

HUMAN RIGHTS IN SERBIA

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HUMAN RIGHTS IN SERBIA 2012
LAW, PRACTICE AND INTERNATIONAL
HUMAN RIGHTS STANDARDS

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Abbreviations

1998–2011 Reports – BCHR Annual Reports on Human Rights in the FRY, Serbia and Montenegro

AEAD – Act on the Election of Assembly Deputies

AI – Amnesty International

ANEM – Association of Independent Electronic Media

APV – Autonomous Province of Vojvodina

BIA – Security Intelligence Agency

CaT – UN Committee against Torture

CC – Criminal Code

CCA – Constitutional Court Act

CESCR – Committee for Economic, Social and Cultural Rights

CeSID – Centre for Free and Democratic Elections

CoE – Council of Europe

CPA – Civil Procedure Act

CPC – Criminal Procedure Code

CPT – CoE Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

DEVD – Decision on the Election of AP Vojvodina Assembly Deputies

doc. UN – UN document

DS – Democratic Party

DSS – Democratic Party of Serbia

EC – European Commission

ECHR – European Convention on Human Rights

ECtHR-ECHR – European Court of Human Rights

ECmHR – European Commission of Human Rights

ESC – European Social Charter (Revised)

EU – European Union

EULEX – European Union Rule of Law Mission

- FA – Family Act
- FNRJ – Federal People’s Republic of Yugoslavia
- GDP – Gross Domestic Product
- GRECO – Group of States against Corruption
- GSA – Gay Straight Alliance
- Hague Tribunal/ICTY – International Criminal Tribunal for the Former Yugoslavia
- HCA – Health Care Act
- HIA – Health Insurance Act
- HJC – High Judicial Council
- HLC – Humanitarian Law Center
- ICCPR – International Covenant on Civil and Political Rights
- ICESCR – International Covenant on Economic, Social and Cultural Rights
- IJAS/NUNS – Independent Journalists’ Association of Serbia
- ILO – International Labor Organization
- IMF – International Monetary Fund
- JAS/UNS – Journalists’ Association of Serbia
- LA – Labour Act
- LDP – Liberal Democratic Party
- LEA – Local Elections Act
- LGBT – Lesbian Gay Bisexual Transgender
- MDRI-S – Mental Disability Rights Initiative of Serbia
- MIA – Ministry of Internal Affairs
- NALED – National Alliance for Local Economic Development
- NCPA – Non-Contentious Procedure Act
- NES – National Employment Service
- NGO – non-government organisation
- NPM – National Preventive Mechanism
- NSBNM – National Council of the Bosniak National Minority
- ODIHR – Office for Democratic Institutions and Human Rights
- OSCE – Organisation for Security and Cooperation in Europe
- PSEA – Penal Sanctions Enforcement Act

- PUPS – Party of United Pensioners of Serbia
RATEL – Republican Telecommunications Agency
RBA – Republican Broadcasting Agency
REC – Republican Election Commission
RHIF – Republican Health Insurance Fund
RS – Republic of Serbia
RTS – Radio Television of Serbia
SAI – State Audit Institution
SaM – Serbia and Montenegro
SFRJ/SFRY – Socialist Federal Republic of Yugoslavia
Sl. glasnik – Official Gazette (of the SRS and, subsequently, the RS)
Sl. list – Official Herald (of the SFRY and, subsequently, SAM)
SNS – Serbian Progressive Party
SORS – Statistical Office of the Republic of Serbia
SPS – Socialist Party of Serbia
SRJ/FRY – Federal Republic of Yugoslavia
SRS – Socialist Republic of Serbia
UN – United Nations
UNESCO – United Nations Educational, Scientific and Cultural Organization
UNHCR – United Nations High Commissioner for Refugees
URS – United Regions of Serbia
VBA – Military Security Agency
Venice Commission – European Commission for Democracy through Law of the Council of Europe
VOA – Military Intelligence Agency
YUCOM – Lawyers’ Committee for Human Rights

Preface

The Belgrade Centre for Human Rights (BCHR) has been publishing its synthetic and comprehensive reports on the state of human rights in the country since 1998. The purpose of these synthetic reports is to present and review the constitutional and legal provisions related to human rights in Serbia and indicate the improvements in the national legislation or its incompliance with international (universal and European) standards, i.e. all the treaties Serbia has ratified to date and thus bound itself to incorporate them in its national law and honour them in practice.

The BCHR's associates have been regularly monitoring the legislative activities with the aim of analysing the conformity of the Serbian laws with international standards. In-depth analyses of the laws adopted before 2012 were provided in the prior Reports and are referred to in this Report where appropriate. This Report analyses in greater detail the laws and legal amendments adopted in 2012.

The BCHR in 2012 also extensively researched the case law of Serbia's courts, notably their application of international standards in proceedings in which the parties claimed human rights violations, particularly the case law of the Constitutional Court of Serbia, given its jurisdiction to rule on constitutional appeals.

As in its previous reports, the BCHR perused all the available sources during the preparation of this Report, that is, it systematically monitored the media and reports and statements of international and local NGOs and focused on the data indicating grave violations of specific rights. The Report does not offer final assessments; rather, it presents data published by the media and in human rights reports.

Like in 2011, 15 dailies, with a total circulation of 800,000, were published in Serbia in 2012. Two-thirds of them were tabloids. Two dailies went out of business and two new ones were launched in the year behind us.

Three of the 15 dailies were regional in character, two focussed on sports, one on the economy and one was handed out free of charge. The five of the remaining eight newspapers – Politika, Danas, Blic, Večernje novosti and Kurir – that can be qualified as relevant in terms of their influence and nationwide circulation were monitored by BCHR's associates for the 2012 Report. The authors of the Report also monitored the weeklies NiN and Vreme, the Beta, Tanjug and Fonet agency wires and the websites of these news publishers and the B92 website. They also perused the news and press releases issued by media associations.

A total of 7,950 articles on human rights were read in preparation of the 2012 Report, or a quarter more than the previous year (6,256).

Most of these articles, 1,300 of them, dealt with political rights and democracy (28.86%), the topic that ranked second in 2011 (16.34%). The reason for the substantial increase in the number of reports on this subject lies in the general elections held in the first half of the year, the numerous subsequent reshuffles of the just appointed local governments, the political clashes between the winning coalition led by the Serbian Progressive Party and the defeated coalition headed by the Democratic Party, as well as the negotiations on Kosovo and Metohija and its status.

Reports on the right to a fair trial ranked second, marking an increase over 2011, when they ranked fourth (22.11% in 2012 as opposed to 13.74% in 2011). The hike can mostly be attributed to the fight against corruption and economic crime launched by the new Serbian government, including the arrest of the richest Serbian businessman Miroslav Mišković.

Texts on social and economic rights again ranked third (9.30% in 2011; 15.12% in 2011). The smaller number of articles on these rights can probably be attributed to the public's weariness of these issues, although the economic and social situation further aggravated in 2012.

Reports on confrontation with the past, which had ranked supreme in 2011, fell to fourth place in 2012 (from 18.03% to 8.42%). The slump in the number of articles reporting on the work of the ICTY, the national war crime trials and rehabilitation is above all due to the fact that cooperation with this international tribunal has practically been completed.

Articles on the freedom of expression again ranked fifth (8.29% in 2012; 8.33% in 2011). The continuously high share of reports on these topics in the selected articles on human rights and the one-fifth increase in the number of these reports over 2011 corroborate the thesis that the problems in this area have been growing rather than decreasing.

Reports on views on violence, which ranked ninth in 2011, rose to sixth place in 2012 (from 2.85% to 7.68%) due to the increase of violence in society, caused by the grave economic and social situation, as well as to the tacit support political and judicial authorities have been extending violence by their failure to act or their tepid and slow reactions.

Discrimination ranked seventh in 2012 (3.24%), which marked a substantial drop over 2011 (when articles on discrimination accounted for 5.74% of the reports). This, however, does not indicate that discrimination is not as frequent in Serbia's society, but, rather, that tolerance to discrimination has risen.

Texts on the status of the minorities (2.50% in 2012 over 3.36% in 2011), the status of the independent regulatory authorities (2.11% in 2012 over 2.65% over 2012) and judicial reform (1.54% in 2012 over 2.56% in 2011) followed.

Articles on the work of the Constitutional Court of Serbia ranked 11th (1.48% in 2012 over 0.62% in 2011) and reports on the status of religious communities ranked 12th (1.31% in 2012 over 2.52% in 2011).

Next came reports on the freedom of movement (1.20% in 2012 over 3.02% in 2011), which included articles on asylum seekers. They were followed by articles on human trafficking (0.98% in 2012 compared to 1.15% in 2011) and restitution of property (0.32% in 2012 over 1.55% in 2011).

The fewest texts dealt with Serbia before international bodies, including the applications Serbia's citizens filed with the European Court of Human Rights in Strasbourg (0.30% in 2012 over 0.94% in 2011), the reform of the criminal law (0.18% in 2012 compared to 0.27%) and non-government organisations (0.17% in 2012 over 0.71% in 2011).

The authors of the Report also aimed to analyse all the collected information about the events and actions affecting the state of human rights in the country and to highlight the problems and difficulties citizens have been encountering in exercising their human rights. They also drew attention to the state's failure to implement strategies and plans geared at promoting human rights and the implementation of laws, instances of discrimination, the status of specific categories of the population, which are at a disadvantage vis-à-vis the majority, and many other circumstances affecting the full enjoyment of human rights and having simultaneously strong political implications and effects on the state of human rights in the country.

The following associates of the Belgrade Centre for Human Rights took part in the preparation of this Report: Andrea Čolak, Iva Danilović, Dina Dobrković, Bojan Gavrilović, Vidan Hadži Vidanović, Nikola Kovačević, Anđelka Marković, Marina Mijatović, Žarko Marković, Nevena Nikolić, Lena Petrović, Dušan Pokuševski, Ivan Protić, Una Protić, Imola Soros, Duška Tomanović, Sonja Tošković, Ana Trkulja and Jovana Zorić.

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

The masculine pronoun is used in the Report to refer to an antecedent that designates a person of either gender unless the Report specifically refers to a female. Both the authors of the Report and the BCHR advocate gender equality and in principle support gender neutral language.

Introduction

The year behind us was an election year in Serbia. The authorities adhered to the practice they had resorted to during the previous election cycles and called elections at all levels, quoting cost-effectiveness as the reason. Local, parliamentary and presidential elections were held on the same day. The first round of the elections on 6 May 2012 showed that the Democratic Party (DS) and the Serbian Progressive Party (SNS) enjoyed approximately similar support in the electorate, 22.3% and 24% respectively. It, however, appeared that the DS, which has been presenting itself as a social democratic party, enjoyed much greater coalition potential than its main opponent, which was still having trouble convincing the voters that it had moved from the extreme right to right of centre on Serbia's political map. The DS and the parties rallied round it also banked on the personality cult of Serbian President and DS party leader Boris Tadić, who decided to cut his term in office short and take an active part in the elections. Although it remains unclear why the presidential elections were held nearly a year before their time, it is extremely likely that the then ruling DS believed that it would win more votes if Tadić ran in the elections. Even after the SNS won more seats in parliament than the DS, many believed that Tadić would win the second round of the presidential elections and that his party would form a government similar to the 2008 one.

The then President of the Serbian Progressive Party Tomislav Nikolić, however, won the second round of the elections, after which the talks on the future cabinet became quite complicated. A new ruling coalition, rallied round the SNS and the Socialist Party of Serbia, was agreed after nearly two months of negotiations and it formed the new Government. The leader of the SPS, which was a minority partner in the previous ruling coalition, was appointed Prime Minister. This party, whose popularity plunged after its first leader Slobodan Milošević was ousted in 2000, experienced a renaissance at the 2012 elections, winning almost 150% more votes than at the 2008 elections and became the third strongest party on Serbia's political stage, enabling it to play the crucial role in the determination of the new Government's composition and policies.

The newly-formed Government of Serbia is an odd compromise. The SNS took the place of the DS, which had been the majority partner in the previous ruling coalition, but all its minority coalition partners stayed on in the new cabinet. Although it won much less votes than the SNS, the SPS took the offices of Prime Minister and Minister of Internal Affairs, while the SNS satisfied itself with the offices of First Deputy Prime Minister, Defence Minister and Justice Minister. The Ministry of Finance went to the United Regions of Serbia (URS), a party (associa-

tion) that had been a member of the previous cabinet, while the development ministries were divided up among the SPS, SNS and the minor coalition partners. The under-representation of the SNS in the Government given the support it won at the elections is stark but should not be exaggerated. Although the SNS appears to be less present in the Government than it should be, it should be borne in mind that this party assumed control over the security agencies and responsibility for combating corruption, which has been defined as the priority of the new Government. Therefore, although it renounced its leadership of the Government *de iure*, it assumed the main power levers, while its new President, Aleksandar Vučić, imposed himself as the main pillar of the extremely popular fight against corruption.

The elections were held in a peaceful atmosphere. The largest parties had been provided with relatively equal media time during the election campaign and no obstructions of the pre-election activities were registered. During the first round of the presidential elections, when the local and parliamentary elections were also held, the SNS claimed that votes had been stolen at several polling stations and that the elections were thus irregular on the whole. These allegations remained unproven even after the SNS took power. This was the third time since 2000 that a major change in the balance of political forces took place in Serbia and that the helm of the country was handed over to the election winner in a fully democratic atmosphere.

Hopes that the forming of the new Government would be accompanied by the depoliticisation of the public administration did not materialise. Despite the declarative commitment to end particracy in Serbia, the ruling parties also appointed their senior party officials to leading management posts in the public companies and the state administration. This is extremely concerning as some of the newly appointed officials charged with important public affairs lack even the elementary professional and educational qualifications, let alone the requisite work experience. The practice of appointing senior party officials to head public companies was not halted even after the adoption of the new Act on Public Companies. In sum, there can be no talk of the depoliticisation of the public sector or the full professionalisation of the civil service.

The new Government's policy priorities include launching EU accession talks, addressing the Kosovo issue, fighting corruption, a burning problem in Serbia, and dampening the effects of the unrelenting economic crisis. Serbia was finally granted the status of an EU candidate country in March 2012, before the elections were called, but the date for starting the accession talks had not been set by the time this Report went into print. Normalisation of relations with Kosovo is the main requirement the EU member states have set Serbia for the accession talks to begin formally.

The new Government demonstrated willingness to start talks and offer compromise solutions to the Kosovo issue. It committed itself to fulfilling all the agreements its predecessor made with the Priština authorities, including the one on inte-

grated border management. Serbian Prime Minister Ivica Dačić and Kosovo Prime Minister Hashim Thaqi met for the first time in October 2012. They reaffirmed the integrated border management agreement and its implementation began in early 2013. Although the talks are still in their initial stage, there is no doubt that the new Government went a step further towards addressing the Kosovo issue than its predecessor. The very willingness to discuss Kosovo with the highest representatives of the Kosovo institutions and the increasingly frequent declarations of the readiness to open the question of the province's final status are interpreted as encouraging signals that this issue, which has been burdening Serbia's political life for decades, may be dealt with more pragmatically and realistically than earlier. It should also be borne in mind that the pillars of the current Government had ruled Serbia at the time the situation in Kosovo culminated in armed conflicts in 1998 and that these parties had been in power at the time the UNSC Resolution 1244 defining Kosovo's current status was adopted. These parties thus not only bear the greatest responsibility for the current relations between Belgrade and Priština; their past, too, gives them much greater legitimacy to work on the revision of these arrangements than the Democratic Party had. Namely, expectations are that the decisions on Kosovo adopted by the current Government, even those further weakening or annulling Belgrade's influence in Kosovo, will be honoured by the rightist forces in society as well.

The Government's policy on Kosovo is not, however, absolutely clear. It sent out very different public messages in 2012, from the well-known "Both Kosovo and Europe" and "Less than Independence, More than Autonomy" slogans to mentions of the possibility of discussing Kosovo's UN membership. Furthermore, there is increasing insistence that Serbia will never recognise Kosovo's *unilaterally* declared independence, which may indicate that Serbia might be willing to consider consensually agreed independence. Serbia's President Nikolić finally published his draft Platform for the Resolution of the Kosovo Issue, which states that Serbia will not recognise Kosovo's "unilateral" independence and insists on the demilitarisation of the province and autonomy for the Serbs living in Kosovo. The Platform was qualified as unrealistic by most of Serbia's politicians. The Government soon adopted its own Platform, which was not made public by the end of 2012, under the explanation that the confidentiality of Serbia's negotiating positions had to be preserved.

Serbia was finally granted the status of an EU candidate country in March 2012 although it was not set a date for starting the accession talks. The slowdown in Serbia's progress towards EU membership in 2012 can partly be ascribed to the halt in legislative activities caused by the long election campaign and partly to the initial unwillingness to discuss Kosovo. The talks on EU accession moved out of the *cul de sac* thanks to the Government's willingness to discuss Kosovo sensibly and its initial efforts to eradicate corruption. Serbia's accession efforts are expected to pick up in pace in 2013.

The political changes in Serbia were accompanied by a considerably cooling of its relations with the states in the region. Good neighbourly relations definitely

did not benefit from the inept and frequently inappropriate statements by the new Serbian President, such as the ones in which he denied the Srebrenica genocide or described Vukovar as a Serb town. The reservations the leaderships of other former Yugoslav states had towards the new Belgrade leadership did not come as a surprise given its track record in the 1990s. The relations between Serbia and its neighbours reached their nadir when the International Criminal Tribunal for the Former Yugoslavia (ICTY) acquitted the Croatian generals accused of crimes against the Serb population during the 1995 Storm campaign. The reactions of the politicians and the public at large both in Croatia and Serbia demonstrated that nationalism was still very much alive in the region. It nevertheless appeared that the shocks reverberating across the Balkan political stage finally abated by the end of the year and that regional relations were on an upward trajectory.

There was hardly any legislative activity in the first half of 2012. Not one reform law was adopted from January to July 2012. The new Government withdrew from the parliamentary pipeline all (73) laws submitted by its predecessor, which further slowed down the alignment of the legislation with international standards. A number of laws aligning the national legislation with the EU *acquis*, notably, in the fields of energy, forestry, water management, agriculture, et al, were adopted in the latter half of the year. The adoption of amendments to specific procedural laws, the Criminal Code, the laws on the judiciary and health, and the adoption of a new Migration Management Act warrant mention from the human rights perspective. The National Assembly also adopted amendments to a law on security agencies and the Personal Data Protection Act, which had been heavily criticised in the past.¹

The fight against corruption, resulting in several sensationalist arrests, gained in momentum in the autumn of 2012. The prosecutors and the police brought in some of the leading Serbian businessmen for questioning. The most influential among them, Miroslav Mišković, was taken into custody in December 2012 on suspicion that he had abused his office during the privatisation of several road building companies in Serbia. The charges laid against Mišković were not publicly disclosed by the end of the reporting period. The Government, notably its Deputy Prime Minister charged with combating corruption, publicly vowed on a number of occasions to investigate all the controversial privatisations and to fight corruption through institutional channels. The impression is, however, that no headway has been made in institutionalising the fight against corruption and that it currently depends on the agility of one man and his team. The fact that the media pompously announced many of the arrests before they actually happened and that the suspects had been declared guilty in the media even before they were indicted, however, gives rise to concern. Furthermore, some of the most powerful businessmen were deprived of liberty on suspicion of committing economic crimes, which are extremely difficult to prove, even before the investigations against them had been completed or indictments based on evidence had come into force.

1 These amendments and laws are analysed and commented in the relevant sections of the Report.

The economic situation in Serbia did not improve much in 2012. Unemployment remained extremely high and the price hikes were not accompanied by increases in the average wages. The Government did not come out with a clear economic policy or a recovery plan during its first six months in office.

The year behind us was marked by increased activities of the Constitutional Court, which rendered several landmark rulings and finally dealt with some politically unpopular issues. Its leading judgments regarded the reform of the judiciary, the powers of the Autonomous Province of Vojvodina, the systematic non-enforcement of court decisions ordering the payment of back wages to workers of bankrupt socially-owned companies and the *de facto* prohibition of the Pride Parade. The independence of the Constitutional Court was brought into question. These apprehensions are understandable to an extent, given the problematic history of the constitutional judiciary in Serbia and the former Yugoslavia.

Public distrust of the national courts again contributed to Serbia reigning supreme on the list of countries with the highest number of applications against them before the European Court of Human Rights per capita. Although what precisely Serbia's citizens complained of cannot be precisely established, there is no doubt that many of the applications concern the non-enforcement of the domestic courts' decisions and overly long court proceedings.

Serbia spent 2012 in a complex struggle, torn between building stable democratic institutions and the tendency to submit to the leader (regardless of his political option). Commitment to EU accession has survived the changes at the helm of the country and the confusing Kosovo policy of the prior Government was at least supplemented by the commitment to finally address this issue, although the principles on which this solution is to be based are not apparent to the public. While public attention focussed on the major state issues and popular arrests, the unemployment rate continued growing, as did the prices of the staples and the number of political scandals; so did the number of illegal economic asylum seekers, who continued threatening Serbia's visa-free regime with the European Union, and of complaints to international bodies submitted by those who had not been served justice before the domestic courts.

Summary

1. *Fulfilment of Obligations under International Treaties*

As a signatory of a series of universal international human rights instruments, Serbia is under the obligation to submit periodic reports to the UN committees. Serbia had to submit its report to the UN Committee against Torture, but it didn't happen. On the other hand, Serbia submitted its report to the UN Committee on Rights of Persons with Disabilities. The Government also began preparing the report for the UN Committee on the Rights of the Child, which is to be submitted by the end of 2013. There were also strong indications that the state would finally submit its report to the UN Committee on Economic, Social and Cultural Rights in early 2013, with an almost two-year delay.

The Council of Europe Committee for the Prevention of Torture published its report alerting to a number of issues after its 2011 visit to the Serbian prisons, detention facilities and psychiatric establishments. The questions the UN Committee for the Elimination of Discrimination against Women asked Serbia and its replies were also published in 2012.

The Government continued with its practice of not publishing its reports to international bodies. Not much attention was awarded to the reports published by the international bodies either.

2. *National Human Rights Guarantees – Legal Remedies*

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

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

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

3. Serbia before the European Court of Human Rights

Serbia ended the year fifth on the ECtHR list of countries with the greatest number of application filed against it. It was outranked by Russia, Turkey, Italy and Ukraine. It, however, ruled supreme on the list of countries with the number of lodged applications per capita. The ECtHR has to date rendered 73 judgments against Serbia, twelve of which in 2012. Apart from one judgment, which regarded the motion for the revision of its earlier judgment, the ECtHR found Serbia in violation of at least one right enshrined in the Convention or its Protocols in 10 of the other 12 judgments; in addition to its customary breaches of the right to a fair trial and peaceful enjoyment of property, the ECtHR also found it in violation of the right to life in one case, the prohibition of ill-treatment in one case, and the prohibition of discrimination regarding the right to property in one case.

4. Ratification of International Human Rights Treaties

Serbia did not conduct any significant activities towards ratifying international treaties on human rights in 2012.

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

The Constitutional Court has become more efficient legal mechanism for protecting human rights. It has to date resolved over seven thousand cases and found violations of human rights guaranteed by the Constitution and international human rights treaties in 1,620 of them. The Constitutional Court has referred to ECtHR case law, albeit some of the references appear indiscriminate and unspecific at times. The large number of constitutional appeals before the Constitutional Court and the fact that nearly half of them claim violations of the right to a trial within a reasonable time are concerning. The lawmakers missed the opportunity to exempt the Constitutional Court from reviewing the cases on this right when they were amending the Constitutional Court Act, although the Venice Commission recommended the transfer of this jurisdiction to regular courts to relieve the Constitutional Court of its backlog. Despite its huge docket, the Constitutional Court in 2012 rendered several landmark judgments on the leading problems in the field of human rights protection.

6. *Judicial Reform*

The Constitutional Court in 2012 de facto declared null and void the judicial appointment procedure, widely considered the most controversial element of the judicial reform. It found that the procedure was not conducted by an impartial authority, that the procedural rules were not abided by and that the judicial appointment criteria were inadequate and unspecific. Over 300 judges were reinstated and the review of their appointment was not launched by the end of the reporting period.

The Constitutional Court declared the election of the President of the Supreme Court of Cassation unconstitutional, which resulted in her dismissal and the appointment of an Acting President of the Supreme Court of Cassation.

The inadequate court network, resulting in huge burdens on some courts and perceived as one of the main causes of judicial inefficiency, remained in place in 2012. A large number of cases have been pending for five or more years. Furthermore, the enforcement of tens of thousands of final judgments has been pending for over three years. At the end of 2012, the authorities finally presented a plan to increase the number of Basic Courts.

7. *Political Life and the 2012 Elections*

Elections at all levels were held in 2012. No major irregularities were identified during the election process, which was conducted in a peaceful atmosphere. Public officials have, however, continued abusing their offices to improve the media visibility of individual candidates and political parties during these elections as well. Furthermore, some have abused the status of national minority parties in order to pass the so-called natural threshold and secure themselves seats in parliament with fewer votes. There were also abuses of the possibility of associations of citizens to take part in the elections to circumvent the rules on campaign media slots and the regulations on the financing of political parties. Allegations of election fraud were heard after the parliamentary elections and the first round of the presidential elections. These allegations never made it to court and the party, which had voiced them publicly, went quiet after its presidential candidate won the second round of the presidential elections.

The handover of power was peaceful. The previous President admitted defeat and congratulated his rival before election night was over. The new Government formed soon afterwards consists of nearly all the minor partners in the previous ruling coalition, except that they now rally round the Serbian Progressive Party rather than the Democratic Party. Although the new Government initially vowed to depoliticise the public sector, it soon became apparent that political party membership was still one of the main criteria for appointing senior officials to head the state administration and public companies and institutions.

8. *Powers of Security Agencies and Protection of Privacy*

The extensive powers of the Serbian civilian and military security agencies to secretly collect specific personal data and monitor electronic communication without prior court consent finally found themselves in the public eye after several state officials stated that they themselves had been under such surveillance. Three months earlier, the Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection warned that the intelligence agencies were accessing data on the citizens' electronic communication very frequently and that many of the records of such accesses were deficient or inaccessible. The BCHR had itself perused the available documentation on the surveillance of electronic communication. It established on the basis of the available information that only the Security Intelligence Agency (BIA) kept proper records on access to electronic data on communications of the telephone operators' users and that it accessed such data over 12,000 times. It was also established that the Military Security Agency (VBA) had begun keeping records of such data only recently, albeit only on accesses in accordance with the Constitution, while the data on anti-constitutional accesses were unavailable.

The Constitutional Court in 2012 at long last reviewed the legal powers of the VBA to access data on the citizens' communication without the consent of the court and declared them unconstitutional. The Court had not reviewed the constitutionality of similar powers vested in other security agencies under the Act on the Security Intelligence Agency, the Criminal Procedure Code and the Electronic Communications Act. Although it is absolutely clear how the Court will rule on the constitutionality of the provisions in these laws, the Government did nothing to amend the impugned provisions in light of the above-mentioned decision and align them with the view of the Constitutional Court.

9. *Freedom of Assembly*

The outdated and inadequate law governing the organisation of public events will soon be replaced by a new law, the draft of which was presented to the expert public in 2012. The draft marks an improvement over the valid law but the legislators have retained some of the fiercely criticised provisions in the valid law. For instance, the draft mostly preserves the restriction on holding public events at specific venues, the organisers' obligation to estimate how many people will attend the event and the broad possibilities for limiting the freedom of assembly, which are not in compliance with the Constitution and international conventions. Some of the new provisions in the draft also warrant criticism. There is, however, still room for amending the draft text and for improving the provisions during the public debate.

The Pride Parade was again prohibited in 2012. The authorities banned all the other events scheduled for the same day. The Ministry of Internal Affairs pro-

hibited the Pride Parade because it estimated that the safety of people and property would be at risk, although there were no indications that the participants in the event would exercise any violence or break the law. The blanket prohibition of all the events scheduled for the same day as the Pride Parade is absolutely unacceptable.

The Constitutional Court in 2012 reviewed the appeal of the *de facto* ban of the 2009 Pride Parade and found violations of the right to assembly and the right to an effective legal remedy. It, however, did not establish that the state authorities had discriminated against the Parade participants by essentially banning their event. The importance of this decision should not be exaggerated although it is, indeed, a step forward both in terms of the protection of the freedom of assembly and the protection of the LGBT population. The Constitutional Court found a breach of the freedom of assembly primarily on legal technicalities, not because it thought that the *de facto* ban was unnecessary or disproportionate in a democratic society. Furthermore, the Constitutional Court refused to establish that the organisers of the Pride Parade had been discriminated against on grounds of their sexual orientation.

10. *Freedom of Association*

The Constitutional Court continued reviewing the Republican Public Prosecutor's motions to prohibit several ultra-right organisations in 2012. In June 2012, it prohibited the Fatherland Movement *Obraz*, after finding that its activities had been aimed at violating human and minority rights and freedoms and at inciting national and religious hatred and intolerance. It also established that *Obraz* had been pursuing or planned to pursue its goals by violent means. The Court rendered a totally opposite decision in November 2012 and did not prohibit several other rightist associations, having established that they did not violate the rights of others or did not plan to apply violent methods either in their programmes or their public appearances.

11. *Restitution of Property*

The Restitution Agency, which is charged with reviewing applications for the restitution of property taken away after World War Two, finally became operational in March 2012. The Agency's track record and efficiency in the first nine months have been quite good. The transparency of the Agency's work is to be lauded.

Although the restitution procedure has finally been launched, the European Court of Human Rights has continued finding Serbia in violation of the right to property of applicants whose back wages have not been paid because the final court decisions have not been enforced. The ECtHR also found a breach of the right to property of numerous army reservists, who had not been paid their war allowances

for the time they spent in uniform during the 1999 NATO air strikes. The ECtHR further established found that the right to property of foreign nationals, mostly those of Bosnia-Herzegovina, had been violated because they could not claim their right to their old foreign currency savings. Finally, the ECtHR found that the right to property of Kosovo citizens had been violated because they had not been paid their pensions since 1999 in contravention of the law and in the absence of any prior decisions.

12. Economic and Social Rights

The unemployment rate stood at 22.4% in October 2012. Around 10% of the workers are employed on fixed-term contracts. Over 170,000 people lost their jobs in 2012. Many employers have been circumventing the imperative provisions of the Labour Act by forcing the workers to renounce their redundancy packages when they left the company, by drawing up fictitious employment contracts, et al. Labour law has been violated often and grossly, particularly to dismiss pregnant women and women on maternity leave. Discrimination against women in the labour market is still very much present. The Constitutional Court dealt with a number of employment related issues in 2012 and mostly rendered decisions that will help improve the protection of workers' rights.

The obsolete Strike Act still in force in Serbia is largely incompatible with international standards and constitutional norms. The new draft strike act is expected to be submitted to the National Assembly and adopted in 2013.

The quality of Serbia's health care was ranked last on the 2012 Euro Health Consumer Index survey. The health care system suffers from major financial unsustainability. Serbia is the only European country without a law protecting patient rights.

I

GENERAL CONDITIONS FOR THE ENJOYMENT OF HUMAN RIGHTS

1. International Human Rights Treaties and Serbia

Serbia is bound by all universal international human rights treaties, which used to bind the state union of Serbia and Montenegro (SCG), the Federal Republic of Yugoslavia (FRY) and the Socialist Federal Republic of Yugoslavia (SFRY).²

All major universal human rights treaties are binding on Serbia, including the International Covenant on Civil and Political Rights and two Protocols, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of Discrimination against Women and its Protocol, the Convention on the Rights of the Child and two Protocols (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography), the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Protocol and the Convention on the Rights of Persons with Disabilities and its Protocol. The only UN human rights convention Serbia has not ratified yet is the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which it had signed back in 2004. Serbia in 2010 ratified the Protocol Additional to the Geneva Conventions

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

of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), the Convention for the Safeguarding of the Intangible Cultural Heritage and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (See Appendix I).

Serbia ratified many regional instruments. SaM ratified the ECHR and the 14 Protocols thereto on 26 December 2003. Serbia has not had any valid reservations to the ECHR since 2011.

The Framework Convention for the Protection of National Minorities was ratified back in 1998 by the then FRY. The SaM Assembly on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Assembly of Serbia and Montenegro ratified the European Charter for Regional and Minority Languages. Serbia ratified the Revised European Social Charter, the CoE Convention on Action against Trafficking in Human Beings and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The National Assembly ratified the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society and European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Serbia in 2012 at long last submitted its report to the UN Committee on Economic, Social and Cultural Rights, pursuant to its obligation to submit periodic reports to international human rights bodies. It also submitted its report to the UN Committee on Rights of Persons with Disabilities. The UN Committee on the Elimination of Discrimination against Women sent a list of questions to the Government in 2012, which the latter responded to relatively efficiently. This Committee is to review the Government report and responses in July 2013. Serbia was late in submitting its reports to the UN Committee against Torture which was due in 2012. Serbia is under the obligation to submit reports to the following UN committees in the coming years: the Committee on the Rights of the Child in March 2013, when it is also to submit reports on the implementation of two Optional Protocols to the Convention on the Rights of the Child (on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography), the Committee on the Elimination of All Forms of Discrimination in January 2014 and to the Human Rights Committee in April 2015.

The nationals of Serbia are entitled to file individual complaints to all the UN Committees charged with monitoring the implementation of human rights conventions and considering such submissions with the exception of the Committee on Economic, Social and Cultural Rights given that Serbia has not ratified the Optional

Protocol to the International Covenant on Economic, Social and Cultural Rights.³ Serbia has also failed to accept the right to the submission of collective complaints to the European Committee of Social Rights under the Revised European Social Charter. Serbia's citizens are also entitled to file applications with the European Court of Human Rights.

Serbia ranked first on the list of countries by the number of applications filed against it with the European Court of Human Rights (ECtHR) per capita in 2012 and was outranked only by Russia, Turkey, Italy and Ukraine on the list of countries with the greatest number of applications against them.⁴ The ECtHR delivered 12 judgments on the merits against Serbia as the respondent state and found it in violation of at least one right enshrined in the Convention or its Protocols in 10 of the cases. Apart from ruling that Serbia violated the right to a fair trial and peaceful enjoyment of property, the ECtHR also found it in breach of the right to life in one case,⁵ the prohibition of ill-treatment in one case,⁶ and the prohibition of discrimination in a case regarding more than one applicant.⁷

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

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- 3 The FRY recognised the competence of the Committee against Torture to receive and consider individual communications and communications by states parties under Articles 22 and 21, respectively, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. SaM ratified the Optional Protocol to the Convention against Torture, establishing an efficient system of monitoring prison and detention units, in December 2005. On 22 June 2001, the FRY ratified both the Optional Protocol to the International Covenant on Civil and Political Rights – thereby making it possible for individuals to submit communications to the Human Rights Committee – and the Second Optional Protocol to the Convention abolishing the death penalty. On 7 June 2001, the FRY made the declaration recognising the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual and collective complaints alleging violations of the rights guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination. The FRY in 2002 ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women whereby it accepted the Committee's competence to monitor the implementation of the Convention, receive and review communications submitted by or on behalf of individuals or groups of individuals regarding violations of rights guaranteed by the Convention. The Optional Protocol to the Convention on the Rights of Persons with Disabilities, allowing for submission of individual applications to the Committee for the Rights of Persons with Disabilities, was also ratified in 2009.
- 4 The ECtHR statistics are available at: http://www.echr.coe.int/NR/rdonlyres/70EB5DB7-1491-4629-AA7C-8BA70A318037/0/Pendingapplications_affairespendantes31012013.pdf.
- 5 *Mladenović v. Serbia*, ECtHR, App. No. 1099/08 (2012).
- 6 *Hajnal v. Serbia*, ECtHR, App. No. 36937/06 (2012).
- 7 *Vučković and Others v. Serbia*, ECtHR, App. No. 17153/11(2012).

2. Human Rights Treaties in the Legal System of Serbia

The Constitution of Serbia,⁸ adopted in 2006 contains a broad catalogue of human rights but some human rights provisions are deficient or ambiguous. The Constitution, however, leaves room for correcting some shortcomings in provisions on human rights in practice. Under Article 18(3), provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions supervising their implementation. This implies that the views of e.g. the ECtHR or the UN Human Rights Committee must be taken into account when interpreting human rights provisions. It may be presumed that an interpretation taking into account views of international human rights protection bodies (which is the obligation of those interpreting these provisions under the Constitution) will be to the benefit of promoting human rights.

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

The Constitution, however, includes a disputable provision that places international treaties above laws but below the Constitution in the hierarchy of legislation as it stipulates the compliance of the ratified international treaties with the Constitution (Art. 16 (2) and Art. 194 (4)).⁹ Therefore, international treaties that had previously been in force can now not be applied unless they are in accordance with the new Constitution. A state cannot withdraw from the obligations it had accepted under an international treaty by amending national legislation, even the Constitution. The question therefore arises of what the practical effects will be if a ratified international treaty actually is not in accordance with the Constitution. As per international treaties Serbia is yet to accede to, they cannot be ratified unless they are in compliance with the Constitution.

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

8 *Sl. glasnik RS*, 83/06.

9 In its Opinion on the Constitution of Serbia, the Venice Commission, too, concluded that this provision raised important issues. See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, paragraphs 15–17.

3. Restrictions and Derogations of Human Rights

3.1. *Restrictions of Human Rights*

The Constitution prescribes that guaranteed human and minority rights may be restricted only if such restrictions are allowed by the Constitution but only to the extent necessary in a democratic society to fulfil the purpose for which such restriction is permitted. When imposing restrictions on human and minority rights and interpreting these restrictions, all state agencies, courts in particular, are obliged to take into account the essence of the right subject to restriction, the importance of the purpose of restriction, the nature and scope of the restriction, the relationship between the restriction and its purpose, as well as consider the possibility of fulfilling this purpose by a lesser restriction of the right, while the restrictions should never infringe the essence of the guaranteed right (Art. 20), but the Constitution does not explicitly state that the aim of the restriction must be legitimate.¹⁰ This shortcoming can be partly overcome by a general interpretation clause in Article 18, under which “[P]rovisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation”. Given the ECtHR’s case law, a legitimate aim would have to be prerequisite for a human rights restriction to be acceptable.

Pursuant to Article 18(2) of the Constitution, the manner of exercising certain freedoms and human rights may be prescribed by law – when so explicitly envisaged by the Constitution and when necessary to ensure the exercise of a specific right owing to its nature. In the first case, the Constitution admits that certain rights cannot be exercised directly and that the Constitution itself can explicitly indicate when the exercise of those rights shall be regulated by law. This does not necessarily imply a restriction of rights, although the fact that the Constitution leaves it to laws to elaborate how specific rights are exercised allows for limiting the scope of the enjoyment of such rights.

In the second case, however, the Constitution does not explicitly state which rights may or may not be exercised directly and leaves that assessment to the legislature. This may create potential for abuse and the restriction of directly exercisable rights by laws. The Constitution explicitly prescribes that a law regulating the realisation of a specific right may not infringe the substance of that right. Article

¹⁰ In its Opinion on the Constitution of Serbia, the Venice Commission commented Article 20 of the Constitution related to restrictions of human and minority rights (paragraphs 28–30 of the Opinion). Apart from criticising this provision for not requiring the existence of a legitimate aim for the restrictions to be allowed, the Commission also opined that the excessively complicated drafting of these Articles risked leading to many issues of interpretation. See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007.

20 of the Constitution clearly defines the principle of proportionality, as well as the standards which courts in particular must adhere to when interpreting restrictions of human and minority rights. The Constitution strictly lays down the principle of proportionality. The standards for evaluating proportionality are in keeping with the case law of the European Court of Human Rights.¹¹ The Constitution does not explicitly prohibit restrictions of human and minority rights guaranteed by the generally accepted rules of international law, international treaties, as well as laws and other regulations in force, but it comprises only a general provision prescribing that the achieved level of human and minority rights may not be reduced.

3.2. Derogation of Human Rights

The Constitution allows derogations of constitutionally guaranteed human and minority rights upon the proclamation of a state of war or a state of emergency (formal requirement) but only to the extent deemed necessary (substantive requirement).¹² This wording provides more leeway for derogations of human rights than the European Convention on Human Rights, which allows derogations “to the extent strictly required by the exigencies of the situation“. There are also some gaps in the list of rights that may not be derogated from in the Constitution (Article 202(4)).¹³

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

Derogation measures shall be temporary in character and shall cease to be in effect when the state of emergency or war ends (Art. 202 (3)). Derogations of specific human rights during a state of war or emergency are in accordance with Article 4 of the ICCPR and Article 15 of the ECHR which allow for derogations in time of public emergency which threatens the life of the nation.

11 See *Handyside v. United Kingdom*, ECmHR, App. No. 5493/72 (1976); *Informationsverein Lentia v. Austria*, ECtHR, App. Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90 (1993); *Lehideux and Isorni v. France*, ECtHR, App. No. 24662/94 (1998); *A., B. and C. v. Ireland*, ECHR, App. No. 25579/05 (2010).

12 Article 202(1) of the Constitution.

13 See the European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, paragraphs 97–98.

4. Effectiveness of Legal Remedies for the Protection of Human Rights Provided by the Serbian Legal System

4.1. *General*

International instruments oblige states to ensure the protection of human rights within their national legal systems to allow for the realisation of all rights enshrined in international human rights treaties in proceedings before domestic courts and prevent resort to international mechanisms, i.e. initiation of reviews of individual complaints by UN committees or of applications against states by the European Court of Human Rights (ECtHR). Article 22 of the Constitution of Serbia sets out that everyone shall have the right to judicial protection in case any of their human or minority rights guaranteed by the Constitution have been violated or denied and the right to the elimination of the consequences of such a violation. It also provides everyone with the right to seek protection of their human rights and freedoms before international human rights protection bodies. Under international standards, states shall provide both effective remedies and the right to compensation or some specific legal remedies.¹⁴ Article 35 of the Constitution guarantees the right to rehabilitation and compensation of damages to persons unlawfully or groundlessly deprived of liberty, detained or convicted for a punishable offence and compensation to persons who had suffered pecuniary or non-pecuniary damages inflicted on them by the unlawful or inappropriate work of the state authorities, while Article 36 guarantees everyone the right to file an appeal or apply another legal remedy against any decisions on their rights. Apart from the Constitution, several other laws also envisage the rights to reparations, rehabilitation and compensation of damages.

4.2. *Ordinary Legal Remedies*

The distinction drawn between ordinary and extraordinary legal remedies in domestic law is absolutely irrelevant when assessing their effectiveness from the perspective of international law. Legal remedies may be considered effective in general, but their effectiveness is assessed depending on the circumstances of each individual case. In theory, any procedural action laid down in the law and resulting in the realisation of a specific right or providing satisfaction for a breach of that right may be considered a legal remedy. Such procedural actions may be undertaken in all types of proceedings – civil, non-contentious, misdemeanour, criminal, administrative, bankruptcy proceedings, as well as in constitutional protection proceedings. It, however, needs to be borne in mind that international documents do not provide guarantees entitling private citizens to institute criminal proceedings against other

¹⁴ For example, Article 39 of the Convention on the Rights of the Child obliges states to take all appropriate measures to promote the recovery and social reintegration of a child victim.

persons. Restrictions of the private citizens' right to access criminal courts in the capacity of prosecutors (such as the ones in Serbian legislation) are not considered a violation of the right to an effective legal remedy.¹⁵ A distinction also needs to be drawn between the right to an effective legal remedy and the right of access to a court.

Serbian laws provide a broad range of ordinary and extraordinary legal remedies. Citizens are guaranteed the right to appeal any decision of the first-instance civil court (Article 367 of the Civil Procedure Act (hereinafter: CPA) deals with appeals of judgments and Article 399 with appeals of decisions).¹⁶ An appeal of a civil judgment must be lodged within 15 days from the day a copy of the judgment is delivered, with the exception of cases regarding promissory notes and checks, where the appeals have to be filed within eight days (Article 367(1)). The deadline for appealing a decision rendered in a civil case is somewhat limited by the 2011 CPA. Namely, Article 368 of this Act lays down that an appeal of a first-instance judgment ordering a natural person to pay a claim where the principal does not exceed the equivalent value of 300 EUR in RSD, i.e. an entrepreneur or legal person to pay a claim where the principal does not exceed the equivalent value of 1000 EUR in RSD shall not stay the enforcement of the judgment. Although this provision does not infringe the right to a legal remedy per se, it appears to prejudice the outcome of the appeals proceedings and to unnecessarily complicate the enforcement of the final court decisions in the event the appeals are upheld and the first-instance judgments are modified or overturned. The most drastic restriction of the right of appeal in the new CPA is the prohibition of raising procedural legal objections in the appeals (Article 372(2)). Civil appeals are reviewed by the immediately higher courts with real and territorial jurisdiction.

A motion for the revision of a final judgment is an extraordinary legal remedy envisaged by the CPA (Article 403). International human rights protection bodies generally treat such revisions as effective and ordinary legal remedies. The right to file a motion for a revision, however, is limited considerably by the CPA. First and foremost, the Act does not allow revisions of final judgments in property disputes when the claims regard the right of ownership of real estate or pecuniary claims, transfers of property or performance of other obligations in the event that the value of the subject matter in the impugned part of the judgment does not exceed the equivalent value of 100,000 EUR at the average exchange rate of the National Bank of Serbia on the day the claim is filed (Art. 403(3)). Furthermore, a motion for a revision may only be filed by a litigant's representative from among the ranks of lawyers (Article 403(3)). Finally, a motion for a revision may be filed only on points of law or procedure (Article 407). Such motions may not in principle be filed with respect to incorrect findings of fact (Article 407(2)). The motions for revision are reviewed by the Supreme Court of Cassation.

