted initiatives, it failed to initiate proceedings on the constitutionality of Art. 25 para. 1 - 6 of the Law on Financial Support to Families with Children. The above provisions have disparate impact on Roma children, because they prescribe the abolition of the right to parental allowance if at least one of the children in the family is not up-to-date with mandatory immunization schedule or does not attend regular primary school, or preschool preparatory program. Since numerous state and

420 A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, op. cit., 8. It should be borne in mind that the reference to sources of international law and the application of international human rights standards has been an exception in practice of courts in Serbia for a long period of time, occurring only recently; it is most often a reference to the jurisprudence of the European Court of Human Rights. For more details, see Tatjana Papić and Vladimir Đerić, *The Role of the Constitutional Court of Serbia in the Times of Transition*, Working Paper 2/2016, Belgrade Centre for Human Rights, 22-23.

421 Slobodan Beljanski et al, *Relation between the Constitutional Court and Judiciary – Current State and Prospects*, Cepris, op. cit., 74.

422 Ibid.

other reports reiterate devastating statistics on coverage of Roma children by immunization and on their attendance of school and preschool preparatory program, it is quite certain that this provision raises the issue of discrimination against Roma children. Unfortunately, in this case the Constitutional Court failed to show that it attaches importance to such a disputable legal issue.

If we look at individual rights, it is noticeable that there is **a discrepancy between the number and status of labor rights in the Constitution and law and their enjoyment and the position of workers in practice**. In addition to the outcome, also **the length of proceedings** often deters citizens from seeking judicial protection, even in those proceedings that are considered urgent, as it is the case with labor disputes. Judicial protection in the field of health care was mainly reduced to the protection of the rights of insured persons, while the protection of the rights of vulnerable persons and groups who remain outside the health insurance system was lacking, even in those cases when they would have the right to be covered by compulsory health insurance. **In terms of access to health care, the legislator played a more progressive role** (prescribing provisions aimed at facilitating the access to health insurance for members of vulnerable groups), **than the Constitutional Court, which missed the opportunity to ensure the implementation of quality legal solutions by annulling bylaws directly contradicting relevant laws**. In the field of social protection, the shortcomings become clearer if the situation in Serbia is compared with the practice of the Colombian Constitutional Court, which considers that individuals who are in a state of extreme vulnerability and could be left without the means for basic subsistence must be provided with timely judicial protection.⁴²³ In contrast, in Serbia, **socially vulnerable individuals who are left without the means necessary for life do not have timely and effective protection at their disposal, and for years may be left without any income and opportunities to exercise their rights to social protection**.⁴²⁴ Difficulty in accessing free legal aid is another circumstance that can make it difficult to access justice in the event of a violation of socio-economic rights. Beneficiaries of social housing who are at risk of homelessness in practice generally cannot receive adequate protection of the right to housing, **and there is no effective legal remedy that could challenge the termination of a social housing lease agreement and prevent eviction while the procedures aiming to challenge an eviction still last**.

On several occasions in constitutional review proceedings, the Constitutional Court has had the opportunity to decide on the constitutionality of **fiscal consolidation measures restricting socio-economic rights**, but in such proceedings this court mostly defended the law, not the Constitution, and **missed the opportunity to establish clear doctrinal positions**,⁴²⁵ in connection with the assessment of the constitutionality of laws passed during the economic crisis which

423 For more details on this topic and the concept of "related fundamental rights" in practice of the Colombian Constitutional Court, see Magdalena Sepulveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice", in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008.

424 See, for example, UŽ- 5337/2015; UŽ-6193-2013. It should be taken into consideration that mechanisms such as appeals and appeals on grounds of administrative silence are not sufficient, especially if there is a possibility to annul decisions in administrative proceedings for an unlimited number of times, which is why procedures in simple matters of existential importance to individuals last for several years.

425 See for example, Olivera Vučić, *Separate Opinion on the Decision on the Constitutionality of the Reduction of Pensions* IUz-531/2014 of 23 September 2015. In that separate opinion, regarding the decision of the Constitutional Court on the constitutionality of the reduction of pensions, it is pointed out that "this is not the first time that the Constitutional Court decided to be loyal to the legislator, and not to the Constitution itself as a measure of its judgment".

restrict social rights.⁴²⁶ Unlike the constitutional courts in many other countries, such as the Lithuanian Constitutional Court, which have developed a precise doctrine on the “limits” of “human rights” restrictions,⁴²⁷ there are no such interpretative positions in Serbian Constitutional Court decisions that would set firm, sufficiently clear obstacles to arbitrary legislative interventions in human rights guaranteed by the Constitution.⁴²⁸ Instead, examples of decisions regarding pension cuts show that the Constitutional Court has left **the legislator almost complete freedom to restrict social and economic rights at its discretion, if it deems it necessary.**

In the practice of Serbian Constitutional Court there is no clear interpretational framework and positions in terms of social rights, retrogressive measures (or distribution of resources for realization of these rights). Even in those cases where retrogressive measures were declared unconstitutional (as, for example, in the restriction of the right to compensation in connection with injuries at work), there was no reference to the practice of the Committee on Economic, Social and Cultural Rights and interpretation of obligations of the states in cases of adoption of retrogressive measures, which could contribute to more careful approach in adoption of measures with the impact on enjoyment of economic and social rights.

