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# Justiciability of Economic and Social Rights in Serbia

Summary



Republic of Serbia  
MINISTRY FOR HUMAN AND MINORITY RIGHTS  
AND SOCIETAL DIALOGUE



GOVERNMENT OF  
THE REPUBLIC OF SERBIA  
PUBLIC POLICY SECRETARIAT



UNIVERSITY OF  
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# Justiciability of Economic and Social Rights in Serbia – Summary

The issue of justiciability of economic and social rights is highly relevant in a practical sense. The possibility to get social assistance if you have no means to provide the subsistence minimum, to keep one's home if there is a risk of eviction, or to acquire necessary medicines when there is no way to pay for them, can all hinge on this issue. For a long time, the concept of economic and social rights has been disputed. Civil and political rights are usually perceived as directly applicable, and any violation of these rights can be adjudicated by the courts. However, in the case of economic, social, and cultural rights, it is often believed that they can only be gradually attained through policy measures taken by the state, and thus, not suitable for court proceedings. Nevertheless, practice of courts in various countries around the world, as well as the protection of economic and social rights at a regional and international level, put in the background theoretical discussions about whether economic and social rights are justiciable, leading to the inquiry of how this protection can be more effective. This shift has been substantially attributed to the Committee for Economic, Social and Cultural Rights, a body that interprets and oversees the International Covenant on Economic, Social and Cultural Rights (also referred to as the Covenant) which safeguards the most important social and economic rights.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which entered into force in May 2013, represents a crucial step forward in terms of perceiving and protecting economic and social rights. It enables citizens of countries that have ratified it to file individual complaints when violations of their economic, social, and cultural rights have not been addressed within the domestic legal system. This way of protecting economic and social rights could soon be available to the citizens of Serbia, as the parliamentary procedure of ratifying the Optional Protocol is ongoing since June 2023. Following a short overview of the fundamental matters related to the status and justiciability of economic and social rights in Serbia, this analysis goes on to recall the advantages of the proposed ratification of the Optional Protocol.

## Justiciability of Economic and Social Rights

The justiciability of economic and social rights represents the ability to initiate the court or other suitable procedures to evaluate any violations of these rights and to secure that adequate protection is provided. The issue of justiciability is closely related to the provision of legal remedies. The need to provide legal remedies when

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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.

Arguments in favour of non-justiciability of social and economic rights stress that these are neither natural rights nor individual powers, 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. The judiciary is believed to lack the institutional capacity and expertise to make decisions on social policy matters and resource allocation. Moreover, the principle of the separation of powers is frequently used to oppose the justiciability of economic and social rights.

In connection with the claim that matters involving the allocation of resources should be left to the political authorities rather than the courts, the Committee on Economic, Social and Cultural Rights recalls the fact that the courts are generally already involved in a considerable range of matters which have significant resource implications. In addition, both civil and political rights require considerable resources and substantial judicial costs. Although it is emphasized that the courts are not democratically elected by the people and are not competent enough to determine how much funds should be allocated for the exercise of certain rights, it is within the competence of the courts to ensure that the legislator acts in accordance with the constitution. Despite the undisputable importance of the principle of separation of powers, we should not lose sight of other important principles, such as the principle of the rule of law, and one of the elements of the rule of law is precisely the requirement to provide an effective legal remedy in the event of a violation of rights.

**The Committee for Economic, Social and Cultural Rights** has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation and **in vast majority of legal systems, all Covenant rights possess at least some significant justiciable dimensions.**

When discussing about the justiciability of rights in the General Comment no. 5, **the Committee on the Rights of the Child**, emphasized that there must be effective means to correct violations of rights, in order for guaranteed rights to have meaning. In doing so, the Committee on the Rights of the Child expressly emphasizes that **economic, social, and cultural rights, as well as civil and political rights, should be considered justiciable.**

The number of decisions protecting various social rights is continuously growing covering issues such as homelessness, forced eviction, health and social protection,

water and medicine supply, malnutrition, and the right to education. Despite significant differences in the manner and efficiency of protection of economic and social rights in the legal systems of different countries, examples of successful protection of economic and social rights are so widespread even locally that the key question is no longer whether judicial protection of economic and social rights can be provided, but how this protection can be improved.

Therefore, it is important to ask the following question: **how is the protection of social and economic rights guaranteed in practice and what attributes must a legal remedy have in order to be deemed effective.** 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. The second dimension of the legal remedy refers to the very outcome of these proceedings and provision of adequate redress for such violations. 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.

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.