15 See the *2011 Report*, I.2.2.

16 *Sl. glasnik RS* 72/11.

The other extraordinary legal remedies prescribed by the CPA, the motion for the re-examination of the final judgment and the motion for retrial, do not essentially constitute effective legal remedies under international standards.

The criminal legislation also envisages the right of appeal (Article 432 of the Criminal Procedure Code, hereinafter: CPC). An appeal may be lodged within 15 days from the day a copy of the judgment is delivered.¹⁷ The deadline may be extended at the request of the parties (Article 432(2)). The appellants may claim substantive violations of the criminal procedure, violations of the substantive criminal law, incorrect and insufficient findings of fact or challenge the penalties. The CPC also allows for retrials and the submission of motions for the protection of legality. The latter remedy primarily serves to reverse human rights violations in criminal proceedings established by the Constitutional Court of Serbia or the European Court of Human Rights (ECtHR).

The General Administrative Procedure Act¹⁸ and the Non-Contentious Procedure Act¹⁹ include similar provisions on the right of appeal. Judgments rendered in administrative disputes may not be appealed. Administrative disputes may only be instituted against decisions on matters previously reviewed in administrative proceedings.²⁰

4.3. Constitutional Appeals and Effectiveness of Constitutional Appeals

Constitutional appeals may be filed against individual enactments or actions by state bodies or organisations exercising public authority and violating or denying human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or do not exist (Art. 170). The Constitutional Court Act also allows for the filing of a constitutional appeal in the event the appellant's right to a fair trial was violated or in the event the law excluded the right to the judicial protection of his human and minority rights and freedoms (Art. 82)). This provision provides for the filing of a constitutional appeal after the exhaustion of all other effective legal remedies.

The appellants may seek the protection of all human rights enshrined in the Constitution or another international instrument binding on the Republic of Serbia.²¹ All natural or legal domestic or foreign persons who are holders of the con-

17 *Sl. glasnik RS* 72/11, 101/11 and 121/12.

18 Articles 12, 123 (appeals), Article 239 (retrials), *Sl. list SRJ*, 33/97, 31/01, *Sl. glasnik RS*, 30/10.

19 The Act governs the right of appeal for each type of non-contentious procedure.

20 Article 7, Administrative Disputes Act, *Sl. glasnik RS* 111/09.

21 See the Constitutional Court's views on the reviews of and rulings on constitutional appeals, available in Serbian at http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Ставови_Уставног_суда_у_поступку_испитивања_и_одлучивања.doc.

stitutionally guaranteed human rights and freedoms have the active legitimation to file a constitutional appeal. A constitutional appeal is not an *actio popularis*, and it needs to be noted that the potential appellant must have personally been the victim of a breach of a constitutionally guaranteed human right or freedom. Other persons (natural persons, state authorities or organisations charged with the monitoring and realisation of human rights) may file a constitutional appeal on behalf of a person whose right or freedom was violated only with his written consent.

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

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

As mentioned, the Criminal Procedure Code provides for the submission of a motion for the protection of legality in the event the Constitutional Court found that a defendant's right had been violated during the criminal proceedings and that the violation affected the lawful and proper adjudication of the matter or that a constitutionally guaranteed human right or freedom of the defendant or another participant in the proceedings had been violated or denied.

In its reviews of appeals against excessively long trials, the Constitutional Court plays a preventive role as it may order a review of the case or its completion within the shortest possible period. In its hitherto practice, however, the Constitutional Court had not set the courts it has referred cases back to any deadlines by which they are to take specific actions or complete the cases.

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

tional appeal procedure, however, suffers from numerous shortcomings. Firstly, the Constitutional Court is not authorised to revoke the decisions of lower courts.²² A human rights violation may be remedied only by the submission of an extraordinary legal remedy in criminal or civil proceedings. In its review of the draft amendments to the Constitutional Court Act, the Venice Commission stated that the establishment of the possibility of a full constitutional appeal before the Constitutional Court was highly recommended from a human right's perspective and that there would be more applications to the European Court of Human Rights if the Constitutional Court was not allowed to review judgements of the ordinary courts. The Venice Commission also emphasised that the powers of and the respect for the Constitutional Court were undermined if it did not have the power to annul a prior judgment.²³ Secondly, the Constitutional Court cannot order the legislator to adopt regulations ensuring the respect of a particular constitutional right. The most the Constitutional Court can do is recommend the adoption of such legislation. The 2011 amendments to the Constitutional Court Act have, on the other hand, strengthened the constitutional appeal institute in some aspects. Notably, they did away with the inefficient provisions under which claims for compensation of damages caused by violations of human rights were reviewed subsequently by the Damages Commission²⁴ and simultaneously entitled the Constitutional Court to rule on such claims during the review of the appeals, provided that the appellants claimed damages in the constitutional appeals.²⁵ The damages awarded by the national courts, including the Constitutional Court, need to be proportionate to the compensation the ECtHR would award in a similar situation. This, however, does not mean that the redress must be of equal value. Awarding lower amounts of damages than those awarded by the ECtHR does not in principle amount to a violation of the Convention provided that they are not unreasonable.²⁶

Constitutional appeals had in the past proven systemically inefficient in cases in which the appellants, workers of liquidated socially owned companies and those in bankruptcy, complained of the non-enforcement of court decisions upholding their claims for the payment of their back wages.²⁷ However, the Constitutional Court had rendered landmark decisions in 2012, by which it upheld the constitu-

22 This solution was introduced by the 2011 amendments to the Constitutional Court Act (*Sl. glasnik RS* 99/11).

23 See the Venice Commission Opinion on Draft Amendments and Additions to the Law on the Constitutional Court of Serbia, paragraphs 47–50, available at [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)050-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)050-e.pdf).

24 See the *2011 Report*, I.2.3.2.

25 See Article 33(3) of the Act Amending the Constitutional Court Act and Article 89(3) of the Constitutional Court Act.

26 See the ECtHR judgment in the case of *Vidaković v. Serbia*, ECHR, App. No. 16231/07.

27 See the ECtHR judgment in the case of *Milunović and Čekrlić v. Serbia*, ECHR, App. Nos. 3716/09 and 38051/09.

tional appeals in such cases and awarded damages.²⁸ It will be interesting to see whether the ECtHR will in the future consider the constitutional appeal an effective legal remedy in such cases as well, given the Constitutional Court's new case law.

4.4. Implementation of Decisions Rendered by International Bodies

After reviewing periodic reports, UN committees adopt concluding observations and recommendations for the state, which are to ensure the full implementation of the relevant international treaties. Some of these recommendations are general in character and indicate the deficiencies in the domestic law or the conduct of the state authorities and require their harmonisation with international standards. Such deficiencies are also highlighted in decisions rendered by treaty bodies reviewing individual communications, but they also require of the states to take individual measures regarding breaches of the complainants' rights. Under procedures before UN treaty bodies, a state found in violation of an individual's right(s) enshrined in a Convention is under the obligation to notify the relevant UN committee of the measures it has taken to implement its views within a period ranging between three and six months. This requirement is based on the fact that all universal international human rights treaties include provisions under which the states parties assume the obligation to guarantee the existence of effective legal remedies for all violations of rights enshrined in these treaties.

The judgments of the European Court of Human Rights (ECtHR) carry greater weight and impose greater obligations on States Parties to the ECHR, which undertake to bring their legislation and jurisprudence into compliance with the ECtHR case law when they ratify the ECHR. The Civil Procedure Act²⁹ accordingly allows for a retrial of a case in which a final decision has been rendered upon the motion of a party in the event it acquires the opportunity to invoke an ECtHR judgment establishing a human rights violation and which may result in the adoption of a decision more favourable for that party (Art. 426(11)), i.e. in the event the Constitutional Court reviewing a constitutional appeal established a breach or denial of a human or minority right or freedom enshrined in the Constitution during civil proceedings and this may result in the adoption of a decision more favourable for the party (Art. 426(12)). Article 485 of the Criminal Procedure Code³⁰ provides for the submission of a motion for the protection of legality in the event it is established by a decision of the Constitutional Court that the final judgment or a decision rendered during the proceedings preceding its rendering is not in compliance with the Constitution, generally recognised rules of international law and ratified international treaties, or in the event a human right or freedom of the convict or another participant in

28 See the Constitutional Court Decisions in the cases of UŽ 775/09 and UŽ 1392/10.

29 *Sl. glasnik RS* 72/11.

30 *Sl. glasnik RS* 72/11, 101/11 and 121/12.

the proceedings enshrined in the Constitution or the ECHR and Protocols thereto had been violated or denied as established in a Constitutional Court decision or an ECtHR judgment. This solution has left the recommendations of UN Committees beyond the scope of these provisions. The Administrative Disputes Act³¹ includes a provision under which a motion for retrial may be filed in the event “a view in a subsequent European Court of Human Rights decision on the same matter may affect the lawfulness of the court proceeding” (Art. 56(7)). This Act, thus, adopts the restrictive approach that exists in the other procedural laws as well.

Unfortunately, such solutions marginalise the decisions of UN committees and other international monitoring bodies and give the state full discretion to ignore the decisions of these bodies.

4.5. Recommendations

1. Amend the law to provide the Constitutional Court with the powers to revoke the judgments of regular courts and adopt regulations ensuring the respect of individual constitutional rights.

2. Amend the procedural laws to allow retrials of cases on the motion of the parties who can invoke a UN Committee decision to their benefit.

5. Independent Regulatory Authorities

The status of the independent regulatory authorities in the Republic of Serbia generally remained unchanged in 2012. Their work was, however, partly hampered by the election cycle that resulted in procedural delays and affected the fulfilment of the roles of these institutions charged with overseeing the work of the state administration and human rights protection. The status of the independent regulatory authorities was assessed against several indicators – the stability of their human capacities and the legitimacy they enjoy in the public, the capacities at their disposal, the executive and legislative authorities’ reactions to their initiatives and proposals, and the public trust in and access to these authorities.

5.1. Human Capacities and Legitimacy of the Independent Regulatory Authorities

The first Protector of Citizens, Saša Janković, was re-elected to that office in August 2012. He was proposed by the National Assembly Committee for Con-

31 *Sl. glasnik RS* 111/09.

stitutional and Legislative Issues at an extraordinary session on 1 August 2012. The Committee also unanimously suggested to the National Assembly to review the appointment of the Protector of Citizens in an urgent procedure.³² Saša Janković's re-election was supported by all caucuses; 167 deputies voted for him and one deputy abstained.³³ The election procedure was not, however, launched within the statutory deadline. Under the Protector of Citizens Act,³⁴ the procedure for the election of a Protector of Citizens shall be initiated at least six months before the term in office of the outgoing Protector is to expire, i.e. by February 2012. Given that the process coincided with the general elections, the National Assembly Committee for Constitutional and Legislative Issues, the only body entitled to draw up the list of candidates nominated by the caucuses, was not constituted until the elections passed and the new parliamentary majority was formed. When the term in office of the Protector of Citizens expired, the Office was run by Acting Protector Miloš Janković, the Deputy Protector of Citizens charged with looking after the rights of persons deprived of liberty. Saša Janković publicly reiterated on a number of occasions that the authority of an institution was much smaller when it was headed by an official in an acting capacity because that official could not operate at full steam and act freely and independently.³⁵ He also warned that the number of enforced recommendations, which used to stand at 70%, had plunged.³⁶

The Office of the Commissioner for Information of Public Importance and Personal Data Protection, the oldest independent regulatory authority in Serbia (established in 2004), performed its duties mostly without hindrance in 2012, although under somewhat difficult circumstances. There are still individual instances of the authorities persistently ignoring the Commissioner's orders and grossly violating the Free Access to Information of Public Importance Act. Namely, some authorities refused to allow access to the required information not only after the Commissioner ordered them to do so, but in the procedure in which his orders were enforced as well, and refused to pay into the budget the multiple fines laid against them. The Government, which the Act obliges to ensure the enforcement of the Commissioner's decisions when the measures at his disposal prove ineffective, failed to react appropriately in such instances.

Changes at the helm of the Anti-Corruption Agency took place in 2012. The prior Director, Zorana Marković, was unanimously dismissed by the Agency Board on 9 November 2012. Her dismissal was preceded by a conclusion of the Agency Board that she had damaged the Agency's reputation. Marković was given a 15-day deadline to respond to the allegations in the conclusion. Article 20 of the Anti-Cor-

32 See: <http://otvoreniparlament.rs/2012/08/02/382786/>.

33 Belgrade daily Press on Janković's re-election <http://www.pressonline.rs/info/politika/236230/sasa-jankovic-ponovo-izabran-za-zastitnika-gradjana.html>.

34 *Sl. glasnik RS* 79/05 and 54/07.

35 *Blic*, 11 March, p. 5.

36 *NIN*, 22 March, p. 15.

ruption Agency Act³⁷ specifies that an Agency Director may be dismissed for the negligent performance of duties, in the event he becomes a member of a political party, damages the reputation or political impartiality of the Agency.

The Board cited a number of reasons for the dismissal of the Agency Director. The first was that she had signed on behalf of the Agency and without the Board's knowledge an application to the Government for the assignment of apartments to address the staff's housing issues pursuant to a decree on the resolution of the *housing needs* of staff elected and appointed to or employed by the users of *state-owned* resources.³⁸ Furthermore, she violated Article 21 of the Anti-Corruption Act because she did not advertise the Deputy Director vacancy and did not recruit staff for the vacancies in the department overseeing the financing of political entities in election year, including the head of department vacancy. The Board also criticised her for failing to act on its initiative and publish a collection of the Agency's practice. Furthermore, she published a rulebook on the public offices, jobs and activities senior state officials may perform without the Agency's consent on the website and publicly promoted it in the media and at training seminars before it had come into force and the Board had rendered a decision on it.³⁹ According to the reasoning of the Board, precisely these moves prevented the Agency from imposing itself as a reputable and independent and sustainable institution in the public.⁴⁰ Her job was advertised in mid-November 2012⁴¹ and the Acting Agency Director and previously the Board Secretary, Tatjana Babić, was appointed Agency Director.⁴²

The previous Director's actions prompted the Anti-Corruption Agency to submit a request to the Republican Directorate for Property to specify how many state-owned housing units it disposed of, who was living in them and on which grounds and to provide it with copies of the rent contracts signed with the appointed and elected civil servants. The Directorate replied that a total of 4,668 tenants and 16,245 housing units were registered in the state records, but that it did not have data on who was actually living in the units.⁴³

37 *Sl. glasnik RS* 97/08, 53/10 and 66/11 - Constitutional Court decision.

38 The Agency Board qualified the decree as open to abuse and as having corruptive potential in its reasoning. The Agency asked the Republican Directorate for the Property of the Republic of Serbia to designate an official who would officially be handed over the keys to the two apartments in Belgrade the Government allocated to the Agency. More information is available in Serbian at: http://www.acas.rs/sr_lat/aktuelnosti/783-vracanje-stanova.html.

39 The Board also stated in its Conclusion that it had not been provided with adequate working premises after the Agency moved to new offices.

40 The Agency Board reasoning is available on the Agency website: <http://www.acas.rs>.

41 Belgrade daily *Večernje novosti* report on Agency Director candidates <http://www.novosti.rs/vesti/naslovna/aktuelno.290.html:410573-Konkurs-Agencije-za-borbu-protiv-korupcije-Suzava-se-lista>

42 The Agency's press release on the appointment of the Director http://www.acas.rs/sr_lat/sednice-odbora/836-izabran-direktor.html

43 The Agency's press release on the Directorate's reply http://www.acas.rs/sr_lat/aktuelnosti/807-odgovor-stanovi.html

At its session on 17 September 2012,⁴⁴ the National Assembly Committee for Finance, the Republican Budget and Oversight of Public Spending drew up a list of candidates for the post of State Audit Institution (SAI) Chairman. Under the State Audit Institution Act, the Council members shall be elected to five-year terms in office and may be re-elected once. The Committee's list of candidates was reviewed by the National Assembly at its ninth extraordinary session on 25 September 2012. The previous SAI Council Chairman Radoslav Sretenović was re-elected to that office with 149 votes for and three votes against.⁴⁵

One daily launched a campaign against Commissioner for Protection of Equality Nevena Petrušić and the Commissioner's Office in December 2012. In her press release posted on the Office website, the Commissioner distanced herself from the media accusations and said that the competent state authorities had been informed about everything and that a personal vendetta of a staff member was at issue. The Commissioner also assessed that such campaigns posed a threat to an independent authority, which should be free from anyone's influence.⁴⁶

5.2. The Funding of the Independent Regulatory Authorities

The Commissioner for Information of Public Importance and Personal Data Protection and the Protector of Citizens were designated additional office space to use together in Karađorđeva Street 48 in Belgrade back in 2010. The building is, however, in need of major reconstruction, which was not conducted in 2012 either, since the costs of reconstruction exceeded the funds the two institutions received from the budget.⁴⁷ In mid-June 2012, the two institutions notified the Republican Directorate for the Property of the Republic of Serbia that the space had on a number of occasions been used for the organisation of events, particularly events rallying larger numbers of participants, which it had not been designated for, and that they had learned about them from the media.⁴⁸ The Ministry of Internal Affairs Emergency Management Sector conducted an *ad hoc* check of the building and in

44 The report on the Committee's session is available in Serbian at http://www.parlament.rs/Peta_sednica_Odbora_za_finansije,_republi%C4%8Dki_bud%C5%BEet_i_kontrolu_tro%C5%A1enja_javnih_sredstava.15896.941.html.

45 The following four caucuses nominated him: the Serbian Progressive Party (SNS), the Democratic Party of Serbia (DSS), the Socialist Party of Serbia (SPS) and the Social-Democratic Party of Serbia (SDPS).

46 Commissioner's statement on the accusations is available in Serbian at: <http://www.ravnopravnost.gov.rs/lat/vesti.php?idVesti=153>.

47 See the Information Booklet of the Commissioner for Information of Public Importance and Personal Data Protection <http://www.poverenik.rs/en/information-booklet/information-booklet/1287-2012-.html>.

48 The Commissioner's press release is available in Serbian at <http://www.zastitnik.rs/index.php/lang-sr/2011-12-25-10-17-15/2464-2012-08-31-14-27-06>.

July 2012 prohibited its lease for public events because it did not satisfy the basic legal and technical requirements.⁴⁹

The Office of the Commissioner for Information of Public Importance and Personal Data Protection was still seated in two cramped buildings at two different locations in Belgrade (Svetozar Marković Street 42 and Deligradska Street 16) in 2012.⁵⁰ The Office does not have a Registry or even the minimum number of IT experts it needs in the field of personal data protection in this era of rapid IT development. Lack of space has directly impacted on the timely protection of human rights afforded by the Commissioner. There were around 2,500 cases regarding access to information and around 300 personal data protection cases still pending at the end of 2012. The situation directly incites human rights violations, puts the Office staff under a major strain and may result in the loss of public trust in the Commissioner's work and the protection this institute affords. Due to the huge inflow of cases and understaffing, the Commissioner was forced to focus on the cases in which delay risked causing irreparable damage. The Commissioner's Office cannot recruit more staff because it lacks office space.

The Office of the Commissioner for Protection of Equality opened a Reception Office where the citizens can file their complaints personally. The Office is open on Tuesdays and Thursdays and the citizens have to set an appointment by phone. In May 2012, the Commissioner was provided with a temporary office to receive the members of the public in the Administration for the Joint Services of the Republican Authorities in Nemanjina Street 22–26 in Belgrade. The Commissioner for Protection of Equality used the budget and donated funds to purchase the equipment for its professional department, notably office furniture, computers and other technical equipment.⁵¹

The Anti-Corruption Agency moved into an office building it rents in 2011. The offices fully satisfy the Agency needs.⁵² As the Agency noted in its 2011 Annual Report, the 2012 Budget Act earmarked funds to purchase a building and thus permanently resolve the Agency's office space issue, but it remained unclear where these funds would come from. The media reported in the first half of 2012 that the Government intended to draw a 4.5 million EUR loan from a Serbian bank to purchase a building, and that a draft law on such a loan was submitted to the National Assembly for adoption and then withdrawn from the pipeline.⁵³ The Anti-Corruption

49 The memo of the Emergency Management Sector is available in Serbian at http://www.zastitnik.rs/attachments/2464_7uprava%20za%20vanredne%20situacije.pdf.

50 The offices in both buildings had an area of 500 square meters and an average of 40 staff members worked in them in 2012.

51 Information Booklet of the Commissioner for Protection of Equality, data on funding, available in Serbian at <http://www.ravnopravnost.gov.rs/lat/informatorRada.php?idKat=10>.

52 See the Anti-Corruption Agency 2011 Annual Report http://www.acas.rs/images/stories/Annual_Report_of_the_Agency_2011.pdf.

53 See the press reports in Serbian at: <http://www.blic.rs/Vesti/Ekonomija/303914/Vlada-kupuje-zgradu-Agenciji-za-borbu-protiv-korupcije>; *Novi Magazin*, 4, May, p. 8.

tion Agency Information Booklet states that the Government gave its consent to the Agency to purchase its office space.⁵⁴ An additional 200,000,000.00 RSD were earmarked in the budget reserve for that purpose.⁵⁵

The State Audit Institution has offices in Belgrade, Niš and Novi Sad.⁵⁶ The SAI Council Chairman said in August 2012 that SAI would open offices in Kragujevac and Užice as well.⁵⁷

Apart from the Office of the Protector of Citizens, which had more than the envisaged number of staff in 2012 (79 instead of 63),⁵⁸ the other independent regulatory authorities continued operating with fewer staff than envisaged in their in-house job classification enactments. The Office of the Commissioner for Information of Public Importance and Personal Data Protection remained understaffed and had 41 instead of the 69 members of staff it needs.⁵⁹ The State Audit Institution was also under-resourced: it had 127 instead of the 421 members of staff envisaged by its job classification enactment. In its Serbia 2012 Progress Report, the European Commission emphasised that the SAI was still in the institution-building phase and under-resourced.⁶⁰

The Anti-Corruption Agency's Internal Organisation and Job Classification Rulebook came into force on 1 January 2012. Under the Rulebook, the Agency needs 123 staff members; it, however, has only 70 members of staff.⁶¹ The Commissioner for Protection of Equality had 20 members of staff although it needs 60⁶² under its Internal Organisation and Job Classification Rulebook.⁶³

54 Serbian Government Conclusion 05 Ref No 401-2408/2012 of 30 March 2012, *Sl. glasnik RS*, 25/12.

55 Anti-Corruption Agency Information Booklet, available in Serbian at http://www.acas.rs/sr_lat/component/content/article/41/152.html.

56 SAI Information Booklet, data on funding, available in Serbian at <http://www.dri.rs/images/pdf/dokumenti/informator04102012cir.pdf>.

57 See the RTV Kragujevac report on <http://www.rtk.co.rs/kragujevac/item/3651-kragujevac-dobija-kancelariju-revizora>.

58 Protector of Citizens Information Booklet, p. 15, and the Rulebook on the Internal Organisation and Job Classification in the Protector of Citizens Professional Department, p. 11, available in Serbian at <http://www.ombudsman.rs/index.php/lang-sr/o-nama/normativni-okvir-za-rad/142-2008-06-04-15-44-40>.

59 See the Information Booklet of the Commissioner for Information of Public Importance and Personal Data Protection on <http://www.poverenik.rs/en/information-booklet/information-booklet/1287--2012-.html> "Narrative Presentation of the Organizational Structure", p. 17.

60 See the *EC Serbia 2012 Progress Report*, str. 64.

61 Anti-Corruption Agency Information Booklet, available in Serbian at http://www.acas.rs/sr_lat/component/content/article/41/152.html, p. 4

62 Information Booklet of the Commissioner for Protection of Equality, Comparative Overview of the Required and Existing Staff Members in the Commissioner's Professional Department available in Serbian at <http://www.ravnopravnost.gov.rs/lat/informatorRada.php?idKat=10>.

63 The Rulebook is available in Serbian at <http://www.ravnopravnost.gov.rs/files/Pravilnik%20o%20sistemizacij%20i%202006%202010.pdf>.

5.3. The Legislative and Executive Authorities' Reactions to the Initiatives and Proposals of the Independent Regulatory Authorities

The Protector of Citizens filed an initiative with the Government of the Republic of Serbia to amend the Non-Contentious Procedure Act and allow parties to demand their rights in court in the event they cannot realise them in administrative proceedings.⁶⁴ Given that the initiative arrived during the election campaign, the adoption of the amendments was put off until the new convocation of the National Assembly was sworn in. These amendments were enacted in August 2012.⁶⁵ The Protector of Citizens submitted amendments to the Draft Act on Maximum Remuneration in the Public Sector to the National Assembly in September 2012.⁶⁶ He proposed the restriction of both the salaries and overall earnings of individuals from public funds, given that the salaries of many senior state officials are relatively low, but they “supplement” them with quite high allowances for their membership in management and other committees and bodies in other public authorities and organisations. The Protector of Citizens had sought the restriction of the earnings of staff of all republican, provincial and local authorities and organisations and public and other companies founded by authorities at all levels without exception. However, the adopted amendments include exceptions which are not reasoned at all; these exceptions include no other than the authorities that should be fighting against systemic corruption and safeguarding the proper use of public funds, as the Protector of Citizens noted in his press release.⁶⁷

The Commissioner for Information of Public Importance and Personal Data Protection in 2012 started drafting a Model Act on the Protection of Whistleblowers in 2012. This is a very useful initiative because the European Commission also noted in its Serbia 2012 Progress Report that there was little action to protect whistleblowers.⁶⁸

The Anti-Corruption Agency expressed its disagreement with the solutions in the working version of the National Anti-Corruption Strategy drafted by the Min-

64 The initiative is available in Serbian at http://www.ombudsman.rs/index.php/lang-sr_YU/zakonske-i-druge-inicijative/2126-2012-01-27-08-06-05.

65 Media and Open Parliament reports on the adoption of the amendments to the Non-Contentious Procedure Act, available in Serbian at <http://www.rts.rs/page/stories/sr/story/9/Politika/1165298/Usvojen+Zakon+o+vanparni%C4%8Dnom+postupku+.html> and <http://otvoreniparlament.rs/2012/08/31/415840/>

66 The Protector of Citizens' amendments are available in Serbian at http://www.ombudsman.rs/attachments/2510_amandmani%20na%20predlog%20zakona.pdf.

67 The Protector of Citizens press release on the National Assembly rejecting his amendments is available at http://www.ombudsman.rs/index.php/lang-sr_YU/2011-12-25-10-17-15/2011-12-25-10-13-14/2510-2012-09-28-14-23-08.

68 See the *Serbia 2012 Progress Report*, p. 50, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf.

istry of Justice and State Administration. The Strategy envisaged the division of powers between the Anti-Corruption Council and the Anti-Corruption Agency; the former would oversee the implementation of the Strategy, while the latter would be awarded greater powers to investigate false asset reports filed by state officials and the discrepancies between their revenues and outlays.⁶⁹ The Agency issued a press release voicing concern over the transfer of its oversight powers to the Council and noted that, although it had been a member of the working group drafting the Strategy, it could not render an opinion on the working version because it had not taken part in its preparation.⁷⁰ Namely, the Agency was not forwarded the working version of the document and only learned about it from the media. The working version was subsequently forwarded to the Agency and it submitted its comments to the Ministry in early 2013.⁷¹

5.4. Amendments to the Protector of Citizens Act and to the Free Access to Information of Public Importance Act

The Ministry for Human and Minority Rights, State Administration and Local Self-Governments drafted amendments to the Protector of Citizens Act in cooperation with the Protector of Citizens. The Serbian Government in February 2012 upheld the amendments and forwarded the Draft Act amending the Protector of Citizens Act to the National Assembly for adoption. The amendments revise some of the existing solutions and provide the Protector of Citizens with greater powers. The Draft Act was withdrawn from the parliamentary pipeline when the new convocation of the Assembly was constituted.

The amendments are to strengthen the Protector of Citizens' powers to initiate the amendments of laws, by-laws and general enactments with the Serbian Government i.e. the National Assembly if he believes that the shortcomings of the specific regulation have been resulting in the violation of the citizens' rights and to initiate the adoption of new laws, by-laws and general enactments of relevance to the realisation and protection of the citizens' rights. These provisions would satisfy the need to strengthen the Protector's role in monitoring systemic violations of rights.

The amendments also envisage special measures for protecting the complainants, lay down the procedures for the administrative authorities' complaint review and reporting procedures, introduce penalties for the non-fulfilment of the statutory

69 RTS report on the working version of the Anti-Corruption Strategy, available in Serbian at <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1237132/Nova+strategija+za+borbu+protiv+korupcije.html>

70 Anti-Corruption Agency reaction to news on the working version of the Anti-Corruption Strategy http://www.acas.rs/sr_lat/aktuelnosti/813-reagovanje-strategija.html.

71 The Anti-Corruption Agency comments on the working version of the Strategy are available in Serbian at http://www.acas.rs/images/stories/Komentari_na_radnu_verziju_Strategije_16012013-1.pdf.

obligations, and lay down the instances in which the Protector of Citizens shall terminate the oversight procedure. With the aim of ensuring that the use of the material and human resources and time is more efficient and cost-effective, the amendments specify the reasons why the Protector of Citizens will not initiate the procedure for overseeing the work of an administrative authority.

The authors of the amendments propose that the decisions to continue the procedure before the Protector of Citizens do not depend on the will of the complainants in specific cases. The possibility to continue the procedure without the consent of the co-complainant to terminate it, even when it is obvious that the omission that had led to the initiation of the procedure had been eliminated, proved inexpedient in practice. The proposed amendment allows the Protector of Citizens to terminate the oversight procedure or continue it in the event he is of the view that a major omission is at issue and that those liable for it have to be identified or that it warrants an additional recommendation.

The amendments also put in place measures for protecting the complainants. In particularly justified instances, the Protector of Citizens is entitled not to reveal the complainant's identity to the administrative authority. Furthermore, he can recommend to the authority at issue to abandon, temporarily or permanently, the measures it has been taking or intends to take against the complainant. The Protector of Citizens may recommend to the authority complained of or another administrative authority to undertake measures needed to protect the complainant's rights and interests. The authors also proposed a more efficient system for reviewing the complaints, because it was established that the Protector of Citizens had initiated a large number of oversight procedures *ex officio*. The draft amendments also include provisions imposing on the administrative authorities the obligation to themselves review the public's complaints of their work, notably to establish an efficient, accessible and free procedure for receiving, reviewing and addressing the complaints. Furthermore, the administrative authorities would have to prepare annual reports on complaints of their work and submit them to the Protector of Citizens.

Practice has shown that the Protector of Citizens Act needs to include penal provisions, like other laws. The Draft Act follows the logic in the other regulations and lists the specific incriminated actions of the responsible official and staff and defines the range of the fines.⁷² The competent ministries and the Republican Legislation Secretariat issued their opinions about the Draft Act.⁷³ The Ministry of Justice was of the view that the Protector of Citizens should not oversee the work

72 Text taken from the publication *Protector of Citizens – Recommendations in Practice*, prepared within the project entitled "Strengthening the Ombudsman's Role" implemented by the Committee of Human Rights Lawyers and the BCHR, available in Serbian at <http://ombudsman.yucom.org.rs/wp-content/uploads/2013/02/Za%C5%A1titnik-gra%C4%91ana-preporuke-u-praksi.pdf>.

73 The draft amendments and the opinions of the relevant ministries and other authorities are available in Serbian at <http://www.zastitnik.rs/index.php/lang-sr/2011-12-11-11-34-45/2124-2012-01-26-13-14-31>.

of the State Prosecutors' Council and the High Judicial Council and that the term in office of the Protector of Citizens should not be extended from five to seven years.

Amendments to the Free Access to Information of Public Importance Act were also drafted in 2012. The prior Government submitted the Draft Act to the National Assembly for adoption. The amendments improve and specify the valid provisions, particularly those laying down penalties for violating this law. The current Government unfortunately withdrew the Draft Act from the parliament pipeline. The Commissioner for Access to Information of Public Importance and Personal Data Protection issued a number of press releases, noting the need to adopt or amend regulations governing human rights in 2012. Apart from the need to amend the Free Access to Information of Public Importance Act, he also alerted to the problems in the enforcement of the Classified Information Act and called for the urgent adoption of the relevant by-laws without which this Act is inapplicable. He also proposed that the Act be amended to ensure its full implementation in practice and even that a new law governing the matter be adopted. The Commissioner has for a long time been insisting on the adoption of a law protecting whistleblowers in accordance with CoE Resolution 1729 (2010).

Given the obstacles he has faced in applying the Personal Data Protection Act, the Commissioner is of the view that it would be best to adopt a new law governing this matter or significantly amend the valid one to align it with the actual needs and the relevant international standards. The better protection of personal data necessitates the urgent adoption of an action plan for implementing the Personal Data Protection Strategy, which will define the activities, expected effects, the authorities that have to fulfil the specific tasks and the deadlines for their fulfilment. The Commissioner also presented an initiative that the proposers of laws and legal amendments be obliged to seek the Commissioner's opinions on the provisions regarding personal data. The Commissioner also noted the need for the adoption of Government enactments governing particularly sensitive data and a law governing security checks. Neither of the Commissioner's initiatives was taken up in 2012.

5.5. Public Trust in and Access to the Independent Regulatory Authorities

The public has recognised the independent regulatory authorities as their partners, as corroborated by the increasing number of complaints they have been filing and their greater resort to mechanisms available to the independent regulatory authorities to realise their rights. Apart from Belgrade, the Protector of Citizens' Professional Department also operates local offices in Preševo, Bujanovac and Medveda. The offices are open to the public every workday and the citizens can also reach the Office staff on cell phones after hours. Thanks to the project entitled Electronic Access to the Protector of Citizens, which this institution has been implementing together with the Serbian Library Association, citizens in ten municipalities

can contact the Office legal professionals on duty via video links. This electronic access to the Protector of Citizens was introduced within a project supported by the Norwegian Government and implemented until June 2012.⁷⁴ The number of citizens who contacted the Protector increased from 12,130 in 2011 to 15,372 in 2012. The number of complaints also grew over 2011 and stood at 4,475 in 2012.⁷⁵

The Commissioner for Information of Public Importance in 2012 reviewed a much greater number of petitions regarding the non-enforcement of measures for improving transparency – 6,228, compared to 263 in 2011.⁷⁶ In 2012, the right to access information was exercised the most by individual citizens and civic associations, journalists and media representatives, trade unions, representatives of political parties, the authorities themselves, lawyers, businessmen and others.

The Commissioner had a docket of 6,037 cases regarding access to information in 2012, or 12.5% more than in 2011. Of them, 2,398 had been pending from 2011 and 3,649 were filed in 2012. The volume of the Commissioner's activities on complaints regarding access to information was 40% greater in 2012 than in 2011. The Commissioner, for instance completed the procedures in 3,553 of the cases, i.e. around 20% more than in 2011. Of these 3,553 cases, the Commissioner dealt with 2,269 petitions, finding 2,054 well-founded, 215 ill-founded or suffering from formal shortcomings; 140 petitions were dismissed as ill-founded and 75 for formal reasons.

As far as personal data protection is concerned, the Commissioner conducted 365 inspections of the implementation and enforcement of the Personal Data Protection Act (PDPA) in 2012 and completed the proceedings in 164 of the cases.⁷⁷ The Commissioner issued 67 warnings and ordered 14 measures regarding the irregularities he established and, together with the Protector of Citizens, filed a motion to the Constitutional Court to review the constitutionality of Article 286(3) of the Criminal Procedure Code. The Commissioner also filed 35 misdemeanour reports over breaches of the PDPA, and filed one criminal report over the unauthorised collection of personal data. The Commission reviewed 174 petitions and resolved 129 of them. He registered 303 personal data controllers and 1,575 records of personal data filing systems in the Central Register. The Commissioner also acted on 12 motions for the transfer of personal data from Serbia, issued 569 reasoned opinions and replies, of which 432 to individual citizens, 65 to legal persons and 72 to state and local authorities. Of the 72 opinions, 18 regarded the pre-drafts or working versions of laws.

74 Protector of Citizens Information Booklet, p. 103.

75 The Protector of Citizens statistics are available in Serbian at <http://www.ombudsman.rs/index.php/lang-sr/2013-01-14-14-36-04>.

76 Information Booklet of the Commissioner for Information of Public Importance and Personal Data Protection, <http://www.poverenik.rs/en/information-booklet/information-booklet/1287--2012-.html>, pp. 133-134.

77 The Commissioner found that the PDPA was violated in 103 cases and that there were no breaches of the PDPA in 61 cases.

Due to the limited capacities to receive members of the public in person, the Commissioner for Protection of Equality opened a Reception Office and receives clients twice a week. Over 1,000 cases were submitted to the Commissioner's Office by October 2012.⁷⁸

In late December 2012, the SAI presented its Report on the Financial Audit of the Draft Act on the Annual Statement of Accounts of the Republic of Serbia 2011 Budget and its reports on the irregularities in the work of 46 audited entities.⁷⁹ The SAI established that eight local self-government units had not abided by the Budget System Act and had assumed obligations exceeding those approved in the budget.⁸⁰ The SAI said it would file misdemeanour charges against the Justice Ministry and the Ministry of Religions and the Diaspora and 16 public companies that had violated the public procurement regulations.⁸¹ The first final verdict for a breach of the public procurement procedure, initiated by the SAI, was rendered in Niš in November 2012.⁸²

5.6. *Recommendations*

1. Provide the Commissioner for Information of Public Importance and Personal Data Protection, the Commissioner for Protection of Equality, the Anti-Corruption Agency and the State Audit Institution with the resources to recruit appropriate complements of staff envisaged in their in-house job classification enactments.
2. Adopt the proposed amendments to the Protector of Citizens Act to strengthen the independence of this institution.
3. Strengthen the mechanisms for overseeing the implementation of the recommendations of the independent regulatory authorities⁸³.

78 See the statements by the Commissioner for Protection of Equality in B92's report *Discrimination is Widespread in Serbia*, available in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=10&dd=07&nav_category=12&nav_id=649494

79 See the list of audited entities on the SAI website <http://www.dri.rs/cir/mediji/saopstenja-za-javnost/111--26-2012-.html>

80 According to the SAI, Serbia's general government debt stood at 15,473.23 million EUR on 31 December 2012. According to the Debt Management Agency, it stood at 14,480.36 million EUR, i.e. 992.87 million EUR less than SAI established. The SAI also established during the audits that the general government debt (excluding restitution-related liabilities) stood at 51% of the GDP on 31 December 2012, which is higher than the 45% cap set in Article 27e of the Budget System Act and constitutes a violation of the general fiscal rule.

81 Fonet report on the SAI plan to file misdemeanour charges, available in Serbian at http://www.mc.rs/upload/documents/saopstenja_izvestaji/2012/12-26-12-drzavna-revizorska-institucija.pdf

82 Blic report on the judgment <http://www.blic.rs/Vesti/Drustvo/355301/Nis-Prva-pravosnazna-presuda-po-prijavi-DRI/>. The names of the persons the SAI launched proceedings against are available on the SAI website: <http://www.dri.rs/cir/mediji/saopstenja-za-javnost/77--20-2012-.html>.

83 In cooperation with the Protector of Citizens, the BCHR and the Lawyers' Committee for Human Rights YUCOM have designed a methodology for monitoring the implementation of the recommendations of the Protector of Citizens.

4. Amend the provisions allowing the initiation of the procedure to dismiss a member of the State Audit Institution Council with the consent of only 20 Assembly deputies to consolidate the independence of this institution.
5. Lay down stricter penalties for misdemeanours laid down in the Act on Free Access to Information of Public Importance.
6. Adopt an action plan for the implementation of the Personal Data Protection Strategy that will define the activities, expected effects, the authorities charged with the specific tasks and the deadlines within which the tasks have to be fulfilled.
7. Act in accordance with the Personal Data Protection Act, under which the government shall adopt enactments on the archiving of and measures to protect particularly sensitive data and adopt the requisite by-laws forthwith.
8. Adopt a law on the protection of whistle-blowers.
9. Adopt a law governing security checks.

6. Prohibition of Discrimination

6.1. *General*

Discrimination is prohibited by many international treaties ratified by Serbia – by both UN Covenants (the ICCPR and ICESCR), the ECHR and Protocol 12 thereto, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, ILO Convention No. 111 concerning Discrimination (Employment and Occupation)⁸⁴ and the UNESCO Convention against Discrimination in Education.⁸⁵

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

Discrimination is a criminal offence under the Criminal Code⁸⁶ (Arts. 128, 317 and 387). Many other laws also include anti-discriminatory provisions e.g. the

84 *Sl. list FNRJ (Dodatak) 3/61.*

85 *Sl. list SFRJ (Dodatak) 4/64.*

86 *Sl. glasnik RS 85/05, 88/05, 107/05, 72/09 and 111/09.*

Act on Churches and Religious Communities⁸⁷ (Art. 2), the Labour Act⁸⁸ (Arts. 18–23), the Employment and Unemployment Insurance Act⁸⁹ (Art. 8), the Act on the Basis of the Education System,⁹⁰ the Health Protection Act,⁹¹ etc. The Anti-Discrimination Act⁹² is a general anti-discrimination law which leaves room for special regulation of specific areas where discrimination occurs the most frequently.⁹³

6.2. *National Minorities and Minority Rights*

6.2.1. *General*

The Republic of Serbia has ratified the leading international documents protecting the rights of national minorities, including the Council of Europe Framework Convention for the Protection of National Minorities (hereinafter: Framework Convention), the European Charter for Regional and Minority Languages and the International Covenant on Civil and Political Rights. These documents, however, comprise merely blanket norms programmatic in character that define the goals states ought to achieve. Their provisions can hardly be applied directly. This is why the goals set in the international documents are primarily pursued by the adoption of relevant laws and Government policy measures at the national level.

The Constitution of the Republic of Serbia includes a number of provisions protecting the collective and individual rights of persons belonging to national minorities (Part II, Chapter 3). The constitutional provisions on national minorities largely follow the provisions of the Framework Convention. Several constitutional provisions, however, warrant criticism, not because they are in contravention of international law, but because they treat the social reality in Serbia inappropriately. Namely, the Constitution defines the Republic of Serbia as the state of Serbian people and all citizens who live in it (Article 1), whereby it gives the majority population precedence over the national minorities. The ethnic definition of the state has, however, been somewhat rectified by reference to “all citizens” in this provision and by Article 2(1), which specifies that sovereignty shall be vested in the citizens.

None of the international documents define the concept of a national minority, which is left to the will of the legislators of the contracting states. The Constitution of the Republic of Serbia does not include a provision defining a national

87 *Sl. glasnik RS* 36/06.

88 *Sl. glasnik RS* 24/05 and 61/05 and 54/09.

89 *Sl. glasnik RS* 36/09 and 88/10.

90 *Sl. glasnik RS* 72/09 and 52/11.

91 *Sl. glasnik RS* 107/05, 88/10, 99/10 and 57/11.

92 *Sl. glasnik RS* 22/09.

93 A detailed analysis of the Anti-Discrimination Act and the procedures for protection from discrimination it envisages is available in the *2011 Report*, I.4.1.2.

minority as a legal category. This definition is provided in the Act on the Protection of Rights and Freedoms of National Minorities (hereinafter: Minority Protection Act).⁹⁴ The Act affords protection to every group of nationals sufficiently representative but constituting a minority in the territory of the Republic of Serbia, belonging to a population group with a long-standing and firm bond with the territory and possessing distinctive features, such as language, culture, national or ethnic affiliation, origin or religion, distinguishing it from the majority of the population, and the members of which are characterised by their concern for the preservation of their common identity, including culture, tradition, language and religion. Under this definition, only nationals of Serbia may be considered persons belonging to national minorities, which places at a disadvantage stateless people and persons who cannot exercise the right to a legal personality (mostly Roma) in the territory of the Republic of Serbia.⁹⁵

The authors of the Constitution failed to incorporate in it the provision in the Framework Convention, under which any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities in the exercise of rights and freedoms flowing from the principles enshrined in the Framework Convention (Art. 20). The Constitution, therefore, does not comprise provisions prohibiting the abuse of national minority rights. This prohibition is, however, set out in the Minority Protection Act, which prohibits any abuse of rights aimed at violently changing the constitutional order, violating territorial integrity or guaranteed rights and freedoms or instigating racial, religious or ethnic hatred or intolerance (Art. 7(1)). Furthermore, the rights enshrined in the Act may not be exercised to achieve goals in contravention of the principles of international law or directed against public safety, morals or health of people (Art. 7(2)).

6.2.2. Ethnic Breakdown of the Population of the Republic of Serbia

The Statistical Office of the Republic of Serbia (SORS) on 29 November 2012 published a report on the ethnic breakdown of Serbia's population pursuant to the 2011 Census of the Population, Households and Dwellings.⁹⁶ The Census applied the concept of *habitual residence*, under which individuals are considered residents of the place where they spend most of their time regardless of where they are registered as residents. According to the Census, Serbia is populated by Serbs 83.32%, Albanians 0.08%⁹⁷, Bosniaks 2.02%, Bulgarians 0.26%, Bunjevci 0.23%, Vlachs 0.49%, Goranis 0.11%, Yugoslavs 0.32%, Hungarians 3.53%, Macedonians 0.32%, Moslems 0.31%, Germans 0.06%, Roma 2.05%, Romanians 0.41%,

94 *Sl. glasnik SRJ* 11/02.