The Constitutional Court did not remain fully consistent with its principled determination not to engage in the assessment of the suitability of the law, so in the decisions on the constitutionality of the reduction of pensions it dealt more with the suitability than with the constitutionality of the disputed law. It is also noticeable that in the constitutional review proceedings, the Constitutional Court dealt more with economic and financial issues, instead of constitutional and legal reasoning, and that the consideration of the disputed provisions is reduced to the question of whether these measures were necessary and useful, and not whether they are constitutional.⁴²⁹ The quality and importance of normative (constitutional) review of legislation is diminished by the Constitutional Court’s avoidance of scheduling and conducting public hearings in many cases where the disputed issues are so numerous and significant that they sufficiently indicate the existence of reasons for scheduling a public hearing.⁴³⁰ It is also noticeable in the judicial review that the Court occasionally resorts to illogical, complex or unsustainable solutions in order to avoid establishing unconstitutionality.⁴³¹ The key problem is the recourse to these solutions in order to avoid acting in certain cases, which indicates the lack of true readiness to provide adequate protection of the socio-economic rights of citizens.

426 Bosa Nenadić, *Separate Opinion on the Decision on the Constitutional Court in the case Iuz-531/2014.*

427 Ibid; Dragan M. Stojanović, *Separate Opinion on the Decision on the Constitutional Court no. Iuz-531/2014.*

428 Dragan M. Stojanović, *Separate Opinion on the Decision on the Constitutional Court no. Iuz-531/2014.*

429 See, for example, Milan Škulić, *Separate Opinion on the Constitutional Court Decision no. IUz-138/2016* (Decision on constitutionality of reduction of net salaries in the public sector) and Milan Škulić, *Separate Opinion on the Constitutional Court Decision no. IUz-351/2015* (Decision on constitutionality of reduction of pensions).

430 See, for example, Bosa Nenadić, *Separate Opinion on the Constitutional Court Decision no. IUz-531/2014*, Dragan M. Stojanović, *Separate Opinion on the Constitutional Court Decision no. IUz-531/14*, Olivera Vučić, *Separate Opinion on the Constitutional Court Decision no. IUz-531/2014* of 23 September 2015. See also Article 37 of the Law on the Constitutional Court.

431 This is illustrated by the views that foreign nationals should be considered as prevented from taking immediate care of the child, for the purpose of exercising the right to parental allowance (Decision on assessment of constitutionality of the Law on Financial Support to Families with Children), or that the Constitution guarantees the right to pension, but not the pension amount (Decision on constitutionality of pensions cuts).

Devastating messages arise in particular from the process of normative (constitutional) review of bylaws that prevent Roma without permanent or temporary residence from accessing health insurance. The Constitutional Court failed to protect the rights of members of a highly vulnerable group in this undisputed case, which did not require any excessive innovation or judicial activism - it was only necessary to annul from the legal order acts that were in obvious conflict with laws higher in the hierarchy of laws. When compared with these inadequate answers to initiatives for constitutionality assessment, even more unfavorable is the situation that was happening when **the submitters of initiatives remain without any answer regarding the submitted initiatives.**

The analyzed practice of protection of socio-economic rights in Serbia reminds that there is often a gap between the extent to which these rights are recognized, and the extent to which they are protected before the courts. Although we find a more desirable approach in Serbian law - explicitly recognizing economic and social rights in the Constitution, what is lacking is judicial activism in order to ensure greater respect for these rights and reduce inequality. Although the purpose of constitutional guarantees of inalienable human and minority rights is primarily the preservation of human dignity,⁴³² the principle of respect for human dignity was not used to create new social rights, i.e. to materialize substance of social rights listed in the Constitution.⁴³³

Practice presented here justifies the conclusion that the Serbian judiciary is characterized by an approach based on "solving cases instead of solving problems", while politically sensitive issues are postponed instead of being resolved.⁴³⁴ After reviewing the listed shortcomings, the benefits that the citizens of Serbia would have from the ratification of the Optional Protocol and the possibility of accessing to an international mechanism specialized in the protection of socio-economic rights become obvious, in situations when such protection cannot be obtained before domestic authorities. However, the state explicitly rejected the recommendation to ratify the instrument.⁴³⁵ Therefore, it seems even more important to recall the advantages that ratification of the Protocol would have for the state itself.