## Models of Justiciability

Models of justiciability and the actions taken to secure protection in case of violation of economic and social rights are contingent on the position these rights occupy in the relevant legal system. Despite considerable variation between states in the status of social and economic rights in the comparative law, there are several common methods of safeguarding social and economic rights under 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.

In the last few decades, it has been increasingly common to embed economic and social rights into constitutions. We observe a mixed approach in many of these documents, implying that certain social and economic rights are directly applicable and justiciable, while others are left to the discretion of the legislator and are not per-

ceived as subjective rights, but as the guiding principles and goals for the state's social policy.

Incorporating explicit protection of social and economic rights into constitutions is certainly the preferable option, in order to ensure that such rights are granted the same level of protection as civil and political rights. In some countries, the constitution may not guarantee social and economic rights, however, this should not prevent these rights from being justiciable. Judicial protection in such cases is typically provided by pointing out the interdependence between social and economic rights and civil and political rights or by emphasizing 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 interdependence of human rights. It is a common point of emphasis that human rights are mutually dependent, which allows civil and political rights guarantees to be used to shield against breaches of economic and social rights in those legal systems that lack social rights guarantees which victims can appeal to and seek justice.

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 employed with varying degrees of success to protect economic and social rights. For instance, the Constitution of India does not contain a clause protecting the right to health, yet the Supreme Court in the country was able to ensure the protection of this right through a broad interpretation of the right to life. Moreover, according to the Supreme Court of India, a critical component of the right to life is the right to means of subsistence, without which the survival of every individual is endangered. It is beneficial to examine the example of Germany, as its constitution does not guarantee all social and economic rights, but does guarantee the right to human dignity, which the Constitutional Court has interpreted in a way that allows for a minimum standard for each social right based on human dignity. According to this interpretation, the amount of social benefits should be sufficient to cover the subsistence minimum.

Relying on civil and political rights may also be useful for individuals whose social and economic rights have been violated and whose states have not ratified the Optional Protocol to the Covenant on Economic, Social and Cultural Rights, nor have

they provided an adequate domestic remedy, but have ratified other instruments (regional or universal) that provide for protection of civil or political rights. Thus, for example, the European Court of Human Rights (ECtHR) can determine a breach of the right to life due to the failure to provide adequate and timely medical care.

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, depending on courts' sensitivity 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.**

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

Access to social rights is often denied because of the violation of the principle of equality. Therefore, reliance on anti-discrimination provisions is paramount for the protection of vulnerable groups who are denied access to certain social and economic rights.

The prohibition of discrimination in terms of economic and social rights is not only provided for in instruments dedicated to the protection of those rights, but also in instruments primarily dedicated to civil and political rights, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights. Thus, the prohibition of discrimination and Article 14 of the ECHR is applicable not only to rights which the State is obliged to secure under the Convention, 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 Convention – including economic and social rights. Section I, 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. 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. Therefore, the right to equality can also serve as a very important mechanism on the basis of which vulnerable groups can seek protection of their economic and social rights.

# 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, the procedures by which their protection can be sought should be looked into. To ensure that human rights are justiciable, there must be explicit recognition of them, as well as an appropriate legal system in place to provide remedies and control mechanisms for determining violations of those rights and obligations that states have when it comes to provision of redress for violations of rights.

Although the case law of different countries might diverge in this segment, some common 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 decisions in individual cases of violation of rights (individual protection of people whose rights have been violated).

As for the normative (abstract) review, it is mainly about the prerogative 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 regulations that affect the exercise of economic and social rights if they are not in compliance with the constitution and international laws.

The significance of the court's role in protecting economic and social rights is aptly demonstrated through the Lithuanian Constitutional Court's stance on pension restrictions. When reviewing the introduced pensions restrictions, the Lithuanian Constitutional court has explicitly laid down the boundaries that the legislator is not allowed to breach with regards to the enjoyment of social rights, ruling out the possibility of reducing pensions beyond one budget year. Consequently, the legislator must review the economic situation every fiscal year, reconsider the potential reductions in social benefits, and recompense pensioners whose pensions have been reduced due to economic and financial crises. The Lithuanian court's well-defined stance on the subject of pensions cuts reveals how constitutional courts can provide unambiguous direction to the legislature when it comes to restricting economic and social rights in times of financial constraints and austerity policies and thus thwart the unjustified infringement of social and economic rights.