95 More in the *2011 Report*, II.3 and 4.5.

96 Available at <http://media.popis2011.stat.rs/2012/Nacionalna%20pripadnost-Ethnicity.pdf>.

97 Most of the Preševo, Bujanovac and Medveđa Albanians boycotted the census, see *2011 Report*, II.4.2.1.

Russians 0.05%, Ruthenians 0.20%, Slovaks 0.73%, Slovenes 0.06%, Ukrainians 0.07%, Croats 0.81%, Montenegrins 0.54%, Others 0.24% while 2.23% of the respondents did not declare their nationality, 0.43% declared their regional affiliation and 1.14% were undeclared. The data on the ethnic breakdown of the population are important for understanding cultural diversity and the status of the ethnic groups in society, as well as for defining the policies and strategies to advance the status of persons belonging to ethnic groups.

6.2.3. Prohibition of discrimination against persons belonging to national minorities

The Constitution prohibits discrimination against persons belonging to national minorities and guarantees their equality before the law. The prohibition of discrimination is also guaranteed by the Minority Protection Act, the Anti-Discrimination Act and the Statute of the Autonomous Province of Vojvodina (Art. 20), the Act on the Basis of the Education System (Art. 44) and the Labour Act (Art. 18). The Constitution allows for affirmative action measures to achieve full equality of the majority population and persons belonging to national minorities but only in the event such measures are aimed at eliminating the extremely unfavourable living conditions which particularly affect them. The Framework Convention (Art. 4) and the Minority Protection Act (Art. 4) do not set these additional conditions for the implementation of affirmative action measures, and merely state that such measures shall be undertaken to promote full and effective equality. The Human and Minority Rights Office (erstwhile Human and Minority Rights Directorate) did not adopt the general enactments for the implementation of affirmative action measures in 2012.⁹⁸ The Human and Minority Rights Office was charged with implementing affirmative action measures pursuant to the Instructions on the Nationwide Enrolment of Students in the First Year of Bachelor's and Integrated Studies in Higher Education Institutions Founded by the Republic in the 2012/2013 School Year⁹⁹ enacted by the Ministry of Education and Science in June 2012. Under the Instructions, each higher education institution shall reserve an appropriate number of places at the top of its list of successful applicants drawn up after the entrance examinations with a view to enrolling Roma students by applying affirmative action. The Protector of Citizens, however, identified problems in the application of these affirmative action measures and discussed them with the Assistant Minister of Education and Science and the Chairman of the Roma National Council. They agreed that precise instructions needed to be enacted to ensure the implementation of these affirmative measures.

The prohibition of inciting racial, ethnic, religious or other inequality, hatred or intolerance is constitutional in rank (Art. 49 of the Constitution). Article 317

98 Human and Minority Rights Office Memo No. 000-03-00001/2012-01 of 25 October 2012.

99 Instructions on the Nationwide Enrolment of Students in the First Year of Bachelor's and Integrated Studies in Higher Education Institutions Founded by the Republic in the 2012/2013 School Year, No. 612-00-00-1139/2012-04 of 15 June 2012.

of the Criminal Code incriminates incitement of ethnic, religious and other hatred or intolerance.¹⁰⁰ The BCHR researched the courts' penal policies and case law regarding Article 317 of the Criminal Code and arrived at the conclusion that they have not been uniformly interpreting the elements of the substance of this crime, particularly where the act and the consequences of the crime are at issue. Namely, a linguistic interpretation of the provision suggests that this particular crime is an inchoate crime. In other words, no actual harm has to have occurred as a consequence of incitement. The substance of the crime lacking a consequence is at issue. The act of incitement suffices even if no consequence occurred.¹⁰¹ However, courts often require consequences in the form of "inciting or fomenting ethnic, racial or religious hatred or intolerance" before they declare someone guilty of this felony.¹⁰² In the view of some judges, the fact that the defendant's actions could have objectively resulted in such a consequence suffices.¹⁰³ This interpretation is definitely the correct one. Furthermore, the courts have different views on who this crime can be committed against, i.e. whether it was committed in the event the act (e.g. insult on ethnic grounds) was directed at a specific person belonging to a national minority or whether it had to have been directed against a specific racial, ethnic or religious group. In one judgment, the Novi Sad Appellate Court took the view that it was irrelevant against how many people the crime had been committed, that it was only relevant whether the act was liable to incite hatred, dissent or intolerance among people.¹⁰⁴ The Novi Sad Appellate Court's reasoning is correct and logical. The analysis of the judgments available to the BCHR lead to the conclusion that the penal policy is mild and that the courts attach excessive importance to mitigating circumstances, which is why they often pass lenient sentences.¹⁰⁵ Most courts

100 Whoever instigates or foments ethnic, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia shall be punished by imprisonment of six months to five years (paragraph 1). If the offence is committed by coercion, ill-treatment, compromising security, ridicule of national, ethnic or religious symbols, damage to property belonging to someone else, desecration of monuments, memorials or graves, the offender shall be punished by imprisonment of one to eight years (paragraph 2). Whoever commits the offences in paragraphs 1 and 2 of this Article by abuse of office or powers, or in the event these offences result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence specified in paragraph 1 of this Article by imprisonment of one to eight years, and for the offence specified in paragraph 2 of this Article by imprisonment of two to ten years (paragraph 3).

101 Data obtained pursuant to requests for access to information of public importance sent to all Appellate Courts and the Higher Courts in Subotica, Sombor, Zrenjanin, Novi Pazar, Negotin, Vranje and Niš.

102 Negotin Higher Court judgment 1K 17/11 of 30 May, 2011, p. 23. Kragujevac Appellate Court Judgment Kž1 4044/10 of 22 April. p. 3

103 Negotin Higher Court judgment 1K 49/10 of 8 December 2010, p. 29, Belgrade Appellate Court judgment Kž 1 287/11 of 8 March 2011, p. 5.

104 Novi Sad Appellate Court judgment of Kž I 431/10 of 3 February 2011, p. 3.

105 Niš Appellate Court judgment Kž 38/10, of 7 May 2009, Kragujevac Appellate Court judgment Kž 1 902/12 of 12 March 2012, p. 3.

sentence defendants found guilty of this crime to between three and six months' imprisonment and a suspended sentence.

Incitement of ethnic, religious or other hatred or intolerance is often not subjected to criminal prosecution or those found guilty of this offence are handed down misdemeanour penalties. The Municipality of Temerin has been the scene of inter-ethnic conflicts between the Serb and Hungarian populations for years. Several physical clashes broke out in 2011, but that was the first time that Hungarian youths were the assaulters, not just the victims. What is concerning is that these incidents were prosecuted as misdemeanours and that each of the defendants was convicted to 25 days' imprisonment. Fresh incidents on ethnic grounds, physical violence and graffiti conveying messages of hate and intolerance were registered in this municipality in 2012.¹⁰⁶ Seven members of the Hungarian organisation Youth Movement 64 Districts were arrested in October 2012 on suspicion of committing the crime of inciting racial, religious and ethnic hatred and intolerance.¹⁰⁷ The Novi Sad Higher Court launched an investigation against them.

In March 2012, unidentified vandals damaged the memorial plaque on the mass grave of Germans who perished in WWII camps in the village of Gakovo at Sombor. The local German association St. Gerhard filed a criminal report against the unidentified perpetrators. The Chairman of the association voiced his discontent because no one had been prosecuted for this incident yet.¹⁰⁸ According to information available to the BCHR, the perpetrators had not been identified by the end of 2012.

Several Albanians were deprived of liberty in 2012 due to the implementation of *reciprocal measures*, which actually amounted to discrimination on ethnic grounds in all respects. In the run up to the 6 May 2012 elections, on 27 March, the Kosovo police arrested four Serbs at the Bela zemlja administrative crossing and placed them into 48-hour police custody. The following were arrested on suspicion of undermining Kosovo's constitutional order: Vitina Serb Mayor Srećko Spasić, municipal administration staff Ivica Nojkić and Aleksandar Stojiljković and officer of the Ministry of Internal Affairs of Serbia Uroševac Police Administration Svetozar Nasković.¹⁰⁹ The police found them in possession of election propaganda material, the voter registers and the seal of the parallel Vitina municipality. The then

106 Centre for the Development of Civil Society study entitled *Temerin – the Present or the Future of Vojvodina*, authors Vladimir Ilić and Miroslav Keveždi, available in Serbian and Hungarian at http://cdcs.org.rs/index.php?option=com_docman&task=cat_view&gid=13&Itemid=60.

107 The seven suspected youths entered a cafe on JNA Str. 150 in Temerin in the night of 20/21 October 2012. They gave the guests the Nazi Sieg Heil greeting, pushed and insulted them on ethnic grounds, cursing their "Serbian mothers". The report on the incident is available in Serbian at <http://ww.novosti.co.rs/vesti/naslovna/aktuelno.291.html:402704-Temerin-Psovali-Srbezvali-Hitlera>

108 Information obtained in a telephone conversation with the Chairman of St. Gerhard.

109 See http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=03&dd=28&nav_id=79479.

Serbian Minister for Kosovo and Metohija said that the arrested Serbs were taking the voter registers to be updated.¹¹⁰ The Minister of Internal Affairs commented the arrest of the four Serbs as a “classical example of insolence and pressure” on the Kosovo Serbs and announced that the next few days would show “what it is like when reciprocal measures are introduced”.¹¹¹ The media reported that the arrest of two Albanians, Hasan Abazi and Adem Urseli, at Končulj were the reciprocal measures against the Kosovo authorities the Minister had mentioned.¹¹² The Minister later nevertheless denied that he had been referring to arrests of Albanians under reciprocal measures.¹¹³ All arrests based on political decisions to implement “reciprocal measures” (which are not grounds for deprivation of liberty under any Serbian law) would amount to arbitrary and illegal conduct by the executive authorities and the most severe violations of human rights fully negating the rule of law. It remains unknown whether the people, who had been deprived of liberty, had filed damage claims with the domestic courts over these arrests. If they have, the courts need to devote particular attention to the lawfulness and motives of these arrests.

The Gendarmerie arrested five Albanians suspected of war crimes in Bujanovac and the villages of Veliki Trnovac and Breznica on the eve of the general elections in Serbia, on 4 May 2012.¹¹⁴ The arrests caused revolt in the Albanian community in South Serbia and around 2,000 Albanians protested in the heart of Bujanovac.¹¹⁵ The representatives of Albanians in South Serbia organised a news conference in Preševo, at which the MP in the National Assembly, Riza Halimi, said that he expected of the Government to distance itself from police minister’s actions and statements.¹¹⁶ The five Albanians were set free because the crimes they were suspected of were covered by the 2002 Pardons Act. This is contradictory in itself given that no one may be pardoned for war crimes under international standards. Furthermore, the men were suspected of killing two young men in the ground security zone in 2001 while they were members of the Liberation Army of Preševo, Medveđa and Bujanovac (OVPBM). It is unclear how these actions could have been qualified as “war crimes” at all given that war crimes can be committed only during

110 Source http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=03&dd=28&nav_id=79491..

111 Source <http://www.rts.rs/page/stories/sr/story/9/Politika/1072216/Ta%C4%8Di+otvoreno+provocira.html>

112 Source http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=03&dd=28&nav_id=79491.

113 Source <http://srb.time.mk/read/154342d3ba/f6a6e281db/index.html>.

114 Available in Serbian at <http://www.tanjug.rs/novosti/41725/uhapseni-albanci-sprovedeni-umup-u-beogradu.htm>.

115 Source <http://www.rts.rs/page/stories/sr/story/9/Politika/1096680/Protest+Albanaca+u+Bujanovcu.html>.

116 The statements on the event by the Minister of Internal Affairs, Assembly Deputy Riza Halimi and Bujanovac Mayor are available in Serbian at <http://www.novosti.rs/vesti/naslovna/aktuelno.292.html:378228-Uhapseni-Albanci-otimali-i-kasapili-Srbe>

an international or internal armed conflict. Given that there were no armed conflicts in 2001, no war crimes could have been committed.

Marko Kasneti was arrested on the border with Serbia in April 2012 and charged with war crimes against Serbs in Kosovo in 1999.¹¹⁷ The arrest was widely reported by the media and used during the election campaign by Minister of Internal Affairs Ivica Dačić. Kasneti was tried by the Special War Crimes Court and in November 2012 convicted in the first instance to two years' imprisonment for the crimes he committed in Prizren¹¹⁸.

6.2.4. Equal Participation in Public Affairs and Political Life

The Constitution entitles persons belonging to national minorities to participate in public affairs and hold public offices under the same conditions as other citizens and states that the ethnic breakdown of the population and the adequate representation of persons belonging to national minorities shall be taken into consideration when recruiting the staff of state, provincial and local self-government authorities and public services. Under the Minority Protection Act, the ethnic breakdown of the population must be taken into account when recruiting staff of public services, including the police (Art. 21). There are, however, no records on the representation of persons belonging to ethnic minorities in public affairs. Although keeping of such records appears not to be in accordance with the freedom to express one's ethnic affiliation guaranteed by the Framework Convention, the Constitution and the Minority Protection Act, the Republic of Serbia should nevertheless collect and register such data, particularly since records of the ethnic breakdown of the population are already kept for other purposes (e.g. to establish whether the right to the official use of a minority language may be or is realised). Namely, the SORS already has data on the ethnic breakdown of the population and the ethnicity of the individual citizens it collected during the 2011 Census of the Population, Households and Dwellings. Given that the SORS collected the ethnicity data fully in accordance with the law (the census takers advised the citizens that they were not under the obligation to declare their ethnicity), these records could prove useful in establishing the representation of national minorities in public affairs and political life. Although these records may not fully reflect the actual representation of national minorities in the administration of public affairs (since the respondents were not under the obligation to declare their ethnicity), they might serve as an indicator of the need to introduce affirmative action measures to ensure full equality in participation in public affairs and political life. In any case, any collection of data on ethnicity affiliation would, of course, have to be voluntary.

117 See the B92 report at <http://www.b92.net/eng/news/crimes-article.php?mm=4&dd=14&yyyy=2012>.

118 See the BIRN report at <http://www.balkaninsight.com/en/article/ex-kla-sentenced-for-war-crimes-in-prizren>.

Fifty two of the 91 political parties in Serbia are registered as national minority parties.¹¹⁹ A national minority party may be established by a minimum of 1,000 adult nationals of Serbia with a legal capacity, i.e. it needs a tenth of the signatures a non-minority political party has to collect to register. The natural threshold applies to national minority parties and coalitions, wherefore they are awarded seats in parliament even if they won less than 5% of the votes cast. All parties, the main goal of which is to represent and advocate the interests of a national minority and to protect and advance the rights of persons belonging to a national minority pursuant to international legal standards, shall be considered political parties of national minorities. The Republican Election Commission (REC) shall declare a party or a coalition that submitted an election ticket a national minority political party or coalition when it proclaims its election ticket at the request of the nominator of the election ticket filed together with the election ticket (Article 81, Act on the Election of People's Deputies).¹²⁰ Every voter, candidate or election ticket nominator may challenge a REC ruling, action or failure to act. REC rulings on the complaints may be appealed with the Administrative Court.

The current convocation of the Assembly includes five deputies of a Hungarian minority party, three deputies of a Bosniak minority party, while the Macedo-

119 The Roma national minority is represented by seven political parties: the Democratic Union of Roma, the Roma Democratic Party, the Roma Democratic Left, Srđan Pajin's Roma Party, which is part of the ruling coalition, the United Party of Roma, the Roma Party of Unity and the Union of Roma of Serbia. The interests of the Hungarian national minority are represented by the Democratic Party of Vojvodina Hungarian headed by András Ágoston, the Hungarian Hope Movement led by Bálint László, the Alliance of Vojvodina Hungarians chaired by István Pásztor, the Civic Alliance of Hungarians headed by László Rác Szabó, the Democratic Fellowship of Vojvodina Hungarians led by Áron Csonka and the Party of Hungarian Unity chaired by Zóltan Smieszko. The Albanian minority is represented by the following parties: Riza Halimi's Party for Democratic Action, Ragmi Mustafa's Democratic Party of Albanians, the Democratic Union of the Valley, the Democratic Union of Albanians, the Party for Democratic Progress and the Democratic Party. The following four parties represent the Vlach national minority in political life (the Vlach Democratic Party of Serbia, "Serbia in the East", the Vlach Democratic Party and None of the Above), headed by People's Deputy Nikola Tulimirović. The interests of the Croatian national minority are represented by the Democratic Alliance of Croats in Vojvodina and the Democratic Community of Croats. Montenegrins, Macedonians and Goranis are each represented by one party: the Montenegrin Party, the Democratic Party of Macedonians and Orhan Dragaš's Civic Initiative. Ruthenians, Slovaks and Romanians are each represented by two parties, while the Bunjevci and the Bulgarian national minorities are each represented by three parties. Eight of the 12 existing Bosniak parties were formed in 2000; the Bosniak People's Party, headed by Mujo Muković, Serbian Progressive Party's coalition partner, was established in 2012. The eldest Bosniak party in Serbia is the Sandžak Democratic Party (1990), after which the following parties were established: Party of Democratic Action of Sandžak (1996), the Bosniak Democratic Party of Sandžak headed by Esad Džudžević (1996) and the People's Movement of Sandžak (1999).

120 *Sl. glasnik RS* 35/00, 57/03 – Constitutional Court Decision, 72/03 – other law, 75/03 – corrigendum of the other law, 18/04, 101/05 – other law, 85/05 – other law, 28/11 – Constitutional Court Decision and 36/11 and 104/09 – other law.

nian, Croatian and Roma minority parties each have one deputy in parliament. The Democratic Party of Albanians, headed by the current Mayor of Preševo and running the municipality, boycotted the republican parliamentary elections and called on other ethnic Albanian parties to follow suit.¹²¹ In the view of the leader of this party, the state authorities have for years now not expressed any interest in the status of Albanians in the Preševo valley. The Coalition of the Albanians of the Preševo Valley, comprised of seven Albanian minority parties, however, ran in the elections and won one seat in the National Assembly. The Albanian national minority is thus represented in the National Assembly by Riza Halimi, an independent people's deputy. The Bosniaks have two ministers in the Government: Sandžak Democratic Party leader Rasim Ljajić is the Deputy Prime Minister and Minister of Foreign and Internal Trade and Telecommunications, while the leader of the Party of Democratic Action of Sandžak, Sulejman Ugljanin, is the Minister without Portfolio.

6.2.5. Freedom to Express One's National Affiliation

Under Article 3 of the Framework Convention, every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. This freedom is enshrined both in the Constitution and the Minority Protection Act (Art. 5). Furthermore, the Personal Data Protection Act qualifies data regarding ethnicity, race, language and religion as particularly sensitive data that may not be processed without the voluntary consent of the person they concern. Violation of the freedom to express one's national affiliation is a crime (Article 130 of the Criminal Code).

A problem regarding the freedom to express one's ethnic affiliation arose with respect to the Romanian national minority in 2012. In early March 2012, Romania boycotted the approval of Serbia's EU candidate status because of the problems the Romanian national minority had in exercising its rights. It changed its view after a protocol on the rights of the Romanian minority in Serbia was signed. The representatives of Serbia and Romania agreed that Serbia would allow persons belonging to the Romanian national minority to freely declare themselves Romanians would be entitled to education, religious services and access to media in Romanian.

6.2.6. Right to Preservation of Identity

The Constitution guarantees to persons belonging to national minorities the rights to express, preserve, foster, develop and publicly express their national, ethnic, cultural and religious specificities; use their symbols in public places; use their

121 Source <http://www.blic.rs/Vesti/Politika/317104/MustafaPozivam-Albance-da-bojkotuju-srpske-izbore>.

languages and scripts; and have proceedings conducted in their languages by state authorities, organisations vested with public powers, provincial and local self-government authorities in communities in which they account for a substantial share of the population; to education in their languages in state and provincial institutions and to establish private educational institutions; to use their first and last names in their native languages; to write the traditional local names of streets, settlements and topographic signs in their languages in communities in which they account for a substantial share of the population; and to full, timely and impartial information in their languages, including the rights to express, receive, impart and exchange information and ideas and to establish their own media outlets in accordance with the law (Art. 79). The Constitution guarantees to the national minorities the right to establish educational and cultural associations to be funded from voluntary contributions. The Minority Protection Act lays down that the state shall provide such associations with financial aid to the extent possible and ensure public service broadcasts of cultural content in the languages of national minorities. Cultural institutions founded by the state are under the obligation to ensure the presentation and protection of the cultural and historical heritage of the minorities in their territory and involve the representatives of National Minority Councils in decisions on the manner of presenting the national minorities' cultural and historical heritage.

During his visit to Novi Bečej and talks with the representatives of the municipal Council for Inter-Ethnic Relations, the Protector of Citizens learned that this municipality faced major problems caused by the destruction of bilingual signs and inscriptions of settlements inhabited by persons belonging to the Hungarian national minority and insufficient informing of the national minorities in their native languages. The Council also told the Protector of Citizens that the municipal administration was not forwarding it the Assembly session materials, wherefore it was unable to render its opinions on areas within its purview to the Municipal Assembly on time.¹²²

The Bujanovac local authorities' decision to rename streets with a view to affirming the national identity of the local population gave rise to inter-ethnic tensions. The Bujanovac Municipal Assembly upheld the suggestion of the Albanian political parties to change the names of 23 city streets, which had borne the names of Serbian historical figures, and name them after well-known Albanian figures. In protest, the local Serb councilmen walked out of the Assembly session, at which the decision was taken. The Municipal Commission, charged with renaming the streets, is comprised of seven members, four of whom are Albanians. Every local self-government decision on street names is, however, subject to the approval of the ministry charged with local self-government affairs.¹²³ The then Minister qualified

122 http://www.ombudsman.pravamanjina.rs/index.php/sr_YU/podaci/mape

123 In the event the content of a decision on the names of parts of the settlements does not correspond to historical or real facts, violates general and state interests, offends national or religious feelings or public morals, the ministry charged with local self-government affairs will refuse to

the decision on renaming the streets as yet another of the many moves demonstrating the political immaturity of the Bujanovac municipal management, as a trite political promotion of specific Albanian politicians aimed at destabilising the situation in the municipality.¹²⁴

A monument with the inscribed names of 27 members of the so-called Liberation Army of Preševo, Bujanovac and Medveđa (OVPBM), who had died in the attempt to violently secede the Preševo Valley from Serbia, was erected in November 2012 on the square in front of the Preševo municipal headquarters. The chairman of the OVPBM veterans association did not think that the monument was a provocation of the Serbian authorities, because it was erected in a town mostly inhabited by Albanians and, furthermore, most OVPBM members were pardoned back in 2002.¹²⁵ A monument with the names of killed OVPBM troops has been standing in the main street of the village of Veliki Trnovac at Bujanovac for ten years now. The Government at first acted with restraint, concerned that the removal of the Preševo monument might give rise to security issues. Such monuments create tensions between the Albanian and Serbian populations, particularly when they are erected in places burdened by a conflict-ridden past. The monument was ultimately removed in early 2013, in the presence of strong police forces. Its removal passed without major incidents.¹²⁶

At the proposal of the National Council of the Bosniak National Minority (NCBNM with a technical mandate), a memorial plaque was erected in Novi Pazar on 4 August 2012 to mark the anniversary of Bosniak cultural heritage and commemorate a controversial figure Aćif Hadžiahmetović. While some Bosniak representatives believe that he was a hero and their legitimate representative because he successfully defended Novi Pazar from the Chetniks, others believe that he was the commander of the Nazi Novi Pazar forces and founder of the Albanian Fascist Organisation *Balli Kombëtar* (National Front). The plaque provoked fierce reactions both in the local community and the Serbian Government. The Ministry of Justice and State Administration ordered the Novi Pazar City Administration to remove the plaque.¹²⁷ A conclusion on compliance with the order was to have been adopted at a special session of the City Council. However, since such a conclusion was not adopted on time, the Administrative Inspectorate of the Ministry of Justice and State Administration filed a misdemeanour report against the head of the Novi Pazar City Administration. The leading local NGOs also called for the removal of the plaque.

issue its consent to the provisions within sixty days from the day it receives the draft decision (Art. 94(1), Local Self-Government Act, *Sl. glasnik RS* 129/2007).

124 *Vreme*, 9 February, p. 9.

125 See the B92 report in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=11&dd=24&nav_category=12&nav_id=662979

126 A detailed analysis of this event will be provided in the *2013 Report*.

127 *Danas*, 13 August, p. 5.

6.2.7. Use of Languages

The right to linguistic identity, as a fundamental collective right of national minorities, is protected by the European Charter for Regional or Minority Languages. The Charter also binds the States Parties to ensure that the judicial and administrative authorities and public services communicate with persons belonging to national minorities in their languages (under specific conditions). The Charter specifies the alternative measures the States Parties are to undertake in their education systems to protect minority languages. These measures apply to all levels of education (preschool, primary, secondary, technical, vocational, university and adult education) and bind the States to make available full or a substantial part of education in the relevant minority languages, to provide for the teaching of the relevant regional or minority languages as an integral part of the curriculum or to provide facilities for the study of these languages as university and higher education subjects (Art. 8). The Charter also binds the States Parties to provide the basic and further training of the teachers required for holding classes in minority languages. Under Article 2 of Protocol No. 1 to the ECHR, no person shall be denied the right to education and in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical conviction. This Article, therefore, does not oblige the states to comply with the parents' preferences about the language in which their children are educated; nor can linguistic preferences be subsumed under a "religious and philosophical conviction". Although it appears that the right to education would be meaningless if it did not entail the right to education in a national minority language, the interpretation of Article 2 of Protocol No. 1 does not entail the state's obligation to provide education in minority languages at its own expense; nor does Article 2 guarantee the parents and children the right to demand to be schooled in a language of their choice.¹²⁸ The right to education guarantees to persons subject to the jurisdiction of the states signatories to Protocol No. 1 the right, in principle, to avail themselves of the means of instruction existing at a given time.¹²⁹ To interpret the right to education in conjunction with the prohibition of discrimination in Article 14 of the ECHR as conferring on everyone within the jurisdiction of a State a right to obtain education in the language of his own choice would lead to absurd results.¹³⁰ For the right to education to be effective, the state must officially recognise also studies in other languages, which are not officially in use.

128 See the ECtHR judgment *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium*, Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63 and 2126/64 of 23 July, 1968.

129 *Ibid.*

130 *Ibid.*

Under the Constitution, the Serbian language and the Cyrillic script shall be officially in use in the Republic of Serbia. The official use of other languages and scripts is governed by the Official Use of Languages and Scripts Act,¹³¹ under which the municipalities shall specify in their statutes which minority languages are in official use in their territories. The exercise of this right is safeguarded primarily by the cities and municipalities, because the right to the official use of a language is exercised primarily in the local community institutions. Under the Minority Protection Act, the language and script of a national minority shall be officially used on an equal footing in the municipality in the event the national minority accounts for at least 15% of the population of the municipality according to the last census results. Under the Statute of the Autonomous Province of Vojvodina, apart from the Serbian language and script, the Vojvodina provincial authorities and organisations shall also officially use the following languages and scripts: Hungarian, Slovak, Croatian, Romanian and Ruthenian. Albanian, Bosnian and Bulgarian are officially in use in several other Serbian municipalities. National Minority Councils propose the introduction of the languages and scripts of national minorities as official languages and scripts in local self-government units.

The IT and E-Government Sector of the Vojvodina Secretariat for Education, Administration and National Communities in 2012 created a database on the official use of languages and scripts in the territory of the Autonomous Province of Vojvodina. The database includes data on the ethnic breakdown of the population in each city and municipality, data on administrative proceedings conducted in national minority languages and on funding the Provincial Secretariat for Education, Administration and National Communities awarded cities and municipalities to promote multilingualism in the territory of the AP of Vojvodina. The data were collected to provide a more comprehensive overview of the use of national minority languages and define more precisely the criteria for allocating budget funds to promote multilingualism.

During its normative review of the constitutionality of the Act on the Competences of the AP of Vojvodina, the Constitutional Court qualified as unconstitutional the provision authorising the AP Vojvodina to govern the official use of national minority languages and scripts in the territory of Vojvodina via its authorities, given that the Constitution lays down that the official use of languages and scripts shall be governed by primary and not by secondary legislation.¹³² Given that the Local Self-Government Act entitles local self-government units traditionally inhabited by persons belonging to national minorities to introduce the official use of national minority languages and scripts on an equal footing, the Constitutional Court also qualified as unconstitutional the provision in the Act on the Competences of the AP of Vojvodina authorising the AP of Vojvodina not only to govern which national mi-

131 *Sl. glasnik RS* 45/91, 53/93, 67/93, 48/94, 101/05, 30/10.

132 Constitutional Court Decision No. I Uz – 353/2009, of 10 July 2012.

nority languages will be officially used by its authorities, but also authorising it to lay down which, if any, national minority languages will be officially used in each individual city or municipality in the Province instead of the local self-government units. This unconstitutional provision had actually restricted the right to local self-government. In its Decision, the Constitutional Court found that the provision allowing the AP of Vojvodina to provide the national minorities with education in their native languages at all levels was not unconstitutional, because this provision affords additional rights to national minorities pursuant to provincial regulations, which the Constitution allows, and which are funded by the Autonomous Province.

Notwithstanding whether a national minority language is officially in use in a local self-government unit, the Vital Records Act¹³³ lays down that the names of persons belonging to national minorities shall be entered in the vital records in the language and orthography of the national minority. Under the Act on the Basis of the Education System, persons belonging to national minorities shall be schooled in their native languages, and, exceptionally bilingually or in the Serbian language (Art. 9 (2)). These legal provisions are, however, not always applied in practice.

During their working visit to Bosilegrad, the staff of the Protector of Citizens' Professional Department were told by the representatives of the National Council of the Bulgarian National Minority and the local non-government organisations that ethnic Bulgarians, as members of an autochthonous national minority accounting for the majority of the population in this municipality, were not exercising their right to education and the official use of their language and script in the manner and at the level guaranteed by the law, because the relevant procedures envisaged by the law were not initiated on time by the schools and local self-governments. The problems in the work of the National Council, caused by the predominant influence of political parties and lack of funding, have obstructed the Council's performance of its duties in the citizens' best interests, which, inter alia, resulted in the end to the publication of a Bulgarian language newspaper, which had been issued for decades.¹³⁴

After a decade long good practice, ethnic Hungarian applicants for the Novi Sad Law School were placed at a disadvantage *vis-à-vis* the applicants schooled in Serbian in 2012. Namely, the applicants, who had completed secondary education in Hungarian, were given a Serbian Language and Literature test in Hungarian during the admission testing without any forewarning. Their overall scores were poorer and they did not make the list of students funded from the budget.¹³⁵ The Novi Sad Law School rejected the complaints filed by four applicants. The Hungarian diplomatic mission expressed the expectation that the entrance exams would be repeated.

133 *Sl. glasnik RS* 20/09.

134 Source: <http://www.ombudsman.pravamanjina.rs/index.php/sr>.

135 See the press release by the National Council of the Hungarian National Minority, available in Serbian at <http://www.mnt.org.rs/sr/8-Vesti-iz-obrazovanje/547-Saopstenje-za-javnost>.

The Provincial Ombudsman assessed that there were no irregularities during the admission tests.¹³⁶ Dragan Petrović, who heads the Vojvodina Secretariat for Science and Technological Development, said that agreement was reached with the National Council of the Hungarian National Minority to leave things be for the 2012/2013 school year but that all unclear entrance exam rules needed to be clarified in detail before the next school-year.

The National Council of the Hungarian National Minority did not support the Subotica primary school Kizur Ištvan idea to open a bilingual Hungarian-Serb class. The Council Education Committee Chairwoman Joó Horti Livia said that experiences of foreign countries demonstrated that bilingual classes did not facilitate the preservation of minority languages, but, rather, served assimilation much better.¹³⁷

The National Council of the Bosniak National Minority with a technical mandate (headed by Esad Džudžević) and the self-styled National Council of the Bosniak National Minority (headed by Samir Tandir) sent a letter to the President of Serbia, the Government and the Education Ministry demanding that the Bosnian language be introduced as a mandatory subject in the education system. In response to the MPS' questions in parliament, the Education Minister said that the legal procedure had to be complied with, i.e. that the textbooks proposed by the Council had to be approved by the competent educational institution.¹³⁸ The Minister stressed that each textbook had to be in line with the curriculum "given the hypothetical possibility that a textbook to be used in class might offer a different interpretation of some events from our imminent or distant past, which is actually the case when our region is at issue, and particularly about some events outside the region." Esad Džudžević sent another letter to the Minister specifying that his NCBNM had drafted a document titled Model of Education of Sandžak Bosniaks in the Republic of Serbia on the basis of the recommendations of the Education Improvement Institute two years ago and that all the requirements were in place for introducing the education in Bosnian in schools. Džudžević called on the Education Ministry to publish the curricula in the Model of Education of Sandžak Bosniaks in the Republic of Serbia in the Education Gazette to facilitate their application.¹³⁹ Assistant Education Minister Vesna Fila, however, said that the Bosniak curricula suffered from specific shortcomings and that they were in need of improvement.¹⁴⁰

136 See <http://www.blic.rs/Vesti/Vojvodina/334244/Ombudsman-Nije-bilo-nepravilnosti-tokom-prijemnog-ispita-za-Pravni-fakultet-u-Novom-Sadu>.

137 See the report in Serbian entitled *National Council of Hungarians against Bilingual Class*, available at http://www.rtv.rs/sr_lat/vojvodina/subotica/nacionalni-savet-madjara-protiv-dvojezicnog-odeljenja_311554.html.

138 Source: MP questions in August 2012, transcript, available in Serbian at http://www.parlament.gov.rs/Poslani%C4%8Dka_pitanja_u_avgustu.15768.941.html

139 See the report in *Danas* of 21 September, p. 6.

140 http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=12&dd=26&nav_category=12&nav_id=672584.

However, the education in Bosniak was due to begin in the second semester of the ongoing school year.¹⁴¹

The NGO Youth Initiative for Human Rights sent an appeal to the Ministry of Education, Science and Technological Development to provide the Albanian students in the municipalities of Bujanovac, Medveđa and Preševo with textbooks in their native language. The ABC primer was the only textbook available in Albanian during the previous school-year. According to the data of the National Council of the Albanian National Minority, around 100 different primary school and around different 400 secondary school textbooks in Albanian are needed for unhindered education in Albanian.

There is only one primary school providing education in both Serbian and Albanian in the municipality of Bujanovac. The Coordination Body for South Serbia organised Serbian language lessons for persons belonging to the Albanian national minority in Preševo, Bujanovac and Medveđa to facilitate the subsequent integration of Albanians in the state institutions. The classes, attended by students between 15 and 30 years of age, began on 24 November 2012 and are held twice a week.¹⁴²

6.2.8. The Right to Full and Impartial Information in National Minority Languages

The right of persons belonging to national minorities to full and impartial information is guaranteed both by the Constitution and the Minority Protection Act, which lays down that the state shall ensure the broadcasting of news, cultural and educational content in national minority languages on public service radio and TV stations and that it may also establish radio and TV stations to broadcast programmes in national minority languages (Art. 17). Under Article 17 of the Public Information Act, the Republic, autonomous provinces and local self-governments are under the obligation to secure part of the funding or other conditions for the work of media outlets in national minority languages. Most media in national minority languages in the multi-ethnic municipalities are not privately owned and are funded by the cities and municipalities, i.e. they were founded by the cities and municipalities. The adoption of the Broadcasting Act in 2002 seriously brought into question the survival of electronic media in minority languages because this Act mandated the privatisation of all electronic media by 31 December 2007 except for the public service broadcaster Radio Television of Serbia. The Vojvodina Secretary for Culture and Information, Slaviša Grujić, was of the view that the privatisation of minority language media outlets founded by local self-governments would result in the reduction of the number of programmes in minority languages.¹⁴³ Furthermore, there

141 http://www.danas.rs/danasrs/drustvo/bosanski_jezik_u_sandzackim_skolama.55.html?news_id=253424

142 <http://www.kt.gov.rs/cr/news/arhiva-vesti/mladi-albanci-masovno-uce-srpski-jezik.html>.

143 Opinion of the Provincial Secretary for Culture and Information regarding the privatisation of *Radio Subotica* available in Serbian at <http://www.youtube.com/watch?v=YFpGvM6V8Js>.

is always the risk that the new owners will stop broadcasting minority programmes, particularly if they bought the outlet for another reason (to gain possession of its land and buildings, for instance, rather than to inform). The media privatisation process should have been completed by now, but the privatisation of minority media was suspended and many of the outlets founded by cities and municipalities have not been privatised yet. The minority deputies in the National Assembly last year fiercely opposed the Draft Media Strategy envisaging the privatisation of all outlets apart from the Serbian and Vojvodina public service broadcasters. They were of the view that the Strategy had to include provisions allowing the National Minority Councils to found local media outlets. The Strategy was, however, adopted in September 2011, without the provisions sought by the minorities.

The Ministry of Culture, Information and Information Society brought into question the realisation of the constitutional and legal principle guaranteeing the protection of the national minorities' cultural identities and languages when it stopped co-funding at least one newspaper in Albanian, Bosnian, Bulgarian and Roma languages. The Ministry has been implementing the Strategy for the Development of the Public Information System¹⁴⁴ which, inter alia, prevents print media and other outlets founded by National Minority Councils from applying for funds at tenders unless they had already been approved co-funding from the budget. The Protector of Citizens expects that the Ministry of Culture, Information and Information Society will create the legal and actual conditions for continuing the publication of at least one newspaper in Albanian, Bosnian, Bulgarian and Roma languages.¹⁴⁵

6.2.9. National Councils of National Minorities

The National Councils of National Minorities are sui generis legal persons vested with extremely important public powers aimed at ensuring the realisation of the national minorities' rights to self-government in culture, education, information and official use of languages and scripts.¹⁴⁶ The National Minority Councils were established under the Minority Protection Act and their powers and election are governed in greater detail by the National Councils of National Minorities Act (NSNMA).¹⁴⁷ According to the regulations in force, however, the concept of the NSNMA better suits to the needs and capacities of the national minorities that are larger, better organised, concentrated in a particular area, that have influential political parties represented at all government levels. These minorities (specifically, their political elites that de facto represent their interests) have no problem availing themselves of the opportunities provided by the complex and complicated NSNMA. The other minorities, which are not as united, live in diverse parts of the country or lack the capacities or the financial and technical support, have availed themselves of

144 *Sl. glasnik RS* 75/11.

145 Opinion of the Protector of Citizens of 20 June 2012.

146 More on the powers and election of National Councils in the *2011 Report*, II 4.13.6

147 *Sl. glasnik RS*, 72/09.

merely a small part of the opportunities afforded by the Act. The NSNMA governs the fundamental issues regarding the internal make-up of the Councils in a very general manner. Under the Act, a National Minority Council shall have a Chairperson, who shall act for and on behalf of the Council, an executive authority and committees for education, culture, information and the official use of languages and scripts. The Act does not specify whether a National Minority Council may also establish committees dealing with other fields which fall under minority rights in a broader sense e.g. a committee that would focus on the minority's proportionate representation in public life. Such committees have been established in practice, although the Act does not explicitly provide for that possibility.¹⁴⁸

Under the NSNMA, National Minority Councils shall take part in the allocation of budget funds for national minorities awarded at tenders for funding programmes and projects in the fields of culture, education, information and the official use of languages and scripts. The implementation of numerous projects was brought into question in 2012, due to a two-month delay in the payment of funds for the work of the National Minority Councils. Furthermore, the then Human and Minority Rights Directorate sent all the National Minority Councils a letter notifying them that the funds earmarked for July 2012 would be cut by 20 percent.¹⁴⁹ There were, however, no delays in transferring budget funds to the National Minority Councils until the end of the year.

National minorities have experienced a problem in realising their rights via the National Minority Councils due to the incompatibility of the Culture Act and the NSNMA, notably the provisions on the establishment of cultural institutions by the local self-governments and the transfer of the founding rights to these institutions to the National Minority Councils. Namely, under the Culture Act, local self-governments may establish cultural institutions to preserve and develop the cultural specificities and preserve the cultural identities of the national minorities and they may amend the founding documents of an existing cultural institution at the proposal of a National Minority Council and declare it of particular relevance to the preservation of the national minority's national identity. However, the NSNMA lays down that the state, provinces or local self-governments, as founders of cultural institutions of particular relevance to the development of a national minority's culture, shall transfer part of their founding rights to the National Minority Councils. The National Minority Councils have written to the Provincial Ombudsman asking for the alignment of the Culture Act and the NSNMA.

The Republic of Serbia Council for National Minorities, which should be monitoring the realisation of the rights of the national minorities, was established

148 The National Council of the Roma National Minority, for instance also established a Housing Committee, an Employment Committee and a Health Committee. It had initially planned to establish 19 committees.

149 Source: http://www.danas.rs/danasrs/drustvo/zakocen_rad_na_projektima.55.html?news_id=244455.

under a Government Decree in 2009. A total of 19 National Minority Councils and the Alliance of Jewish Municipalities are registered in Serbia. The register of the National Minority Councils is kept by the Ministry of Justice and State Administration.

The problem regarding the legitimacy of the two National Councils of the Bosniak National Minority was not resolved in 2012. There are two National Minority Councils representing the interests of persons belonging to the Bosniak national minority – one of them has a technical mandate and is chaired by Esad Džudžević, while the other one, chaired by Samir Tandir, is not recognised by the authorities. In early January 2012, the Bosniak National Minority Council with a “technical mandate” submitted to the National Assembly for a public debate a Declaration on the Rights and Freedoms of Bosniaks in Serbia, in which it claims that the Bosniaks’ rights in various fields are jeopardised.¹⁵⁰ The document was disseminated to Bosniak political parties, institutions, organisations and NGOs, and to international organisations. The Declaration was rejected by the Bosniak National Council chaired by Tandir Samir as illegitimate.

6.2.10. Prohibition of forced assimilation

The Constitution prohibits forced assimilation (Art. 78). The Minority Protection Act prohibits both forced assimilation (Art. 5(3)) and measures changing the ethnic breakdown of the population in areas inhabited by national minorities and impeding the realisation of the rights of persons belonging to national minorities (Art. 22). Article 23 of the Minority Protection Act allows persons belonging to a national minority and National Minority Councils to file damage claims with the competent courts to protect their rights. The Act also allows National Minority Councils to file constitutional appeals (on their own behalf or on the behalf of persons belonging to a national minority).

Under the NSNMA, National Minority Councils shall initiate proceedings before the Constitutional Court, the Protector of Citizens, the Provincial Ombudsman and other competent authorities if they believe that a constitutionally or legally guaranteed right or freedom of a person belonging to a national minority has been violated (Art. 10).

The Official Use of Languages and Scripts Act lays down that its implementation shall be overseen by the ministries charged with administration, transportation, urbanism and housing-communal affairs, education, culture and health within their purviews (Art. 22). Under Article 22 of the NSNMA, National Minority Councils shall propose to competent authorities to perform oversight of the official use of languages and scripts.

150 <http://www.bnv.org.rs/wp-content/uploads/2012/01/Deklaracija-nacrt-final.pdf>.

6.2.11. Protection of the Rights of Persons Belonging to National Minorities before Independent Regulatory Authorities

The Protector of Citizens reviewed 130 cases based on complaints from persons belonging to national minorities from January to October 2012. The exact number of completed reviews and the content of the decisions, as well as any initiatives to launch criminal or disciplinary proceedings against the responsible persons, will be published in the Protector of Citizens' 2012 Annual Report.¹⁵¹

The Protector of Citizens established that the Belgrade City Administration, the Administration Secretariat's Sector for the Civil Status of Citizens, Vital Records and Voting Rights Savski venac violated the right of a person belonging to a national minority to enter his first and last names in the vital records in the language and script of the national minority he belongs to. The authority complied with the recommendation of the Protector of Citizens and persons belonging to national minorities can now enter their names in the vital records in their native languages and scripts *a posteriori*.

During his review of a complaint filed by a resident of Belgrade, the Protector of Citizens established that opinions of court-sworn interpreters are not obtained *ex officio* in procedures in which decisions are taken to enter the names of persons belonging to national minorities in their native languages or scripts in the vital records after their initial entry in the vital records. Such conduct is not in accordance with the Vital Records Act,¹⁵² the Instructions on the Keeping of Vital Records and the General Administrative Procedure Act. This situation regards cases when the applicants have no evidence or any public document indicating the form of their first and last names in a national minority language and it is necessary to engage a court-sworn interpreter to ensure that the names are properly entered. The Protector of Citizens recommended to the then Ministry for Human and Minority Rights, State Administration and Local Self-Government to notify all vital records departments that they needed to apply the valid Instructions on the Keeping of Vital Records and vital records forms and of their obligation to obtain the opinions of the court-sworn interpreters *ex officio* by applying the provisions of the General Administrative Procedure Act. The Ministry complied with the recommendation of the Protector of Citizens, which should ensure the uniform application of the procedure by all vital records departments in Serbia and establish legal certainty with respect to the realisation of the rights of national minorities.

In the view of the Protector of Citizens, the rights of persons belonging to national minorities are not realised in the manner which is in their best interest even in municipalities in which they account for the majority population. The Protec-

151 Protector of Citizens Memo No 35/258/11 of 18 October 2012.

152 In the event specific data were not entered in the vital records due to a *force majeure* or an extraordinary situation or for another similar reason, the data shall be entered *a posteriori* pursuant to a decision of the competent authority.

tor of Citizens issued recommendations regarding the right to the official use of languages and scripts of national minorities to the local authorities in Novi Pazar, Sjenica, Tutin and Prijepolje and established that local authorities had failed to display the names of the authorities exercising public powers, local self-government units, settlements, squares and streets and other toponyms in the language of the Bosniak national minority pursuant to the Official Use of Languages and Scripts Act, although they introduced Bosnian as an official language in their Statutes.