432 Article 19, para. 1 of the Constitution of RS states: Guarantees for inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open, and democratic society based on the principle of the rule of law.

433 Similar situation exists in other Central and Eastern European countries. See also Andras Sajo, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court* in Roberto Gargarella, Pilar Domingo and Theunix Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, op. cit., 96.

434 See also Tanasije Marinković, *Judicial Culture and the Role of Judges in Developing the Law in Serbia*, Institute for Democracy "Societas Civilis", Skopje, September 2021, 16, 24.

435 In the last cycle of the Universal Periodic Review of the exercise of human rights, which was conducted before the United Nations Human Rights Council, out of the total of 190, the Republic of Serbia rejected fifteen recommendations for improving the situation in the field of human rights protection. Among those fifteen rejected recommendations is the one calling on the Republic of Serbia to sign and ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. A 11 – Initiative for Economic and Social Rights, *Second-Class Rights*, 7.

Signing and Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights – a Step Forward towards Better Protection of Economic and Social Rights?

The first notable advantage that ratification of the Optional Protocol to the Covenant would bring, due to the Committee's specific approach, would be the possibility of dialogue with the Committee on various options for resolving issues in the field of protection of socio-economic rights. Instead of a judicial monologue that boils down to establishing the existence of a violation of rights or determining damages, **the focus would be on dialogue with the state on various options for exercising socio-economic rights and guidelines and recommendations for gradual development of a framework for full enjoyment of those rights.**⁴³⁶ In the field of socio-economic rights, ratification of the Protocol could mark abolition of the current policy of "solving the cases instead of problems", which is currently present in Serbian judiciary.⁴³⁷

The purpose of ratification of the Optional Protocol to the Covenant is not to impose sanctions on states for violating socio-economic rights, but to try to ensure full enjoyment of these rights in practice through *constructive dialogue*.⁴³⁸ The Committee could **clarify and concretize the obligations of the Covenant and make them easier to implement before domestic authorities.**

If we look at the impact of the ratification of the ECHR, similar outcomes could occur in the field of socio-economic rights by ratifying the Protocol – **courts, and in particular the Constitutional Court, would make greater efforts to provide an effective remedy for domestic violations.**

Another advantage of proceedings before the Committee would be a greater **focus on systemic changes and the elimination of structural problems**, rather than a remedy to identified viola-

436 For more details see Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, op. cit., pg. 46 and 58. See also, Malcolm Langford, *Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Special Issue of Nordisk Tidsskrift for Menneskerettigheter Nordic Journal of Human Rights, Vol. 27, No. 1, 2009, pg. 37. It should also be borne in mind that in petition proceedings, with regard to the obligations of progressive realization of rights, the basic premise in the Committee's approach is that States may choose from a number of possible measures to implement the rights set out in the Covenant. See Optional Protocol to the ICESCR, Article 8(2). See also, Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in Frédéric Mégret and Philip Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd ed., 2020), pg. 17. See also Christian Courtis, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A new instrument to address human rights violations*, Espaço Jurídico Journal of Law [EJLL], 16(2), 295–302, 299.

437 Tanasije Marinković, *Judicial Culture and the Role of Judges in Developing the Law in Serbia*, op. cit., 16, 24.

438 Md Al Ifran Hossain Mollah, *Assessment into Feasibility of Ratifying the OP-ICESCR from the Context of Justiciability of Economic, Social and Cultural Rights in Bangladesh*, op. cit..

tions and damage award in individual cases.⁴³⁹ The Committee may thus make recommendations to the State aimed at removing structural obstacles to the exercise of a particular right (for example, it may recommend the adoption of new regulations).⁴⁴⁰

Ratification of the Protocol does not represent an omnipotent solution to the problem in the field of socio-economic rights, but it would undoubtedly bring **great differences in the lives of many citizens who would have better access to rights that greatly affect their quality of life.**⁴⁴¹

Ratification of the Optional Protocol would provide an opportunity for all citizens of the Republic of Serbia to protect their rights when they fail to exercise protection before national authorities and would introduce an additional **mechanism that can improve the normative framework for protection of economic and social rights, while improving the work of institutions and domestic judicial and administrative bodies responsible for the protection of human rights.**⁴⁴²

Moreover, by ratifying the Protocol, **domestic authorities would be more familiar with the provisions and obligations of the Covenant, so it would be easier to apply them.** By reviewing individual cases, the Committee can point out certain systemic problems more easily and contribute to their solution faster than when repeating warnings about those problems in concluding observations on the way in which the state implements the Covenant.⁴⁴³

Only in the short term, it may be appropriate for the state to keep international mechanisms specialized in the protection of socio-economic rights inaccessible to citizens. Given the interdependence of human rights, neither the passive position of the Constitutional Court nor the refusal of the state to ratify the Optional Protocol can prevent violations of socio-economic rights from being considered before other international judicial and quasi-judicial bodies.⁴⁴⁴