## Ex-Ante Review

Bearing in mind the significance of the prevention, the ex-ante review is an important means of protecting social and economic rights. A careful examination of regulations to be enacted is the easiest way to prevent human rights violations. The constitutional court or parliamentary committees are usually tasked with this type of review. In some jurisdictions, recommendations made by bodies in charge of *ex ante* review are binding. Following the example set out in Section 1 of the Great Britain Equality Law, the Serbian Law on Amendments to the Law on the Prohibition of Discrimination enacted in 2021 has recently introduced the impact assessment of regulations or public policies on the observance of the principle of equality for the most socio-economically vulnerable persons or groups.

## International Mechanisms for the Protection of Social and Economic Rights

The legal justiciability of social and economic rights can also be ensured by accepting international mechanisms that, directly or indirectly, deal with the protection of social and economic rights.

Social rights can get 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 social and economic rights. The European Social Charter and the European Committee of Social Rights established by that Charter were given an important role in the protection of social rights following the adoption of the Protocol to the Charter, which provides for a system of collective complaints.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights holds great significance in furthering the enforcement of social and economic rights, granting individuals or groups the ability to submit complaints to the Committee on Economic, Social and Cultural Rights in the event that they believe their Covenant-enshrined rights have been breached and all domestic remedies have been exhausted. The experience of the countries that have ratified the Optional Protocol shows that accession to this instrument has a number of positive effects to the realization and protection of economic and social rights.

Justiciability at international level, and access to judicial and quasi-judicial bodies at the international level, should not be seen as a replacement for the justiciability of social rights in domestic law, but as a way to supplement national rights protection systems, which is one of the primary advantages of being a signatory to international instruments like the Optional Protocol to the Covenant.

## Status and Protection of Economic and Social Rights in Serbia

### Serbian Legal Framework

The Constitution of the Republic of Serbia 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).

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).

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.

Human rights protection primarily takes place in **courts of general and special jurisdiction**, although protection before **administrative authorities** is also significant. Serbian general jurisdiction courts include Basic Courts, Higher Courts, Appellate Courts, and the Supreme Court (until 2023 it was the Supreme Court of Cassation). Of the courts of special jurisdiction, the misdemeanour courts are important for this analysis, and above all, the Administrative Court. Administrative disputes (judicial control of the administrative system) are the most significant forms of control over the administrative system. **The Constitutional Court has a special role to play in**

**protecting human rights**, as it is responsible for the review of the general legal acts, and the decisions on constitutional claims arising from human rights breaches. With regards to legal **protection in individual cases**, in addition to **regular judicial protection**, the protection of human rights through **constitutional complaints** submitted to the Constitutional Court is anticipated. Moreover, the Constitutional Court is empowered to assess the conformance of general acts, laws, and ratified international treaties with the Constitution (**ex-post judicial review of general acts; ex-post abstract review of regulations**). Beside the aforementioned obligation for public authorities to conduct impact assessments of regulations or public policies mandated in 2006, the Constitutional Court may conduct the judicial review of the constitutionality of regulations prior to their enactment (**ex-ante review**).

The Constitution 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.

The Constitution itself does not draw a distinction between human rights, that is, between civil and political rights, on the one hand, and social and economic rights, on the other. The Constitutional Court has determined that **a constitutional complaint provides protection for all human and minority rights and freedoms, both individual and collective, that are guaranteed by the Constitution, regardless of their placement in the Constitution or whether they are explicitly stated or implemented in the constitutional system by ratified international treaties**. It is the responsibility of the legislature to regulate the exercise of most economic and social rights. Therefore, the content of social rights, conditions and prerequisites for their enjoyment, acquisition and termination of rights are prescribed by law. This does not mean that these rights are not suitable for being directly applicable constitutional rights; The Constitutional Court's practice supports the notion that they are able to benefit from judicial safeguards, including a constitutional appeal.

Although it is not in the realm of judicial protection, **independent human rights institutions** also have powers contributing to more effective protection of social and economic rights. For example, in addition to the authority to act on complaints in individual cases, the Commissioner for the Protection of Equality and the Protector of Citizens have the authority to provide opinion on regulations concerning human rights and equality, to submit proposals for constitutional review of general acts, as well as to submit an initiative to adopt or amend regulations important for the realization of human rights, including the prohibition of discrimination.

In terms of **international or regional protection mechanisms**, Serbia has not ac-

cepted two protection mechanisms specialized in these rights: the system of collective complaints before the European Committee of Social Rights, and the possibility of submitting individual petitions to the UN Committee on Economic, Social and Cultural Rights. This situation could soon change, since in June 2023 the Government of the Republic of Serbia enacted the proposal of the Law on Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The list of guaranteed rights and envisaged legal remedies provides an important indication, but it does not provide a complete picture of how these rights are protected. It is therefore necessary to examine the way in which social and economic rights are protected in practice.