Acting on a complaint of a Subotica resident, the Protector of Citizens established that the Republican Geodetic Authority Cadastre Sector issued copies of cadastral plans only in Serbian and in the Cyrillic script. The Republican Geodetic Authority did not ensure the technical prerequisites for issuing copies of the cadastral plans in the languages of national minorities as well. The Protector of Citizens issued a recommendation to the Republican Geodetic Authority to put in place the technical prerequisites ensuring that the persons belonging to national minorities can exercise their right to the official use of their native languages and scripts.

The Provincial Ombudsman received 25 complaints from individual citizens and 10 complaints from National Minority Councils claiming violations of the rights of persons belonging to national minorities in the January – September 2012 period.¹⁵³ Prompted by media reports, the Provincial Ombudsman also launched several proceedings on his own initiative. The competent authorities of individual local self-governments also addressed the Ombudsman, seeking his views on the application of the NSNMA.

Individual citizens complained of a variety of issues. Most complaints were found to be ill-founded or not within the purview of the Provincial Ombudsman.¹⁵⁴ The citizens alleged that the state authorities and local self-government units violated their right to the official use of their national minority language and script or that the local self-government units were not taking into account the ethnic breakdown of the population and the adequate representation of persons belonging to national minorities when they were recruiting staff. The reviews of these complaints ended with the withdrawal of the complaints because the authorities had eliminated the shortcomings they had been alerted to during the review procedure. In the first nine months of the year, the Provincial Ombudsman also received complaints from the National Councils of the Hungarian, Slovak, Ruthenian, Czech and Ashkali national minorities. Most of them concerned violations of the right to the official use of languages and scripts by the state and local self-government authorities, the provincial administration's non-compliance with the NSNMA during the allocation of budget funds for funding and co-funding projects in the field of culture or the lack of trans-

153 Provincial Ombudsman's Letter No. VII – OM – D – 43/12 of 25 October 2012.

154 The citizens wrote to the Provincial Ombudsman asking him for advice on employment - to intercede on their behalf to get a job on grounds that they belonged to a national minority or to help them obtain financial aid. They also claimed that they had been denied welfare or that their electricity had been cut off because they belonged to a national minority.

parency of the tenders at which these funds were awarded. The Ombudsman completed the review of a number of these complaints and issued the relevant opinions or recommendations, while the review of the other complaints was still under way at the end of the reporting period.

One National Minority Council complained that the persons belonging to that national minority were unable to file tax returns on forms in their language and script in places where that language was officially in use, or claims for restitution of property or compensation. The Ombudsman did not issue an opinion or recommendation because the competent Ministry failed to provide a specific and clear answer to the question posed in the complaint, wherefore the Ombudsman had exhausted all the avenues at his disposal.

The National Council of the Hungarian National Minority filed a complaint with the Provincial Ombudsman claiming that a number of founders of cultural institutions in Vojvodina were operating unlawfully. In February 2012, the Provincial Ombudsman issued a recommendation to the city and municipal administrations of Novi Sad, Subotica, Pančevo, Senta, Bečej, Kikinda and Vršac to take the necessary measures to ensure that the National Council of the Hungarian National Minority participates in the management and exercise of the founding rights to cultural institutions of particular relevance to the identity of that national minority.

In 2012, the Office of the Commissioner for the Protection of Equality published seven opinions on allegations of discrimination on ethnic grounds, notably the segregation of and discrimination against Roma children in educational institutions, discrimination against Roma by media outlets, discrimination against persons belonging to the Romanian national minority regarding the repossession of land that had been declared socially-owned property, discrimination against Roma in the field of housing and the discriminatory statements made by the Belgrade Mayor. The Commissioner for Protection of Equality established that five of the seven complaints were well-founded.¹⁵⁵

6.2.12. Recommendations

1. Holders of state offices have to publicly promote tolerance and equality of citizens to a greater extent
2. The Supreme Court of Cassation ought to render a general legal view on the interpretation of the substance of the crime entitled incitement of ethnic, religious and other hate or intolerance (Art. 317 of the Criminal Code) to ensure coherence of the case law
3. Promote the good practices of the independent regulatory authorities and the judicial and administrative authorities to encourage persons belonging to national minorities to report discrimination on ethnic grounds.

155 More in I.6.6.

4. Ensure the fair representation of staff belonging to national minorities in public authorities.
5. Ensure that all national minorities can exercise their right to education in their native languages.
6. Provide schools offering education in minority languages or bilingual education with all the requisite textbooks in national minority languages. Particularly provide textbooks in Albanian for the Albanian students in Bujanovac, Medveđa and Preševo.
7. Align the Culture Act with the NSNMA, notably the provisions on the founding of cultural institutions by local self-governments and the transfer of founding rights to cultural institutions to the National Minority Councils
8. Acquaint the national minorities that are not well organised or do not wield significant political influence with the opportunities the NSNMA offers for the realisation of the collective rights of national minorities
9. Guarantee and ensure the right of National Minority Councils to found media outlets.
10. Provide for the transfer of a specific percentage of the founding rights to media outlets that broadcast programmes in national minority languages to the National Minority Councils free of charge during the privatisation of these outlets to enable the national minorities to affect the content and languages of the programmes
11. Ensure that public service broadcasters air programmes in national minority languages
12. Ensure co-funding for national minority media in the Serbian state budget
13. Align the Broadcasting and Public Information Acts, on the one hand, with the Local Self-Government and Culture Acts, on the other.

6.3. Persons with Physical or Intellectual Disabilities

6.3.1. General

By adopting the Act Ratifying the UN Convention on the Rights of Persons with Disabilities¹⁵⁶ and the Optional Protocol thereto¹⁵⁷, Serbia put in place a legal framework for the full equality and active involvement of people with disabilities in social life and their effective enjoyment of human rights and fundamental freedoms.¹⁵⁸ By recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and

156 *Sl. glasnik RS (Međunarodni ugovori)*, 42/09.

157 Serbia ratified the Optional Protocol the same year, *Sl. glasnik RS (Međunarodni ugovori)* 42/09.

158 See the BCHR 2009 Report, I.4.18.11.

environmental barriers that hinders their full and effective participation in society on an equal basis with others,¹⁵⁹ the Convention explicitly adopts the so-called social model of disability.

Article 21 of the Constitution of the Republic of Serbia prohibits all forms of discrimination, both direct and indirect, on any grounds, including, explicitly on grounds of an intellectual or physical disability. The Strategy for Improving the Status of Persons with Disabilities for the 2007–2015 Period¹⁶⁰ sets the following goal: “the improvement of the position of persons with disabilities to the position of equal citizens who enjoy all rights and responsibilities”. In the Strategy, “persons with disabilities” denotes persons with congenital or acquired physical, sensory, intellectual or emotional impairments who are, due to social or other barriers, unable or have limited opportunities to engage in social activities at the same level as others, regardless of whether they are capable of engaging in such activities with the use of technical aids or support services”. Persons with disabilities are defined in the same terms in Article 3 of the Act on the Prevention of Discrimination against Persons with Disabilities (APDPD).¹⁶¹ Serbian law, however, does not have a single definition of disability. Both terms are defined in a number of laws, by-laws and policy documents.¹⁶²

6.3.2. Employment of Persons with Disabilities

The Republic of Serbia is a signatory of the relevant international instruments providing a legal framework for the employment of persons with disabilities – the Convention on the Rights of Persons with Disabilities, the International Labor Organization recommendations and conventions and the Revised European Social Charter. Employment of persons with disabilities is also governed at the national level by the Labour Act¹⁶³, the Act on the Prevention of Discrimination against Persons with Disabilities¹⁶⁴, the Anti-Discrimination Act¹⁶⁵ and the corollary Act

159 Preamble to the Convention on the Rights of Persons with Disabilities, paragraph 1(e).

160 *Sl. glasnik RS* 1/07. An English translation of the Strategy is available at <http://www.forum-osi.org/download/english/strategy-for-improving-the-position-of-persons-with-disabilities-in-the-republic-of-serbia-en.pdf>.

161 *Sl. glasnik RS* 33/06.

162 The Government of Serbia noted as much in its Initial Report on the Implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia, which was endorsed with a one-year delay, on 10 May 2012. Pursuant to Article 35(1) of the Convention, the Republic of Serbia is under the obligation to submit comprehensive reports on measures taken to give effect to its obligations under the Convention and on the progress made in that regard. Serbia’s Initial Report is available at http://www.ljudskaprava.gov.rs/sites/default/files/u3/konvencije/invaliditetom/inicijalni_izvestaj_na_engleskom_j.pdf.

163 Articles 18-23 of the Labour Act prohibit direct and indirect discrimination and explicitly list disability among the prohibited grounds of discrimination and lay down that a person discriminated against may claim damages by filing a civil lawsuit.

164 *Sl. glasnik RS* 33/06.

165 *Sl. glasnik RS* 22/09.

on the Professional Rehabilitation and Employment of Persons with Disabilities (APREPD).¹⁶⁶

The APREPD elaborates the legal grounds for protecting the employment-related rights of persons with disabilities and specifies employment incentive measures, measures for improving the professional rehabilitation services, employment of persons with disabilities in professional rehabilitation and social companies, their engagement in work centres, the establishment and work of a budget fund for the training and employment of persons with disabilities. The money in this fund shall be used to stimulate the employment, professional rehabilitation and particular forms of employment and work engagement of persons with disabilities.¹⁶⁷ The Republic of Serbia, as the employer of direct and indirect budget beneficiaries the wages of which are paid from the state budget, has been fulfilling its obligation to employ persons with disabilities by designating budget funds for each given year.¹⁶⁸ It, therefore, does not directly promote the right to work of persons with disabilities, because budget beneficiaries are not under the obligation to hire a specific number of persons with disabilities set in the APREPD.

According to the APREPD, the National Employment Service (NES) is charged with assessing the capacity to work of persons with disabilities.¹⁶⁹ Of the 18,592 persons with disabilities registered as unemployed in 2011,¹⁷⁰ 6,030 found jobs from January to October 2012, while the NES no longer kept records for 2,936 of them.¹⁷¹

6.3.3. Inclusive Education

The Act on the Basis of the Education System¹⁷² put in place the prerequisites for inclusive education and the continuous education of children with disabilities. Inclusion covers both children with developmental difficulties, children from underprivileged communities, drop outs, children from internally displaced families

166 *Sl. glasnik RS* 36/09.

167 See the 2012 Report on the Employment of Persons with Disabilities in Serbian at http://sr.cod.rs/images/Zaposljavanje_osoba_sa_invaliditetom_-_Izvestaj_2012_COD_BCHR.pdf.

168 Article 8, Rulebook on Monitoring the Fulfilment of the Obligation to Employ Persons with Disabilities and Proof of the Fulfilment of That Obligation.

169 The state Pension and Disability Insurance Fund Expert Commission prepares the findings, drafts the opinion and assesses the working capacity of a person with a disability and the likelihood of him finding and retaining a job. This document includes the person's personal data, medical history, physical check-up findings, results of specialist medical examinations, medical records on which the working capacity assessment is based, a diagnosis, code, conclusion and epicrisis, a working capacity assessment, recommendations of jobs the person can perform and of professional rehabilitation measures and activities.

170 See Employment of Persons with Disabilities in Serbia 2011, p. 56, available at: http://bgcentar.org.rs/images/stories/Datoteke/report%20cod%20bchr%20employment_pwd%202011.pdf.

171 Information obtained from the National Employment Service in response to a request for free access to information of public importance, Memo No. 0051-9-58/2012.

172 *Sl. glasnik RS* 72/09 and 52/11.

and all those having problems in school for social reasons. During the reporting period, local inter-departmental commissions were being established to facilitate cooperation and coordination of support to children from vulnerable groups at the local level.¹⁷³ The Pre-School Education Act¹⁷⁴ gives priority to children from vulnerable groups on enrolment and allows kindergartens to implement special, specialised and alternative programmes. Preschool education is not mandatory for children under six and the local self-governments are charged with providing transportation to children with disabilities and their escorts.

The inclusive education legal framework appears adequate but a number of problems have been identified in the implementation of the inclusive education programme. The inter-departmental commissions have not been set up in all the cities and municipalities. Some of the commissions that have been appointed have not begun operating yet while those that are operational lack the standardised instruments they need to render their decisions.¹⁷⁵ The commissions often render recommendations on inclusive education measures which are not feasible in reality.

The mainstream schools are not fully prepared to educate children with disabilities: the teaching aids and textbooks are not adjusted to their abilities, many of the schools lack the equipment, human resources and assistive technologies they need and still have not eliminated the physical barriers impeding access to children with disabilities. Coordination among the education and social care professionals is insufficient and the parents and guardians lack information about the children's right to education, all of which has undermined the inclusive approach to education.¹⁷⁶

In the view of the National Education Council, it is still too soon to properly evaluate the implementation the inclusive education programme. The Council identified the need to establish a database and systemically monitor the implementation of the programme. It also identified the need to support the kindergarten and school teachers by providing them with training, teaching material, good practice examples, the help of pedagogical assistants and special education teachers. It concluded that special schools should not be closed but reformed.¹⁷⁷ Furthermore, the Council unanimously upheld the Draft Adult Education Act, which was submitted to the National Assembly for urgent adoption in 2012,¹⁷⁸ but was withdrawn from the parlia-

173 Role of Local Self-Governments in Social Inclusion, available in Serbian at <http://www.inkluzija.gov.rs/wp-content/uploads/2010/03/Uloga-lokalnih-samoupravaPrvi-nacionalni-izvestaj.pdf>.

174 *Sl. glasnik RS* 18/10.

175 Submission by a coalition of civil society organisations monitoring the rights of the child in the Republic of Serbia to the Universal Periodic Review, 2012.

176 *Ibid.*

177 Republic of Serbia National Education Council Conclusion rendered at its 77th session on 8 May 2012, available in Serbian at <http://www.nps.gov.rs/aktivnosti/08052012>.

178 The National Education Council unanimously decided to support the Draft Adult Education Act, provided that the law stipulate that the status of an organiser of adult education activities pursuant to the set standards for accredited institutions and curricula is granted by an independ-

mentary pipeline the same year. A considerable number of persons with disabilities, who had not acquired adequate formal education or the education they wanted, have been prevented from having a “second chance” to better themselves and have their prior learning recognised due to the lack of an adequate adult education law.¹⁷⁹

Discrimination in the education system is an increasing problem. Under the Act on the Basis of the Education System,¹⁸⁰ the school inspectorates are charged with the protection of the pupils and school staff from discrimination, but it has transpired in practice that the school inspectors do not recognise discriminatory conduct and have been referred such cases to the school administrations, i.e. the school advisers tasked with professional pedagogical oversight, not with discrimination. Parents of children with developmental difficulties have asked the Committee of Human Rights Lawyers for legal aid because their children had been discriminated against in school and the mechanism of inspectorial supervision proved ineffective.

6.3.4. Deprivation of Legal Capacity of Persons with Psycho-Social or Intellectual Disabilities

The Initial Report on the Implementation of the Convention on the Rights of Persons with Disabilities prepared by the Government of Serbia in 2012,¹⁸¹ is particularly critical of the national regulations governing the deprivation of legal capacity and appointment of guardians. The Report qualifies the system as obsolete and in need of alignment with the Conventions and the obligations undertaken by its ratification. The authors note that guardianship over persons deprived of legal capacity in the Republic of Serbia is governed by laws, most of which had been adopted at the time persons with disabilities were excluded from society and had not been significantly modified for years.¹⁸² In October 2012, a working group of

ent institution; furthermore, if the legislator leaves the provision under which the annual adult education plans shall be adopted by the Government, it has to be specified that this provision applies only to curricula funded by the state. See the Council’s decision in Serbian at http://www.nps.gov.rs/wp-content/uploads/2012/10/misljenje_zakon-odrasli.pdf.

179 The National Employment Strategy for the 2011-2020 Period refers to the European Commission Adult Learning Action Plan and recognises persons with disabilities as one of the most vulnerable groups, i.e. as the group with the poorest education levels, on which the adult education policies must focus. The text of the Strategy (published in *Sl. glasnik RS* 37/11) is available in English at <http://lokalnirazvoj.rs/national-employment-strategy-2011-2020.html>.

180 *Sl. glasnik RS* 72/09 and 52/11.

181 Pursuant to Article 35(1) of the Convention on the Rights of Persons with Disabilities, the Republic of Serbia is under the obligation to submit to the Committee for the Rights of Persons with Disabilities comprehensive reports on measures taken to give effect to its obligations under the Convention and on the progress made in that regard, whereby it has undertaken the obligation to provide an overview of the measures it has taken to align its national law and policies with the Convention, the results, problems and shortcomings in the approach to the implementation of the undertaken obligations. The Initial Report is available at http://www.ljudskaprava.gov.rs/sites/default/files/u3/konvencije/invaliditetom/inicijalni_izvestaj_na_engleskom_j.pdf.

182 The CoE Commissioner for Human Rights also noted the need to amend the laws governing the removal of legal capacity in line with the Convention on the Rights of Persons with

the Ministry of Justice and State Administration presented a working version of the amendments to the Non-Contentious Procedure Act. Despite Serbia's obligation to recognise that persons with disabilities enjoy legal capacity on an equal footing with others in all aspects of life, these amendments adhere to the approach based on the restriction of rights without introducing a mechanism providing persons with disabilities with support in taking decisions on issues affecting their lives. The draft amendments also allow for the full deprivation of legal capacity and do not introduce stronger procedural safeguards for the persons at issue (do not stipulate that persons whose legal capacity is at stake must be provided with free legal aid, that they are heard or at least that an attempt is made to hear them, etc).¹⁸³

Earlier, in the case of *Salontaji Drobnjak v. Serbia*¹⁸⁴, the European Court of Human Rights found a number of omissions of the state authorities and shortcomings in the national legislation governing the deprivation of legal capacity, e.g. it established that applicable domestic legislation did not seem to provide for a periodic judicial reassessment of the applicant's condition and that social work centres had excessive powers. Discrimination is frequent in legal capacity removal proceedings in which persons with psychological or intellectual disabilities are deprived of most of their human rights or their realisation of those rights is placed beyond their control. Legal capacity removal proceedings can be described as summary proceedings in which the basic safeguards of a fair hearing are not respected.

Loss of legal capacity can dramatically affect a person's exercise of his fundamental human rights. Persons deprived of legal capacity lose their active and passive voting rights, the right to marry, the right to work, associate, choose their place of residence, decide on their medical treatment, et al.¹⁸⁵ This category of the population is one of the most vulnerable groups in society due to social exclusion, inadequate legislation and widespread social prejudice.¹⁸⁶

6.3.5. *Deinstitutionalisation*

Deinstitutionalisation entails the closing of large institutions in which persons with disabilities are placed with the goal of enabling them to exercise their right to an independent life in the community (in their families or independently

Disabilities, see the Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia on 12-15 June 2011, paragraph 144, available at <https://wcd.coe.int/ViewDoc.jsp?id=1834869>.

183 The working draft of the amendments is available in Serbian at <http://www.mpravde.gov.rs/cr/news/vesti/radna-verzija-zakona-o-izmenama-i-dopunamazakona-o-vanparnicnom-postupku-dostupna-je-za-komentare-gradjana.html>.

184 ECtHR judgment in the case of *Salontaji Drobnjak v. Serbia*, ECHR, App. No. 36500/05 (2009)

185 See the *2011 Report*, I.4.3.1.

186 Considerable discrimination in the past may result in legislative stereotyping which prohibits the individualised evaluation of the capacities and needs of persons deprived of legal capacity. See the ECtHR judgment in the case of *Alajos Kiss v. Hungary*, ECHR, App. No. 38832/06 (2010), p. 42.

with support).¹⁸⁷ Life in the community is envisaged by the new Social Protection Act.¹⁸⁸ Under this Act, social services shall primarily be extended in the immediate and less restrictive environment and priority shall be given to services enabling the beneficiaries to remain in the community (Article 27). Institutionalisation is envisaged only in the event the beneficiaries cannot continue living in the community and its purpose is to prepare the beneficiaries for return to their families or to lead independent lives, i.e. habilitation and rehabilitation (Article 52). Social care services comprise also community-based day services and independent life supportive services (Article 40).

The Serbian Government adopted the Social Protection Development Strategy¹⁸⁹ in 2005 and the Strategy for Improving the Status of Persons with Disabilities in the Republic of Serbia¹⁹⁰ in 2007. These documents aim to operationalise the de-institutionalisation process, reform institutionalised care and develop a network of community-based services. Most social care institutions, however, lack individual transformation plans including steps that have to be made to reduce the number of beneficiaries and thus enable them to live in the community.¹⁹¹ The death of the wards remains the dominant reason for leaving the institutions.¹⁹² It, therefore, appears that the main problem lies in the fact that the legal provisions have not been implemented yet. This is why most of the wards of the institutions looking after persons with disabilities cannot exercise their right to live in the community and continue living in the large institutions.

6.3.6. *Psychiatric Hospitals and Social Care Institutions*

Due to lack of support to life in the community, many persons with psychosocial and intellectual disabilities live in residential social and psychiatric institutions until they die. They are exposed to a higher risk of abuse due to the substandard material and hygienic conditions in the institutions, neglect, unregulated use of fixation measures and inadequate administration of medications.¹⁹³ The situation is exacer-

187 Article 19 of the Convention on the Rights of Persons with Disabilities guarantees the right of persons with disabilities to lead independent lives and live in the community.

188 *Sl. glasnik RS* 24/11.

189 *Sl. glasnik RS* 108/05, 71/05.

190 *Sl. glasnik RS* 1/07.

191 *The Hidden and Forgotten - Segregation and Neglect of Children and Adults with Disabilities in Serbia*, Mental Disability Rights Initiative of Serbia (MDRI-Serbia), Belgrade, 2012, p. 29 (hereinafter: MDRI-S Report). Available in Serbian at http://mdri-s.org/files/Sklonjeni_i_zabovavljeni.pdf.

192 *Practicing Universality of Rights: Analysis of the Implementation of the UN Convention on the Rights of Persons with Disabilities in View of Persons with Intellectual Disabilities in Serbia*, MDRI-Serbia, Belgrade, 2012, p. 28, available at: <http://mdri-s.org/files/Practicing%20Universality%20of%20Rights.pdf>.

193 According to the opinion of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment Manfred Nowak “[f]orced and

bated by the fact that these institutions are closed, which hinders the wards' access to protection mechanisms. The disputable treatment of institutionalised people is frequently justified on medical grounds and remains undetected or unrecognised as abuse. The absolute character of the prohibition of torture and ill-treatment¹⁹⁴ and its applicability to all situations in which people are held in institutions where their freedom of movement is restricted against their will have to be borne in mind. In its judgment in the case of *Stanev v. Bulgaria*,¹⁹⁵ the ECtHR set the standards for assessing whether the living conditions in an institution reach the threshold of ill-treatment. Namely, inadequate heating and nutrition, the possibility of taking a shower once a week in an unhygienic and dilapidated bathroom, the execrable state of the toilets access to which is dangerous, amount to degrading treatment.

The BCHR did not visit any social care or psychiatric institutions during the preparation of this Report, wherefore it cannot give an impartial overview of the actual situation in these institutions. There are, however, indications that the situation in some institutions gives cause for grave concern.

Around 5,605 people live in social institutions for persons with disabilities, while nearly 3,000 are accommodated in psychiatric institutions.¹⁹⁶ Most of the beneficiaries of these institutions live there for years, some until they die.¹⁹⁷ The National Preventive Mechanism (NPM)¹⁹⁸ visited three institutions in 2012 (two

non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition.... Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment." See more in: The interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, 28 July 2008, paragraph 63, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>.

- 194 In the context of psychiatric institutions, the ECtHR concluded that although it was "for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation". See *Herczegfalvy v. Austria*, ECHR, App. No. 10533/83. (1992), paragraph 82.
- 195 *Stanev v. Bulgaria*, ECHR, App. No. 36760/06 (2012) paragraphs 209 and 212.
- 196 Information obtained in response to a request for information of public information from social care institutions.
- 197 Most of the beneficiaries of social care institutions have lived in them 10 years or longer. The situation is somewhat different in the psychiatric hospitals, because many patients are admitted and released after treatment. There are, however, patients who spend a long time in the psychiatric establishments as well. Longer-term residents of both institutions lack the opportunity to return to the community.
- 198 The National Preventive Mechanism (NPM) is an independent body established at the national level pursuant to the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment. The NPM performs continuous oversight of all establishments in which persons deprived of liberty are held with the aim of preventing ill-treatment. The NPM duties in Serbia are fulfilled by the Protector of Citizens of the Repub-

psychiatric and one social care institutions) but did not publish detailed reports on those visits by the end of the reporting period. However, the recommendations it made to the Special Psychiatric Hospital Sveti Vračevi lead to the conclusion that the hospital facilities are in a deplorable state, that some toilets do not have doors, that the patients are usually physically restrained by one limb and that the hospital does not keep adequate restraint records, that no meaningful activity programmes for the patients are in place, that the patients spend their days in their pyjamas instead of their own clothes, etc. The NPM also established that the patients have never contacted the hospital management or the Protector of Citizens to seek the protection of their rights.¹⁹⁹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2011 visited the special psychiatric hospitals Dr Laza Lazarević in Belgrade and Gornja Toponica in Niš and noted the problematic practice of restraining the patients in full view of other patients, without continuous and direct monitoring by the staff and again called on the Serbian authorities to adopt, without delay, instructions for the use of means of restraint. The CPT also found that there was a high risk of the patients hurting each other, that some facilities were inadequate and overcrowded and noted the lack of psycho-social rehabilitation measures and opportunity to spend time outdoors.

The Mental Disability Rights Initiative of Serbia (MDRI-S) visited seven welfare institutions looking after children with developmental difficulties in 2012 and reported on their living conditions, neglect and treatment, which often amounts to abuse.²⁰⁰ It discovered that a number of wards were living in dilapidated, unventilated and overcrowded unhygienic facilities. Although the CPT had back in 2007 qualified the living conditions in part of the Special Institution for Children and Juveniles Dr Nikola Šumenković in Stamnica as inhuman and degrading,²⁰¹ the situation in this facility was still execrable in 2012.²⁰²

The MDRI-S also registered excessive resort to medication, mechanical restraint and isolation measures,²⁰³ and noted that the wards had absolutely no privacy. The situation was particularly concerning with regard to bed-ridden patients suffering from grave disabilities, who have not left their rooms, or even their beds, for years. The status of institutionalised people with psychosocial and intellectual

lic of Serbia in cooperation with the Vojvodina Provincial Ombudsman and associations, the statutes of which define the protection and advancement of human rights and freedoms as their goal.

199 The NPM's recommendations to the Sveti Vračevi Special Psychiatric Hospital are available at the Protector of Citizens' website www.ombudsman.rs.

200 The Hidden and Forgotten - Segregation and neglect of children and adults with disabilities in Serbia, Mental Disability Rights Initiative of Serbia (MDRI-Serbia), Belgrade, 2012.

201 Due to a combination of severe overcrowding, lack of staff and lack of stimulation/activities, CPT Report to the Government of Serbia on the visit to Serbia in 2007, paragraph 151.

202 *MDRI-Serbia Report*.

203 According to the MDRI-Serbia, these measures are implemented when there are not enough staff members who can provide different types of treatment in situations in which the wards engage in undesirable behaviour either towards themselves or others. *MDRI-Serbia Report*.

disabilities is often exacerbated by the guardianship system in place. The wards may not leave the institutions during the day, or even their rooms, without their guardians' consent. One resident had not left her room for 15 years because her guardian – her mother – would not issue such consent.²⁰⁴

The absence of court convictions for ill-treatment in these establishments and the small number of disciplinary sanctions their managements levelled against the staff is indicative. Notably, not one of the convictions for ill-treatment and torture that the courts forwarded to the BCHR at its requests for access to information of public importance regarded the staff of these establishments. The vast majority of these institutions had not conducted any disciplinary proceedings against their staff for abusing or neglecting the wards in the past three years. Two institutions dismissed the workers found guilty of these offences,²⁰⁵ while the other staff was merely cautioned or temporarily suspended. It remains uncertain whether criminal reports are systematically submitted to the public prosecutors when the staff's treatment of the wards includes elements of a criminal offence.²⁰⁶

What is particularly concerning is that oversight of the living conditions in the social care institutions and psychiatric hospitals is not performed regularly. The absence of the civil sector's involvement in oversight is blatant. Given the clear indications that the situation in these establishments falls short of the standards set out in international documents, much greater oversight of the living conditions, medical treatment and habilitation and rehabilitation in these institutions should definitely be one of the priorities of both the Government, the civil society and the independent bodies.

6.3.7. Protection from Abuse

The Constitution and the Criminal Code both provide for general legal protection from abuse, which also applies to persons with disabilities. They are, however, in need of greater protection because of the nature of institutionalisation, treatment involving medications with undesirable side effects and prejudice against persons with psycho-social or intellectual disabilities.

204 *MDRI-Serbia Report*, p. 112.

205 This information was obtained in response to requests for information of public importance. The Kulina establishment conducted disciplinary proceedings against two staff members for inflicting light bodily injuries to a ward; one was dismissed and the other suspended. The Gvozden Jovančević Institution for Adults and the Elderly conducted disciplinary proceedings against one staff member, who was dismissed for ill-treating and harassing the beneficiaries. The Gornja Toponica Special Psychiatric Hospital conducted two disciplinary proceedings against staff members for lax and negligent performance of their duties, physical and material abuse of the patients; the staff members were issued warnings.

206 The Serbian Government cited the example of the management of the Gornja Toponica Psychiatric Hospital, which instituted criminal proceedings against staff members who had ill-treated the residents. See paragraph 109 of the Response of the Government of Serbia to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Serbia in 2011, available at <http://www.cpt.coe.int/documents/srb/2012-18-inf-eng.htm>.

A law protecting persons with intellectual disabilities has not been adopted yet.²⁰⁷ The Social Protection Act prohibits violence and other violations of the wards' dignity only in general terms (Article 151). The legislation does not provide for special mechanisms to protect institutionalised people. The Government of the Republic of Serbia in 2006 adopted the Special Protocol on the Protection of Children in Social Care Institutions from Abuse and Neglect,²⁰⁸ which envisages a procedure for reporting suspicions of child abuse and neglect. However, this mechanism does not satisfy the basic requirements of independence given that the allegations of abuse and neglect are reviewed by in-house teams, comprised of the institutions' staff.²⁰⁹ There is no mechanism in place to prevent and investigate abuses of adult wards and this issue is left to discretion of the individual institutions. There are no general regulations governing the application of fixation and isolation measures. Judging by everything, the existing mechanisms have failed to protect the dignity of persons under institutional care.²¹⁰

6.3.8. Recommendations

1. Intensify efforts to enable institutionalised people to exercise their right to lead independent lives in the community pursuant to international standards and the obligations the Republic of Serbia undertook when it ratified the Convention on the Rights of Persons with Disabilities.
2. Conduct a systemic reform of the institute of legal capacity deprivation and introduce periodic judicial reviews of decisions on the removal of legal capacity and stronger procedural safeguards protecting persons whose legal capacity is decided on.
3. Introduce independent and functional in-house mechanisms to protect the rights of the wards of homes for persons with disabilities.
4. Provide civil society organisations with unhindered access to social care institutions and psychiatric hospitals.
5. Provide all persons living in homes for people with disabilities with adequate living conditions and abolish the practices of punishing them by physically restraining or segregating them.

207 The Draft Act on the Protection of Persons with Mental Disabilities presented by the Health Ministry in November 2012 clearly prohibits the ill-treatment and abuse of persons with mental disabilities but does not lay down mechanisms for implementing this general prohibition in practice. Furthermore, the Draft regards only the patients of psychiatric institutions. The Draft is available in Serbian at: <http://www.zdravlje.gov.rs/showelement.php?id=4967>

208 The Protocol is available at http://www.unicef.org/serbia/Posebni_protokol_-_socijala.pdf

209 The Republican Social Protection Institute noted that not one case of staff violence against the wards was registered in 2011 and concluded that it was difficult to expect of the institutions to register and report such incidents. See page 32 of the 2011 Report on the Work of Homes for Children and Youths, available in Serbian at the Institute website http://www.zavodsz.gov.rs/index.php?option=com_content&task=view&id=160&Itemid=157.

210 The Government of Serbia reached the same conclusion in its Initial Report on the Implementation of the Convention on the Rights of Persons with Disabilities, paragraph 195.

6. Take all the necessary measures to ensure the inclusion of children with disabilities in the mainstream education system.
7. Courts should pay particular attention to the quality of the legal representation in court of the persons whose legal capacity is at stake and assess whether there are any conflicts of interest between them and their designated guardians.
8. Courts should apply the institute of partial deprivation of legal capacity more often, pay greater attention to each individual case and limit people's legal capacity only to areas in which they have been found incapable beyond doubt and only if that is absolutely necessary.
9. Initiate proceedings for the restoration of legal capacity ex officio and always act on the motions for the restoration of legal capacity submitted by the persons deprived of their legal capacity and/or their guardians.

6.4. Gender Equality and Special Protection of Women

6.4.1. General

Gender equality entails equal opportunities for men and women to exercise their human rights, which is instrumental for the development of democracy and social justice.²¹¹

The Republic of Serbia is party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²¹², numerous ILO Conventions,²¹³ as well as the Revised European Social Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Under Article 15 of the Constitution of the Republic of Serbia, the state shall guarantee the equality of women and men and develop equal opportunity policies. Article 62(3) of the Constitution guarantees the equality of spouses. The Constitutional Court has to date reviewed only one case regarding gender and spousal equality,²¹⁴ in which it did not find any violations of the principle of equality.

The Serbian National Assembly adopted the Gender Equality Act²¹⁵ in 2009 to create the conditions for the implementation of equal opportunity policies and the realisation of rights both by women and men, the implementation of special measures and the prevention and elimination of discrimination on grounds of sex. The enforcement of the Act ought to improve the status of women and ensure more

211 *Discrimination against Women in the Labour Market in Serbia*, Victimology Society of Serbia, Belgrade 2012, p. 19.

212 *Sl. list SFRJ (Međunarodni ugovori)*, 11/81.

213 ILO Conventions Nos. 100, 111, 89 and 156.

214 *Batanjski v. Serbia*, UŽ 127/2007, decision of 2 April 2009.

215 *Sl. glasnik RS*, 104/09.

efficient protection of their rights. Many of its provisions geared at achieving gender equality in political, economic and cultural life are, however, simply not applied in practice, as corroborated by the statistical data collected by the state authorities and civil society organisations. The Republic of Serbia ranked 50th on the World Economic Forum's Gender Gap Index of 135 countries. The annual 2012 Global Gender Gap Report, the seventh of the kind and the first to include Serbia, ranked Serbia 67th on Economic Participation and Opportunity, 76th on Wage Equality for Similar Work, 91st on Health and Survival, 61st on Educational Attainment and 40th on Political Empowerment.²¹⁶

Article 20 of the Anti-Discrimination Act²¹⁷ prohibits discrimination based on sex or sex change. Violence, exploitation, expression of hatred, belittling, blackmail and harassment on grounds of sex are also prohibited, as are public advocacy, support and cultivation of prejudices, customs and other patterns of social behaviour based on the superiority or inferiority of a sex, including stereotyped gender roles. The Labour Act²¹⁸ prohibits placing job seekers or workers at a disadvantage on account of their sex. This Act comprises anti-discrimination norms generally prohibiting the discrimination of employed persons and job seekers, prohibits the most frequent forms of work-related discrimination and allows for the enforcement of affirmative action measures. Job seekers and workers may file damage claims with the competent courts pursuant to the law in the event they had been subjected to a form of discrimination prohibited under the Act (Article 23, Labour Act). The Labour Act anti-discrimination provisions were passed within the process of aligning Serbian law with the EU *acquis*. They also incorporate the provisions in the 1968 ILO Convention No. 111 prohibiting discrimination in respect of employment and occupation.

In February 2009, the Government of the Republic of Serbia adopted the first strategic document dealing with gender equality — the National Strategy for Improving the Status of Women and Gender Equality in the 2010–2015 Period. The Strategy outlines a comprehensive state policy for eliminating all forms of discrimination against women and attaches the greatest priority to economy, education, health, suppression of violence against women and gender stereotypes in the media.

6.4.2. Institutional Gender Equality Protection Mechanisms

The following institutional mechanisms oversee the realisation of gender equality at the state level in Serbia: the National Assembly Gender Equality Committee (established in 2002), the Serbian Government Gender Equality Council (established in 2004) and the Gender Equality Directorate²¹⁹ within the Labour and So-

216 http://www3.weforum.org/docs/WEF_GenderGap_Report_2012.pdf.

217 *Sl. glasnik RS* 22/09.

218 *Sl. glasnik RS* 24/05, 61/05 and 54/09.

219 See its website www.gendernet.rs.

cial Policy Ministry (established in 2008). The independent regulatory authorities, notably the Protector of Citizens of the Republic of Serbia and the Commissioner for Protection of Equality, are also vested with powers relating to gender equality.

Gender equality mechanisms are also in place at the provincial and local levels. In Vojvodina, they comprise the Vojvodina Provincial Secretariat for Labour, Employment and Gender Equality, the Provincial Ombudsman, the Provincial Gender Equality Council, the Vojvodina Assembly Gender Equality Committee and the Provincial Gender Equality Institute. At the local level, cities and municipalities have begun forming Gender Equality Commissions as stipulated by the Gender Equality Act.²²⁰

The Office of the Commissioner for Protection of Equality received 563 complaints since it was established; 54 of them concerned gender-based discrimination while as many as 37% regarded discrimination in employment and recruitment. Five lawsuits have been initiated, three of which in the field of labour relations. All the proceedings were still under way at the end of the reporting period. As the Office of the Commissioner for Protection of Equality noted, women are frequently assigned to lower-paying jobs when they return from maternity leave. The Office also reviewed cases of sexual harassment at work, which is one of the most widespread forms of discrimination against women, in addition to inequality in promotion.²²¹

Apart from these specialised mechanisms, women also have recourse to the general protection mechanisms, such as the Labour Inspectorate, the Republican Agency for the Peaceful Settlement of Labour Disputes, courts of general jurisdiction, etc. Unfortunately, it is impossible to ascertain how efficiently all these mechanisms have been dealing with the individual cases of discrimination against women, particularly since there are hardly any gender disaggregated statistics in Serbia. Some indicators are, however, available. The Labour Inspectorate performed 33,861 checks in 2011, 7,227 of which regarded the enforcement of the Act on the Prohibition of Harassment at Work. The only gender disaggregated statistics the Labour Inspectorate kept in 2011 regarded the workers' complaints of harassment at work (77 of the complaints were filed by women and 67 by men).

The Gender Equality Directorate, the main oversight authority, issued recommendations to local self-governments in 2012, calling on them to invest greater efforts in the implementation of the National Strategy, finally set up the local gender equality commissions, a legal obligation many municipalities have not fulfilled yet, and step up activities to enforce the gender equality policy.²²²

220 Gender Equality Act, Article 39.

221 Data obtained from the Complaints Department of the Commissioner for Protection of Equality.

222 The recommendations are available in Serbian at http://www.gendernet.rs/files/dokumenta/Izvestaji_Uprave/Preporuka_lokal_sajt.pdf.

6.4.3. Special Protection of Women and Maternity

The Labour Act affords special protection to pregnant working women. Pregnant workers are not allowed to perform jobs which the competent authority established are injurious to their health or that of their children, particularly jobs entailing heavy lifting, harmful radiation or exposure to high temperatures (Art. 89). This protective norm is an improvement over the one in the prior Labour Act because it applies to the entire period of pregnancy.

Serbia ratified ILO Convention No. 183 on Maternity Protection²²³ under which states are to adopt measures supporting parenting, above all provisions ensuring that the financial remuneration during maternity leave²²⁴ suffices to preserve the health of the woman and her child and payment of the full wages during pregnancy leave. The Convention also requires of states to adopt the appropriate measures eliminating the risk of maternity being a source of labour-related discrimination.

The amended Health Insurance Act of the Republic of Serbia does not satisfy the standards on pregnancy leave laid down in ILO Convention No. 183. Pregnancy leave allowances were cut from 100% to 65% of the women's wages since 2006. Pregnant women receive remuneration equalling their wages only in Belgrade, Novi Sad, Zrenjanin, Jagodina and Bela Crkva – 65% of their allowances are paid by the Republican Health Insurance Fund and the remaining 35% are covered from the local budgets.²²⁵

The Labour Inspectorate 2010–2012 reports mention problems regarding the status and protection of women only in the parts devoted to the special protection of specific categories of workers, where the Inspectorate noted the most problems in the protection of women on pregnancy or after maternity leave. There have been instances of women losing their jobs upon return from maternity or child care leave as soon as the formal conditions were met. Most of the women workers who sought the assistance of the Labour Inspectorate in this period complained of irregular payments of maternity and child care leave allowances. Women, however, tend to report these and other violations of their work-related rights only once they no longer work in the companies and do not report them earlier in fear of being dismissed.²²⁶

223 *Sl. glasnik RS (Međunarodni ugovori)* 1/10.

224 A total of 35,278 mothers received maternity allowance in Serbia in December 2012; their number would have been much higher if their employers were more conscientious. Although the state guarantees the payment of maternity allowance to all working women on maternity leave, the mothers employed in companies with blocked accounts, have not received a cent. According to the National Bank of Serbia, there were as many as 62,236 such companies! See: <http://upravusi.rs/?vest=drzava-ne-moze-da-garantuje-isplatu-porodiljske-naknade-za-vremedodsustva-sa-posla>.

225 See the Belgrade daily Blic report in Serbian <http://www.blic.rs/Vesti/Drustvo/354461/Drzava-nema-novca-za-pune-plate-trudnica>.

226 *Discrimination against Women in the Labour Market in Serbia*, Victimology Society of Serbia, Belgrade 2012, p. 45.

Dismissal of women workers upon return from maternity leave is not the only problem in this field. According to the Commissioner for Protection of Equality, women are often assigned to lower paying jobs upon return from maternity leave.²²⁷

The amendments to the Act on Financial Support to Families with Children²²⁸ opened the issues of the exercise of the right of women on maternity leave to remuneration and the procedure for transferring funds for the payment of maternity allowances. The legislator lay down stricter conditions for exercising the right to maternity benefits by stipulating the submission of a much greater number of documents. Namely, according to the valid regulations, 12 documents or 86 sheets of paper²²⁹ have to be filed together with the application. Although such stringent conditions were introduced to increase control over the employers, they have not resulted in a de facto improvement of the women's status, because a lot of time and money is needed to collect all the documentation. Women on maternity leave can be left without their allowances even when all the requisite documentation had been submitted and the state fulfilled its obligation and refunded their employers. Namely, under the current procedure, the state is under the duty to refund the employers for the maternity allowances they pay and to transfer the funds to the company accounts. The problem is, however, that these funds are not protected. There is no control over what happens to this money and it is often used for other purposes, particularly if the company's account is blocked. In such cases, women on maternity leave are not paid their allowances and the transferred money is used to cover other company debts.²³⁰ This merely illustrates how complicated administrative procedures, coupled with the absence of mechanisms for overseeing the employers, obstruct the realisation of fundamental labour and social rights, particularly of women in this case.

Serbia adopted the Act on the Prevention of Harassment at Work²³¹ on 26 May 2010. A survey conducted by the Confederation of Autonomous Trade Unions of Serbia in 12 Serbian cities shows that one out of three women workers has been harassed at work.²³² Around 42% of the polled women were themselves harassed or knew someone who had been harassed at work – most of them had been exposed to mobbing and sexual harassment.²³³

227 *Danas*, 5 March, p. 5.

228 *Sl. glasnik RS* 16/02, 115/05 and 107/09.

229 NALED's Grey Book V research shows that 12 documents comprising as many as 86 sheets of paper, including both originals and copies, are needed to apply for pregnancy/maternity leave allowance. The collection of these documents costs the economy 690 million dinars a year. This money would suffice to employ and pay the average wages to 1,200 people in Serbia for one year.

230 See: <http://www.politika.rs/rubrike/Ekonomija/Kroz-porodjajne-muke-do-porodiljskog-bolovanja.lt.html>

231 *Sl. glasnik RS*, 36/10.

232 *Danas*, 9 March, "Laws to Avoid", available in Serbian at http://www.danas.rs/dodaci/forum/zakoni_za_izbegavanje.723.html?news_id=235604.

233 *Ibid.*

6.4.4. Participation of Women in Political Life

The status of women has been improved by the adoption of the Act on the Election of Assembly Deputies that regulates how many women each election ticket must include, a commonplace practice in many European countries. Under the Act, one out of every four candidates on the ticket must belong to the less represented gender on the ticket i.e. the election ticket must comprise at least 30% of the candidates of the less represented gender altogether. A ticket not fulfilling these requirements will be considered deficient and will be rejected by the Republican Election Commission if the nominator does not eliminate the shortcomings.