Ratification of the Protocol would improve the living conditions of many citizens and the degree of respect for socio-economic rights. By avoiding ratification of the Protocol, the state will not avoid liability for violations of these rights. The possibility of protection of social and economic rights also exists before other international (judicial and quasi-judicial) bodies whose jurisdiction has been accepted by the state. The difference is as follows: by ratifying the Optional Protocol to the Covenant, the state has the opportunity, through dialogue with this body specialized in the

439 In the context of the Optional Protocol, the Committee's recommendations, in addition to compensation in individual cases, may include, *inter alia*, calls on the State to rectify the circumstances that led to the violation. The Committee may then recommend to the State a number of measures to assist it in implementing the recommendations, with a particular focus on measures that do not impose excessive costs, with the State party still retaining the possibility of adopting its own, alternative measures. For more details, see Committee on Economic, Social and Cultural Rights, Statement, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under An Optional Protocol To The Covenant*, UN. doc. E/C.12/2007/1, 10 May 2007, §13.

440 Committee on Economic, Social and Cultural Rights, *2020 Yearbook of the Committee on Economic, Social and Cultural Rights*, op. cit., 9.

441 See Md Al Ifran Hossain Mollah, *Assessment into Feasibility of Ratifying the OP-ICESCR from the Context of Justiciability of Economic, Social and Cultural Rights in Bangladesh*, op. cit.

442 A 11 – Initiative for Social and Economic Rights, *What do the Signing and Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Bring Us?*, op. cit.

443 Eibe Riedel, Gilles Giacca and Christophe Golay, *The Development of Economic, Social and Cultural Rights in International Law*, in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.), *Economic, Social and Cultural Rights in International Law- Contemporary Issues and Challenges*, op. cit., pg. 34.

444 This is indicated by the already mentioned case of B.S., in which the eviction of a particularly vulnerable social housing beneficiary was suspended due to interim measure of the ECtHR, after the domestic authorities failed provide a legal remedy to review the decision to terminate the lease agreement and postpone the eviction.

protection of socio-economic rights, to consider various options for eliminating and preventing their violations. Another option is to consider these violations before other bodies, such as the ECtHR and the UN Human Rights Committee, and to identify violations of rights such as the right to life, the prohibition of torture, the prohibition of racial discrimination. By ratifying the Protocol, the state could take on a much more progressive role and, by changing the practice, further contribute to the justiciability and understanding of socio-economic rights at the global level. The states that have ratified the Covenant are still relatively few,⁴⁴⁵ but that is why the decisions of their courts are cited and contribute to more effective protection and understanding of socio-economic rights in many other states. **Ratification of the Protocol can also help domestic authorities to better understand the obligations related to socio-economic rights and influence the legislator to adopt solutions that do not conflict with those obligations.**⁴⁴⁶ The second option and remaining with the decision not to ratify the Protocol can serve as another confirmation that guarantees of social and economic rights are there only by chance i.e. by copying other constitutions,⁴⁴⁷ while there is no real intention to use the potential provided by such a legal framework to ensure the exercise of these rights and the protection of the most vulnerable.

445 In August 2021, a total of 26 states ratified and 46 states signed the Optional Protocol to the Covenant.

446 See also Malcolm Langford, "Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", op. cit., str. 31.

447 Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory", in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 11.

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CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд

341.231.14(497.11)

347.955(497.11)

TRIFKOVIĆ, Milijana, 1983–

Justiciability of economic and social rights in Serbia / [Milijana Trifković, Danilo Ćurčić = translation Tamara Vlahović Šanović]. – Beograd : A 11 – Inicijativa za ekonomska i socijalna prava, 2021 (Zemun : Alta nova). – 84 str. ; 30 cm

"...prepared within the programme 'Active Citizens – Better Society: Advocating for Cooperation and Democratic Development'..." --> str. [92]. – Izv. stv. nasl.: Utuživost ekonomskih i socijalnih prava u Srbiji. – Tiraž 60. – Napomene i bibliografske reference uz tekst. – Bibliografija: str. [85–89].

ISBN 978–86–900707–7–0

1. Ćurčić, Danilo, 1986– [аутор]

а) Људска права -- Заштита -- Србија б) Правни лекови -- Србија

COBISS.SR-ID 50252553



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This document was prepared within the programme “Active Citizens – Better Society: Advocating for Cooperation and Democratic Development”, implemented by BOS with the support of the American people through US Agency for International Development (USAID). The content of the documents is the sole responsibility of the A 11- Initiative for Economic and Social Rights and does not necessarily reflect the views of the USAID, US Government or BOS.

ISBN-978-86-900707-7-0