## Protection of Social and Economic Rights in Practice

### Right to Work

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 labour, and by looking at 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.

In principle, the legal justiciability of labour rights is the least controversial of all social and economic rights. Article 60, paragraph 4 of the Constitution explicitly defines judicial protection of workers' rights (in case of termination of employment). The Labour Law is the overarching legislation in this domain which covers in greater detail the exercise and safeguarding of rights, obligations and duties deriving from employment and work. In the instance of rights being violated, the first resort for protection should be the **consensual resolution of disputed issues**. Moreover, the Labor Law envisages that the **labour inspection** shall monitor the implementation of the law, other regulations on labour relations, general acts, and employment contracts, governing the rights, obligations, and responsibilities of employees.

**The court system** is also available to **protect rights**, meaning legal action can be taken. Lastly, the **Criminal Code outlines the criminal defence of labour and social insurance rights**; for instance, failing to pay wages or contributions is considered a criminal offense.

The Labor Law also stipulates that the labour inspector shall submit a **request for initiation of a misdemeanour procedure** if it finds that the employer has violated

the law or other regulations governing labour relations and registration for compulsory social insurance.

Apparently, the availability of either judicial, or extra-judiciary protection of labour rights, is not questionable. In addition, criminal and legal aspect of the protection of labour and social insurance rights is provided, as well. It is also possible to address the Commissioner for the Protection of Equality. However, in practice there is a discrepancy between the number and status of rights to work in the Constitution 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. **The number of labour inspectors and their effectiveness are insufficient. Misdemeanour proceedings are often time-barred.** Ordinary court proceedings concerning **labour disputes** last for several years.

Of the two **decisions on constitutional complaints** of the Constitutional Court establishing a violation of the prohibition of discrimination one refers precisely to discrimination in the field of work. **S.A.** filed a constitutional complaint when her employment contract was not renewed only because she was on maternity leave. The defendant's report to the National Employment Service classified the applicant of the constitutional complaint as an employee whose employment was not extended because of her pregnancy. The Constitutional Court upheld the constitutional complaint and found a violation of the right to a fair trial and the principles of non-discrimination.

### 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 regulates that the employees shall have the right to salary compensation in case of temporary inability to work, the right to temporary unemployment benefit in accordance with the law (Article 69, paragraph 3) and the right to pension insurance, while the state shall see to economic security of the pensioners (Article 70).

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 (LSP), governing that the right to various types of financial support is exercised in order to ensure the subsistence minimum.

Examining the protection of rights in practice, it was not until February 2023 that the Constitutional Court established a violation of Article 69 paragraph 1 of the Constitu-

tion, caused by the denial of the right to material support as a form of social protection. This was the case of **M. M.** which referred to the realization of the right to allowance for care and assistance of another person, envisaged by Article 92 of the Law on Social Protection. It is interesting that the Constitutional Court's decision was largely rooted in the constitutional principles of social protection. In the proceedings before the Constitutional Court, the fact that constitutional principles were ignored when deciding on a particular right, prevailed over the findings and opinion of an expert witness who determined whether the prerequisites for the exercise of a particular right prescribed by the law had been fulfilled. Consequently, this decision can illustrate how the principles of respect for human dignity and social justice can be applied to ensure protection of the constitutionally guaranteed right to social protection.

In reference to the normative control of regulations carried out by the Constitutional Court, untimeliness was singled out as one of the key problems in the field of social protection. Consequently, judicial review of the constitutionality of the Decree on Measures of Social Inclusion of Beneficiaries of Financial Social Assistance - a bylaw that introduced **unpaid and involuntary work of beneficiaries of financial social assistance** - was awaited for more than eight years. Finally, in October 2022, the provisions of the Law on Social Protection, which were the legal basis for the adoption of the Decree, were ruled to be unconstitutional, thus indirectly annulling the Decree. Nevertheless, the key questions about the legitimacy of obliging people to "earn" the social assistance they receive went unanswered.

For eight years, domestic institutions have not succeeded in settling the question of whether involuntary work imposed on social protection beneficiaries is prohibited - a question that should have been solved long ago. At the same time, present circumstances bring forth new challenges and forms of rights erosion that have to be answered. A novel risk to the enjoyment of social protection and other human rights was caused by the **Social Card Law**, adopted with the aim of automating processes and procedures in the field of social protection. The Social Card Law established a unique register in which over 135 sets of data on beneficiaries of social, child, veteran and disability allowances and related persons are collected and processed, which is an unrecorded large amount of data in domestic law. In less than a year of implementation of that law, the number of beneficiaries of financial social assistance was reduced by more than 27,000 people.