Although there are no laws stipulating that women must account for at least 30% of the Government members, which is the European standard, the new Government has the greatest share of women ministers to date, as many as 26%,²³⁴ which is definitely a step in the right direction. For the sake of comparison, women accounted for four of the 25 ministers in Prime Minister Vojislav Koštunica's Cabinet in 2007–2008. Two of the 28 ministers in Prime Minister Mirko Cvetković's Government (2008–2012) were women after the reshuffle. Prime Minister Ivica Dačić's Government, appointed in 2012, has 19 ministers, five of whom are women.²³⁵ Of the 250 deputies in the National Assembly, 83 are women.²³⁶ There are 94 women deputies among the 306 members of the parliamentary committees, which marks an increase of over 50% compared to the previous convocation of the National Assembly.²³⁷ Women are, however, totally excluded from or symbolically represented in the Assembly committees considered to be the most important or the most influential, such as the Defence and Internal Affairs Committee, the Kosovo and Metohija Committee, the Committee for Finance, the Republican Budget and Oversight of Public Spending, the Security Sector Oversight Committee, etc.²³⁸

234 For the sake of comparison, women account for 52.4% of the MPs in Sweden, 50% of the MPs in Spain, 33% of the MPs in Croatia, 18.5% of the MPs in Serbia and 5.6% of the MPs in Greece.

235 The following women manage ministerial portfolios in the current Government: Alisa Marić (Youth and Sports), Zorana Mihajlović Milanović (Energy), Slavica Đukić Dejanović (Health), Verica Kalanović (Regional Development and Local Self-Government) and Suzana Grubješić (Deputy Prime Minister for European Integration). Source: daily *Blic*, 30 July, p. 2.

236 Following is the breakdown of female deputies by caucus: Serbian Progressive Party (SNS) – 22 out of 65 deputies; Democratic Party (DS) – 16 out of 51 deputies; Socialist Party of Serbia (SPS) – nine out of 25 deputies; Democratic Party of Serbia (DSS) – eight out of 21 deputies; United Regions of Serbia (URS) – four women out of 15 deputies; Liberal Democratic Party (LDP) – six out of 14 deputies; Party of United Pensioners of Serbia (PUPS) – four out of eight deputies; United Serbia (JS) – two out of seven deputies; League of Social Democrats of Vojvodina (LSV) – two out of five deputies; Social Democratic Party of Serbia – three out of nine deputies, Alliance of Vojvodina Hungarians (SVM) – one out of five deputies and the Serbian Renewal Movement-Christian Democratic Party of Serbia (SPO-DHSS) – one out of five deputies and independent MPs – one out of eight deputies, *Večernje novosti*, 9 August, p. 3

237 *Danas*, 23 August, p. 4.

238 The Committee for Administrative, Budgetary, Mandate and Immunity Issues and the Security Sector Oversight Committee each have only one female member, while the Committee for

One positive exception is the European Integration Committee headed by DS deputy Milica Delević. This is the only Assembly body with great political weight in which women account for most of the members – 10 of the deputies on the Committee are female and 6 are male.

6.4.5. Recommendations

1. Consolidate the existing gender equality mechanisms by strengthening the institutions charged with the implementation of the National Strategy for Improving the Status of Women and Gender Equality in the 2010–2015 Period (in terms of their financial and human capacities) and expanding their powers.
2. Sensitise the general public to violations of gender equality and the rights of women in the labour market. Ensure equal treatment of women and men, including representation of women at senior managerial and other decision-making offices and equal remuneration for equal work.
3. Increase the women's awareness of their rights through training, outreach publications and media campaigns.
4. Introduce support mechanisms (ideally free legal aid and counselling) for women victims of human rights violations.
5. Facilitate the maternity allowance procedure and introduce mechanisms to monitor the realisation of this right.

6.5. LGBT Population

6.5.1. General

The prohibition of discrimination on grounds of sexual orientation and gender identity (against lesbian, gay, bisexual or transgender [LGBT] persons) is based on the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other UN human rights documents, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²³⁹

Finance, the Republican Budget and Oversight of Public Spending has only two women members. The situation is identical in the Committee for Economy, Regional Development, Trade, Tourism and Energy. Women members dominate the Committee on Labour, Social Issues, Social Inclusion and Poverty Reduction and the Culture and Information Committee, *Danas* 23 August, p. 4.

239 See Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, International Commission of Jurists, 2007, available at <http://www.unhcr.org/refworld/docid/48244e602.html>. See the Council of Europe standards on non-discriminatory treatment of LGBT persons in *Combating discrimination on grounds of sexual orientation or gender identity - Council of Europe standards*, 2011, available at: http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2590.

The Serbian legislative framework protecting the equality of the LGBT population is largely satisfactory, but the provisions of the valid laws, strategies and by-laws prohibiting their discrimination are not enforced consistently. The Constitution of the Republic of Serbia does not explicitly list sexual orientation among the personal features that constitute prohibited discrimination grounds,²⁴⁰ but both gender identity and sexual orientation are mentioned as prohibited grounds of discrimination in Article 2 of the Anti-Discrimination Act. Article 21 of the Anti-Discrimination Act lays down that sexual orientation is a private matter and that no-one may be requested to publicly declare their sexual orientation, that everyone is entitled to express their sexual orientation and prohibits discriminatory treatment based on such an expression. The greatest shortcoming of the legal framework protecting the non-heterosexual population in Serbia is that the Serbian substantive criminal law does not incriminate “hate crimes”. The introduction of this offence would contribute to the efficient prosecution of those suspected of violence and other crimes against LGBT persons and facilitate their stricter punishment.

6.5.2. Public Attitudes towards the LGBT Community and Enforcement of Regulations

LGBT persons are at a very high risk of discrimination given that the social distance towards this population is the greatest.²⁴¹ The vast majority of high-school students – 80 percent – support some form of discrimination against LGBT persons. A large majority of them believes that homosexuals should keep their sexual orientation behind closed doors and particularly away from children.²⁴²

LGBT Roma²⁴³ and female human rights defenders, particularly those who do not fit the hetero-normative standards,²⁴⁴ are particularly vulnerable. Actual and presumed sexual orientation has given rise to various forms of discrimination and acts of violence.

240 Although the Constitution does not explicitly mention discrimination on grounds of sexual orientation, it prohibits discrimination on any grounds and on grounds of a personal feature, which includes sexual orientation, as the Constitutional Court confirmed, see its decision in the case Už - 1918/2009, of 22 December 2011.

241 Presentation of a public opinion survey conducted by the Commissioner for Protection of Equality and the Centre for Free and Democratic Elections (CESiD) “Phenomenon of Discrimination in Serbia” on 10 December 2012, available at <http://www.mc.rs/mc-web-televizija.1498.html>. Fifty percent of the population is homophobic; 60% think that LGBT persons should not hold the top government offices, 30% do not want to have LGBT persons living in their neighbourhood or working with them. The event entitled “Combating Discrimination on Grounds of Sexual Orientation and Gender Equality” was held in Belgrade on 13 December 2012.

242 “High Schoolers By and Large Want Gays to Stay Behind Closed Doors”, *E-novine*, 27 July 2012.

243 The event entitled “Combating Discrimination on Grounds of Sexual Orientation and Gender Equality”, held in Belgrade on 13 December 2012.

244 Debate “Status of Human Rights Defenders in Serbia – National Policy?”, held in the Human Rights House on 14 December 2012.

Same-sex partners are not recognised the right to marry²⁴⁵ or the right to form extramarital unions,²⁴⁶ wherefore they are discriminated against with respect to a number of rights (alimony, joint adoption of children, joint property, special protection from domestic violence, succession of a surviving partner to the deceased's tenancy rights, the right to refuse to testify, to legal inheritance, to pension survivor benefits, et al). The Constitutional Court took the view that "the authors of the Constitution defined the concept of extramarital unions indirectly, by defining marriage. In other words, by equating extramarital unions with marriage, the authors of the Constitution linked the definition of the essential elements requisite for the existence of an extramarital union to the existence of elements requisite for the existence of a marital union. Given that the Constitution lays down the different sexes of persons consenting to enter a marriage as one of the constituent elements for concluding a marriage, the Constitutional Court is of the view that this condition also extends to persons in extramarital unions. It follows that the concept of an extramarital union in constitutional law entails a union of a man and a woman." However, although stable homosexual partnerships are not recognised as extramarital unions under Serbian law, such unions of same-sex partners are covered by the concept of "family life" just like heterosexual unions and constitute grounds for the creation of mutual rights and obligations, such as, e.g. the right to inheritance, the right to alimony or to protection from domestic violence, wherefore they need to be regulated by law.²⁴⁷

The organisation of a Pride Parade was prohibited in 2012 for the third time on security grounds, i.e. due to threats others voiced against the organisers and participants. This practice indicates that the human rights of LGBT persons are systematically violated and the state's failure to provide them with adequate protection. The competent state authorities have not done their utmost to prevent discrimination against the Parade participants by third parties, while the discriminatory passivity of the competent state institutions and discriminatory statements by the political leaders have facilitated the creation of a climate inciting violence against LGBT persons.²⁴⁸

245 The Constitution defines marriage as a union of a man and a woman (Art. 62(2)).

246 Constitutional Court decision in case No. IU-347/2005 of 22 July 2010.

247 See, e.g. the ECtHR judgments in the cases of *Karner v. Austria*, App. No. 40016/98, judgment of 24 July 2003, and *Schalk and Kopf v Austria*, App. No. 30141/04, judgment of 24 June 2010.

248 See e.g. "Palma: "Dačić, Please Ban the Pride Parade!", 2 October 2012, available in Serbian at: <http://www.smedia.rs/vesti/100460/Parada-ponosa-Dragan-Markovic-Palma-Ivica-Dacic-Palma-Dacicu-molim-te-zabrani-Paradu-ponosa-VIDEO.html>. See the press release the Commissioner for Protection of Equality issued on the 2012 Pride Parade of 14 September 2012, available in Serbian at <http://www.ravnopravnost.gov.rs/lat/saopstenjaZaJavnost.php?idKat=6>, see also the presentation by Prof. Dr. Zorica Mršević at the international conference on LGBT rights entitled "Together against Discrimination" organised by the Montenegrin Government

The Constitutional Court already found that the constitutional right to the freedom of assembly (Art. 54(1)) and the right to a legal remedy (Art. 36(2)) were violated by the Ministry of Internal Affairs decision to relocate the 2009 Pride Parade²⁴⁹ because such decisions are not envisaged by the law and because the organisers of the event did not have at their disposal a legal remedy to challenge the lawfulness of the decision.²⁵⁰ The Court also found in that decision that the anti-discrimination principles could be linked to the denial of the freedom of assembly, but it did “not find that the Ministry had an explicit discriminatory attitude towards the appellants on grounds of their sexual orientation”.²⁵¹ The Court further stated that “discrimination occurs also when the competent state authorities undertake, without discriminatory intent, specific measures that disproportionately affect members of a specific social group, even when these measures do not directly concern them, as well as when they fail to take all the measures within their purview to prevent discrimination against a specific group by third parties”. However, since the Pride Parade had not taken place, the Court observed “that it cannot be reasonably concluded that the competent state authorities had failed to prevent discrimination against the event participants by third parties, because the event had not taken place. The Constitutional Court also found that the constitutional appeal did not cite evidence which would indicate, *prima facie*, the existence of differential treatment of the appellants by the Ministry because of their sexual orientation vis-à-vis the participants in other public events.”²⁵²

The decisions to prohibit the 2011 and 2012 Pride Parades were rendered to allegedly prevent the disruption of public traffic and damage to the health, public morals or safety of people and property (Art. 11(1). Serbian Assembly Act) but did not specify on which particular grounds listed in this Article the events were being prohibited. The Constitutional Court has not ruled yet on the constitutionality of these bans, i.e. whether they pursued a legitimate aim and, if they did, whether they were necessary in a democratic society, i.e. whether there was a pressing social need for such an interference or restriction, whether the state authorities provided relevant and sufficient grounds for such interference and whether such interference in the freedom of assembly was proportionate to the legitimate aim it pursued. When it reviews the constitutional appeals filed by the organisers of the 2011 and

, available in Serbian at <http://gsa.org.rs/2012/03/izlaganje-zorice-mrsevic-na-konferenciji-olgbt-pravima-zajedno-protiv-diskriminacije/>.

249 The organisers of the 2009, 2011 and 2012 Pride Parades complained to the Constitutional Court and the European Court of Human Rights via the Belgrade Centre for Human Rights (*Dorđević and Others v. Serbia*, Application No. 5591/10, UŽ – 5284/2011, *Gabelić Špicer and Others v. Serbia*, App. No. 17802/12). The Constitutional Court has to date rendered a decision only on the constitutional appeal filed by the 2009 Pride Parade organisers, see the decision in the case UŽ- 1918/2009, of 22 December 2011.

250 Paragraph 6.

251 Paragraph 8.

252 *Ibid.*

2012 Pride Parades, the Constitutional Court will have the opportunity to take into account that the attitude of the competent state authorities to the Pride Parade has not changed, and to assess whether the continuous failure of the state authorities, above all the Ministry of Internal Affairs, to do their utmost to ensure the safety of the Pride Parade participants from third parties, i.e. to prevent their discrimination, amounted to violations of the organisers' rights enshrined in the Constitution and the ECHR.

The Kragujevac City Administration and the City Security Council prohibited the public performance dubbed "Demonstration of LGBT Cardboard Effigies" that was to have been organised by the Gay Straight Alliance (GSA) and four other associations. The authorities succumbed to the pressure of violent groups opposing events promoting the rights of people of different sexual orientation or gender identity in this case again.²⁵³

6.5.3. Violence

Serbian NGOs in 2012 publicly alerted to a number of attacks against people the perpetrators presumed were members of the LGBT community. There are, however, no official data on all the crimes committed against LGBT persons or on whether they were motivated by hatred of this group.²⁵⁴ A survey of the views of young men between 14 and 19 years of age showed that 38% of them thought that violence against homosexuals was always justified.²⁵⁵

The police have failed to react adequately to telephone and text threats against LGBT activists, refusing to take any action "until something happens", which in several cases resulted in the infliction of grave physical injuries, like, for instance, the ones sustained by a 2011 Pride Parade co-organiser.²⁵⁶ The attitude of the police towards members of the LGBT population improved to an extent in April and May 2012 and the MIA has begun safeguarding venues at which LGBT persons rally,²⁵⁷ but the police officers' treatment of LGBT persons varies across the country.²⁵⁸ For

253 GSA press release: "GSA Event in Kragujevac Prohibited; GSA: Who is running Kragujevac – Veroljub Stevanović or 'Četnik'?", of 21 June 2012, available in Serbian at <http://gsa.org.rs/2012/06/zabranjena-akcija-gsa-u-kragujevcu/>.

254 Statistics are kept only by form of crime, "Combating Discrimination on Grounds of Sexual Orientation and Gender Equality", event, held in Belgrade on 13 December 2012. The method of keeping official statistics ought to be changed in the event the legislators decide against incriminating hate crimes in the Criminal Code and merely qualify them as "aggravating circumstances".

255 "Survey – 'Resolving Problems' with Violence and Alcohol", 18 December 2012, available in Serbian at <http://www.labris.org.rs/vesti/lokal/5685-istrazivanje-nasiljem-i-alkoholom-gresavaju-problemeq.html>.

256 Debate "Status of Human Rights Defenders in Serbian – National Policy?", held in the Human Rights House on 14 December 2012.

257 *Ibid.*

258 "Combating Discrimination on Grounds of Sexual Orientation and Gender Equality", event held in Belgrade on 13 December 2012.

instance, two young men were assaulted in Smederevo because they appeared gay to their assaulters; one of them sustained grave and the other light physical injuries. The Smederevo crime police was extremely efficient, arrested five people and placed them under 48-hour police custody, after which they were brought before an investigating judge of the Smederevo Basic Court.²⁵⁹

6.5.4. Court Proceedings²⁶⁰

The Belgrade Appellate Court upheld the Belgrade Higher Court judgment in a lawsuit initiated by the GSA against the Belgrade daily Press in which it found that the readers' comments²⁶¹ published on 2 July 2009 on the daily's website edition Press Online constituted hate speech against the LGBT population and that Press had discriminated against this population by allowing the posting of such comments on its website. In its reasoning, the Court said that the first-instance court had been correct to conclude that the impugned comments published on the defendant's website constituted an insult against LGBT persons and incited hatred and violence towards them and that the fact that the comments were deleted from the website did not absolve the defendant, because the website moderator had been under the duty to prevent their publication. The judgment also prohibited Press from reposting these comments on its website and ordered it to publish the integral text of the judgment in its print edition without delay or comment.²⁶²

The Belgrade First Basic Court rendered a judgment finding Nebojša Bakarec, a Democratic Party of Serbia (DSS) senior official and member of the Belgrade city parliament, guilty of a severe form of discrimination against the LGBT population pursuant to Articles 11, 12, 13 and 21 of the Anti-Discrimination Act and prohibiting him from such conduct in the future. He violated the prohibition of hate speech in his text "2 October 2011"²⁶³ by publicly qualifying homosexuality

259 GSA press release: "Smederevo Assaulters Arrested: GSA Applauds Efficiency of Smederevo Police," of 12 September 2012, available in Serbian at <http://gsa.org.rs/2012/09/uhapseni-napadaci-u-smederevu-gsa-pozdravlja-efikasnost-smederevske-policije/>.

260 The BCHR was unable to collect reliable data on discrimination trials because the courts apply different criteria for keeping court statistics. The GSA has to date initiated over 30 lawsuits before various Serbian courts claiming discrimination and violence against the LGBT population, GSA press release: "Verdict against Nebojša Bakarec for Severe Discrimination against the LGBT Population Became Final" of 23 October 2010, available at: <http://en.gsa.org.rs/2012/10/verdict-on-nebojsa-bakarec-for-severe-discrimination-of-lgbt-population-became-final/>.

261 The online edition of the daily Press allowed the publication of readers' comments to the article "I'll be a Gay Icon" that included insults and death threats against LGBT persons and threats of attacks on them and their property.

262 GSA press release: "Court of Appeal in Belgrade Confirmed that Hate Speech against the LGBT Population Cannot be Justified by Freedom of Speech and Information," 16 February 2012, available at <http://en.gsa.org.rs/2012/02/court-of-appeal-in-belgrade-confirmed-that-hate-speech-against-lgbt-population-can-not-be-justified-by-freedom-of-speech-and-information>.

263 The text was published on the www.vidovdan.org portal and is available at http://www.vidovdan.org/index.php?option=com_content&view=article&id=18284:drugi-oktobar-2001-godi

as a disease and “abnormal”. In its reasoning of the judgment, the Court noted that “any communication belittling or intimidating an individual or a group of people on grounds such as race, skin colour, ethnic or national affiliation, gender, sexual orientation, religion or other characteristics and contributing to the incitement of violence and prejudice against individuals or groups” constituted hate speech. It observed that “the essential threat of expressing opinions with elements of hate speech lies in the goal of messages with such content – to cause specific negative effects on a specific person or group because of their personal characteristic”.²⁶⁴

The Belgrade Appellate Court overturned the Belgrade First Basic Court judgment finding United Serbia leader Dragan Marković Palma guilty of severe discrimination against the LGBT population pursuant to Articles 11, 12, 13 and 21 of the Anti-Discrimination Act when he said that “United Serbia and I personally are against all events at which homosexuals are demonstrating in the streets of Belgrade and aiming to present a disease as something normal” and prohibiting him from such conduct in the future. The Belgrade Appellate Court overturned the judgment because it was not properly served on the defendant and ordered a retrial.²⁶⁵

6.5.5. Discrimination against Transsexuals

Transsexual persons are exposed to a high degree of discrimination in exercising their fundamental human rights.²⁶⁶ Transsexuals who underwent sex change operations and obtained legal recognition, i.e. documents in their new names, have had trouble obtaining diplomas in their new names. After reviewing a complaint about this issue, the Commissioner for Protection of Equality recommended to universities in Serbia “to undertake all the necessary measures forthwith to ensure that the University colleges issue new diplomas and other public college documents to persons who changed their names after undergoing a sex change (transgender persons) at their request in a rapid, transparent and accessible procedure, in compliance with national and international standards on protecting transgender persons from all forms of discrimination.”²⁶⁷

As per employment, there is an obvious disproportion between the education levels and jobs held by transgender persons. Most of them perform one-off jobs or

ne&catid=39:drustvo&Itemid=66.

264 GSA press releases: “Verdict against Nebojša Bakarec for Severe Discrimination against the LGBT Population” of 6 July 2012, available at <http://en.gsa.org.rs/2012/07/verdict-against-nebojsa-bakarec-for-severe-discrimination-of-lgbt-population/> and “Verdict against Nebojša Bakarec for Severe Discrimination against the LGBT Population Became Final” of 23 October 2010, available at: <http://en.gsa.org.rs/2012/10/verdict-on-nebojsa-bakarec-for-severe-discrimination-of-lgbt-population-became-final/>.

265 See *2011 Report*, II.4.1.1, and the GSA press release: “Verdict against Dragan Marković Palma Overturned,” 19 September 2012, available at <http://en.gsa.org.rs/2012/09/verdict-against-dragan-markovic-palma-is-revoked/#more>.

266 Commissioner for Protection of Equality, Recommendation of Measures to Achieve Equality, Ref. No. 335 of 16 March 2012.

267 *Ibid.*

work in the grey economy until they obtain the new documents, which additionally jeopardises their livelihood. Transgender persons affected by poverty to a greater extent are forced to engage in the sex industry, which further undermines their safety and exposes them to multiple discrimination.²⁶⁸

6.5.6. Recommendations

1. Adopt a law on same-sex unions or amend the valid legislation to allow same-sex partners to exercise their fundamental rights on grounds of long-term cohabitation.
2. Include hate crimes in the Criminal Code.
3. Ensure the effective enjoyment of the freedom of expression and the freedom of assembly of LGBT persons.
4. Take measures to ensure the effective protection of rights of LGBT persons from threats by third parties.
5. Conduct efficient and effective investigations of threats against or assaults on persons because of their presumed LGBT orientation.
6. Introduce a uniform set of criteria for keeping records of cases in courts with general jurisdiction that will include discrimination as one of the criteria.
7. Adopt a law governing the legal recognition of the effects of sex changes.

6.6. Status of Roma – Social Vulnerability and Discrimination

6.6.1 General

Roma remained the most discriminated against group in the Republic of Serbia in 2012.²⁶⁹ According to the 2011 Census, 147,604 Roma lived in Serbia, whereas 108,000 declared themselves as persons belonging to the Roma National Minority at the 2002 Census.²⁷⁰

The Government of the Republic of Serbia adopted a Decree²⁷¹ establishing the Human and Minority Rights Office, which assumed most of the duties discharged by the prior Human and Minority Rights Directorate. The Office includes

268 J. Zulević, “Research of Problems Transsexuals Face in the Fields of Education, Labour and Employment, Health Care and State Administration,” p. 27 and S. Pavlović, “Analysis of the Legal Status of Transgender and Transsexual Persons in the Republic of Serbia,” pp. 65, 68 in S. Gajin (ed), *Model Law on the Recognition of the Legal Effects of Sex Changes and Determination of Transsexualism*.

269 The survey *Citizens' Attitudes on Discrimination in Serbia*, p. 20, December 2012, is available at: <http://www.undp.org.rs>.

270 More detailed statistics are available at <http://webzrs.stat.gov.rs/WebSite/>.

271 *Sl. glasnik RS 72/12*

the Sector for National Minorities, and, within it, a Group for Improving the Status of Roma and Assisting Migrants.²⁷² The prior Ministry for Human and Minority Rights, the State Administration and Local Self-Governments in late 2011 started drafting a new three –year action plan for the implementation of the Strategy in the 2012–2014 period.²⁷³ In June 2012, the Protector of Citizens sent his opinion to the Ministry for Human and Minority Rights, the State Administration and Local Self-Governments²⁷⁴ recommending the adoption of action plans for the 2012–2014 period because the prior 2009–2011 Action Plan expired. The new Action Plan was drafted by the Human and Minority Rights Office and forwarded to the relevant ministries for their comments.

The Act Amending the Non-Contentious Procedure Act²⁷⁵, adopted in August 2012, lays down the procedure for establishing the time and place of birth of people not entered in the birth registers, which marks the first step towards addressing the problems of several thousand legally invisible people in Serbia. Estimates are that at least 6,500 legally invisible people live in Serbia; most of them are persons belonging to the Roma national minority.²⁷⁶

Discrimination against Roma children in the education system persisted in 2012. The Commissioner for Protection of Equality established that Roma children were segregated in a primary school in the village of Vožegrnci – Blaževo at Novi Pazar, which formed classes of exclusively Roma children.²⁷⁷

The Commissioner also pressed charges²⁷⁸ against the McDonald’s restaurant in Novi Sad, specifically the owner of the McDonald’s franchise in Serbia, the Belgrade-based company Nice Food Restaurants, because the security of the Novi Sad restaurant prohibited Roma children accompanied by a Novi Sad woman from entering the restaurant on 10 July 2012. She also filed a motion to institute misdemeanour proceedings against the company Nice Food Restaurants and its Director,

272 See more in the 2012 Information Booklet of the Human and Minority Rights Office, available in Serbian at: <http://www.ljudskaprava.gov.rs>.

273 See the *2011 Report*, p. 259.

274 Protector of Citizens Opinion No. 16-1026/11, of 18 June 2012, available in Serbian at: <http://www.ombudsman.rs/index.php/lang-sr/2011-12-11-11-34-45/2368--2012-2014->.

275 *Sl. glasnik RS* 85/12. The legal initiative was submitted to the Government of the Republic of Serbia by the Protector of Citizens, pursuant to a petition by the NGO Praxis and the Centre for Advanced Legal Studies, see more in the *Report on the Status of “Legally Invisible” People in the Republic of Serbia* G. Bašić (ed), Protector of Citizens, Belgrade, 2012, available in Serbian at <http://www.ombudsman.pravamanjina.rs/attachments/Izvestaj%20o%20polozaju%20Pravno%20Nevidljivih%20Lica%20u%20RS.pdf>.

276 *Announcement on the Adoption of the Law on Amendments to the Law on Non-Contentious Procedure*, Praxis press release of 4 September 2012, available at <http://www.praxis.org.rs/index.php/en/praxis-in-action/legally-in-persons/item/344-announcement-on-the-adoption-of-the-law-on-amendments-to-the-law-on-non-contentious-procedure>.

277 Recommendation No. 88 211/2011 of 17 January 2012.

278 “Lawsuit against McDonald’s”, press release of 7 August 2012, available in Serbian <http://www.ravnopravnost.gov.rs/lat/vesti.php?idVesti=110>.

as the responsible person, for the misdemeanour in Article 52(2 and 4)²⁷⁹ of the Anti-Discrimination Act.²⁸⁰

6.6.2. Resettlement of the Residents of Informal Roma Settlements

The relocation of the residents of informal Roma settlements continued in 2012. The entire process was conducted under the wary eye of the independent regulatory authorities, the NGO sector and the EU Delegation, the UN OHCHR and UNHCR. The residents of the informal settlement near the New Belgrade Block 72 were evicted in three stages, on 16, 17 and 23 March 2012, while the informal settlement near the Belvil apartment block in New Belgrade was vacated on 26 April 2012.

The resettlement process suffered from a number of deficiencies and many of the stakeholders specified in the Strategy for the Improvement of the Status of Roma in the Republic of Serbia²⁸¹ failed to fulfil their obligations; notably, the Ministry for Human and Minority Rights, State Administration and Local Self-Governments failed to coordinate the work of the state authorities involved in the resettlement; the Labour and Social Ministry failed to take the necessary activities to integrate the relocated Roma residents in their new communities; and the Ministry for Environment, Mining and Spatial Planning failed to prepare an adequate plan and programme for resolving the housing issues of poor Roma²⁸². Roma families that had come from Kosovo have faced the greatest problems as the adequate conditions for their return do not exist yet. After they were evicted, they were offered only temporary accommodation, for several weeks, and then instructed to return to Kosovo. Most of these families have moved to other informal settlements and their housing problems remain outstanding.²⁸³

In the view of the Protector of Citizens, the Belvil eviction was carried out without any major problems and the Belgrade city authorities respected the human dignity of its residents and did not use force. Several organisations disagreed with

279 A legal person or entrepreneur, owner or user of a facility in public use or a public area who denied access to the facility or area to a person or a group of persons on grounds of a personal feature shall be fined between 10,000 and 100,000 RSD. The responsible person in the legal person or a public authority, as well as a natural person, shall be fined between 5,000 and 50,000 RSD for the misdemeanour.

280 “Motion to Institute Misdemeanour Proceedings”, press release of 9 August 2012, available in Serbian at <http://www.ravnopravnost.gov.rs/lat/vesti.php?idVesti=111>

281 The Strategy is available at <http://www.inkluzija.gov.rs/wp-content/uploads/2010/03/Strategija-EN-web-FINAL.pdf>.

282 See more in the Protector of Citizens Report and Recommendations on the Relocation of the Residents of the Informal Roma Settlement at Belvil, 2012, available in Serbian at <http://www.ombudsman.rs/attachments/BELVIL.pdf>.

283 See more in the Praxis Report on the Eviction from the Informal Settlement in Block 72 New Belgrade, Belgrade, 2012, available at <http://www.praxis.org.rs/index.php/en/reports-documents/praxis-reports/item/404-eviction-from-the-informal-settlement-in-block-72-new-belgrade>.

this assessment. Amnesty International considered this eviction to be a forced eviction, due to the lack of adequate notice, genuine consultation and adequate resettlement by the Belgrade authorities. It recommended to the Government of Serbia to introduce a legal framework in full compliance with international human rights law to prohibit all forced evictions.²⁸⁴

The living conditions of residents accommodated in the mobile housing units in the City of Belgrade are better than the ones they used to live in, although these units are not an ideal solution. The City of Belgrade has resettled most of the residents of the informal settlements by itself, without adequate support from the other state authorities. The Roma resettled in the territory of the capital have been realising their rights to welfare, health care, education, public transportation, etc. The Commissioner for Protection of Equality²⁸⁵, however, established “that the provision in the contracts on the use of mobile housing units the Social Protection Secretariat of the Belgrade City Administration has been concluding with the evicted Roma, under which the Secretariat may unilaterally break the contract off in the event the beneficiary does not take a pro-active approach in the City Administration activities aimed at his socialisation and that of his family members, the House Rules applicable in the new mobile housing unit settlement and the warning that persons not living in the settlement may not stay in the settlement are not in accordance with the Anti-Discrimination Act”. The Commissioner recommended to the City Administration to amend the discriminatory provisions of the contracts on the use of the mobile housing units and the House Rules binding on the Roma residents of such settlements.²⁸⁶

The passivity of some local city and municipal governments where Roma were resettled has hindered the achievement of the resettlement purpose and objective: to improve the living conditions of persons belonging to the Roma national minority and facilitate their integration in the community.

The Protector of Citizens recommended to the Niš City Administration to urgently provide the families evicted from the informal Belvil settlement with alternative housing satisfying human rights standards.²⁸⁷ In her recommendation²⁸⁸, the Commissioner for Protection of Equality also described the status of the families resettled to Niš in detail, specifying that 14 persons belonging to the Roma national minority were living in a deserted storage facility, that they lacked beds, electricity

284 See the Amnesty International report Serbia: Belvil forced eviction highlights need for new laws, 2012, available at <http://www.amnesty.org/en/library/info/EUR70/015/2012/en>

285 Commissioner for Protection of Equality Opinion No. 214/2012 of 16 October 2012, paragraph 4.

286 See also the Praxis press release of 6 November 2012 entitled Discrimination against Roma Living in Container Settlements Formed After Forced Evictions, available at: <http://www.praxis.org.rs/index.php/en/praxis-in-action/social-economic-rights/housing/item/425-discrimination-against-roma-living-in-container-settlements-formed-after-forced-evictions>.

287 Recommendation No. 16-2096/12 of 23 July 2012.

288 Commissioner for Protection of Equality Recommendation No 1187 of 29 August 2012.

and sanitary facilities and ordering the City of Niš to take forthwith “all the necessary measures to provide the persons belonging to the Roma national minority and evicted from the settlement at Belvil in New Belgrade and accommodated in the storage facility in Daničića Street in Niš with housing satisfying international housing standards in alternative accommodations for citizens evicted from informal settlements [and] conduct the process for the accommodation and integration of the evicted persons belonging to the Roma national minority in cooperation with the evicted residents and with their active involvement, while taking into account their needs and right to take part in decisions about all issues that concern them, including resettlement and forms of social integration, pursuant to international standards and guidelines for resettling citizens evicted from informal settlement”.

The Protector of Citizens recommended to the Leskovac City Administration to draft a plan for the permanent integration of the families evicted from the settlement at Belvil and take to task the city administration staff charged with this issue for the non-economical actions taken in the process of providing the Roma with alternative housing.²⁸⁹ The NGO Praxis warned that the Leskovac City Administration acted in contravention of the Protector’s recommendation and demonstrated that it did not have a plan for the integration of Roma, because it evicted the Roma resettled from the informal settlement at Belvil from their alternative accommodations. Twenty-three people belonging to the Roma national minority, including 11 children, were evicted from the Leskovac Hostel Mimi, where they were temporarily accommodated after eviction from the informal settlement at Belvil. They received one-off allowances, ranging from 20 to 30 thousand RSD, provided that they resolved their housing problems themselves until the end of the week, when the Leskovac City Administration would find permanent housing for them. According to rough estimates, the Leskovac City Administration spent two million RSD irrationally and inefficiently for the temporary accommodation of the families evicted from the informal settlement at Belvil.²⁹⁰

The residents of the Belgrade suburb Resnik and the police clashed in April 2012 during a neighbourhood protest against the city authorities’ decision to move Roma evicted from the settlement at Belvil into their neighbourhood.²⁹¹ Ethnically motivated attacks also took place in Jabučki rit in May 2012.²⁹² The BCHR expects of the state authorities to demonstrate greater commitment to the resolution of the

289 Protector of Citizens Recommendation 16-1424/12 of 23 July 2012.

290 *Roma Evicted from Alternative Accommodation in Leskovac End up in the Street*, Praxis press release of 1 August 2012, available at <http://www.praxis.org.rs/index.php/en/praxis-in-action/social-economic-rights/housing/item/317-roma-evicted-from-alternative-accommodation-in-leskovac-end-up-in-the-street>.

291 *Blic* report on the assaults on police at anti-Roma protest, available in Serbian at <http://www.blic.rs/Vesti/Beograd/316273/Povredjeno-11-polica-jaca-i-dva-gradjanina-na-protestu-u-Resniku-protiv-doseljavanja-Roma>, 8 April, 2012.

292 *Večernje novosti* report on the assaults on resettled Roma, available in Serbian <http://www.novosti.rs/vesti/beograd.74.html:377850-Beograd-Napadnuti-raseljeni-Romi>, 1 May 2012.

Roma issue and of the local governments to take a more pro-active approach in implementing the measures in the Strategy to assist the Roma families which had come from the informal Belgrade settlements. An adequate and lasting solution for the evicted residents of the informal settlements will be found only if all public authorities join forces and act in concert.

6.6.3. Recommendations

1. Adopt a new Action Plan for the implementation of the Strategy for the Improvement of the Status of Roma in the Republic of Serbia.
2. Take measures to achieve the equality of Roma children in the education system.
3. Conduct efficient and effective investigations and trials of discrimination and of violence against persons belonging to the Roma national minority, identify and punish the responsible legal and natural persons.
4. Respect the dignity and human rights of the residents of informal settlements during their eviction and resettlement.
5. Facilitate the active involvement of the Roma population, whilst respecting their needs and the right to participate in decisions on all issues that concern them, including resettlement and forms of social integration.

II INDIVIDUAL RIGHTS

1. Right to Life

1.1. General

The right to life is enshrined in Article 2 of the ECHR, Article 6 of the IC-CPR and their Protocols abolishing capital punishment. As a signatory of these human rights treaties, Serbia assumed a series of positive obligations, including the incorporation of this right in its positive regulations. The Constitution prescribes that human life is inviolable (Art. 24 (1)) and prohibits capital punishment (paragraph 2). The Constitution also prohibits measures derogating from the right to life during a state of war or emergency.²⁹³

The Constitution is thus in accordance with the provisions of the international human rights instruments. Furthermore, every state is under the obligation to establish efficient criminal legislation envisaging a series of different criminal offences and incriminating the violations of the right to life of other people. In addition, the ECtHR defined in its case law the obligation of states to conduct effective and efficient investigations, that is, investigations “capable of leading to the identification and punishment of those responsible”²⁹⁴ for someone’s violent death.

The ECtHR has to date reviewed violations of Article 2 of the ECHR by the Republic of Serbia in four cases. Serbia and the applicant reached a settlement in the *Petković* case,²⁹⁵ where the violation of the right to life was obviously a consequence of the failure to conduct an efficient and effective investigation. The ECtHR dismissed the application in the *Petrović* case,²⁹⁶ because it found the complaints incompatible *ratione temporis*. In the *Ribić* case,²⁹⁷ the ECtHR found no breach of the right to life.

293 Article 202, Constitution of the Republic of Serbia.

294 See the ECtHR judgment in the case of *Ogur v. Turkey* [GC], App No. 21594/93, § 88, ECHR 1999-III

295 *Petkovic v. Serbia*, ECtHR, App. No. 31169/08.

296 *Petrovic v. Serbia*, ECtHR, App. No. 40485/08.

297 *Ribic v. Serbia*, ECtHR, App. No. 16735/02.

The ECtHR found Serbia in breach of the ECHR in the *Mladenović* case in 2012,²⁹⁸ precisely because the competent authorities failed to conduct an efficient and effective investigation that would have clarified all the circumstances and to punish the perpetrators involved in killing the applicant's son. The public prosecutor's decision not to prosecute *ex officio* a crime of high social risk such as murder, numerous adjournments of the hearings for various, sometimes insufficiently clear reasons and lack of uniform jurisprudence of courts of different instances are merely some of the indicators corroborating the fact that the state had failed to conduct an efficient and effective investigation and complete the court proceedings within a reasonable time and impartially in this case.

Thirty six constitutional appeals have so far been lodged with the Constitutional Court of Serbia alleging violations of Article 24 of the Constitution. Most of the applicants based their claims that their right to life was violated on a breach of their right to work enshrined in Article 60 of the Constitution. They claimed that they had been deprived of their right to fair remuneration for their work and tried to prove that this had endangered their lives. The Constitutional Court did not find a breach of the right to life in any of the constitutional appeals and rejected all 36 of them as ill-founded.

1.2. Legal Protection of the Right to Life

The obligation to legally protect the right to life is fulfilled by the Criminal Code, the Criminal Procedure Code and the Police Act.

The Criminal Code includes a chapter on crimes against life and body (Arts. 113–127), incriminating various forms of violent deaths. The Criminal Code includes numerous categories of other offences that may threaten human lives and health. These offences are grouped in the chapters on crimes against human health (Arts 246–259), the environment (Art. 260–277), general safety of people and property (Arts. 278–288) and public traffic safety (Arts. 289–297). In the event these crimes resulted in someone's death, their perpetrators are sentenced to between one and eight years' imprisonment.

Under Article 109 of the Criminal Procedure Code the police shall protect the witnesses. Such protection is afforded only if it would be impossible or extremely difficult to conduct criminal proceedings regarding crimes against the constitutional order and security, humanity and other values protected under international law, as well as organised crime, without the testimony of that witness. Witness protection is governed in detail by the Act on the Protection of Participants in Criminal Proceedings. Furthermore, Article 73 of the Police Act lays down that victims of crimes and other persons shall be afforded protection as long as their lives are in danger.

The CPC governs in detail the prosecution of perpetrators of crimes which involves pre-criminal proceedings (not part of the criminal proceedings), the pre-

298 *Mladenovic v. Serbia*, ECtHR, App. No. 1099/08.

liminary proceedings entailing investigation and indictment, the main hearing in the first instance and the appellate proceedings. The public prosecutors are under the obligation to prosecute perpetrators of crimes resulting in someone's death *ex officio*. Public prosecutors shall act on criminal reports, the vast majority of which are filed by the police, and may ask the investigating judges to conduct an investigation or file an indictment without conducting an investigation first. An investigating judge shall render a decision terminating the investigation in the event the public prosecutor abandons prosecution during or after the investigation. A non-contentious judicial panel shall render a decision terminating an ongoing investigation during the deliberation of any issue during the investigation in the following instances: 1) in the event the offence the defendant is charged with is not a criminal offence and there are no grounds for applying security measures; 2) in the event the statute of limitations expired or the offence was covered by amnesty or pardon or other circumstances permanently bar prosecution; 3) if there is no evidence that the defendant committed the crime.

According to the Statistical Office of the Republic of Serbia a total of 336 criminal reports for crimes against life and body and resulting in death (Arts. 113–120 of the CC) were filed in 2010; 39 of them were lodged against unidentified persons.²⁹⁹ A total of 221 indictments were filed the same year and final judgments were delivered in 176 of the cases.³⁰⁰ A total of 172 people were sentenced to jail, 69 of whom to 10 or more years' imprisonment. In 21 cases of aggravated murder, the courts convicted the defendants to less than 10 years' imprisonment, which indicates that the courts' penal policy for this crime constituting a major social risk is mild.³⁰¹ The percentage of resolved cases of murders committed in 2010 cannot be established on the basis of the SORS data.³⁰² It is, therefore, difficult to assess the efficiency of the prosecution authorities in resolving cases of violent deaths caused by other people. For comparison's sake, 201 crimes corresponding to the offences incriminated in Arts. 113–120 of the Serbian Criminal Code were reported in Croatia in 2010; 197 of them (or 98%) were resolved.³⁰³

These crimes led to the filing of 285 criminal reports in 2011, 28 of which against unidentified perpetrators. A total of 262 indictments were filed and 210 final verdicts were rendered. The defendants in 201 cases were sentenced to jail; in 58 of these cases, they were convicted to ten or more years' imprisonment. The penal policy for the crime of aggravated murder improved over the previous year, given

299 These criminal reports may not necessarily regard crimes committed in 2010 because the SORS does not keep statistics allowing for monitoring proceedings regarding a specific criminal offence (e.g. homicide). The number of criminal reports in the statistical data include also reports of crimes committed in the previous years. The same applies to indictments and judgments.

300 Including attempted murder.

301 The penalties were probably commuted pursuant to Article 57 of the CC.

302 The same applies to 2011.

303 See the Croatian Ministry of Internal Affairs 2010 report available in Croatian at <http://www.mup.hr/UserDocsImages/statistika/2011/statistika2010..pdf>.

that the courts convicted 45 of the 62 defendants, who were sentenced to jail, to over 10 years' imprisonment.³⁰⁴ The number of homicides in Croatia in 2011 stood at 48 and all the cases were resolved. There was a total of 123 attempted murders and only six were not resolved, wherefore the percentage of resolved cases was extremely high – 95%.³⁰⁵

The BCHR was unable to establish how many criminal reports and indictments were filed in 2012 given that the Republican Public Prosecution Office advised us to contact the SORS in its reply to our request for access to information. The SORS, however, planned on publishing the data in late 2012, but not for all the crimes of interest to the BCHR.³⁰⁶ The BCHR also tried to establish how many violent deaths had been reported to the Ministry of Internal Affairs in the January-September 2012 period and how many of these violent deaths had been caused by other (identified or unidentified) perpetrators. The MIA unfortunately did not respond to our request for access to information.³⁰⁷ It is thus difficult to give an assessment of the overall efficiency in resolving violent death (homicide) cases. However, the information most of the courts provided the BCHR about crimes against life and body (Arts. 113–120 of the CC) allowed the BCHR to assess their penal policies in 2012.³⁰⁸ Of the 18 convictions for aggravated murder, the defendants in 15 cases were sentenced to over ten years' imprisonment (three to between 30 and 40 years in jail), which demonstrates that the courts' penal policy is still mild, like it was in 2011. In 24 of the 40 murder cases in which the defendants were convicted, the courts sentenced them to between three and ten years' imprisonment.

It needs to be noted that the Serbian prosecution authorities have not resolved numerous political murders, include the assassination of journalists Slavko Ćuruvija (on 11 April 1999) and Radoslava Dada Vujasinović (on 8 April 1994), army recruits Dragan Jakovljević and Dražen Milovanović (killed at the Topčider barracks on 5 October 2004) and judge Nebojša Simeunović (killed in November 2000).

1.3. Use of Lethal Force by State Agents

Apart from the police, means of coercion that may be lethal, above all firearms, may be used also by the officers of the Security Information Agency (BIA)³⁰⁹

304 Fourteen judgments regarded attempted murder, and the courts probably convicted the perpetrators to penalties below the statutory minimum.

305 See the Croatian MIA 2011 report, available in Croatian at <http://www.mup.hr/UserDocsImages/statistika/2012/pregled%202011.pdf>.

306 Request No 10-251/12 submitted on 2 November 2012.

307 Request No 10-250/12 submitted on 2 November 2012.

308 All Higher Courts and all but several Basic Courts replied to the BCHR's requests.

309 Under Article 12 of the Security Information Agency Act (*Sl. glasnik RS*, 42/2002 and 111/2009), specific Agency officers "engaged in uncovering, monitoring, documenting, preventing, suppressing and breaking up activities of organisations and individuals involved in organised crime and criminal offences with elements of foreign, domestic and international terrorism and the severest forms of crimes against humanity and international law, and the

and the guards in penal institutions under the jurisdiction of the Ministry of Justice Penal Sanctions Enforcement Administration. Police and BIA officers may use means of coercion, including firearms, under the conditions and in the manner laid down in the Police Act³¹⁰ and the Rulebook on the Technical Features and Manner of Use of Means of Coercion,³¹¹ while the Penal Sanctions Enforcement Act (PSEA)³¹² and the Rulebook on Measures for Maintaining Order and Security in Penal Institutions³¹³ specify under which conditions means of coercion may be used in penitentiaries.