The automation within the social protection system has far-reaching effects on vulnerable citizens and their right to social security, equality, privacy, due process, and legal remedy. Due to the inconsistency of the Social Card Law with the provisions of the Constitution and international treaties that guarantee the above rights, A 11 Initiative submitted an initiative for the review of its constitutionality in April 2022.

Members of International Network for Economic, Social and Cultural Rights (ES-CR-Net), with many years of experience in the field of human rights protection, especially in areas affected by the social card system, supported this initiative by submitting an **Amicus Curiae Brief** to the Constitutional Court of Serbia - a joint expert opinion in which, among other things, they remind that the extensive processing of data of beneficiaries of the social protection system, as laid out in the Social Cards Law, is contrary to the principles of personal data protection, the right to social protection, as well as the prohibition of discrimination, particularly since there is a large Roma population in the social protection system.

Submitting an expert opinion can be a useful way of providing valuable information to the courts, especially when new and complex issues are involved. This can contribute to overcoming one of the obstacles that is often brought up in opposition to the justiciability of economic and social rights, which is that the courts lack institutional capacities and information to engage in complex matters in the economic and social realm.

The initiative to review the constitutionality of the Social Card Law was submitted more than a year ago. The Constitutional Court has remained consistent with its usual pattern of delayed response in addressing any requests for the review of the constitutionality of social rights, despite the fact that implementation of the law in question has endangered the existence and disregarded the social protection rights of a large number of beneficiaries of financial social assistance.

To conclude, it is useful to consider procedures for reviewing the constitutionality of the provisions of the **Law on Financial Support for Families with Children (LFSFC)**, particularly given the fact that it is one of the regulations the Constitutional Court has most frequently deliberated on in recent years and ruled the unconstitutionality of certain provisions. Among the unconstitutional provisions were:

- provisions that stipulate that the right to salary compensation due to the leave from work (for a special care of a child) cannot be claimed for a child receiving the allowance for a care and assistance of another person, as a result of which the parents of children with disabilities are put in a disadvantageous situation, having to choose between the two;
- provisions that put agricultural insurees at a disadvantage position;
- provisions regulating that the threshold of the salary compensation during the maternity leave depends on previous insurance duration;
- provisions that unfairly disadvantage parents (based on their employment status) who exercise the right to other benefits based on the birth and care of a child compared to employed parents.

The number of LFSFC provisions that have been ruled unconstitutional is a sufficient indicator of the importance of constitutional review in the domain of social and eco-

conomic rights, as well as in all other areas of action of the executive and legislative authorities and serves to remind us of the court's role in preventing infringements on human rights. Nevertheless, the Constitutional Court did not completely remain consistent with such a role when it comes to the disputed LFSFC provisions, particularly in relation to certain vulnerable groups.

In June 2022, the Constitutional Court passed a decision **rejecting initiatives to start the procedure for the constitutionality review of Article 25 of the LFSFC**, which makes the exercise of the right to parental allowance conditional on school attendance and immunization of children, which has significant discriminatory effects on Roma children. Based on various research and statistical data that indicate inequalities in the coverage of immunization and education between Roma and non-Roma children, from which it follows that the mentioned conditions have disproportionately negative effects on Roma children, Initiative A 11 submitted to the Constitutional Court an initiative for the constitutional review of Article 25 of the Law indicating that these restrictions represent indirect discrimination of Roma children.

The Committee for Economic, Social and Cultural Rights stressed the necessity of changing those provisions, and in April 2022 it recommended Serbia to review the conditions for parental allowance, with the aim of removing conditions that are discriminatory or have a discriminatory effect and that are in contradiction with human rights norms. However, the Constitutional Court concluded that there was no basis for initiating the procedure and rejected the initiative, without considering the international legal normative framework regarding discrimination, and the recommendations of international bodies directly referring to the challenged LFSFC provisions were ignored.

Two judges disagreed with such a decision and expressed their disagreement in separate opinions. In one of the separate opinions, it is stated that the essential reason for disagreement with the decision of the Constitutional Court "rests on the absence of consideration of indirect discrimination, i.e. on the failure to provide an answer to the claims that Roma children will be disproportionately affected by the conditions for exercising the right to parental allowance compared to children from the majority population." In one of the separate opinions, it is also recalled that, in a situation where the international body for the protection of human rights presents a clear and decisive position on the discriminatory effects of the very normative solution that is the subject of proceedings before the Constitutional Court, the Constitutional Court had to engage in a full analysis of the indirect discrimination, but the decision of the Constitutional Court did not pay attention to the recommendations sent to Serbia on this occasion.

## 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 passed, as a measure aimed at reduction of budget deficit of Serbia. The law prescribes progressive reduction of pensions for all pensioners whose pensions exceeded 208 euro; the cutback affected around 40% of pensioners. No compensation mechanism was established, and pension cuts were introduced as a general measure, without issuing individual decisions subjectable to judicial or administrative review. The pension reduction lasted four years, without periodical reviews of justification and proportionality of introduced cuts.

As pensioners did not have a legal remedy available to contest the pension reduction, they could only turn to the Constitutional Court with an initiative to review the constitutionality of the mentioned law. In October 2015, the Constitutional Court passed a ruling dismissing the initiatives for constitutional review. As the budget shortfall was mitigated and multiple new initiatives for reviewing constitutionality of the Law submitted, the Constitutional Court abstained from coming to a decision for more than three years as long as the Law stayed in effect; once the Law was no longer in effect, the initiatives for the constitutionality review were dropped.

This case represents a missed chance for the Constitutional Court to establish doctrinal positions on the limits of the legislative power in restricting rights in the field of social protection during the crises. 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 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.

## 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. The Constitution does 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, providing for that those ensure the right of each individual to protection of physical and mental health, without discrimination.

The jurisprudence regarding the right to health is largely reduced to procedures related to health insurance rights, conditions for acquiring the status of the insured, access to medicines, medical-technical aids, and reimbursement of costs of medi-

cal services. **Judicial protection in the field of health care mainly represents the protection of the rights of insured persons, while the protection 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 analyse the efficiency of legal remedies in this field, provisions of the Law on Health Care (LHC) and the Law on Health Insurance (LHI) are of particular importance, as they single out particularly vulnerable categories and groups at greater risk of disease and necessitate health care be provided through compulsory health insurance. Roma who do not have temporary or permanent residence registered due to the "traditional way of living", were included in the category of vulnerable citizens.

In 2005, the Law on Health Insurance singled out persons of Roma nationality without permanent or temporary residence as a special category of 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 when those people were able to register for health insurance without permanent or temporary residence registration. 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 file either the temporary residence registration or permanent residence registration at the address of the centre for social work.

The by-law that prevented Roma without temporary or permanent residence from registering for health insurance was challenged before the Constitutional Court. **The Constitutional Court should have addressed the underlying issue: does the Decree, which requires that Roma without temporary or permanent residence provide evidence they are incapable of furnishing (temporary or permanent residence), compliant with the Law on Health Insurance that categorises Roma without permanent or temporary residence as a special group of insured individuals.** This question remained unanswered, and as a result many Roma were left without health insurance due to numerous difficulties in their residence registration procedures. The Constitutional Court recklessly deduced that the Law on Temporary and Permanent Residence was passed in the meantime, regulating that a citizen unable to register residence in any other way, can register the temporary residence at the address of the centre for social work, thus making the disputed provision compatible with the Law. The Constitutional Court completely ignored the circumstance that the initiative for constitutional review referred to the incompatibility of the disputed bylaw with the Law on Health Insurance.

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 undisputed cases, in which no overly progressive role of the Constitutional

Court was required – it simply had to abrogate from the legal system bylaws that were in obvious contradiction with the legislation 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 except as a reminder of the lack of effective institutions and remedies to facilitate access to rights for vulnerable groups, even in cases where those rights are explicitly prescribed by law.

One of the problems in the field of health care is the length of waiting time to health services. Waiting lists for certain health services are formed and the insured persons are forced to either bear the costs of expensive diagnostic examinations themselves or to wait for months to have the examination performed at the expense of the insurance, risking further deterioration of their health. Therefore, some courts (such as the District Court in Novi Sad) 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.

## 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 by the courts in decisions providing protection of the right to housing, mostly with reliance on Article 8 of the ECHR. However, problems arise already in the way the courts interpret the concept of home. For example, the Appellate Court 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. The Appellate Court pointed out that **the disputed apartment could be considered his home "only if 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. It is useful to refer here to the case law of the European Court in the case *Enerildiz v. Turkey* which reiterates that the applicant was definitely deprived of his home, 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.

The position of the Appellate Court in Belgrade, according to which protection of home 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 do not have effective protection against eviction, i.e. the right to housing, even if their eviction would result in homelessness.