Article 100 of the Police Act lays down that firearms may be used “only in the event the task cannot be accomplished by the use of other means of coercion” and in the event their use is “absolutely necessary” to protect the lives of people.³¹⁴ The regulations on the police use of firearms are in that sense in accordance with the standards developed in the ECtHR case law on Article 2.³¹⁵ The Rulebook on the Technical Features and Manner of Use of Means of Coercion sets out that the police will prepare an action plan before they exercise their powers against a person in the event they have information indicating that the person will offer armed resistance (Art. 16).³¹⁶ When regulating recourse to firearms, the legislators aimed to ensure that they are used in the last resort and in keeping with the principle of proportionality. The law thus prohibits the use of arms in the event it might threaten the lives of people not endangering other people’s lives. Furthermore, the Police

constitutional order and security of the Republic, shall exercise the powers laid down in the law and other regulations applied by authorised officers and staff charged with specific tasks of the Ministry of Internal Affairs pursuant to the regulations on internal affairs.” Pursuant to Article 16 (1 and 2) of the Security Information Agency Act, “[I]f essential for the security of the Republic of Serbia, the Agency may assume and directly perform the duties within the remit of the ministry responsible for internal affairs. The decision on assuming and performing the duties within the remit of the ministry responsible for internal affairs shall be taken jointly by the Agency Director and the minister responsible for internal affairs.” These duties, too, shall be performed by the Agency officers “under the conditions and in the manner and by the exercise of powers laid down in the law and other regulations that are applied by authorised officers and staff charged with specific tasks of the Ministry of Internal Affairs pursuant to the regulations on internal affairs” (Art. 16(4)).

310 *Sl. glasnik RS* 101/05, 63/09 – Constitutional Court decision and 92/2011.

311 *Sl. glasnik RS* 19/07 and 112/08.

312 *Sl. glasnik RS* 85/05 and 72/09.

313 *Sl. glasnik RS* 105/06.

314 Specifically, firearms may be used to: protect the lives of people; prevent the escape of a person apprehended during the commission of a crime but only “if there is an imminent threat to life”; prevent the escape of a person lawfully deprived of liberty or against whom an arrest warrant was issued for a crime “if there is an imminent threat to life”; to repel an immediate attack threatening the life of an officer or another person (Art. 100).

315 See, e.g., the ECtHR judgments in the cases of *McCann and Others v. the United Kingdom* (ECtHR, App. No. 18984/91) and *Makaratzis v. Greece* (ECtHR, App. No. 50385/99).

316 This provision aims to prevent violations of the right to life due to the lack of a plan or an inadequate police operation plan, like e.g. in the above mentioned case of *McCann and Others v. the United Kingdom*. See paragraphs 212 and 213 of the judgment.

Act lays down that an officer shall exercise police powers, in accordance with, inter alia, the “standards set in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers” (Article 31(5)).

Regulations governing the use of lethal weapons by the staff of penal institutions are somewhat more detailed than those applying to the police. For instance, the Rulebook on Measures for Maintaining Order and Security in Penal Institutions explicitly lays down that the purpose of using firearms is to incapacitate the assailant and that the authorised officer shall endeavour not to injure the convict’s vital organs, i.e. that he will aim at the convict’s legs (Art. 36(4)). The Rulebook distinguishes between the lethal use of firearms, permitted only if human lives are in danger (Art. 36(5)) and non-lethal use of firearms permitted also when human lives are not in danger.³¹⁷ The main difference between regulations governing the use of firearms by the police and the use of firearms by prison guards is that the former strictly limit the use of firearms to situations in which there is “is an imminent threat to life”, while the latter allow the use of firearms also in situations in which no-one’s life is in danger and when there is only the risk of the convict or detainee absconding. This is not, however, in contravention of Article 2 of the ECHR, which allows the use of potentially lethal means of force in situations when it is absolutely necessary to prevent an escape and does not condition it by the existence of danger to anyone’s life.³¹⁸

Article 25 of the Rulebook on Technical Features and Manner of Use of Means of Coercion prescribes a special internal audit procedure for reviewing whether the use of means of coercion was justified and lawful; such a procedure is conducted whenever firearms were used or when the means of coercion resulted in grave physical injuries or death (Art. 25). In such cases, the Police Director or the head of the relevant regional police directorate in which the police officer who used the means of coercion works, sets up a commission comprised of at least three police officers, which reviews the circumstances in which the means of coercion were used, makes a record of the review and renders its opinion on whether the use of means of coercion was lawful and professional. The opinion of such a commission, which cannot be deemed independent since it may comprise police officers working in the same unit as the policeman whose actions are under review, even officers directly subordinated to him, is forwarded to the police officer charged by the Minister of Internal Affairs with assessing whether the use of means of coercion was justified and lawful. In the event this officer concludes that the use of means

317 Under Article 131 of the PSEA, firearms may be used only if it is impossible to otherwise repel a concurrent and imminent unlawful attack endangering human life; prevent escape of a prisoner from a high security prison; prevent the escape of specific categories of convicts or detainees during their transfer.

318 See, e.g. the judgment in the case of *McCann and Others v. the United Kingdom*, paragraph 148, and the decision of the European Commission of Human Rights in the case of *Stewart v. the United Kingdom*, ECmHR, App. No. 10044/82, paragraphs 11-19.

of coercion was unjustified or unlawful, he shall “propose to the Police Director to take the measures prescribed by the law” (Art. 25(3)). This procedure, which does not preclude other forms of internal audits of the police or investigations conducted by judicial authorities, is the only procedure specifically envisaged in case a state agent caused someone’s death by using means of coercion. As far as its transparency is concerned, it needs to be noted that the Rulebook on the Technical Features and Manner of Use of Means of Coercion only lays down that “information on cases of unjustified or unlawful use of the means of coercion” shall be an integral part of the MIA annual report to the National Assembly and “publicly available” (Art. 25(1)). The law is silent on the role of the injured parties in the procedure, i.e. whether they can take any part in it or propose measures to protect their interests. It appears that they do not have such a possibility and that the only effective investigation in the sense of the ECHR³¹⁹ is the one that can be conducted within an adequate court proceeding. Therefore, the prerequisites for conducting an effective investigation are in place when the unlawful use of the means of coercion is promptly brought to the attention of the relevant judicial authorities. However, given that the internal audit of the justification and lawfulness of the use of means of coercion can be conducted by persons who are not independent, i.e. persons who may have an interest in protecting the policeman who had employed means of coercion unlawfully (as a rule because there is a specific hierarchical link between them or they work in the same unit), there is a risk that the relevant information on the unlawful use of the means of coercion never reaches the judicial authorities if the injured party is passive i.e. does not initiate an investigation. This is why the internal audits of the use of means of coercion should be legally regulated so as to preclude the involvement in the procedure of officers working together or in any inappropriate hierarchical link with the officer whose actions are under review. Furthermore, the regulations should provide the injured parties with the possibility to protect their legitimate interests and have adequate insight in the work of the body conducting the procedure.

Judicial proceedings regarding a death caused by a state agent do not differ at all from proceedings conducted in case of a death for any other reason. The Criminal Procedure Code (CPC) in principle provides for effective investigations in the way in which they are defined in the ECtHR case law.³²⁰

319 The ECtHR dealt with the requirements that must be satisfied for an investigation into someone’s death to be considered effective in several cases. These requirements are summed up in the case of *Kelly and Others v. the United Kingdom* (ECHR, App. No. 30054/96), paragraphs 94-98. Briefly, the initiative to launch the investigation cannot be left to the next of kin, i.e. the authorities must act of their own motion once the matter has come to their attention; the investigation must be independent from those implicated in the events both *de iure* and *de facto*; it must be capable of leading to the identification and adequate punishment of those responsible; it must be conducted without delay; there must be a sufficient element of public scrutiny; the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

320 *Ibid.*

Under Article 129 of the 2011 CPC, which was to have come into effect in early 2013,³²¹ a public prosecutor or a court must order that a specialist in forensic medicine perform an examination and autopsy of the body of, inter alia, a person who had died whilst deprived of liberty. The 2001 CPC³²² does not include such an obligation and merely stipulates that the examination and autopsy of the body of the deceased shall be performed “whenever there is suspicion, or if it is evident that death was caused by a criminal offence or is related to the commission of a criminal offence” (Art. 124). The Rulebook on House Rules in Remand Wards³²³ prescribes that in the event a detainee “died of natural causes”, the court president supervising detainees shall form a commission that shall note the cause of death for the record and that actions shall be taken at the request of the competent investigating judge in the event a detainee “had not died of natural causes” or “suspicion has arisen regarding the cause of death” (Art. 56(3 and 4)). This Rulebook, however, does not specify who assesses whether or not the detainee died “of natural causes” or how. The Police Act and by-laws governing internal affairs and the PSEA and by-laws on treatment of convicts do not envisage a specific procedure in case a person deprived of liberty dies; they only lay down the obligation to notify the competent court or police of the death of a person deprived of liberty (if he died in a penal institution). Therefore, given that Article 129 of the new CPC is still not applied, the procedure in case of the death of people deprived of liberty fully depends on the assessment of the relevant judicial authorities, the only ones with the power to decide whether an autopsy of the deceased should be performed. Of course, the mandatory examination and autopsy of the deceased laid down in Article 129 of the 2011 CPC affords a much better guarantee that the investigation into the death of a person deprived of liberty will be effective; since the 2011 CPC does not set any preconditions that have to be fulfilled before such an investigation is launched, the authorities may wish to consider giving effect to this Article as soon as possible, even before the CPC fully comes into force, particularly if its application is put off yet again.

321 *Sl. glasnik RS* 72/11 and 101/11. The CPC already applies to proceedings conducted by prosecutors with special jurisdiction (for organised crime and war crimes) and is to apply to all other criminal proceedings as of 2013. The CPC was initially to have come into effect with respect to all criminal proceedings on 15 January 2013, but the National Assembly in late December 2012 adopted the Act Amending the CPC submitted by the Government and moving the date when it will fully come into effect and replace the valid CPC to 1 October 2013. The above-mentioned Article 129 does not apply to any court proceeding, but to all instances in which a person dies whilst deprived of liberty, regardless of the grounds for the deprivation of liberty. It can therefore be concluded that this Article cannot apply for now unless the deceased person had been deprived of liberty pursuant to a decision rendered in criminal proceedings, which the new CPC already applies to.

322 *Sl. list SRJ* 70/01 and 68/02, and *Sl. glasnik RS* 58/04, 85/05, 115/05, 85/05 – other law, 49/07, 20/09 – other law, 72/09 and 76/10.

323 *Sl. glasnik RS* 35/99.

Seventy prisoners died in penal institutions in the first ten months of 2012.³²⁴ According to the Penal Sanctions Enforcement Administration data, 65 of them died of natural causes and five committed suicide. The 2012 data roughly coincide with the number of deaths, including suicides, in the previous years.³²⁵

The Criminal Code does not draw any distinctions between state agents and other perpetrators of crimes against life and body. It therefore does not envisage separate penalties for crimes against life and body committed by state agents. Furthermore, the general rules on sentencing do not specify whether the fact that the perpetrator was acting in an official capacity will be considered as an extenuating or aggravating circumstance. The Criminal Code only lays down that the circumstances in which the crime was committed and other circumstances regarding the personality of the perpetrator will be taken into account during sentencing (Art. 54(1)).

1.4. The ECtHR's Judgment in the Case of Mladenović v. Serbia

In May 2012, the ECtHR delivered its judgment in the case of *Mladenović v. Serbia*, in which it found a breach of the right to life due to the lack of an efficient and effective investigation into the death of the applicant's son. The applicant's son was killed during a fight between two groups of youths in 1991 by an off-duty police officer, who shot him while apparently attempting to assist his own brother as one of the participants in the incident. The investigation of the police officer was soon discontinued and the public prosecutor consequently abandoned criminal prosecution. The victim's mother then took over the criminal prosecution. The regular courts rendered two judgments acquitting the police officer, both of which were quashed by the Supreme Court.

The ECtHR established that the termination of the investigation, the prosecutor's refusal to resume prosecution and the unreasonable length of the criminal proceedings against the policeman in which judgments in contravention of the presented evidence were rendered amounted to a violation of the procedural obligation under Article 2 of the ECHR, which obliges the state to conduct efficient and effective investigations of cases of deprivation of life. The proceedings before the

324 Data provided by the Ministry of Justice and State Administration in its memo to the BCHR No. 7-00-00211/2012-42 of 7 December 2012.

325 According to the data of the Penal Sanctions Enforcement Administration, 63 people died in penal institutions in 2011, 58 of them of natural causes. Of the other five, one person died "after an accident in the institution" and four committed suicide. In 2010, 69 people died in penal institutions, 62 of them of natural causes, one "in an accident outside the institution" and six committed suicide. The total number of inmates in these institutions has remained more or less the same in the last few years: there were 11,211 prisoners at the end of 2010, 10,094 at the end of 2011 and 11,080 in late November 2012. See the Penal Sanctions Enforcement Administration 2010 and 2011 Annual Reports (pp. 68 and 83 and pp. 110 and 125 respectively) available in Serbian on the Administration website: <http://www.uiks.mpravde.gov.rs/cr/articles/izvestaji-statistika/>.

national courts had not been completed at the time the ECtHR rendered its judgment in May 2012.

1.5. Recommendations

1. Introduce a single methodology for keeping judicial records and publish updated court statistics regularly.
2. Ensure that internal audits of the lawfulness and justification of the use of means of coercion are conducted by persons absolutely independent from the implicated state agents and ensure that the injured parties can protect their legitimate interests during the procedure and have adequate insight in the work of the bodies conducting the procedure.
3. Start applying the rule in the new CPC³²⁶, mandating an examination and autopsy of a person who died whilst deprived of liberty.

2. Prohibition of Ill-Treatment and Status of Persons Deprived of Liberty

2.1. General

The prohibition of torture and degrading or inhuman treatment or punishment (ill-treatment) is envisaged by all relevant international instruments, from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention of Human Rights, to international human rights treaties focusing exclusively on the prohibition of torture – the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: CaT) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The prohibition of ill-treatment is absolute, which means that it cannot be justified under any circumstances. The prohibition of ill-treatment is a peremptory norm of international law that may not be derogated from at any time. In other words, all people have the right not to be ill-treated at all times. The states' main obligation, which lies in the essence of the prohibition of ill-treatment, is to refrain from ill-treating persons under their jurisdiction. States, however, also have a number of positive obligations aimed at preventing torture, e.g. to conduct effective official investigations of complaints of ill-treatment in order to identify and punish the perpetrators, compensate the victims and ensure humane living conditions and adequate health care to persons deprived of liberty. The states are also under the

326 See Article 129 of the 2011 CPC.

obligation to do their utmost to protect individuals from ill-treatment by private individuals. The prohibition of ill-treatment also entails the prohibition of extraditing people to states where they are at risk of being tortured and of using evidence obtained by torture.

Article 23 and 24 of the Constitution of the Republic of Serbia guarantee the inviolability of human dignity and life and of physical and mental integrity. Article 25 of the Constitution explicitly prohibits subjecting anyone to torture or inhuman or degrading treatment or punishment, while Article 28 lays down that persons deprived of liberty must be treated humanely and with respect to their dignity. This Article also prohibits any violence against a person deprived of liberty and any extortion of a statement. Under the Constitution, persons deprived of liberty are, *inter alia*, entitled to notify a person of their own choice of their arrest without delay and to have counsels of their own choosing attend their interrogations (Art. 27(2) and Art. 29(1)), as well as to redress (Art. 35). The right of persons deprived of liberty to be examined by a doctor of their own choosing is the only one not enshrined in the Constitution, but which persons deprived of liberty must have in the view of the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (hereinafter CPT).³²⁷

It can be concluded that the above-mentioned provisions of the Constitution are in accordance with the ratified international treaties, i.e. that they absolutely prohibit torture and other forms of ill-treatment (inhuman or degrading treatment or punishment). However, although the Constitution is the highest law of the land, the degree in which this right can be exercised greatly depends on the laws and other regulations elaborating the constitutional principles and establishing mechanisms for the prevention of ill-treatment and particularly the practices of the state authorities applying these regulations.

Article 137 of the Serbian Criminal Code incriminates torture and ill-treatment, while Article 136 incriminates the extortion of a confession or statement.

The definition of torture in Serbian law resembles the one in the Convention against Torture,³²⁸ but significantly differs from it on one point. As opposed to the Convention against Torture, under which torture is committed by or at the instigation of or with the consent or acquiescence of a public official or another person

327 See CPT Standards, paragraphs 36 and 42, available at <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

328 The 1984 Convention against Torture defines torture in the following manner: “(F)or the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions”, *Sl. list SRJ (Međunarodni ugovori)*, 9/91.

acting in an official capacity, the Criminal Code defines torture or ill-treatment by a public official as a qualified form of the crime and warrants a stricter penalty. The circle of potential perpetrators of this crime is therefore much broader. On the other hand, the crime of extortion of a confession or statement may be committed only by a public official. The case law of the international human rights bodies indicates that imprisonment ranging between 6 and 20 years may be considered an adequate penalty for torture³²⁹. Torture and ill-treatment warrants up to eight years' imprisonment, while the extortion of a confession or a statement carries a maximum penalty of 10 years' imprisonment. The prescribed penalties are much too mild and not proportionate to the gravity of the crimes.³³⁰ Furthermore, with the exception of the qualified form of extortion, the Criminal Code allows the courts to sentence the perpetrators of both of these crimes to conditional sentences.

Conditional sentences are not only legally allowed, but often imposed in practice as well. For instance, only seven people were convicted for extortion of a confession or statement in the 2006–2010 period; six of them were handed down conditional sentences and only one was sentenced to between 3 and 6 months' imprisonment.³³¹ In the 2006–2010 period, 184 people were found guilty of torture or ill-treatment: 131 were handed down conditional sentences, 17 were fined, five were cautioned by the court, two were found guilty but relieved of punishment, and only 29 were sentenced to imprisonment.³³² Of the 35 people found guilty of torture and ill-treatment in 2011, five were sentenced to imprisonment, five were fined, 23 were handed down conditional sentences, while two were found guilty but relieved of punishment. Only one person was found guilty of extortion of a confession or statement in the same period and punished by a conditional sentence. By the end of the reporting period, the authorities failed to reply to BCHR's requests for information on trials for torture and extortions of confessions or statements.

Torture victims most often exercise their right to redress in civil proceedings; in practice (albeit not under the law), their success depends on whether the pepe-

329 See I. Janković, *Prohibition of Ill-Treatment*, Belgrade Centre for Human Rights, 2010, p. 96.

330 In its Concluding Observations on Serbia of 19 January 2009, the Committee against Torture said that the penalties in Article 137 of the Criminal Code were not proportionate to the gravity of the crime (paragraph 5). In its Concluding Observations on Serbia's report on the implementation of the ICCPR of 24 March 2011 (paragraph 11), the UN Human Rights Committee expressed concern that torture and ill-treatment were only punishable by a sentence of up to a maximum of eight years' imprisonment, and that the statutory limitation period was ten years. It recommended that Serbia amend its legislation and practice, both with respect to the length of the maximum prison term for torture and related crimes, and extend the statutory limitation period, bearing in mind the gravity of such crimes.

331 Data obtained from Judicial Statistics.

332 One person was convicted to 2-3 years' imprisonment, two to 6-12 months' imprisonment, six to 3-6 months' imprisonment, nine to 2-3 months' imprisonment, one to 1-2 months' imprisonment, two to maximum 30 days' imprisonment, eight to maximum two months' imprisonment. Data obtained from Judicial Statistics. These data cover all perpetrators of this crime, wherefore it was impossible to establish how many public officials (police officers, prison guards) were actually convicted.

trator was found guilty of ill-treatment in a criminal trial³³³. Therefore, victims are deprived of the right to compensation in civil proceedings due to the state's inactivity in conducting effective investigations.³³⁴ The situation of persons deprived of liberty, who are subjected to ill-treatment the most often, is much worse than that of other citizens, because they have difficulties accessing the court and are often unable to document their allegations of ill-treatment.

The above statistics clearly demonstrate that the courts' case law on torture and ill-treatment and the extortion of a confession or statement is not conducive to the effectiveness of investigations, adequate punishment of the perpetrators and redress of the victims.

Although the Constitutional Court of Serbia has reviewed constitutional appeals claiming violations of Article 25 of the Constitution, which guarantees physical and mental integrity and prohibits ill-treatment, it has not provided a substantial interpretation of the prohibition of ill-treatment yet.³³⁵ In all Article 25 cases, the Constitutional Court established that the appellants' physical or mental integrity had not been violated by the state authorities' decisions or actions, i.e. that there were no grounds in their constitutional appeals indicating a breach of the Constitution and dismissed them as ill-founded.

Two Constitutional Court decisions are, however, noteworthy. The Constitutional Court reviewed a constitutional appeal³³⁶ of an individual who was prevented from exercising his right to compensation for unlawful deprivation of liberty i.e. forced mobilisation because the shorter statutes of limitations provided by the Act on Contracts and Torts were applied.³³⁷ The Constitutional Court upheld the legal view of the Civil Law Department of the Supreme Court of Serbia of 10 February 2004, under which the statute of limitations for filing damage claims for unlawful deprivation of liberty expired pursuant to Article 376 of the Act on Contracts and

333 Under the CPC, a civil claim arising from a crime may be reviewed in a criminal proceeding, provided that it does not considerably prolong the proceeding. In civil proceedings against perpetrators of crimes, the courts are limited by the criminal courts' final judgments finding the perpetrators guilty with respect to the existence of the crimes and the defendants' liability (Civil Procedure Act, Article 13).

334 In the case of *Dimitrijević v. Serbia*, the Committee against Torture in 2005 concluded that the state had prevented the victim from seeking damages in civil proceedings because it failed to conduct an effective investigation of the ill-treatment charges CAT/C/35/D/172/2000, 2005, (paragraph 7.4).

335 There are 13 decisions on constitutional appeals claiming violations of the right to physical and mental integrity enshrined in Article 25 of the Constitution on the Constitutional Court's website.

336 Decision UŽ 583/2008 of 1 April 2010. The Constitutional Court applied similar reasoning also in the case of UŽ-453/2008 of 28 May 2010.

337 These people had fled to Serbia in the 1990s. They were arrested by the police, subjected to ill-treatment and sent back to the war zones (so-called forced mobilisation). Most of these people were unable to initiate criminal prosecution because they were unable to identify the perpetrators of ill-treatment.

Torts (three years since the injured party became aware of the damage; five years since the occurrence of the damage). According to this view, the longer statutes of limitations in Article 377 of the Act on Contracts and Torts, which equal those for criminal prosecution, apply only to the perpetrators of crimes (natural persons), not the state (a legal person). The Constitutional Court adopted a legal view on 7 July 2011 that the more favourable statutes of limitations applied only if the existence of a crime was established and the defendant was found guilty by final judgment.³³⁸ This interpretation of the Act on Contracts and Tort has precluded numerous victims of forced mobilisation and the ensuing torture from obtaining fair compensation. It is not in keeping with Serbia's international obligations, as the Committee against Torture and the Human Rights Committee also noted in their Concluding Observations³³⁹.

2.2. Use of Force by State Agents

Police officers may use force in the circumstances and in the manner laid down in the Police Act and the Rulebook on the Technical Features and Manner of Use of Means of Coercion, while prison guards may use force in the circumstances and in the manner laid down in the Penal Sanctions Enforcement Act (PSEA) and the Rulebook on Maintaining Order and Security in Penitentiaries. Both the regulations on the police and those on the use of force in penitentiaries lay down that means of coercion shall be applied in accordance with the principle of proportionality (Art. 11(2 and 3) and Art. 36 of the Police Act, Art. 127(2 and 3), PSEA) and that reports shall be prepared on every use of force to ensure that it was lawful; policemen and prison guards submit these reports to their superiors (Art. 86 of the Police Act and Art. 130(4) of the PSEA). Both laws specify the data that each report must include. The PSEA also lays down that inmates subjected to use of force, with the exception of fixation, must be examined immediately by a doctor. The medical report, including the name and allegations of the inmate subjected to means of coercion, shall include the doctor's opinion on whether his injuries may have been caused by the applied measure. This report is submitted to the prison governor together with the guard unit's report and is forwarded to the Director of the Penal Sanctions Enforcement Administration (Art. 130(3 and 4)).³⁴⁰ The regulations on the use of force by the police do not include this obligation or provide the policemen with any

338 See the Constitutional Court's legal view on the statute of limitations re claims for damages caused by a crime, Ref. No. I – 400/1/ 3 - 11 of 14 July 2011.

339 See the Committee against Torture Concluding Observations of 21 November 2008, paragraph 5, and the Human Rights Committee Concluding Observations of 24 March 2011, paragraph 10.

340 The PSEA also lays down that the inmate will be examined again between the 12th and 24th hours since the measure was applied, wherefore the prison governor, and the Director of the Penal Sanctions Enforcement Administration subsequently, are submitted two medical reports together with the prison guards' report.

other instructions on when they are to call in a doctor after using means of coercion. Therefore, some policemen call the doctors in every time force was used, while others only do so when they think it necessary (most often if they notice injuries) or if the person subjected to coercive measures asks for a doctor. Furthermore, in some police stations, the doctors leave their findings/reports with the police, which are attached to the reports that the police officers, who had applied the measures, submit to their superiors. In others, yet, the doctors do not leave their findings/reports with the police, justifying their refusal by the need to protect the patients' privacy.³⁴¹

This issue should be governed by regulations, which ought to lay down the obligation to conduct medical examinations of the persons against whom force was used in specific situations to ensure that they receive the adequate medical care and that any injuries are documented in a timely fashion. This would facilitate the reviews of the lawfulness of the use of force, provided that the medical reports are submitted to the officers charged with monitoring the lawfulness of the use of means of coercion.

The Rulebook on the Technical Features and Manner of Use of Means of Coercion envisages an in-house procedure for controlling the justifiability and lawfulness of the use of force involving firearms, resulting in grave physical injuries, or in the event force was used against more than three people. In such cases, the police director or chief of the regional police administration, in which the officer who used the means of coercion works, shall establish a commission of minimum three police staff that shall review the circumstances in which the means of coercion were used, make a record of the review and render its opinion on whether the means of coercion were used lawfully and professionally (Art. 25(1)). The opinion is forwarded to the police officer charged with assessing the justifiability and lawfulness of the use of force. In the event he establishes that the use of force was unjustified

The Committee against Torture stated the following in paragraph 40 of its General Comment No. 3, "On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress." See the Committee against Torture Concluding Observations of 21 November 2008, paragraph 5, and the Human Rights Committee Concluding Observations of 24 March 2011, paragraph 10.

The PSEA also lays down that the inmate will be examined again between the 12th and 24th hours since the measure was applied, wherefore the prison governor, and the Director of the Penal Sanctions Enforcement Administration subsequently, are submitted two medical reports together with the prison guards' report.

341 This is the case in Novi Sad, for instance, where none of the records on the use of means of coercion BCHR perused included the doctors' reports on their examinations as the local doctors refuse to hand their findings over to the police and cite doctor-patient confidentiality.

or unlawful, he shall propose to the police director to “take the measures set out in the law” (Art. 25(2 and 3)).

The work of the state authorities entitled to use force is also controlled by reviews of complaints. Complaints about police use of force may be filed pursuant to and in accordance with the Police Act (Art. 180) and the Complaints Review Procedure Rulebook, while complaints about the use of force by prison guards are submitted pursuant to Articles 114 and 144a of the PSEA and/or the penitentiary House Rules.³⁴² Complaints of ill-treatment by the police and prison guards may also be filed with the Protector of Citizens (Arts. 25–31, Protector of Citizens Act), but this form of protection is subsidiary in character and the citizens may submit their complaints to the Protector of Citizens only after they had tried to protect their rights in “appropriate legal proceedings” (Art. 25(3)). The Protector of Citizens may exceptionally initiate a procedure on the complaint before “the exhaustion of all legal remedies”.³⁴³

Under Article 180(1) of the Police Act, “[E]veryone is entitled to file a complaint to the Ministry against a police officer if they believe that their rights or freedoms were violated by an illegal or improper action of the police officer”. The complaint shall be submitted to the “police or the Ministry” but it must first be reviewed by the head of the unit in which the implicated police officer works or a person designated by the head of the unit. In the event the complainant disagrees with the views of the superior who reviewed the complaint or fails to respond to an invitation to an interview, or in the event the complaint gives rise to suspicions that a crime prosecuted *ex officio* had been committed, the entire case file is forwarded to a three-member commission, which then conducts a review of the complaint. Complaint Review Commissions have been established in the Ministry and each regional police administration. Every commission comprises three members (a police officer appointed by the Minister, a representative of the Internal Control Sector appointed by the head of that Sector, while the third “civilian representative” is appointed by the police minister at the proposal of the local self-governments (to the commissions of the regional police administrations) or of the “professional associations and NGOs” (to the Ministry Commission). The Commission sessions are public and the complainants and implicated police officers are invited to them; they

342 Four Rulebooks on House Rules are applied in Serbian penitentiaries: the Rulebook on House Rules in Correctional Institutions and District Prisons (*Sl. glasnik RS*, 72/10), the Rulebook on House Rules in Juvenile Correctional Institutions (*Sl. glasnik RS*, 71/06), the Rulebook on House Rules in Juvenile Homes (*Sl. glasnik RS*, 71/06) and the Rulebook on House Rules in Detention Facilities (*Sl. glasnik RS*, 35/99). Each Rulebook includes provisions on the submission of complaints and grievances regarding the violations of the rights of persons deprived of liberty.

343 That is possible “if the complainant would suffer irreparable damage or if the complaint regards a violation of the good governance principle, notably the inappropriate treatment of a complainant by an administrative authority, its dilatoriness or another violation of the administrative staff code of conduct” (Art. 25(5), Protector of Citizens Act).

may be represented by their lawyers at their own expense and “present documents and other evidence”, but they can only present evidence in the possession of the police. The head of the unit in which the implicated officer works and the Commission members may order the procurement of the documents and the presentation of the evidence as well. The commissions keep minutes of their sessions,³⁴⁴ and the final decisions on the complaints must be reasoned in detail and served on the complainant in writing. All this would lead to the conclusion that the complaints review procedure laid down in the valid regulations is transparent, but this form of overseeing the lawfulness of police work can hardly be considered independent.³⁴⁵ When the decision on the complaint is rendered, the complainants are notified that the complaints review procedure has been completed and that they “have at their disposal all legal and other means to protect their rights and freedoms”.

Convicts may file their complaints of ill-treatment to the prison governors, the Director of the Penal Sanctions Enforcement Administration (if they believe that the prison governor violated their rights) or an authorised officer overseeing the work of their penitentiary. Remanded inmates may file their complaints also to the presidents of the competent courts and the investigating judges. The complaints review procedure is regulated relatively poorly. The regulations lay down the deadlines within which the prison governors and the Director of the Penal Sanctions Enforcement Administration (who reviews appeals of decisions on complaints rendered by the prison governors in the second instance or, exceptionally, the complaints in the first instance, if they concern the prison governors) must review the complaints, but do not oblige them to reason decisions (with the exception of the Rulebook on House Rules in Juvenile Correctional Institutions, which states in Article 108(3) that the head of the institution is under the duty to reason the decision on a juvenile’s complaint). Nor do they specify the role the complainants may play

344 The content of the minutes is specified in Article 24 of the Complaints Review Procedure Rulebook.

345 The procedure definitely cannot be considered independent, at least not in the first stage, when the complaints are reviewed by the heads of the units in which the implicated officers work. In the view of the ECtHR, effective investigations are those in which there are no hierarchical or institutional links between those conducting them and those under investigation, but only provided that the former are actually independent. See, e.g. the ECtHR judgment in the case of *Ergi v. Turkey*, ECHR, App. No. 23818/94, paragraph 83-84. The ECtHR’s judgment in the case of *Poltoratskiy v. Ukraine* (ECtHR, App. No. 38812/97) may be useful in assessing whether the MIA complaints review procedure is independent. In that case, the Court found that the investigation of the applicant’s complaints of ill-treatment conducted by the prison authorities had not been effective, *inter alia*, because no external authority appeared to have been involved in any such investigations since the Court had not seen a single document proving that an investigation had been carried out by any domestic authorities other than those directly involved in the facts of which the applicant’s parents complained. The former ECmHR also subscribed to this view (see paragraphs 70 and 126-127 of the judgment). The question remains whether the procedure can be considered independent because the MIA complaints review commissions include “public representatives”.

in the complaints review procedure (whether they can suggest the presentation of evidence or the procurement of specific documentation).

Neither the PSEA nor the Rulebooks on House Rules provide for hearings which the complainants would be invited to and at which they would possibly have the opportunity to confront the penitentiary staff member whose treatment they complained of. It, therefore, appears that the complainants cannot affect the procedure in any way from the moment they file the complaint. The complaints review procedure can hardly be considered transparent given that the review authorities are not under the obligation to reason their decisions or specify in them the measures they had undertaken during the procedure to ascertain whether the complaint was well-founded.

Although both the PSEA and the Rulebooks on House Rules entitle the inmates to file complaints to persons authorised to oversee the work of the penitentiaries, they do not specify how these complaints are dealt with. Furthermore, they do not even oblige the authorised persons to respond to the complaints. A similar problem exists with respect to complaints remanded prisoners may file with the presidents of the competent courts or the investigating judges. Although Rulebook on House Rules in Detention Facilities (Art. 40(2)) and both the 2001 CPC, which was still applied in criminal trials before courts of general jurisdiction in 2012, and the 2011 CPC, which was applied in war crime and organised crime trials (and which is to be applied in all criminal proceedings as of 2013) specify in Articles 152(3) and 222(3) respectively that detainees may file their complaints to court presidents overseeing remanded prisoners i.e. the investigating judges, none of these regulations include any provisions laying down how such complaints should be dealt with. Nor do they oblige the court presidents/investigating judges to review the detainees' complaints. In view of all of the above considerations, the procedures for reviewing the complaints of people deprived of liberty can hardly be qualified as effective mechanisms for protecting their rights.

The procedure in which the Protector of Citizens reviews allegations of ill-treatment cannot be considered effective because the only enactment that the Protector can adopt in such a procedure is a recommendation to an administrative authority and recommendations are not binding.

It can therefore be concluded that none of the non-judicial legal mechanisms for investigating claims of ill-treatment by the state authorities are effective and that only the judicial criminal proceedings allow for the conduct of effective investigations of allegations of ill-treatment.

2.3. Judgments Based on Evidence Obtained under Duress

The Criminal Procedure Code prescribes that court decisions may not be based on evidence when the content of or the manner in which it was collected was in contravention of the provisions of the Constitution or a ratified international treaty, or expressly prohibited by the CPC or another law (Art. 18). It, however, remains

unclear to what extent this prohibition is honoured in practice. The ECtHR has to date rendered two judgments in cases against Serbia,³⁴⁶ finding it in violation of the right to a fair trial because the courts admitted confessions and statements obtained by ill-treatment. Furthermore, the lack of adequate case law on the crimes of extortion of a statement and torture and ill-treatment gives rise to fears that the police extortion of statements is widespread and that the courts do not exclude evidence obtained by ill-treatment. Furthermore, according to BCHR's information, courts often review the defendants' motions for excluding the evidence only at the end of the main hearing.³⁴⁷ This practice constitutes a violation of the right to a fair trial because the defendants cannot plan their defence when they are not sure whether the courts will base their decisions on their statements obtained under duress which are frequently the only or the strongest piece of evidence against him.

2.4. Living Conditions in Penitentiaries and Detention Units

Inhuman or degrading treatment or punishment may arise in the event the state authorities fail to provide the inmates with adequate living conditions, i.e. accommodate them in dry cells of adequate size³⁴⁸ and provide them with access to fresh air and natural lighting, adequate health care, the chance to spend a specific period of time outside their prison cells and protection from inter-prisoner violence.³⁴⁹ Under the PSEA, every convict must have at least four square i.e. eight cubic metres of living space in the dormitory.³⁵⁰ Convicts are entitled to accommodation satisfying contemporary hygienic requirements and suited to the local climate.³⁵¹ The penitentiary sanitary facilities must be adequate and clean and accessible to the inmates at all times; they must also afford them privacy.³⁵² The facilities in which the inmates live and work must be clean, dry, ventilated, heated and sufficiently lit, both by natural and artificial lighting, enabling them to read and work without

346 *Stanimirović v. Serbia*, ECtHR, App. No. 26088/06(2011) and *Hajnal v. Serbia*, ECtHR, App. No. 36937/06(2012).

347 See the BCHR's recommendations for improving the legislative framework and practices related to the prohibition of ill-treatment in Serbia, available at <http://english.bgcentar.org.rs/images/stories/Datoteke/prohibicoin%20of%20ill-treatment%20and%20rights%20of%20persons%20deprived%20of%20their%20liberty%20in%20serbia.pdf>.

348 According to the CPT "[t]he level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint", CPT's 2nd General Report, 1991, paragraph 46.

349 According to the CPT "[t]he cumulative effect of overcrowding and poor material conditions... could be considered to be inhuman and degrading, especially when persons are being held under such conditions for prolonged periods (i.e. up to several months)". *CPT's Report on its visit to Lithuania in 2008*, paragraph 44.

350 PSEA, Art. 67(1), Rulebook on House Rules in Correctional Institutions and District Prisons, Art. 16(2)).

351 PSEA, Art. 68(1).

352 Rulebook on House Rules in Correctional Institutions and District Prisons, Art. 17(3)).

straining their eyesight.³⁵³ Convicts are entitled to spend at least two hours a day outdoors during their spare time.³⁵⁴

The situation in the penal institutions in Serbia is unsatisfactory despite the relatively good legislative framework. The main problem lies in overcrowding, which has given rise to numerous other problems: the short periods of time inmates in Serbia can spend outdoors (most of them can spend an hour outside, even less in some penitentiaries), the poor material conditions in the facilities in which convicted and detained persons live, the lack of meaningful activities, unsatisfactory access to health care, etc.³⁵⁵ The BCHR team found the situation in Pavilion II of the Niš Correctional Institution especially critical; the convicts spend 23 hours a day in small dilapidated and damp cells with three level bunk beds and inadequate access to fresh air and light. These conditions are inhuman and constitute a violation of the prohibition of ill-treatment.³⁵⁶ The situation in the Special Prison Hospital in Belgrade³⁵⁷ also gives rise to concern: accommodation in Ward E (acute psychiatry) risks leading to ill-treatment i.e. inhuman or degrading treatment.³⁵⁸

On 22 July 2010, the Serbian Government adopted the Strategy to Reduce Overcrowding in the Penitentiaries in the 2010–2015 Period,³⁵⁹ which envisages a number of measures aimed at reducing the inmate population. They include greater resort to alternative sanctions (home imprisonment, community service), alternative custody measures (house arrest, seizure of passports, bail), greater resort to release on parole, the forming of a probationary service, etc. The Strategy also envisages the construction of new prisons and pardons.³⁶⁰ The Serbian Assembly on 8 November 2012 passed the Pardons Act³⁶¹ under which around 1,000 convicts were set free and the prison terms of around 3,500 of them were cut. It needs to

353 PSEA, Art. 67(1).

354 PSEA, Art. 68(1).

355 More on the status of persons deprived of liberty in BCHR's 2010 and 2011 annual reports entitled *Prohibition of Ill-Treatment and Rights of Persons Deprived of Their Liberty in Serbia*, available at: http://english.bgcentar.org.rs/index.php?option=com_content&view=article&id=550:2009-suppressing-and-punishing-torture-in-serbia-from-adopting-legal-standards-to-improving-practice-link&catid=155.

356 More on the living conditions in Pavilion II of the Niš penitentiary in the Bulletin No. 14 "Treatment of Persons Deprived of Liberty", available in Serbian at <http://www.bgcentar.org.rs>

357 The Special Prison Hospital was designed to accommodate around 400 patients, but the number of inmates it treats exceeds 700. More on the conditions in the Special Prison Hospital in Belgrade in the Bulletin No. 11 "Treatment of Persons Deprived of Liberty", available in Serbian at <http://www.bgcentar.org.rs>.

358 The Director of the Penal Sanctions Enforcement Administration and the Deputy Protector of Citizens also alerted to the desultory state of the Special Prison Hospital. See the press release on their visit available in Serbian at <http://www.mpravde.gov.rs/lt/news/vesti/poseta-direktora-uprave-i-zamenika-zastitnika-gradjana-okruznom-zatvoru-u-beogradu-i-specijalnoj-zatvorskoj-bolnici-povodom-medjunarodnog-dana-ljudskih-prava.html>

359 The Strategy is available in English at the Justice Ministry website: www.mpravde.gov.rs.

360 More on the Strategy in the *2010 Report*, I.2.5.1.

361 *Sl. glasnik RS* 107/12.

be noted that pardon is the only measure envisaged by the Strategy that does not require funding and saves money in a manner of speaking. It is, however, also the least efficient measure in the Strategy since all it can achieve is reduce the prison population, albeit in the short-term. On the other hand, the roots of the overcrowding – insufficient resort to alternative sanctions, widespread and often unnecessary imposition of detention pending trial, the non-existence of a system to assist the convicts' reintegration into society upon release and oversight of convicts released on parole – have not been eradicated.

The Belgrade police keep people detained up to 48 hours in cells in the city police stations or the city administration while the other police administrations across Serbia lack adequate premises and keep them in detention facilities under the management of the Justice Ministry's Penal Sanctions Enforcement Administration.³⁶² People detained for shorter periods of time are held in premises within the police stations.

Persons deprived of liberty by the police shall be detained in "the official police detention premises or the designated premises of the competent judicial authorities". Exceptionally, they may be detained in other official premises not designated for detention or in a vehicle "but not longer than necessary to transport the detainee or perform other police duties".³⁶³ This exception may be interpreted broadly and allow the police to hold the people they detained in the station offices or the halls. The Rulebook does not specify the minimum area of the police detention facilities or lay down the requirements on their lighting, ventilation, furnishing, etc.

Of the 250 or so police custody facilities in Serbia, 225 are in use. The Serbian National Preventive Mechanism (NPM)³⁶⁴ visited 40 police stations since the beginning of 2012 and established that most of them did not fulfil the above-mentioned standards, i.e. they were not big enough, lacked the buttons for calling guards, heating, clean bed linen and bed spreads, sufficient lighting and ventilation. The dignity of the detainees is compromised in many of these establishments, because the toilets are under video surveillance.³⁶⁵

362 Response of the Government of Serbia to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Serbia from 1 to 11 February 2011, CPT/Inf (2012) 18, available at <http://www.cpt.coe.int/documents/srb/2012-18-inf-eng.htm>.

363 Article 28, Rulebook on Police Powers, (*Sl. glasnik RS* 54/06).

364 The NPM is an independent body established at the national level pursuant to the Optional Protocol to the Convention against Torture. It is charged with continuous oversight of all places in which persons deprived of liberty are held with the goal of preventing ill-treatment. The duties of the NPM in Serbia have been discharged by the Protector of Citizens in cooperation with the Vojvodina Provincial Ombudsman and associations the statutes of which define as their objective the improvement and protection of human rights and freedoms.

365 The NPM's recommendations are available at the Protector of Citizens website in Serbian, <http://ombudsman.npm.rs/>, see also the article published in the Belgrade daily *Večernje novosti* on 24 October 2012.

The CPT found non-standard issue objects in the police stations on all three visits to the Republic of Serbia (in 2004, 2007 and 2011).³⁶⁶ The NPM also found non-standard issue objects in several police stations it visited in 2012 (wooden poles, iron bars, a handmade sword, etc) in the offices in which the interrogations are held.

2.5. European Court of Human Rights Judgment in the Case of Hajnal v. Serbia

The ECtHR in 2012 rendered a judgment against Serbia finding it in breach of the prohibition of torture and inhuman and degrading treatment or punishment. In the case of *Hajnal v. Serbia*³⁶⁷, the Court found that the applicant had been ill-treated by the police several times with the aim of extorting a confession from him, that an independent and effective investigation of his claims of ill-treatment had not been launched, and that his right to a fair trial was violated because his confession to the police under physical and mental duress and in fear of further ill-treatment was used as evidence in court. The judgment also shows that the applicant had been deprived of access to a lawyer of his choice during the police interrogation, that the witnesses were intimidated and ill-treated to extort statements from them, that the police practiced arresting people in the early morning hours and, finally, that complaints of ill-treatment to the competent authorities, i.e. the prosecution offices and the investigating judges are not taken seriously.

2.6. Recommendations

1. Amend the Criminal Code and specify the elements of the crime of ill-treatment in greater detail.
2. Adopt more detailed provisions on when and where medical examinations are conducted; allow persons deprived of liberty to be examined by a doctor whenever they ask for one, rather than leaving it to the discretion of the police or prison staff.
3. Ensure that non-medical staff does not attend the medical examinations of persons in police custody or in detention pending trial and convicted prisoners, unless otherwise required by the doctors.
4. Increase the penalties for ill-treatment.
5. Introduce effective non-judicial mechanisms for reviewing complaints alleging ill-treatment by the police, other state authorities or prison staff.

366 Non-standard issue objects are those that do not fall under standard police equipment and that can be used to intimidate or ill-treat persons deprived of liberty, such as, e.g. baseball bats, metal bars, steel cables, knives, etc.

367 See the judgment in the case of *Hajnal v. Serbia*, App. No 36937/06, (2012).

6. Ensure the transparency of the procedure for reviewing complaints of ill-treatment and that the authority conducting it is fully independent from the units and/or officers whose conduct is under review.
7. Take steps to improve the treatment of inmates and the conditions in prisons in accordance with the Covenant and the UN Standard Minimum Rules for the Treatment of Prisoners; to that end, apart from building new prisons, consider greater resort to alternative sanctions.
8. Ensure thorough, efficient and impartial investigations of all ill-treatment cases and suspension of staff whose liability was established during the investigation.

3. Prohibition of Slavery and Forced Labour

3.1. General

With regard to the prohibition of slavery and forced labour, Serbia is bound both by the ECHR, the ICCPR and many other international treaties on prohibition of slavery and other forms of servitude.³⁶⁸ By ratifying these treaties, Serbia assumed the obligation to protect specific rights and suppress and punish all forms of

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

slavery, status akin to slavery, transportation of enslaved people, human trafficking and forced labour.

Article 4(2) of the ICCPR prohibits derogation from rights listed in paragraphs 1 and 2 of Article 8, because they regard the general status of man, while the other rights listed in this Article deal with labour which is not voluntary, but is neither permanent nor continuous.

Keeping someone enslaved has recently become a topical issue, since it occurs massively in the form of trafficking in human beings. Contemporary international standards on combating human trafficking are incorporated in the United Nations Convention against Transnational Organized Crime and its two Protocols.³⁶⁹

No proceedings claiming violations of Article 4 of the ECHR have been instituted against Serbia before the ECtHR by the time this Report went into print.

3.2. Trafficking in Human Beings

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

The Criminal Code incriminates trafficking in human beings in Article 388 as well as trafficking in minors for adoption (Art. 389).

The 2009 amendments to the Criminal Code³⁷⁰ increased the prison sentences for the simple form of the crime of human trafficking (Art. 388(1)), for trafficking in minors (Art. 388(3)) and trafficking that resulted in grave physical injuries (Art. 388(4)), while a minimum 10-year prison sentence will be rendered in case the human trafficking was committed by an organised crime group (Art. 388(7)). The victim's consent to exploitation is irrelevant if the crime was committed in any of the above-mentioned ways (Art. 388(10)).

Article 388 now includes a paragraph laying down that whoever knew or could have known that a person was a victim of human trafficking and used her position or enabled another to use her position for the purpose of exploitation shall be punished by imprisonment ranging from six months to five years (Art. 388(8)), while perpetrators who knew or could have known that the victim was a minor will be punished by imprisonment ranging from one to eight years (Art. 388(9)). The legislator's intervention considerably improved the relevant provisions in line with international standards.

369 Article 3(1) of the First Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of the Convention against Transnational Organized Crime (hereinafter: First Protocol), defines trafficking in human beings. Article 3(1) of the Protocol against Smuggling of Migrants by Land, Sea and Air, which supplements the Convention against Transnational Organized Crime (hereinafter: Second Protocol) defines smuggling of people.

370 *Sl. glasnik RS*, 72/09.

The name of the crime of trafficking in children for adoption (Article 389) was amended to trafficking in minors for adoption, whereby it should extend to all persons under the age of 18. However, paragraph 1 specifies that this crime is perpetrated against a person who has not turned 16 yet. Therefore, although the amendments to this Article commendably specify that the perpetrators of this crime committed by an organised crime group will be sentenced to five years' imprisonment, BCHR is of the view that it still deviates from the international standard under which everyone under 18 is considered a child.

The amendments commendably increased the penalty for procurement of prostitution from a fine and three years' imprisonment to between six months and five years' imprisonment and a fine (Art. 184).

Despite the steps taken to punish human traffickers and those *knowingly* exploiting human trafficking victims, it needs to be noted that the valid Public Peace and Order Act still lays down that a person found guilty of prostitution will be sentenced to maximum 30 days' imprisonment.³⁷¹ Therefore, victims of human trafficking may be held liable and punished for prostitution (given that sexual exploitation is one of the most frequent forms of exploitation of human trafficking victims), which is quite absurd. This Act governs begging in much the same way³⁷² and beggars are automatically punished because the law does not envisage exploitation as an extenuating circumstance or grounds for acquittal. Furthermore, judging by the prescribed penalty,³⁷³ the Public Peace and Order Act has almost equated the liability of the beggars with that of the organisers. In light of the already chronic problem of exploitation of child beggars in Serbia, the solution is inadequate and, furthermore, not in compliance with the relevant provisions of the national legislation governing human trafficking.

The Government of Serbia adopted the Strategy to Combat Trafficking in Human Beings.³⁷⁴ The Strategy was operationalised by the National Plan of Action for the 2009–2011 Period, adopted at a Government session in April 2009.³⁷⁵ An action plan for the ensuing period was not adopted by the time this Report went into print.

A number of people suspected of trafficking in humans for the purpose of labour or sexual exploitation were arrested across Serbia in 2012, mostly in the

371 Art. 14(1), *Sl. glasnik RS* 51/92, 53/93, 67/93, 48/94, 85/05 and 101/05.

372 Art. 12, *Sl. glasnik RS* 51/92, 53/93, 67/93, 48/94, 85/05 and 101/05

373 “Whoever disrupts the citizens’ tranquillity or disturbs public peace and order by begging ... shall be fined up to 20,000 RSD or sentenced to maximum 30 days’ imprisonment. Whoever organises begging ... shall be fined up to 30,000 RSD or sentenced to maximum 60 days’ imprisonment”, Public Peace and Order Act, Art. 12 (1 and 2), *Sl. glasnik RS* 51/92, 53/93, 67/93, 48/94, 85/05 and 101/05.

374 *Sl. glasnik RS* 111/06.

375 *Sl. glasnik RS* 35/09. Conclusion on the Adoption of the National Plan of Action for Combating Trafficking in Humans in the 2009-2011 Period.

vicinity of Belgrade, in Vojvodina and in Eastern and Southern Serbia.³⁷⁶ Most of them were nationals of Serbia and had subjected their victims to sexual exploitation, as well as labour exploitation and begging. In some cases, the parents or relatives of the exploited children had known and or consented to their exploitation. The courts rendered several first-instance and final decisions in human trafficking cases in 2012.³⁷⁷

Judging by the reports of media, NGOs and international organisations, the fight against human trafficking has improved to an extent in 2012. The enforcement of the law is, however, still perceived as problematic.

According to the US State Department Office to Monitor and Combat Trafficking in Persons Trafficking in Persons Report 2012³⁷⁸, Serbia is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labour, including domestic servitude. The Report notes that children throughout the country, including ethnic Roma, continue to be exploited in the commercial sex trade, subjected to involuntary servitude while in forced marriage, or forced to engage in street begging and that Serbian citizens are subjected to forced labour in other countries, and foreign victims are subjected to sex trafficking and forced labour in Serbia.

Ever since it started publishing its annual Trafficking in Persons Reports, the US State Department Office to Monitor and Combat Trafficking in Persons has never praised the competent authorities in Serbia as much as it did in the 2012 Report – it assessed that the Government of Serbia was making significant efforts to fully comply with the minimum standards for the elimination of trafficking and that it vigorously prosecuted traffickers, increased its conviction rate for trafficking offenders, and carried out innovative anti-trafficking prevention activities, that it took critical steps to transform and institutionalise its response to victim protection in 2011 by continuing its integration of victim protection for all trafficking victims, including males and children, into the existing nationwide social protection system and that it identified a significant number of trafficking victims relative to the rest of Balkan region in 2011 and improved its detection of forced labour. The Report was nevertheless critical of the enforcement of the legislation in practice.³⁷⁹ Serbia

376 *Beta*, 28 March and 8 May; *Blic*, 30 March; *Večernje novosti*, 6 June and 13 August; *Radio 021*, 7 September and *B92* 20 September.

377 *Blic*, 13 February; *Beta*, 21 March; *ASTRA – News*, 9 May and *Tanjug*, 19 October.

378 The Trafficking in Persons Report 2012 is available at <http://www.state.gov/j/tip/rls/tiprpt/2012/192368.htm>.

379 The 2012 Report, *inter alia*, states that the authorities need to: ensure that NGOs with a history of providing victim care in Serbia are included and integrated in the system of direct victim care, in order to ensure effective care and reintegration assistance; vigorously prosecute, convict, and punish sex and labour trafficking offenders including any officials complicit in trafficking; ensure sustained state budget funding for comprehensive assistance, including appropriate support for NGOs providing longer-term care and rehabilitation assistance to victims, etc. Like the 2011 Report, this one, too, mentioned that the Government's refusal to cooperate directly with

was again ranked as a Tier 2 country, i.e. among countries whose governments do not fully comply with the Trafficking Victims' Protection Act minimum standards but are making significant efforts to bring themselves into compliance with those standards.

In its annual 2012 Progress Report on Serbia³⁸⁰, the European Commission noted that some steps were taken to implement the action plan of the national strategy to combat human trafficking, but also noted the need to update the strategy and associated action plan, establish a uniform database for criminal reports and proceedings and a specific monitoring mechanism in this area and ensure the effective compensation and social inclusion of victims, through a special fund, in line with existing EU standards. The Commission described Serbia as moderately advanced in fighting trafficking in human beings.

The legislation concerning the status of human rights victims has significantly improved in the past few years.³⁸¹ In October 2008, the Serbian Assembly adopted the Aliens Act³⁸² which, inter alia, envisages that a victim of transnational human trafficking shall be granted temporary residence even if he does not submit specific evidence in the event his residence is in the interest of criminal proceedings for the crime of human trafficking (Art. 28). It, however, remains unclear whether this provision applies also to victims in cases in which no criminal proceedings have been initiated or in the event the victim is unable or unwilling to take part in them. In that sense, the 2004 enactment³⁸³, adopted pursuant to the prior Movement and Residence of Aliens Act, afforded broader protection than this provision in the new Asylum Act.

Furthermore, Article 28(5) of the Aliens Act lays down that an alien "referred to in paragraph 5 of this Article" shall be provided with adequate accommodation, food and basic living conditions if necessary. The legislator obviously erred by referring to paragraph 5 of the Article, which does not mention either "aliens" or any other people, and should have referred to paragraph 4 of the Act. However, a literal interpretation of paragraph 5 will preclude the fulfilment of the obligation to pro-

the Government of the Republic of Kosovo continued to hamper Serbia's efforts to investigate and prosecute some transnational trafficking.

380 Serbia 2012 Progress Report, Brussels, 10 October 2012, p. 54, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf

381 The analyses of the prior provisions are available in the *2008-2011 Reports*, section I.4.4.

382 *Sl. glasnik RS*, 97/08.

383 The Serbian Minister of Internal Affairs in 2004 adopted Instructions on Approval of Temporary Residence to Foreign Nationals, Victims of Human Trafficking. Under this enactment, such victims were entitled to temporary residence for humanitarian reasons, notably: for a period of three months to provide the victim with protection and assist his recovery and return to his country of origin or prior residence; for a period of six months in the event the victim cooperates in uncovering the crimes and the perpetrators; for a one-year period in the event the victim takes an active part in the trial as a witness or an injured party, as well as for the victim's personal safety (see the *2004 Report*, I.4.4.3).

vide victims of human trafficking with accommodation, food and the basic living conditions at the expense of the state.

Neither the Aliens Act nor any other Serbian regulations govern the safe return of victims of transnational human trafficking to their countries of origin or the repatriation procedure.

The competent authorities continued investing efforts in improving the status of human trafficking victims in 2012. The opening of a Centre for the Protection of Human Trafficking Victims was announced.³⁸⁴ Furthermore, a working group established by the Justice Ministry drafted a Special Protocol on the Judicial Bodies' Activities to Protect Human Trafficking Victims in the Republic of Serbia.³⁸⁵ A Rulebook on Minimum Social Protection Standards to Protect Human Trafficking Victims was also prepared in 2012.³⁸⁶ In addition, the competent authorities announced that a fund for assisting human rights victims and supporting their rehabilitation would be established.³⁸⁷ The National Anti-Trafficking Coordinator said that "it is time we realised that forced marriages are not the matter of culture or tradition, but constitute a drastic violation of child and human rights," whereby he sent an important message that the practice of forced marriages in Serbia was unacceptable.³⁸⁸

A number of events were staged to alert to the human trafficking problem in 2012.³⁸⁹ Although some representatives of the competent institutions have been investing significant efforts in combating human trafficking³⁹⁰, the number of preventive activities funded exclusively from the state budget is negligible.

Non-government organisations, independent authorities and the media highlighted several problems in this area in 2012. They noted the steady increase in the number of trafficked children and men trafficked for the purpose of labour

384 Centre for Human Trafficking Victims, *Beta*, 15 March 2012.

385 The Protocol was designed to provide guidance to ensure the efficient identification of victims and provide them with adequate protection and ensure efficient conduct of trials with particular emphasis on the treatment of the victims. The Protocol is available in English at <http://www.mpravde.gov.rs/en/news/news/special-protocol-on-acting-of-the-judicial-bodies-in-protection-of-victims-of-human-trafficking-in-the-republic-of-serbia.html>

386 The draft Rulebook is available at the following website: www.ungiftserbia.org/.

387 *Blic*, 8 April 2012, <http://www.blic.rs/Vesti/Hronika/316217/Trgovci-ljudima-ce-placati-odstetu-svojim-zrtvama>

388 *Ibid.*

389 A number of activities are now traditionally held on 18 October, to mark the EU Anti-Trafficking Day. See the memos of the National Coordinator to the members of the Anti-Trafficking Team of 17 May, 11 September and 16 October; the media reports on the ASTRA and VIP Mobile "I'm Not for Sale" street campaign on 16 October; the Red Cross of Serbia Information Workshops on 25 October 2012, etc.

390 The representatives of state authorities have launched the initiatives, attended the events and taken part in their organisation.

exploitation,³⁹¹ the problems regarding the status of the victims at trials,³⁹² and the exploitation of children for begging and the problems the competent authorities have faced in attempts to suppress this form of child exploitation.³⁹³ Lack of training and sensitisation of the staff charged with these problems were highlighted as one of the challenges.³⁹⁴ The media quoted the results of surveys and research of international non-government organisations and reported on the problem of forced marriages, citing the case of forced marriages in Germany in which Serbian women were the victims.³⁹⁵

The fact that the number of child trafficking cases has not been falling notwithstanding the efforts also gives rise to concern. In its press release marking Universal Children's Day, ASTRA noted that the number of child victims was extremely small in the early 2000s but that it soared in the past five years and that children now accounted for around 40% of the identified victims. Nearly all the child victims ASTRA had contact with since 2007 were nationals of Serbia. Serbia, however, still does not have an appropriate shelter for child victims of human trafficking or special programmes for their recovery and reintegration tailored to their age.³⁹⁶

There are no updated or reliable data on the number of children begging in Serbia, but estimates are that there is over 1000 of them.³⁹⁷ The surveys of child begging conducted in 2011³⁹⁸ identified a series of chronic problems. One of them

391 *Deutsche Welle*, 4 April 2012; *Fonet*, 19 June 2012; *Večernje novosti*, 19 June 2012; *Tanjug*, 19 June 2012; *Kurir*, 1 September 2012; *Blic*, 7 and 8 October 2012.

392 As far as the criminal prosecution of suspected human traffickers and human trafficking trials in general are concerned, civil society representatives voiced their concern because some judges still did not understand the human trafficking problem, which resulted in the secondary victimisation of the victims during the proceedings. "NGOs continued to report that authorities failed to recognize some victims of trafficking, occasionally resulting in victims being detained, jailed, otherwise penalized, or even prosecuted for unlawful acts committed as a direct result of their being trafficked." See the Trafficking in Persons Report 2012, available at <http://www.state.gov/j/tip/rls/tiprpt/2012/192368.htm>, *Victimology Society of Serbia: Victims in Serbia Still Not Provided with Adequate Assistance*. See also *Tanjug*, 21 February 2012, and *Status of Human Trafficking Victims in Judicial Proceedings – 2012 Case Law Analysis*, ASTRA, p. 23, available in Serbian at <http://www.astra.org.rs/wp-content/uploads/2011/11/PravnaAnalizaASTRA.pdf>.

393 *Blic*, 30 March and 2 July 2012; *B92*, 1 July 2012 and *Tanjug*, 14 July 2012.

394 *Danas*, 2 July 2012.

395 *Ibid.*

396 Press Release on the Occasion of Universal Children's Day, ASTRA, 20 November 2012. see also E-novine, 20 November 2012.

397 Over 1000 Kids Begging, *Tanjug*, 24 December 2011.

398 The surveys Child Begging in Vojvodina (2011) and Child Begging in the Republic of Serbia (2011) were conducted within a project implemented in the West Balkan region by the state and regional Ombudsman institutions, members of the SEE Children's Ombudspersons' Network. The Belgrade-based Centre of Youth Integration also partook in the surveys in Serbia, which were supported by Save the Children Norway. More on the surveys is available in Serbian at the websites of the Vojvodina Ombudsman and the Protector of Citizens.

is that the precise number of child beggars cannot even be estimated because of the specific features of the phenomenon and the fact that there are no records of them or a single methodology for registering them. Furthermore, the experts themselves disagree on what child begging actually entails, which is why no planned measures for addressing the problem exist.³⁹⁹

The BCHR had not obtained any data by the end of the reporting period that any victims of human trafficking in Serbia received redress for the violation of their rights.⁴⁰⁰

The NGOs in 2012 repeatedly alerted to the increase in human trafficking for labour exploitation⁴⁰¹ and called on stakeholders such as the trade unions, the National Employment Service and the Ministries of Economy, Labour and Social Policy to involve themselves more actively in addressing this issue.

The media in mid-2012 quoted several NGOs advocating the decriminalisation of prostitution.⁴⁰² However, apart from these individual appeals by the NGO sector, no other initiatives were launched to amend the legislation governing this important issue.

The key problems from the human rights perspective arise from the fact that 1) the response to the increase in the number children and young people who are victims of human trafficking is inadequate, 2) the response to the increase in the number of victims trafficked for the purpose of labour exploitation is inadequate, 3) the response to begging and exploitation for begging is inadequate, 4) the victims of human trafficking do not have access to redress for gross violations of their rights and that 5) the victims of human trafficking for the purpose of sexual exploitation can still be held liable for prostitution. Despite the state's efforts to suppress human trafficking, it can be concluded that its responses are still inadequate and that as much effort needs to be invested in improving the legislative framework as in improving the practices to ensure the full enjoyment of the prescribed rights.

3.3. Trafficking in Human Organs

Harvesting of organs or body parts is mentioned as one of the purposes of the crime of human trafficking (Criminal Code, Art. 388(1)). Article 78 of the Transplantation of Organs Act adopted in August 2009⁴⁰³ incriminates, inter alia, coercing a person to consent to donate his or another person's organ for transplantation while

399 More in the *2011 Report*, I.4.4.

400 Several thousand victims of human trafficking have been registered in the thirteen years Serbia has fought against human trafficking. Only a few victims were awarded redress by the court; the amounts of the redress did not reflect the gravity of the violations of their rights.

401 *Tanjug*, 1 March and 19 June 2012; *Deutsche Welle*, 4 April 2012; *Fonet*, 19 June 2012; *Večernje novosti*, 19 June 2012 and *Beta*, 18 October 2012.

402 *Appeal to the Government of Serbia – Save Lives, Let Serbian Prostitutes Do Their Job*, www.telegraf.rs, 31 July 2012.

403 *Sl. glasnik RS* 72/09.

he is alive or upon death and the extraction of his organs (the offender will be sentenced to between two and ten years of imprisonment). The same sentence shall be pronounced against a person donating or offering to donate his or another person's organ for transplantation for a fee and against a person soliciting, transporting, transferring, handing over, selling, purchasing organs, mediating in the sale of organs or mediating in any other manner in the transplantation of organs or participating in an organ transplantation procedure which is the subject of a commercial transaction (Art. 79). This sentence also awaits a person found to have transplanted the organ or participated in the transplantation of an organ to a person, who had not consented to organ transplantation in writing, a person who had extracted an organ from a deceased person i.e. participated in extracting an organ from a deceased person whose brain death had not been diagnosed and declared, a person who had extracted an organ or participated in the procedure of extracting an organ from a person who had prohibited organ donation upon death while he was alive (Art. 80).

The legislation in this area has been completed and aligned with relevant international standards by the qualification of these offences as crimes and the list of misdemeanours in Articles 81–83.⁴⁰⁴

A simple Internet search shows that there is a supply and demand for human organs both in Serbia and the region.⁴⁰⁵ Those willing to sell their organs usually say they resorted to this drastic move because they could not make ends meet otherwise.⁴⁰⁶ This demonstrates not only the citizens' awareness of the existence of the black market of human organs but also the critical depth of poverty in specific parts of the country.

The media picked up foreign press reports on Serbia being the origin of trafficking in organs, primarily due to the drastic increase in poverty.⁴⁰⁷

No proceedings regarding trafficking in human organs were initiated by the competent authorities in 2012.

404 The CoE Convention on Human Rights and Biomedicine (Art. 21) and its Additional Protocol Concerning Transplantation of Organs and Tissues of Human Origin (Arts. 21 and 22) and the CoE Parliamentary Assembly Recommendation 1611 (2003) (Arts. 12 and 14(iii(e))) insist on the prohibition of organ trafficking for commercial purposes, the advertising of the sale or purchase of organs or tissues in return for material gain and on the amendment of the national criminal codes to ensure that those responsible for trafficking, brokers, intermediaries, hospital/nursing staff and medical laboratory technicians involved in the illegal transplant procedure and medical staff who are encouraging and providing information on "transplant tourism", who are involved in transplanting organs obtained through illegal trafficking or in follow-up care of the patients and who fail to alert the health authorities of the situation are held accountable. The Convention, Protocol and Recommendation are available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm>, <http://conventions.coe.int/Treaty/EN/Treaties/Html/186.htm>, and <http://assembly.coe.int/Main.asp?link=/Documents/Adopted-Text/ta03/EREC1611.htm>.

405 The number of classified ads with specific data (phone number or address) of a person offering or looking for a specific human organ is not negligible.

406 *Blic*, 3 June 2012.

407 *Blic*, 3 and 30 June 2012, and *E-novine*, 4 June 2012.

3.4. *Smuggling of People*

Article 350(2) of the Criminal Code prohibits the smuggling of people and specifies that whoever enables a person who is not a national of Serbia to illegally cross Serbia's border or to live in or transit through Serbia illegally in return for material gain shall be punished by imprisonment. The amendments to the Criminal Code raised the penalty, which had ranged from six months' to three years' imprisonment, to between six months and five years' imprisonment. Under paragraph 3 of this Article, endangering the life or the health of the smuggled person shall be considered an aggravating circumstance and the perpetrator shall be sentenced to between one and ten years' imprisonment. Under the amendments, in the event the crime of smuggling was committed by an organised crime group, the perpetrator(s) shall be sentenced to between three and twelve years' imprisonment. This provision, however, still does not afford the smuggled people with adequate protection – inhuman or degrading treatment and exploitation of the smuggled migrants are not defined as a qualified form of crime, which deviates from the standard established in the Second Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Art. 6(3)).

The Criminal Code also fails to lay down that migrants shall not become liable to criminal prosecution for the fact of having become the victims of the crime of smuggling or of being in possession of false personal or travel documents for that purpose, or for having stayed on in Serbia although they did not satisfy the requirements for lawful residence, whereby it deviates from the standard established in the Second Protocol (Art. 5).

The number of reports on human smuggling via the Republic of Serbia towards Western European countries has been increasing every year.⁴⁰⁸ The illegal migration channels pass through Serbia to Croatia and Hungary towards EU member states. Most of the smugglers are nationals of Serbia, while most of the smuggled migrants originate from Asian and African countries. In all the registered cases, the smuggled people were found in violation of the State Border Protection Act and the Aliens Act and were punished by a fine and/or imprisonment and/or the ban to enter Serbia for a specific period of time.

3.5. *Forced Labour*

Forced or compulsory labour encompasses every work done under threat or punishment.⁴⁰⁹ According to Article 6(1) of the ICESCR, persons who do not work

408 *Blic*, 30 January, 6 and 22 February, 12 March, 25 April, 24 May and 20 October; *Beta*, 4 March and 5 November; *Tanjug*, 14 June, 27 and 28 September, 14 December; *Fonet*, 31 August and etc.

409 Article 2(2) of ILO Convention No. 29 defines forced labour as “any labour or service required from a person under threat of punishment and for which this person did not volunteer” (see also

may be deprived of material compensation for work, but they must not be forced to work, meaning that there is the right, but not the obligation to work.

The Constitution explicitly bans forced labour in Article 26(3)). This article expands the protection of rights set by international standards by envisaging that sexual or economic exploitation of vulnerable persons shall be deemed forced labour. Article 26(4) of the Constitution lists which forms of labour shall not be deemed forced labour; this provision is in compliance with Article 8(3c) of the ICCPR.

The ICCPR prescribes that the prohibition of forced or compulsory labour cannot be interpreted as a prohibition of execution of forced labour sanctions pronounced by the competent court. Under Article 218 of the CPC, detainees may perform specific jobs within the penitentiary compound but only voluntarily and at their own request and shall be remunerated for the work in the amount set by the governor of the penitentiary.

As far as convict labour is concerned, the European Court of Human Rights ruled in the case of *De Wilde, Ooms, Versyp v. Belgium*⁴¹⁰ that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR. The relevant provisions on convict labour in the national legislation have in that respect been harmonised with international standards. In the provisions on the work obligation of convicts, the PSEA (Arts. 86–100) emphasises the rehabilitation element of work performed by convicts.

The Defence Act⁴¹¹ prescribes the work obligation of citizens during a state of war and a state of emergency (Art. 50 (1)). Under the Act, the work obligation cannot be imposed on persons listed in the Act as particularly vulnerable, such as the parent of a child under 15 years of age whose spouse is performing military service, a woman during pregnancy, childbirth and maternity leave, a person unfit for work (Art. 55 (3)), which is in keeping with international standards. However, the Defence Act does not prescribe the duration of the work obligation of individuals.

The ICCPR does not absolutely prohibit derogation of Article 8(3). In keeping with this is Article 26(4) of the Constitution, which specifies situations that shall not be considered forced labour, including labour or service of military staff and labour or services during a state of war or emergency in accordance with measures set during the declaration of war or a state of emergency, but its authors failed to limit the duration of the work obligation.

However, the failure of the legislator to define the duration of compulsory labour in the Defence Act provides room for arbitrariness in decisions on the duration of the citizens' work obligations during a state of war or emergency, wherefore it deviates from international standards. The provisions of this law thus have to be

Van der Musselle v. Belgium, ECmHR, App. No. 8919/80 (1983); *Siliadin v. France*, ECHR, App. No. 73316/01 (2005)).

410 ECHR, App. Nos. 2832/66, 2835/66 and 2899/66 (1971).

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

aligned with ILO Convention No. 29 Concerning Forced or Compulsory Labour, which states in Article 12(1) that the maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months shall not exceed sixty days, including the time spent in going to and from the place of work.⁴¹²

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

3.6. Recommendations

1. Provide human trafficking victims with medical and legal assistance.
2. Establish a nationwide database on criminal reports and criminal trials for human trafficking. The competent authorities ought to keep records on the number of victims, perpetrators and penalties imposed for human trafficking crimes.
3. Develop a coordinated mechanism for addressing child trafficking to eliminate this form of crime.
4. Align the existing and/or adopt new regulations governing begging. Devise a plan of measures to address child begging.
5. Develop a coordinated mechanism for addressing the problems of organised begging and exploitation of children for begging.
6. Develop a coordinated mechanism for addressing the problem of human trafficking for the purpose of labour exploitation.
7. Decriminalise prostitution.
8. Adopt the relevant provisions on a redress fund and ensure that past and present victims of human trafficking in Serbia are entitled to such redress.
9. Identify a sustainable mechanism for funding legal and other forms of urgent assistance to human trafficking victims provided by NGOs.
10. Establish a mechanism for monitoring and evaluating the victim protection and reintegration mechanisms and implement it in cooperation with international, regional and bilateral partners.
11. Adopt a national anti-trafficking action plan.

412 In paragraph. 2 of that Article, the Convention indirectly indicates that labour defined in Article 1 shall be considered as an exception from the prohibition of forced labour, since it prescribes that each worker shall be issued a certificate on the period during which he was subjected to compulsory labour.

10. Right to Liberty and Security of Person;

4.1. *Prohibition of Arbitrary Arrest and Detention*

The key purpose of the right to liberty and security of person is to prevent arbitrary or unjustified deprivations of liberty. Exceptions to this right must be interpreted strictly.⁴¹³ The distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.⁴¹⁴ “In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question”.⁴¹⁵ The requirements regarding the lawfulness of the deprivation of liberty and the prohibition of arbitrariness do not apply only to deprivations of liberty in criminal cases, but to all deprivations of liberty, such as, for example, mental illness, vagrancy, drug and alcohol addiction, etc.⁴¹⁶ According to ECtHR case law, these situations include confinement in a psychiatric institution or a social protection institution⁴¹⁷, holding individuals in the airport transit zones⁴¹⁸, interrogations in police stations⁴¹⁹, the police stopping and searching individuals⁴²⁰, house arrest,⁴²¹ etc. This right includes a number of procedural safeguards against unlawful and arbitrary deprivations of liberty, notably everyone’s right to be informed of the reasons for his arrest and of any charge against him, to be promptly taken before a judge, release and compensation. Furthermore, states must define precisely the instances in which deprivations of liberty are justified and ensure judicial control of the lawfulness of detention. Finally, according to the UN Human Rights Committee, states are obliged to take “reasonable and appropriate” measures to protect the personal integrity of every individual from injury by others.⁴²²

413 McKay v. the United Kingdom, ECHR, App No. 543/03, (2006).

414 The right to liberty of movement and freedom to choose residence is a restriction upon liberty lower in intensity and it is protected by Article 2(1) of Protocol No. 4 to the ECHR.

415 *Guzzardi v. Italy*, ECHR, App No. 7367/76 (1980), paragraph 92, and *Creanga v. Romania*, ECHR, App No. 29226/03, (2012), paragraph 91.

416 In its General Comment No. 8 on Article 9, the UN Human Rights Committee pointed out that this right was applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.

417 *Shukuturov v. Russia*, ECHR, App. No. 44009/05, (2008); *Stanev v. Bulgaria*, ECHR, App. No. 36760/06 (2012)

418 See *Amuur v. France*, ECHR, App. No. 19776/92 (1996)

419 See *I.I. v. Bulgaria*, ECHR, App. No. 44082/98, (2005).

420 *Foka v. Turkey*, ECHR, App No. 28940/95, (74-79)

421 *Dacosta Silva v. Spain*, ECHR, App No. 69966/01, (2006)

422 See *Delgado Paéz v. Columbia*, UN Human Rights Committee, UN doc. CCPR/C/39/D/195/1985 (1990), paragraph 5.5.

The Constitution of Serbia allows for the deprivation of liberty “only on the grounds and in a procedure stipulated by the law” (Art. 27 (1)). A person deprived of liberty must be brought before the competent court within 48 hours or released (Art. 29(2) of the Constitution). Any person reasonably suspected of a crime may be detained only upon the decision of the court, should detention be necessary to conduct criminal proceedings (Art. 30(1) of the Constitution). Detention shall be kept to a minimum (Art. 31(1 and 2) of the Constitution).

The CPC lays down that only a competent court may order detention and only in cases prescribed by the law if the purpose of detention cannot be achieved otherwise (Arts. 141–143). The decision on detention is taken by an investigating judge or a judicial panel, upon the questioning of the individual, unless it was impossible to serve him with the summons for questioning because he was inaccessible or had failed to report a change in address or if there is danger of delay. The decision on detention is served on the person concerned at the time of deprivation of liberty or within 12 hours from the moment of deprivation of liberty or appearance before the investigating judge. The detained person may appeal this decision. Appeal does not stay enforcement (Art. 143(3)). The appeal must be reviewed within 48 hours. The duration of detention must be restricted to the shortest possible time. Unfortunately, the perusal of the courts’ case law has indicated that the courts often avoid reviewing the lawfulness of detention before they take a final decision to terminate the criminal proceedings.

The new Criminal Procedure Code⁴²³ introduces an entirely new investigation model – the prosecutorial investigation model and in Article 43 charges the public prosecutors with conducting investigations and concluding plea agreements and agreements on testimony.

The police may deprive people of liberty for a specific period of time on a number of grounds. Article 229 of the CPC allows the police and the prosecutors to detain a suspect but only in exceptional circumstances. This measure may be applied to collect information or interrogate a person if any of the grounds for ordering custody in Art. 227(1) exist, a suspect summoned to provide information (Art. 226(7)) as well as a citizen summoned to provide information but whom the police start considering a suspect during the questioning. The purpose of detaining persons who are considered suspects in the absence of grounds for custody is unclear. Namely, it remains unclear why these people have to be deprived of liberty if the collection of information or the interrogation of a suspect was not completed within the statutory four hours and there are no grounds for custody (risk of escape, destruction or concealment of evidence, obstruction of proceedings, reoffending, etc). On the other hand, the police may detain a person pursuant to Art. 227(1) if any of the grounds for detention exist.⁴²⁴ A total of 4,459 people were detained pursuant to

423 The enforcement of the new Criminal Procedure Code was put off for 1 October 2013 by the adoption of the Act Amending the Criminal Procedure Code on 24 December 2012.

424 More on the detention of suspects under the new CPC in the *2011 Report*, I.4.5.1.

Article 229 of the CPC in the January-September 2012 period.⁴²⁵ The large number of people detained in this period indicates that police custody is not an exceptional measure as the CPC defines it. The data on the number of people detained by the police on other legal grounds in the given period were not available.⁴²⁶

The chief guarantee afforded the suspects is that they must be questioned in the presence of their counsels. Under the CPC, the questioning of the suspect shall be delayed until his defence counsel arrives, eight hours at most. In the event the counsel fails to appear by then, the police shall immediately release the suspect or bring him before the competent judge.⁴²⁷

A person, who had failed to respond to a police summons to provide information, may be brought in by force only if the summons included a warning to that effect (Art. 226, CPC). Collecting information from one person may last four hours at most (Art. 226 (3))⁴²⁸. If, in the course of collecting information, the police assess that the summoned person may be considered a suspect, they are duty-bound to immediately notify him of the crime he is suspected of, the grounds of suspicion, the right to retain counsel and other rights granted suspects under the CPC (Art. 226 (8)).⁴²⁹

Under Article 53 of the Act on Police, a person disrupting or endangering public order may be remanded if it is otherwise impossible to restore public order or eliminate the danger. Such detention shall last 24 hours at most. The remanded person may appeal the detention order with the competent court. The police shall remand drivers established to be driving under the influence, under the intense influence or under the full influence of alcohol and/or under the influence of psychoactive substances until they sober up, for a maximum of 12 hours at the order of a police officer (Art. 283 of the Public Traffic Safety Act.⁴³⁰ This provision may be problematic because it obliges the police to remand such drivers without taking into account the circumstances of each individual case or providing for the application of less stringent measures (temporary seizure of the drivers' vehicles, escorting them to their place of residence, hospital, etc), which can also protect public interest, i.e. prevent drunk drivers from driving.⁴³¹

The Non-Contentious Procedure Act (NCPA)⁴³² provides for committing a person to a high security psychiatric institution. It is applied to persons whose free-

425 Ministry of Internal Affairs reply to BCHR's request for access to information of public importance.

426 *Ibid.*

427 More on detention of suspects under the new CPC in the *2011 Report*, I.4.5.1.

428 *Ibid.*

429 *Ibid.*

430 More on specific provisions on detention not in accordance with international standards in the *2010 Report*, I.4.5.1.1.

431 See *Kharin v. Russia*, ECtHR, App. No. 37345/03 (2011), paragraph 35.

432 *Sl. glasnik RS*, 25/82, 48/88, 46/95 and 18/05.

dom of movement⁴³³ and communication with the outside world need to be restricted due to the nature of their illness (Art. 45 (1)) i.e. if the nature of their illness is such that their lives or the lives of other people or property might be in danger (Art. 44, Health Care Act). These requirements have been defined much too broadly, primarily because the state authorities are not under the obligation to first review the possibility of applying other, more lenient measures. The legal framework does not stress that involuntary institutionalisation in a medical establishment may be ordered for treatment purposes, that the patients must be examined by independent medical court experts, that the courts must periodically review the patients' deprivation of liberty⁴³³ and establish direct contact with the person at issue.⁴³⁴ People institutionalised against their will are not afforded adequate legal aid either.

The ECtHR has on a number of occasions underlined that no one may be deprived of liberty for being "of unsound mind"⁴³⁵ unless a true mental disorder is established before a competent authority on the basis of objective medical expertise and the mental disorder must be of a kind or degree warranting compulsory confinement (to treat or prevent the person from harming himself or other persons⁴³⁶). The validity of continued confinement depends upon the persistence of such a disorder.⁴³⁷ "Involuntary hospitalisation may indeed be used only as a last resort for want of a less invasive alternative, and only if it carries true health benefits without imposing a disproportionate burden on the person concerned."⁴³⁸

In the January-October 2012 period, the Niš Basic Court alone rendered 1,273 decisions on compulsory hospitalisation. The Belgrade Basic Court rendered 230 such decisions in the same period.⁴³⁹ Insight in some of the decisions that the Niš Basic Court forwarded to the BCHR lead to the conclusion that the reasonings

433 Under Article 51 of the Non-Contentious Procedure Act, persons may not be institutionalised involuntarily in a health facility for more than one year and the establishment shall submit periodic reports on their health to the court.

434 Under Article 38(2) of the NCPA, the person shall be examined by an expert in the presence of a judge, unless such an examination is conducted in an in-patient health institution. This provision is illogical because patients who are to be involuntarily hospitalised are always examined in a health institution.

435 Article 5(1(e)) of the ECHR.

436 *Hutchison Reid v. the United Kingdom*, ECHR, App No. 50272/99, paragraph 52.

437 *O.H v. Germany*, ECHR, App No. 4646/08, (2011), paragraph 77.

438 *Pleso v. Hungary*, ECHR, App No. 41242/08, (2012), paragraph 66.

439 Data obtained in response to requests for access to information of public importance. Other courts rendered fewer decisions on involuntary institutionalisation. The Vršac Basic Court rendered 30 and the Pančevo Basic Court 23 decisions on compulsory confinement while the other courts did not render more than several such decisions each. The large number of decisions rendered by the Niš Basic Court can be attributed to the practice of the Gornja Toponica Special Psychiatric Hospital on involuntary hospitalisation. Namely, as the CPT established, all patients brought by the police and/or their families are assumed to be hospitalised against their will and the involuntary hospitalisation procedure is automatically initiated before the Niš Basic Court instead. See the CPT Report on its visit to Serbia in 2011, paragraph 134, available at <http://www.cpt.coe.int/documents/srb/2012-17-inf-eng.htm>.

of the decisions consist of an identical sentence with stereotyped reference to “a mental illness” and the need to hospitalise the persons to treat and look after them. The decisions do not refer to medical findings or explain why the deprivation of liberty is necessary.

In its Report published in 2012, the CPT alerted to a series of troubling practices and actions regarding compulsory confinement in Serbia.⁴⁴⁰ Namely, no independent medical expertise is involved in the involuntary psychiatric hospitalisation procedure, involuntary psychiatric patients have no effective legal assistance and are not even provided with copies of the court decisions (paragraph 132)⁴⁴¹, while in some cases, the decisions on hospitalisation are taken after the statutory deadlines.⁴⁴² When the courts come to hold hearings in the hospitals, which is not always the case, the number of patients they hear during per session suggest that the right to be heard is of a relatively formal character and that not enough time and attention are devoted to each individual case.⁴⁴³ The issue of voluntary hospitalisation in these institutions is also debatable.⁴⁴⁴ The CPT noted that the legal status of approximately 400 patients was unclear and could *de facto* amount to deprivation of liberty without any legal grounds (paragraph 136). The CPT also qualified the procedure in the case of subsequent transformation of a patient’s legal status from involuntary to voluntary and vice versa as unclear, noting that no separate legal procedure was followed and the fact that a patient was admitted against his will but subsequently agreed to his hospitalisation was only mentioned with a brief entry by the doctor in the patient’s medical file and not signed by the patient (paragraph 135).

Furthermore, the CPT noted that hundreds of patients no longer requiring hospitalisation remained in the psychiatric hospitals for years on end. According to the Director of the Gornja Toponica Special Psychiatric Hospital, some 40% of all the patients (707) were in this situation only because they had nowhere to go (paragraph 106). It is thus necessary to put in place community services that would look after such patients upon release.

Persons deprived of legal capacity are placed in social care institutions or psychiatric hospitals with the consent of their guardians who are appointed by the guardianship authorities i.e. the Social Work Centres. There are currently over 3,554

440 The CPT in 2011 visited the Gornja Toponica Special Psychiatric Hospital at Niš and the Dr. Laza Lazarević Special Psychiatric Hospital in Belgrade. See the CPT Report on its visit in 2011, paragraphs 105-141.

441 The NPM established as much during its visit to the Special Psychiatric Hospital Sveti Vračevi, see recommendation 33088 of 17 December 2012, available in Serbian at <http://ombudsman.npm.rs/>.

442 In Gornja Toponica the period could be as much as six weeks. See the CPT Report on its visit in 2011, footnote 89.

443 The CPT noted that 94 cases were examined during the 3.5-hour hearing on 28 January 2011, which gave two minutes and 20 seconds per case on average. See the CPT Report on its visit in 2011, footnote 89.

444 The NPM also expressed doubts about the relevance of the will of the persons institutionalised in the Sveti Vračevi Special Psychiatric Hospital. See its Recommendation No. 33088 of 17 December 2012, available in Serbian at <http://ombudsman.npm.rs/>.

people deprived of legal capacity or in extended parental custody in Serbian social protection institutions and psychiatric hospitals.⁴⁴⁵ Nearly 75% of the wards of homes for people with disabilities have guardians (38% of them are in the custody of the guardianship authorities while the rest are in the custody of their kin or persons close to them).⁴⁴⁶

According to the institutions' replies, most of them were institutionalised with the consent of their permanent or temporary guardians. However, a number of them have stayed on in the institutions for a long time and without any legal grounds, i.e. without their guardians' consent. Some institutions lack relevant data, i.e. cannot establish on what grounds their wards had been institutionalised. Data obtained from the psychiatric hospitals and social protection institutions indicate that the institutions admit patients on a "voluntary" basis also with the consent of the temporary guardians, appointed during the legal capacity removal proceedings.⁴⁴⁷ This practice is not in accordance with the national regulations.⁴⁴⁸

Although such institutionalisation does not constitute deprivation of liberty under Serbian law, the institutionalised people may not leave the institutions without their guardians' consent⁴⁴⁹ wherefore it can amount to deprivation of lib-

445 This number was arrived at by adding up the data obtained in response to requests for access to information of public importance and data in reports by organisations that have visited such institutions in 2012 and is by no means a final estimate. Namely, some of the institutions did not have accurate data and some failed to respond to the requests for access to information. In any case, it is the most conservative estimate and the number of people institutionalised with their guardians' consent can only be higher.

446 The Republican Social Protection Institute 2011 Report on the Work of Homes for Children and Youths, p. 39, and 2011 Report on the Work of Homes for Adults, p. 11. Both reports are available in Serbian at: http://www.zavodsz.gov.rs/index.php?option=com_content&task=view&id=160&Itemid=157.

447 This practice was noted in several social protection institutions and one psychiatric hospital, which does not mean that it is applied in others as well. Namely, the requests for access to information of public importance were formulated in a way that did not require of the establishments to explicitly state whether they looked after wards institutionalised only with the consent of their temporary guardians. The NPM identified this practice also in the Sveti Vračevi Special Psychiatric Hospital and recommended that it cease, see the NPM's Recommendation No. 33088 of 17 December 2012, available in Serbian at <http://ombudsman.npm.rs/>.

448 A guardianship authority may appoint a temporary guardian to a person with legal capacity in the event it deems that the person has to have a guardian to protect his personality, rights or interests... The decisions on the appointment of a temporary guardian shall specify the legal operations or types of legal operations the guardian may undertake depending on the circumstances of each individual case (Art. 132, Family Act). Therefore, a temporary guardian may be authorised to undertake individual legal operations but not to decide on the institutionalisation i.e. deprivation of liberty of his ward.

449 In that respect, the ECtHR stated that the fact that a person lacked legal capacity to decide matters for himself or did not necessarily mean that he was unable to understand his situation, *D.D. v. Lithuania*, ECHR, App. No 13469/06, (2012), paragraph 150. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without

erty.⁴⁵⁰ Given that these people were deprived of their legal capacity because they suffer from a mental illness, it is simultaneously the only acceptable ground for depriving them of liberty. This is why such deprivations of liberty must satisfy the above requirements that have to be fulfilled for depriving of liberty “persons of unsound mind”.⁴⁵¹ On the other hand, it is clear that the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty.⁴⁵² In that sense, the ECtHR stresses that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.⁴⁵³

Furthermore, a disturbing practice, which is not envisaged by the law, emerged in Serbia – placement of persons in residential institutions is conditioned by depriving them of their legal capacity.⁴⁵⁴ The link between the deprivation of legal capacity and institutionalisation (in social care institutions or psychiatric hospitals) is also corroborated by the research of the legal capacity court proceedings conducted by the BCHR and the MDRI-S. In 57% of all cases reviewed, the person deprived of legal capacity was institutionalised either sometime during his lifetime or at the time of the procedure.⁴⁵⁵

4.2. *Right to Be Informed of Reasons for Arrest and Charges*

Article 9(2) of the ICCPR states that a person who is arrested shall be informed, at “the time of his arrest”, of the reasons for his arrest and “promptly” informed of the charges against him. The ECtHR emphasises that any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a

prior consultation of the interested person will as a rule require careful scrutiny. See *Stanev v. Bulgaria*, ECHR, App. No. 36760/06 (2012), paragraph 153.