Social housing beneficiaries experience a multitude of difficulties, one of which is that **there is no effective legal remedy in the domestic legal order that will permit the review of decisions to revoke the lease of social apartments, after which the beneficiaries of those apartments are threatened by 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 ensure that the normative framework enables individuals subjected to eviction orders, which could lead to violations of the Covenant's rights, to appeal the decision before the competent authorities with the power to review eviction orders and examine the proportionality of the decision.

Roma population is among 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, without access to basic services and human rights. In particular, the period from 2009 to 2012 was marked by a number of large-scale forced evictions in Belgrade, with residents affected by eviction procedures most often left without adequate protection of the right to housing.

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. 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. Due to the extremely short eviction deadlines, judicial protection was generally provided only after the decision enforcement, 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 were often conducted without providing alternative accommodation, and it happened that alternative accommodation was provided only to a part of the residents affected by the eviction.

The umbrella law in this field, **the Law on Housing and Building Maintenance** passed in 2016, provides to some extent better protection for the inhabitants of in-

formal settlements, in those proceedings in which they face forced evictions. 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.**

However, it is precisely in the area of housing that we come across **rare examples of direct application of the Covenant in Serbia.** Thus, back in 2015, with reference to the Covenant, Zemun municipality suspended the eviction procedures of internally displaced Roma from the informal settlement "Grmeč", after initiating proceedings before the Protector of Citizens, the Commissioner for the Protection of Equality and before the ECtHR (in order to impose a temporary injunction), so to prevent eviction. Zemun Municipality **decided to suspend the eviction procedures of internally displaced Roma from the informal settlement "Grmeč" until permanent accommodation is provided to the residents of this settlement, referring to the Law on Ratification of the International Covenant on Economic, Social and Cultural Rights.**

Eight years later, in 2023, **the second case of direct application of the International Covenant on Economic, Social and Cultural Rights** was recorded in the proceedings regarding the announced eviction of the informal settlement "Antena", in New Belgrade. Being one of the few cases where the Covenant was applied directly to preserve the right to housing and prevent forced evictions, the "Antena" case is an exceptional example that provides understanding of the many roles various institutions can play to ensure the right to adequate housing.

The decision of the municipal inspector of the Department for Inspection Affairs of the municipality of New Belgrade dated March 29, 2023, ordered Roma living in the "Antena" settlement to remove their houses within 24 hours of the issuing of the decision. The above Decision was based on the Decision on Maintaining Urban Cleanliness, the Decision on Municipal Order, and the Decision on Municipal Inspection, as a result of which the residents were denied the right to a legal remedy, because the appeal shall not stay decision execution.

In order to urgently stop evictions, A 11 Initiative addressed the Commissioner for the Protection of Equality, the Protector of Citizens, the Ministry of Human and Minority Rights and Social Dialogue, the Secretariat for Social Protection of the City of Belgrade and the Commissariat for Refugees and Migration (since the risk of eviction affected a large number of internally displaced families). Due to the lack of legal means suitable to postpone the execution, a request for an interim measure was submitted to the European Court of Human Rights on March 30.

On March 31, **the European Court of Human Rights** issued an interim measure ordering the suspension of evictions until April 20.

On March 31, **the Commissioner for the Protection of Equality** put forward a recommendation to the municipality of New Belgrade to not proceed with the forced eviction of residents of the Roma settlement "Antena."

Finally, on April 10, **the municipality of New Belgrade took action to halt the enforcement of the ruling made by the municipal inspector of the Department for Inspection Affairs of the municipal administration of New Belgrade**, which ordered the residents of the "Antena" settlement to dismantle their barracks, **"on the basis of the Law on Ratification of the International Covenant on Economic, Social and Cultural Rights**, until permanent housing is provided to the users of the barracks in question". This is the second recorded case of direct application of the Covenant in Serbia.

Surprisingly, **the Protector of Citizens** stayed silent until May 23, and based solely on the statement of the municipality of New Belgrade, claiming that "no activity that can be referred to as forced eviction was undertaken at any point", he determined that there was no foundation for any additional action.

Although the Protector of Citizens should be able to take on a more prominent role when it comes to the protection of social and economic rights (given that the Commissioner for the Protection of Equality is mostly focused on the prevention of discrimination), nevertheless his effect in the protection of social and economic is becoming less and less discernible.

## 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. 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.

There is also a tendentious avoidance of the Constitutional Court to engage in the assessment of regulations in the realm of social and economic rights, at least while they are in force. Consequently, the review of constitutionality of the reduction of pensions and salaries in the public sector was conducted only when the laws had ceased to be effective. Assessment of the constitutionality of the tax on the lease of social housing has been waiting for eight years. It took eight years for the review of constitutionality

of the Decree on Measures of Social Inclusion of Beneficiaries of Financial Social Assistance allowing the introduction of forced labour of beneficiaries of financial social assistance, and the key questions about the legitimacy of obliging people to "earn" the social assistance they receive went unanswered. Particularly concerning is the decision on rejecting the initiative to review constitutionality of Article 25 of the Law on Financial Support to Families with Children, which makes the exercise of the right to parental allowance conditional on school attendance and immunization of children, which has significant discriminatory effects on Roma children, due to their lower coverage by education and immunization. Unfortunately, the Constitutional Court failed to deal with the question of whether these conditions represent indirect discrimination against Roma children, which is highlighted in the separate opinions of the judges accompanying the decision in that case.

In the area of social rights, the Constitutional Court is reticent to address matters with substantial jurisprudence already established by international human rights institutions, such as forced labour and indirect discrimination. At the same time, we witness the emergence of more complex matters and new types of rights erosion that call for a response from the Constitutional Court. This is the case with the risk of automation in decision-making and extensive processing of personal data of social protection beneficiaries - risks brought by **the Social Card Law**, the review of constitutionality of which was requested in April 2022.

### **A discrepancy between the number and status of labor rights in the Constitution and their enjoyment and the position of workers in practice is visible.**

Apart from the outcome, **the length of the proceedings** often deters citizens from seeking judicial protection, even in those proceedings which are considered urgent, as is the case with labour disputes. Judicial protection in the field of health care was mainly limited to the protection of the rights of the insured, while there was no protection of vulnerable persons and groups that remain outside the health insurance system, even in those cases where, based on current laws, they would have the right to be covered by mandatory health insurance. **In terms of access to health care, the legislator played a more progressive role** (by prescribing provisions aimed at making it easier for members of vulnerable groups to apply for health insurance) **than the Constitutional Court, which missed the opportunity to ensure the implementation of quality legal solutions by removing by-laws that are in obvious contradiction with the primary legislation. In the field of social protection, socially vulnerable citizens who are left without the means necessary for life do not have timely and effective protection at their disposal, and for years they may remain without any income and the opportunity to exercise their rights to social protection.** Beneficiaries of social housing who are at risk of homelessness generally cannot obtain adequate protection of their right to housing, **and there is no effective legal remedy that could challenge the termination of the social housing rental contract and prevent eviction while the review is ongoing.**

On several occasions in judicial review proceedings, the Constitutional Court has had the opportunity to rule on the constitutionality of **fiscal consolidation measures restricting social and economic rights**, yet in such proceedings mostly supported the law rather than the Constitution, and thus **missed the opportunity to establish clear doctrinal positions** in regard to determining the constitutionality of laws passed during the economic crisis restricting social rights. Decisions regarding the pension cuts indicate that the Constitutional Court **left the legislator complete freedom to limit social and economic rights at its discretion**.

Examining the protection of social and economic rights reveals a gap between how widely acknowledged the rights are and how much protection they receive. Although in Serbian law we find a more desirable approach - a number of social and economic rights are expressly recognized by the Constitution, judicial action to ensure better respect and alleviate inequality is not prevalent.

After scrutinizing the shortcomings in the system of protection of social and economic rights, benefits that Serbian citizens would have from ratifying the Optional Protocol and enabling access to an international mechanism specialized for the protection of these rights, in situations where protection cannot be obtained before domestic authorities have become more obvious. Although the state initially explicitly refused to ratify that instrument, as of June 2023 the Law on Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights entered the parliamentary procedure. Citizens of Serbia are one step away from the possibility of more effective protection of economic and social rights. Therefore, it is important to recall the advantages that the ratification of the Protocol would have for the country itself.

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

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 violations and damage award in individual cases. The Committee may thus make recommendations to the state aimed at removing structural obstacles to the exercise of a particular right.

Ratification of the Protocol does not represent an omnipotent solution to the problem in the field of social and 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**. Ratification of the Optional Protocol 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. Ratification of the Protocol can also help domestic authorities to better understand obligations related to social and economic rights and influence the legislator not to adopt solutions that conflict with those obligations**.

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 social and economic rights at the global level. The states that have ratified the Covenant are still relatively few, but that is why the decisions of their courts are looked at and serve as a guidance for more effective protection and understanding of social and economic rights in many other states.

Constitutional guarantees of social and economic rights, no matter how important, are not sufficient and require effective protective mechanisms to ensure their implementation. After the announced ratification of the Optional Protocol to the Covenant, the citizens of Serbia are within reach of better and more effective protection of their economic and social rights.

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