450 *Stanev v. Bulgaria*, ECHR, App. No. 36760/06 (2012), paragraph 132. The CPT holds the same view, see the CPT Report on its visit to Serbia in 2007, paragraph 175.

451 *Ibid.* Paragraphs 154 and 155.

452 *Ibid.* paragraph 153.

453 *H.L v. The United Kingdom*, ECHR, App. No. 45508/99, (2004).

454 *The Hidden and Forgotten - Segregation and neglect of children and adults with disabilities in Serbia*, Mental Disability Rights Initiative of Serbia (MDRI-Serbia), Belgrade, 2012, p. 41 (hereinafter MDRI-S Report), available in Serbian at http://mdri-s.org/files/Sklonjeni_i_zaboravljeni.pdf

455 *Practicing Universality of Rights: Analysis of the Implementation of the UN Convention on the Rights of Persons with Disabilities in View of Persons with Intellectual Disabilities in Serbia*, MDRI-Serbia, Belgrade, 2012, p. 20, available at: <http://mdri-s.org/files/Practicing%20Universality%20of%20Rights.pdf>.

court to challenge its lawfulness.⁴⁵⁶ All persons deprived of liberty, including persons with mental disorders, are entitled to this right.⁴⁵⁷

Under Article 27(2) of the Constitution, “All persons deprived of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay”.

The provisions of the CPC are in accordance with international standards given that the accused i.e. suspect is entitled to be notified in detail and in a language he understands and promptly, at the first hearing at the latest, of the offence he is charged with, the nature of and grounds for the charges and evidence collected against him (Art. 4(1.1)).⁴⁵⁸

A suspect must be given the opportunity to read the criminal report, the crime scene report, the findings and opinions of court experts and the motion for investigation immediately before the first hearing and at his own request (Art. 89(3)). A person deprived of liberty may institute proceedings before the court, i.e. file an appeal with the court, which is duty bound to urgently rule on the lawfulness of the deprivation of liberty (Art. 5(3.4)).⁴⁵⁹

The right to be informed of the reasons for arrest is also enshrined in Article 52(1) of the Police Act, the Road Safety Act and the State Border Protection Act.

Notwithstanding the explicit guarantee of this right in the Constitution, it is only envisaged in the Serbian criminal law. The Non-Contentious Procedure Act, which governs confinement in a health institution, for instance, does not lay down that the institutionalised patients must be informed of the reasons why they were deprived of liberty. Persons deprived of legal capacity and placed in social protection and psychiatric establishments with the consent of their guardians are not considered persons deprived of liberty and do not have this right either.

4.3. *Right to Be Brought Promptly Before a Judge and to a Trial within a Reasonable Time*

Although it is hard to determine what “promptly” means, it would seem that this period should not exceed four days even in exceptional circumstances and should be much shorter in normal circumstances.⁴⁶⁰ Under international standards,

456 *Lazaroski v. “The Former Yugoslav Republic of Macedonia”*, ECHR, App. No. 4922/04, (2009).

457 *Van Der Leer v. The Netherlands*, ECHR, App No. 11509/85, (1990), paragraphs 27-29.

458 More on the right to be informed of the reasons for arrest and charges in the new CPC in the *2011 Report*, I.4.5.1.1.

459 *Ibid.*

460 See *Brogan v. United Kingdom*, ECtHR, App. No. 11209/84 (1988), p. 33; *McKay v. United Kingdom*, ECHR, App. No. 543/03 (2006); *Medvedev and Others v. France*, ECHR, App. No. 3394/03 (2010).

a person must be brought before an independent and impartial authority (independent from the executive authorities and the prosecutors).

Under Serbian law, custody shall as a rule be ordered by an investigating judge or a judicial panel, by the court under the new CPC, at the request of the prosecutor, wherefore it may be considered that the standard requiring that the decision be taken by a judge “or other officer authorised by law to exercise judicial power” has been met.⁴⁶¹

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

The Constitution prescribes that detention pending indictment may last for maximum three months pursuant to a decision by a competent first instance court and that it may be extended by a decision of a superior court another three months. The period starts running on the day of arrest and the suspect shall be released if charges have not been raised by the end of this period (Art. 31(1)). The Constitution does not limit the duration of detention once the defendant is indicted and reduces it to “the shortest possible time” (Article 31(2)). The CPC governs in detail detention ordered in regular and summary proceedings within the limits set by the Constitution. It, too, does not limit the duration of detention after the indictment takes effect but it envisages the judicial panel’s review of the grounds for detention every month before the indictment becomes effective and every two months thereafter (Art. 146(2)).

When setting measures to ensure the defendant’s presence at the trial and the unobstructed conduct of criminal proceedings (summons, compulsory appearance, prohibition to leave his place of residence, bail and detention), the courts are under the duty not to impose a more stringent measure if the purpose can be achieved by a more lenient measure, i.e. when the requirements for substituting a more stringent measure by a more lenient one are satisfied *ex officio* (Article 133, CPC).

The main problem regarding detention in Serbia is that the courts still apply this measure the most often in order to ensure the presence of the defendants. The number of detainees increased considerably in 2010, rising from 2,601 in January to 3,332 in December 2010. The remanded population stood at 3,102 in late 2011.⁴⁶²

461 See, *mutatis mutandis*, *Bezicheri v. Italy*, ECtHR, App. No. 11400/85 (1989), p. 20.

462 The 2010 and 2011 Annual Reports of the Penal Sanctions Enforcement Administration, available in Serbian at <http://www.uiks.mpravde.gov.rs/cr/articles/izvestaji-i-statistika/>

The number of detainees was estimated at over 3,000 in late December 2012.⁴⁶³ It appears that the main problem arises from the fact that detention is ordered under one of the grounds for detention in Article 142 without consideration being given to other measures ensuring the defendants' presence at the trial, i.e. replacing the harsher measures by more lenient ones, as well as from the broad interpretation of individual circumstances indicating the existence of grounds for ordering detention. The Constitutional Court, for instance, qualified as ill-founded the reasoning of the Subotica Basic Court that the "unemployment of the applicant, his engagement in agriculture, the fact that he has three children and that his wife is unemployed and that he was convicted for endangering public traffic safety constitute particular circumstances indicating that he will again commit the crime of unauthorised crossing of the state border and smuggling of humans".⁴⁶⁴ In the case of *Đermanović*, the ECtHR emphasised that, with the passage of time, the authorities must constantly examine the initial ground for ordering detention with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial. Use of standardised formulas, consistently referring to the same ground and the same circumstance justifying the initial order of detention cannot justify prolonging detention. Furthermore, the ECtHR found that the Serbian authorities had failed to consider alternative means of ensuring the applicant's presence at the trial, such as, for example, the seizure of his travel documents.⁴⁶⁵

4.4. *Right to Appeal to Court against Deprivation of Liberty*

This right is envisaged in cases when a person has been ordered custody by a non-judicial body.⁴⁶⁶ The opportunity to initiate proceedings to review the lawfulness of the deprivation of liberty must be provided, both in theory and in practice, soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter.⁴⁶⁷ The UN Human Rights Committee took the stand that judicial control must be provided immediately, not after the decision by the second-instance administrative body.⁴⁶⁸

The Constitution of Serbia guarantees the rights of all persons deprived of liberty to address the court, which is to urgently review the lawfulness of the deprivation of liberty.

463 Statement by the State Secretary of the Ministry of Justice and State Administration of 22 October 2012, available in Serbian at <http://www.blic.rs/Vesti/Hronika/349069/Drzava-izrekla-gradjanima-ukupno-87-godina-neosnovnog-pritvora-odsteta-tri-miliona-evra>

464 Constitutional Court decision on a constitutional appeal, Case No. Už 2567/2011, (2011) paragraph 5(4).

465 See *Đermanović v. Serbia*, ECHR, App No. 48497/06, (2010), paragraphs 77-80.

466 See *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, App. Nos. 2832/66, 2835/66 and 2899/66, p. 76.

467 *Molotchko v. Ukraine*, ECHR, App No. 12275/10, (2012), paragraph 148.

468 See *Mario Inés Torres v. Finland*, ECHR, App. No. 291/1988 (1990).

vation of liberty and order their release if they were unlawfully deprived of liberty (Art. 27(3)). Furthermore, the Constitution lays down that the court shall review an appeal of a detention order and deliver its decision within 48 hours (Art. 30(3)). The Constitutional Court upheld a constitutional appeal because the court failed to urgently review the appeal of a detention order, i.e. render its decision within the constitutional 48-hour deadline.⁴⁶⁹ This deadline, however, does not apply to appeals of decisions extending detention given that “the urgency standard is looser when the court’s decision to extend detention is reviewed in the second instance, because a decision on the appeal actually constitutes additional review of its justification”.⁴⁷⁰ In this particular case, the Constitutional Court upheld the constitutional appeal because it took the court 28 days to review the appeal of the decision extending detention⁴⁷¹. This is in keeping with ECtHR case law, which found, for instance, that 17-day-long⁴⁷² and 26-day-long reviews⁴⁷³ were not speedy.

Under the CPC, an appeal of a decision on 48-hour police custody, which must be rendered within a maximum of two hours from the moment of deprivation of liberty, may be lodged with the competent investigating judge who shall rule on it within four hours (Art. 229(2 and 3)). Data on how many of such appeals were successful and resulted in the release of these detainees (4,459 in all) in the January-September 2012 period were not available.⁴⁷⁴

Article 53(3) of the Police Act lays down that the competent court shall review an appeal of 24– hour police detention of a person disturbing public law and order within 48 hours. This provision is illogical and does not constitute an effective legal remedy, particularly if one bears in mind that the law states that the person shall be served the detention order within six hours from the moment he is brought in. Consequently, more than 50 hours may pass from the moment persons are deprived of liberty and their appeals are reviewed if they lodge their appeals as soon as they are served the detention orders.

A police officer’s order to detain a drunk driver is not appealable (Art. 283(1), Road Safety Act).

A health institution that admits for treatment a person without his consent or without a court decision is under the obligation to notify the competent court thereof within the following three days (Art. 46(1), NCPA)⁴⁷⁵. This provision is in contravention of Article 29 of the Constitution, under which a person deprived of liberty without a court decision must be brought before the competent court within

469 Už-1446/2011, paragraph 5.

470 Už-3641/2010, paragraph 5(4).

471 Už-3641/2010, paragraph 5(7).

472 *Kadem v. Malta* ECHR, App No. 55263/00, (2003), paragraphs 44-45.

473 *Mamedova v. Russia*, ECHR, App No. 7064/05, (2006), paragraph 96.

474 Request for access to information of public importance.

475 The Health Care Act stipulates that the court shall be notified of involuntary hospitalisation within 48 hours (Art. 44(2)).

48 hours from the moment of deprivation of liberty. Under the NCPA, the court has as many as 30 days upon receipt of the notice to rule on whether the person should be retained in the health institution.⁴⁷⁶ This deadline is excessive in the opinion of the BCHR, particularly in view of the fact that the court has only 12 hours from the moment of detention to issue a decision on detention in criminal cases (Art. 30(3)). In late 2012, the Ministry of Justice and State Administration opened a public debate about the draft amendments to the Non-Contentious Procedure Act⁴⁷⁷ which cut down the deadlines for reporting involuntary hospitalisation to 48 hours and for rendering decisions on confinement in a neuro-psychiatric establishment to three days. The draft amendments, however, also envisage detention of people in social protection institutions. It is unclear why the legislator provided for the implementation of the measure of deprivation of liberty, the harshest measure that can be applied against people with intellectual disabilities, in social protection institutions as well. The Health Ministry publicly presented the Draft Act on the Protection of People with Intellectual Disabilities in November 2012. Various versions of this law had been presented over the past few years but no consensus was reached as to its content. Although this Draft Act includes some improvements, it does not govern the right to liberty and security of persons in accordance with international human rights standards. For instance, it does not oblige the courts to conduct periodic reviews of the grounds for the further hospitalisation of patients or provide special safeguards to people deprived of legal capacity and institutionalised merely pursuant to their guardians' consent.⁴⁷⁸ In any case, this draft law should not be adopted in its present form despite some of the improvements it brings.

The courts may issue a decision ordering that a person whose deprivation of legal capacity is under review be placed in an appropriate medical institution temporarily but no longer than three months, if in the doctor's opinion, this would be necessary in order to determine his mental state, unless extended placement may adversely affect the person's health (Art. 38 (3)). A complaint against such a court decision may be filed by the person against whom the proceedings are being conducted, regardless of his mental state, as well as by his guardian or temporary representative within three days of receipt of a copy of the decision (Art. 39 (1 and 2)).

Persons institutionalised pursuant to their guardians' consent do not have access to a court before which they could directly challenge the lawfulness of their deprivation of liberty. Furthermore, they only have a theoretical possibility to restore their legal capacity which would result in their release in case of a positive out-

476 Article 50, NCPA. The ECtHR found that 19 days was excessive for a court decision on an appeal of involuntary hospitalisation, see the case of *Van Glabeke v France*, App. No 38287/02, judgment of 11 December 2003.

477 The working version of the Act Amending the Non-Contentious Procedure Act is available at <http://www.mpravde.gov.rs/cr/news/vesti/javna-rasprava-o-izmenama-i-dopunama-zakona-2012.html>

478 See the Protector of Citizens comment of the Draft Act on the Protection of Persons with Mental Disabilities No. 3245 of 18 December 2012, available in Serbian at: <http://www.zastitnik.rs/index.php/lang-sr/2011-12-11-11-34-45/2654-2012-12-20-08-51-16>.

come, given that the courts are not obliged to re-examine whether the deprivation of legal capacity is still justified. Namely, although a person deprived of legal capacity may file a motion for restoring it, the courts and other state authorities are not under the obligation to notify them of that option. Furthermore, persons deprived of legal capacity do not have access to legal aid and relevant expertise; their social contacts are limited and they are often victims of prejudices because of which their appeals are not attached much importance. Finally, given that a person's legal capacity may be reinstated only in the event the reasons that led to its removal (an illness or a psycho-physical disability) cease to exist, it is clear that a disability cannot disappear per se and that persons with intellectual disabilities, in particular, merely have a theoretical possibility of reinstating their legal capacity. The ineffectiveness of the right to initiate proceedings to recover one's legal capacity is corroborated by a survey of case law on the removal and reinstatement of legal capacity, according to which only 5 of the 1000 analysed court decisions (i.e. 0.5%) rendered between 2008 and 2010 regarded the reinstatement of legal capacity. Legal capacity was restored in only three cases; only in one case was the procedure initiated by the person deprived of legal capacity.⁴⁷⁹

The ECtHR is of the view that the compulsory confinement of persons of unsound mind in a psychiatric hospital or a social care institution, who may also be deprived of their legal capacity, constitutes deprivation of liberty and that they are entitled to periodic reviews of the lawfulness of their confinement or to take proceedings "at reasonable intervals" before a court. The ECtHR also underlines that Article 5 requires that the procedure followed have a judicial character and that it is essential that the person concerned should have access to a court and the opportunity to be heard. Special procedural safeguards may prove called for in order to protect the interests of these persons.⁴⁸⁰ The CPT arrived at the same conclusion after its visit to Serbia in 2007.⁴⁸¹

4.5. Right to Compensation for Unlawful Deprivation of Liberty

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

According to the Justice Ministry data, 2,601 damage claims over unlawful deprivations of liberty were filed with the Damages Commission and 707 settlement agreements on the payment of compensation worth around 120 million RSD were

479 See the MDRI-S Report, p. 17.

480 *D.D. v. Lithuania*, ECHR, App No. 13469/06, (2012), paragraphs 163-164.

481 The CPT recommended that steps be taken without delay to ensure that persons placed in the specialised institutions have the effective right to bring proceedings to have the lawfulness of their placement decided by a court. See the CPT Report on its visit to Serbia in 2007, paragraph 175, available at <http://www.cpt.coe.int/documents/srb/2009-01-inf-eng.htm>.

concluded from 1 January 2008 to October 2012.⁴⁸² The total amount paid pursuant to damage claims over unlawful deprivations of liberty against the Republic of Serbia is not known. The amounts awarded, however, vary greatly. The NGO Humanitarian Law Center qualified the pecuniary damages awarded non-Serb victims as “derisory” and specified that the Belgrade First Basic Court ruled that Serbia pay 1.3 million RSD to five Kosovo Albanians for unlawful detention ranging between 8 and 17 months and ill-treatment by the police and Army of Yugoslavia.⁴⁸³ On the other hand, retired army general Aco Tomić was awarded six million RSD in 2008 in compensation for spending 100 days in custody during the 2003 state of emergency.⁴⁸⁴

Given that the Serbian legal system does not recognise as deprivation of liberty the placement of people deprived of legal capacity in social care institutions and psychiatric hospitals on the basis of their guardians’ consent, it also does not recognise or secure them the right to claim damages for unlawful deprivations of liberty.⁴⁸⁵

4.6. Recommendations

1. Order more often alternatives to detention, i.e. measures ensuring the presence of defendants and the unobstructed conduct of criminal proceedings (bail, prohibition to leave place of residence, etc).
2. Regularly review grounds for extending detention in light of the circumstances that may have changed due to the passage of time, the completion of procedural actions during the proceedings, etc.
3. Apply ECtHR standards when considering confinement of people in neuropsychiatric establishments.
4. Apply uniform criteria for setting the amounts of damages for unlawful deprivations of liberty of Serbs and people of other nationalities.
5. Apply the police custody measure exceptionally, as prescribed by the Criminal Procedure Code.
6. Amend the Road Traffic Safety Act and introduce measures milder than deprivation of liberty for drunk driving, such as, e.g. temporary vehicle seizure.
7. Amend Article (53(3) of the Police Act and put in place an effective legal remedy for persons held in 24-hour custody for disturbing or endanger public law and order.

482 See the B92 website report in Serbian http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=10&dd=23&nav_category=12&nav_id=654226

483 Humanitarian Law Center press release of 18 June 2012, available at <http://www.hlc-rdc.org/?p=20417>.

484 See the report on damages awarded to Tomić in the Belgrade daily Politika, 11 January 2008, available in Serbian at <http://www.politika.rs/rubrike/Hronika/10577.lt.html>.

485 See, *mutatis mutandis*, *Stanev v. Bulgaria*, paragraphs 182-191.

8. Align the legislative framework on the status of people with psycho-social or intellectual disabilities, notably the regulations governing their deprivations of liberty (Non-Contentious Procedure Act, Health Care Act, Act on the Protection of People with Intellectual Disabilities, Free Legal Aid Act, etc), with the case law of the ECtHR and the Convention on the Rights of People with Disabilities.
9. Stop institutionalising i.e. depriving of liberty people deprived of their legal capacity without their consent and pursuant to the consent of their legal guardians. Provide such people with access to a court, which will rule on the justification for their institutionalisation in accordance with the provisions on compulsory hospitalisation.
10. Provide people with psycho-social or intellectual disabilities the opportunity to live in the community or in a less restrictive environment.

5. Right to a Fair Trial

5.1. Judicial System

Serbia's court network consists of courts of general jurisdiction and specialised courts. Courts of general jurisdiction comprise Basic, Higher and Appellate Courts and the Supreme Court of Cassation, as the highest court in the state. Specialised courts comprise the Commercial Courts, the Commercial Appellate Court, Misdemeanour Courts, the Higher Misdemeanour Court and the Administrative Court (Art. 11, Act on Organisation of Courts).

In its capacity of a first-instance court, a Higher Court has the jurisdiction to try crimes warranting over 10 years' imprisonment, crimes against the Army of Serbia, disclosure of a state secret, incitement to a violent change of the constitutional order, incitement to national, racial or religious hatred or intolerance, violation of territorial sovereignty, conspiracy to commit an anti-constitutional activity, damage to the reputation of the Republic of Serbia, a foreign state or an international organisation, money laundering, disclosure of an official secret, violations of the law by judges, public prosecutors and their deputies, endangering air traffic safety, manslaughter, rape, sexual intercourse with a helpless person, sexual intercourse by abuse of post, abduction, trafficking in minors for adoption purposes, violent conduct at a sports event and acceptance of bribes. Higher Courts also conduct criminal proceedings against juveniles, rule on petitions for the suspension of security measures or legal consequences of convictions for criminal offences within their jurisdiction and on requests for rehabilitation, the prohibition of the distribution of the press and dissemination of information by media outlets. Furthermore, Higher Courts conduct civil proceedings in the first instance in the event the value of the

matter under dispute allows for an appeal on the points of law, rule in civil disputes involving establishing or disproving maternity or paternity, copyrights and related rights, the protection and use of inventions, models, samples, trademarks and indications of geographic origin (unless they fall within the jurisdiction of another court), disputes regarding the publication of a correction or a reply to information over a violation of the prohibition of hate speech, protection of the right to a private life, the failure to publish information and redress for publishing information.

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

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

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

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

The drastic reduction of the number of regular courts has been one of the greatest problems of the Serbian judiciary that arose as a consequence of the 2009 judicial reform. The Serbian network of courts of general jurisdiction is now comprised of 34 Basic Courts with 102 Court Units, 26 Higher and four Appellate

Courts. Although cost-effectiveness had been one of the main goals of the reform, this court network has proven extremely uneconomical compared to the one that existed until 2009. The disastrous consequences of the reform on court performance are, however, much more relevant from the perspective of the right to a fair trial. They have led the authorities to start designing a new network of courts of general jurisdiction in 2012, which, according to information released by the Government, will be comprised of 72 Basic Courts with 14 Court Units, while the number of Higher and Appellate Courts will remain unchanged.⁴⁸⁶ The number of Basic Courts in Belgrade alone is to increase from two to six – three will have jurisdiction over the inner city area and three over the suburbs. The plans to reform the court network are more than welcome in view of the data on judicial performance, including the performance of the court with the heaviest workload, the First Basic Court in Belgrade. The number of judges will also have to be increased if court efficiency is to improve. Expectations are that many of the non-appointed judges will be reinstated and assigned to the new courts in the network given the Constitutional Court decision on non-appointed judges.

5.2. Constitutional Judiciary

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

Judges shall be appointed from amongst “prominent lawyers” who are at least 40 years of age and have at least 15 years of experience in practicing the law (Art. 172 (5)). Under the Constitution, at least one judge appointed from each of the three lists of candidates must be from the territory of the autonomous provinces (Art. 172 (4)). The Constitution and the Constitutional Court Act⁴⁸⁷ failed to lay down clear and efficient rules on the appointment of the Constitutional Court judges or proper guarantees of the Court's independence. The opportunity to rectify some of the constitutional inconsistencies in the Constitutional Court Act was, unfortunately, missed. The Act Amending the Constitutional Court Act⁴⁸⁸ adopted in 2010 failed to improve the procedure under which the judges of this Court are appointed.

486 See: <http://www.politika.rs/rubrike/Hronika/Nova-mreza-sudova-Srbije.lt.html>.

487 *Sl. glasnik RS* 109/07.

488 *Sl. glasnik RS* 99/11.

A Constitutional Court judge shall be dismissed in the event he joined a political party, violated the prohibition of conflict of interests, permanently lost the ability to work, was convicted to a prison sentence or convicted for an offence rendering him unfit for discharging the duty of a Constitutional Court judge (Art. 15 (1), Constitutional Court Act). The Constitutional Court shall assess whether any of these conditions have been fulfilled in a procedure initiated by the bodies authorised to nominate the Court judges or the Constitutional Court itself (Art. 15 (2 and 3)). A decision on the dismissal of a Constitutional Court judge shall be taken by the National Assembly, i.e. even when that judge had been appointed by another body authorised to nominate Constitutional Court judges. The Act prohibits the Constitutional Court judges from discharging “another public or professional function or job with the exception of professorship at a law college in the Republic of Serbia” (Art. 16 (1)).

The Act Amending the Constitutional Court Act introduced novel provisions which should help improve the Court’s efficiency. The Constitutional Court’s work had been slowed down by the obligation to render all its decisions in plenary sessions. The amendments now allow it to render decisions also in Large and Small Judicial Chambers.

The Constitutional Court has two Large Judicial Chambers, each comprising a chairperson and seven judges. Large Judicial Chambers adopt their decisions unanimously; matters that do not receive unanimous support are referred for review to the plenary session of the Court. Small Judicial Chambers, comprising three judges, are entrusted with rendering specific decisions and conclusions that are procedural in character. In the event a Small Judicial Chamber is unable to reach agreement on a matter within its jurisdiction, the decision on it is taken by a Large Judicial Chamber. The most important decisions, such as decisions on the merits in cases involving the assessment of constitutionality and legality, on the prohibition of political parties, trade unions, civil associations or religious communities and on violations of the Constitution by the President of Serbia, are still rendered by the Court in plenary sessions.

5.3. Independence and Impartiality of Courts

Article 4 of the Constitution comprises provisions on the separation of powers and independence of the judiciary. The Act on Organisation of Courts⁴⁸⁹ includes a provision explicitly prohibiting any use of public office, media or any public appearance to affect the outcome of court proceedings or any other influence on the court (Art. 6).

489 *Sl. glasnik RS* 116/08, 104/09, 101/10, 31/11, 78/11 and 101/11.

5.3.1. Election and Appointment of Judges

The Constitution establishes two bodies charged with appointing judges and deputy public prosecutors, the High Judicial Council and the State Prosecutors' Council.⁴⁹⁰ Judges shall be elected to their first three-year terms in office by the National Assembly at the proposal of the High Judicial Council, while their appointments on permanent tenure shall be made by the High Judicial Council (Art. 147, Constitution).

The High Judicial Council (HJC) has 11 members. They comprise the President of the Supreme Court of Cassation, the Justice Minister and the chairperson of the Assembly committee charged with the judiciary, who shall be members *ex officio*, and eight members elected by the National Assembly. These eight members comprise six judges with permanent tenures and two eminent legal professionals with at least 15 years of professional experience, a solicitor and a law school professor (Art. 153). With the exception of *ex officio* members, the other HJC members are appointed to five-year terms in office.

The Constitution retained the principle of permanent judicial tenure, but introduced the rule that judges shall first be elected on three-year tenures and shall thereupon be appointed to permanent judicial offices. The Constitutional Act on the Implementation of the Constitution⁴⁹¹ provided for the general election/appointment of all judges. The problems that arose during the general appointment of judges in 2009 were analysed in the prior BCHR Reports. The Constitutional Court rendered a series of decisions in 2012 upholding all the criticisms of the judicial appointment procedure. Although the legal views the Constitutional Court took make political sense and fully satisfy the need to preserve judicial independence, it is often very difficult to follow the legal reasonings on which they are based. It can be concluded that the Constitutional Court departed from its prior practice and commendably applied a very high degree of judicial activism in its decisions on the appointment of judges.

The most important Constitutional Court decision was the one it rendered in July 2012, when it declared unconstitutional the non-appointment of over 100 judges.⁴⁹² Namely, the Constitutional Court established that the procedure in which the judges were declared incompetent, unqualified or unworthy of judgeship was not in compliance with the requirements of the right to a fair trial enshrined in Article 32 of the Constitution. The Court notably found that the procedure before the High Judicial Council should in all aspects be viewed as a procedure in which an individual's civil rights and obligations are decided on and that it had to satisfy all the requirements of a fair trial. The Court established that the right to a fair trial

490 Public Prosecutors are elected by the National Assembly at the proposal of the Government.

491 *Sl. glasnik RS* 98/06.

492 Case VIIIU-534/2011. Available in English on the website of the Judges' Association of Serbia [http://www.sudije.rs/files/file/pdf/VIIIU-534-2011-final-ENG%20\(1\).pdf](http://www.sudije.rs/files/file/pdf/VIIIU-534-2011-final-ENG%20(1).pdf).

of the non-appointed judges had been violated on five different grounds. Firstly, the objections of the non-appointed judges were not reviewed by an independent appeals authority. Secondly, even in cases where the appeals authority could have been considered independent, the Court established that the criteria for establishing the judges' worthiness and competence were inadequate and did not satisfy the "lawfulness" requirement under the ECHR standards. Furthermore, the Court found procedural violations during the appointment and objection review procedures. Finally, the Court found that the judges who had filed objections challenging their non-appointment had been deprived of the right to a public hearing.

As far as the impartiality of the convocation of the High Judicial Council that reviewed the objections of the judges who had not been appointed by the first convocation of the High Judicial Council, the Constitutional Court found that the three *ex officio* members of the HJC (the President of the Supreme Court of Cassation, the Justice Minister and the chairman of the relevant National Assembly committee) and the member of the Council from the ranks of solicitors had also been members of the Council that had rendered the initial appointment decisions. Therefore, four HJC members who had reviewed the objections sat on the HJC that had decided on the appointments. The Constitutional Court applied the ECtHR's view in the case of *De Haan v. The Netherlands*,⁴⁹³ and observed that a legal remedy against a decision could not be reviewed by the same person responsible for the decision. As the Constitutional Court correctly interpreted, the Council's decision-making role involves more than just the act of voting. The fact that members who cannot be considered impartial provide a quorum and thus enable the body to render decisions suffices. Although the HJC members, who could not be considered impartial, refrained from voting on the objections, their votes effectively amounted to votes against.

This, however, did not suffice to declare the whole convocation of the HJC that reviewed the objections partial. Although four members of the HJC were disqualified by this absolutely correct interpretation, the validity of the HJC's quorum for rendering decisions was not undermined, given that quorum is provided by six of the HJC's 11 members. The Constitutional Court thus had to establish that the HJC could have rendered decisions on the objections by fully ignoring the presence of the four disqualified members. The Court also found that the HJC member from among law school professors should also have been disqualified during the HJC deliberations of the objections given that the Anti-Corruption Agency had ruled that his membership of the HJC was to terminate *ex officio* because he held two public offices. The Constitutional Court was, however, not of the view that this HJC member was disqualified because his membership was terminated *ex officio*, but because his impartiality had been "brought into question" by the Agency decision. Namely, HJC members may be dismissed only by the National Assembly, which refused to act in accordance with the Agency decision, and the law school profes-

493 ECtHR, App. No. 22839/93 (1997).

sor remained a member of the HJC despite the Agency decision. The Constitutional Court, however, found that the Agency decision brought into question his impartiality and disqualified him on that ground. This stand is problematic in view of the extremely high standard for proving partiality in the meaning of the right to a fair trial. Although the Constitutional Court's view on this issue is intuitively correct, the Court should have paid much more attention to the issue of the partiality of the HJC member from the ranks of law school professors and elaborated the grounds for its view.

Finally, the Court established that HJC members from among judges could have decided on the objections filed by the non-appointed judges. Given that there are six such members in the HJC, decisions voted in by all these members would have been legally irreproachable and satisfied the fair trial requirement. The Constitutional Court, however, established that criminal proceedings had been launched against one of these members and that he had not taken part in the work of the HJC because he was in pre-trial custody during the reviews. Therefore, in a large number of cases, the decisions on the objections had been taken by an authority the composition of which did not satisfy the impartiality principle.

Some decisions on the objections had been taken by a legally irreproachable HJC. The Constitutional Court, however, established that those decisions were not in compliance with constitutional guarantees either, although some of its findings are quite confusing.

To start with the unproblematic findings, the Constitutional Court established that the judges, whose objections had been reviewed, had been deprived of a right to a public hearing. It also found procedural violations. This would have sufficed to overturn the entire appointment procedure. The Constitutional Court was, however, apparently of the view that there was possibly proof that some of the reviews had been conducted in accordance with the procedure, that public hearings had been held and that the convocation of the HJC that had reviewed these objections had been legally irreproachable. In order to effect the revocation of all the decisions on the non-appointment of judges, the Constitutional Court opted for a legal manoeuvre demonstrating extraordinary creativity, but rendering it extremely problematic.

Namely, the Constitutional Court found that the standards for declaring a judge incompetent, unqualified or unworthy, which are laid down in the Act on Judges and elaborated in the Rules on Criteria and Standards for Assessing the Qualification, Competence and Worthiness and for Reviewing the Decisions on the Termination of Judicial Office Rendered by the First Convocation of the High Judicial Council⁴⁹⁴ were inadequate or failed to satisfy the requirement regarding the clarity and predictability of the legal provisions. This part of the Court's decision is the most problematic one.

494 *Sl. glasnik RS* 35/11 and 90/11.

First of all, it is for the legislator and not the court to decide on the adequacy or inadequacy of legal standards. The Constitutional Court should (and could) not have reviewed the adequacy of the legal solutions and was to have focussed only on their constitutionality. Adequacy is not a constitutional category. The Constitutional Court's conclusion that the assessment of competence cannot be based on statistical data extracted by absolutely unacceptable methods is correct from the perspective of fairness and common sense but not from the perspective of constitutional law. Had the Constitutional Court elaborated this finding further and analysed these politically unacceptable solutions in the light of the constitutional provisions, its decision would not have been problematic. The failure to do so has cast a shadow on an otherwise well-founded Court decision.

On the other hand, the Constitutional Court's finding that the standards for assessing the judges' competence are not precise enough to be considered lawful is based on a constitutional law category and the Constitutional Court is definitely to be commended for at least trying to apply this extremely important standard developed in ECtHR case law. The problem, however, is that it appears that the Constitutional Court required absolute precision of a legal norm that could automatically apply to all cases, which is simply impossible; nor has the ECtHR ever set such a requirement. Every legal norm is abstract to an extent, which is precisely why it is applicable in a huge number of similar albeit somewhat different actual situations. The Constitutional Court's finding that the standard of a "gross breach" of judicial office is not precise enough to be considered legal grounds for finding a judge incompetent appears to exceed the scope of the requirement regarding the precision of the legal norms. Furthermore, the lawfulness requirement regards the lawfulness of limiting a human right enshrined in the Constitution or the ECHR. The Constitutional Court provided absolutely no explanation of which human rights of the non-appointed judges had been restricted by such imprecise norms. The Court's failure to do so has cast a shadow on its legal reasoning of this legal matter.

Finally, it needs to be noted that the Constitutional Court failed to take a view on the constitutionality of the first convocation of the HJC, particularly in the light of the election of its Chairperson, who is simultaneously the President of the Supreme Court of Cassation. Namely, the entire appointment procedure would be unconstitutional if the first convocation of the HJC were declared unconstitutional. This failure, criticised by judge Vučić in her separate opinion, gains in relevance in light of the Constitutional Court decision of December 2012 declaring unconstitutional Article 102(5) of the Act on Judges laying down the procedure for the election of the Supreme Court of Cassation President. Be that as it may, the decision on the objections of the non-appointed judges was fully reaffirmed by the Constitutional Court's October 2012 decision annulling the non-appointment of the other non-appointed judges.⁴⁹⁵

495 VIIIU-413/2012.

5.3.2. Termination of Judicial Office and Disciplinary Proceedings

Under the Constitution, the tenure of a judge shall terminate at his own request, on meeting the legal retirement requirements, by dismissal or non-appointment on permanent tenure (Arts. 148 (1) and 57, Act on Judges). The decision shall be taken by the High Judicial Council (Art. 57). The Constitution does not list grounds for the dismissal of judges, leaving the regulation of this issue to law, whereby it reduces the constitutional protection of judges from the legislative branch. The Act on Judges lists the following grounds for dismissal: a) in the event he had been convicted to a prison sentence of minimum 6 months or a punishable offence rendering him unworthy of judgeship, b) in the event he had discharged his duties incompetently or committed a grave disciplinary offence (Art. 62). Incompetence shall denote insufficiently successful discharge of judicial duties, if a judge's performance is appraised as "unsatisfactory" in accordance with the criteria for evaluating the performance of judges (Art. 63). Anyone may file an initiative for the dismissal of a judge. The dismissal procedure shall be launched at the proposal filed by the court president, the president of the immediately higher court, the President of the Supreme Court of Cassation, the authorities charged with evaluating the work of judges or the Disciplinary Commission. The High Judicial Council shall establish whether there are grounds for dismissal (Art. 64). Article 151 of the Constitution and Article 5 of the Act on Judges guarantee immunity to judges, wherefore they may not be held liable for opinions they voiced or how they voted on a decision, unless they committed a criminal offence in violation of the law.

The disciplinary liability of judges is regulated by Chapter VII of the Act on Judges. The Disciplinary Commission shall initiate dismissal proceedings against a judge when it establishes that the judge had committed a grave disciplinary offence. The Disciplinary Prosecutor and the judge against whom the disciplinary proceedings were launched may appeal the Disciplinary Commission decision with the High Judicial Council. A judge may file a complaint with the High Judicial Council over a violation of any right which the Act on Judges does not provide a particular remedy for. If the High Judicial Council finds the complaint well-founded, it shall undertake measures to protect the judge's right.

As mentioned in the above analysis of the Constitutional Court decision on the non-appointment of judges, the Constitutional Court found that the criteria for evaluating the judges' competence and qualification were inadequate and imprecise. The Court did not explain its view in greater detail.

5.3.3. Guarantees of Judicial Independence (Recusal, Case Assignment, Non-Transferability)

The Constitution guarantees the so-called principle of non-transferability of judges (Art. 150) and this principle is consistently elaborated in the Act on Judges (Arts. 2(2) and 18). A judge may be assigned or seconded to another court only if he agrees to the transfer. Exceptionally, the consent of the judge shall not be required if

the court he has been appointed to or most of its jurisdiction has ceased to exist. Judicial impartiality is guaranteed by Serbian law in provisions specifying a number of reasons when judges may be recused from a proceeding. These reasons focus on conflict of interests or regard their prior involvement in the case. Recusal may be sought by the judge or the parties in the proceeding. The court president decides on the motion for recusal. Under Art. 22 of the Act on Judges, a judge is not obliged to justify his legal views and findings of fact to anyone, including the court president and the other judges, except in the reasoning of the decisions and in instances explicitly stipulated by the law. This provision ensures the mutual independence of the judges.

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

5.3.4. Incompatibility

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

Under the Act on Judges, a judge may not hold office in legislative or executive bodies, public services or provincial or municipal authorities. A judge may not be a member of a political party or be politically active in any other way; engage in any paid public or private work or provide legal services or advice for a fee. A judge may be a member of the state, provincial or municipal election commission. Other offices, engagements and activities contrary to the dignity and independence of a judge or damaging the reputation of the court shall also be incompatible with judgeship. The High Judicial Council shall determine which actions are contrary to the dignity and independence of a judge or damaging the reputation of the court pursuant to the Ethics Code. In cases specified by the law, a judge may engage in educational or scientific activities in judicial training institutions during working hours (Art. 30).

5.4. Fairness

The Constitution guarantees everyone the right to equal protection of his rights in the proceedings before a court of law, other state bodies, agencies exercising public powers and provincial or local self-government authorities, and the right

to appeal or to apply another legal remedy against a decision concerning his right, obligation or lawful interest (Art. 36).

The lack of an adequate free legal aid system is one of the greatest problems arising with respect to the right to fairness. The Government of the Republic of Serbia adopted the Strategy on the Development of a Free Legal Aid System in the Republic of Serbia for the 2011–2013 Period. Pursuant to the Strategy objectives, the Justice Ministry established a working group in May 2011 to draft the Legal Aid Act. The BCHR analysed the working draft of the law in its *2011 Report*.⁴⁹⁶ No significant headway was made in this field in 2012. A Council for the Implementation of the Free Legal Aid Strategy was established in early 2012 but did not convene even once. The Council of Europe's expert opinion on the draft law was forwarded to the Government in February 2012.⁴⁹⁷ There were no signs that the new Government, formed in mid-2012, would step up work on this law; the 2013 state budget does not have an allocation for free legal aid.

5.4.1. Trial within Reasonable Time

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

Serbia's Criminal Procedure Code recognises the rights of the defendants to be brought before a court as soon as possible and to a trial without any undue delay and obliges the courts to endeavour to conduct the proceedings without undue delay. The Ministry of Justice and State Administration database on the domestic courts' caseload shows that a number of criminal cases had not been resolved efficiently.⁴⁹⁸ BCHR's survey covered the five biggest courts in Serbia – the Belgrade First and Second Basic Courts and the Novi Sad, Niš and Kragujevac Basic Courts – and found a large number of criminal cases that have been pending over 10 years before these courts and their predecessors (15 before the Belgrade First Basic Court, two before the Kragujevac Basic Court and three before the Novi Sad Basic Court). First-instance decisions have not been rendered in as many as 45 criminal cases in the Novi Sad Basic Court and 25 criminal cases in the Belgrade Second Basic Court although five years have passed since they were filed. The Belgrade First Basic Court had as many as 473 first-instance criminal cases pending for over five years.

The situation in the civil departments is not much better. BCHR's survey showed that there were 43 first-instance civil cases pending for over 20 years and

496 See the *2011 Report*, I.4.6.4.

497 Available at: <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/expertises/Opinion%20on%20the%20Draft%20Law%20on%20Free%20Legal%20Aid%20of%20the%20Republic%20of%20Serbia.pdf>.

498 Available in Serbian at: http://tpson.portal.sud.rs/libra_portal_full/default.cfm?action=1&strana=1&potez=0&pismo=CIRILICA.

573 pending for over a decade before the Belgrade First Basic Court. The other courts covered by the survey also had civil cases pending for over 10 years: the Belgrade Second Basic Court had 10, the Niš Basic Court two, the Kragujevac Basic Court 23 and the Novi Sad Basic Court 32 such cases in its dockets. Non-judicial probate proceedings also warrant mention here – 12 of them (eight in Kragujevac) were still pending for more than a decade.

When hearing a labour dispute or a case regarding a collective agreement, the court is under a special obligation to act with expedition, particularly when scheduling hearings and setting deadlines. BCHR registered 42 labour disputes (36 of which before the Belgrade First Basic Court) that have been pending for over 10 years before the courts covered by the survey. The Peaceful Settlement of Labour Disputes Act⁴⁹⁹ and the Act on Mediation⁵⁰⁰ regulating peaceful settlement of other forms of disputes could also help address problems regarding trials within reasonable time, particularly in the context of labour disputes.

Finally, it needs to be noted that a new Law on Enforcement and Security was adopted in 2011.⁵⁰¹ The *2011 Report* provides a detailed overview of the changes it brings but it is still too early to assess its effects, especially in view of the fact that the domestic courts' performance has been the poorest in the field of enforcement. The BCHR's survey of the courts' dockets corroborated that the situation in this area is extremely concerning. The Belgrade First Basic Court had the greatest number of judgments awaiting enforcement for over two years – 10,261 – which is *prima facie* in violation of Article 6 of the ECHR. The Belgrade Second Basic Court had 2,415 and the Novi Sad 600 such judgments. The Kragujevac Basic Court's enforcement results were extremely poor in light of its territorial jurisdiction – as many as 4,483 judgments have been awaiting enforcement for *over three years*. Of them, 633 had been delivered over 10 years ago, wherefore this Court's performance in this field was by far the poorest. The situation in the Niš Basic Court was not much better either; 4,156 judgments were awaiting enforcement, but "only" 123 of them had been delivered over ten years ago. These results give rise to grave concern, all the more since they refer to the situation in only five of the 37 Basic Courts (albeit the largest ones). These five courts alone failed to enforce over 30,000 enforceable judgments that had been rendered over two years ago (the survey covered only enforceable judgments rendered more than three years ago by the Niš and Kragujevac Basic Courts). Although public companies (e.g. the Serbian Electricity Company, the public utility companies) are the enforcement creditors in the vast majority of these cases, estimates are that at least 10% of the cases would surely give rise to a violation of Article 6 of the ECHR if the enforcement creditors complained to the ECtHR i.e. result in the filing of 3,000 applications with the ECtHR. This would be absolutely unacceptable, especially in view of the fact that there were already

499 *Sl. glasnik RS* 125/04 and 104/09.

500 *Sl. glasnik RS* 18/05.

501 *Sl. glasnik RS* 31/11.

10,450 cases against Serbia pending before the ECtHR at the end of the reporting period,⁵⁰² although most of them are likely to be declared inadmissible. Therefore, only a few of the above-mentioned cases regarding non-enforcement are among those pending before the ECtHR. It can be concluded, without the risk of exaggerating, that the situation is extremely concerning.

It is still premature to assess whether the recent changes of specific procedural laws have improved the courts' performance and to what extent. It may, however, be asserted that the resolution of this extremely serious problem was not facilitated in the least by the way in which the Serbian judiciary was reformed. The state is already under major pressure because of the non-enforcement of court decisions, pressure that has increased with every ECtHR judgment and friendly settlement.⁵⁰³

5.4.2. Public Character of Hearings and Judgments

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

Civil and criminal proceedings are guided by the general rule that hearings and trials are public and may be attended by adults. The CPC envisages that the main hearing may be attended by persons over 16 years of age. Under the CPC, the court may *ex officio* or upon a motion by a party, but only upon hearing the views of the parties, exclude the public from the entire or part of the trial in order to protect morals, public law and order, national security, minors or the privacy of the parties to the proceedings or to protect justified interests in a democratic society. The public is always excluded from a trial of a minor (Art. 75, Juvenile Justice Act⁵⁰⁴).

The Act on Misdemeanours⁵⁰⁵ excludes the public from trials if that is necessary in public interest or to protect morals and from trials of minors (Art. 296). Exclusion of the public from a main hearing is in contravention of the law, constitutes a grave violation of due process and grounds for appeal (Art. 368 (4), CPC and Art. 361 (2.11), CPA).

The CPA formulates the grounds for excluding the public from a hearing differently: the public may be excluded from a hearing to protect the interests of national security, public order and morals in a democratic society and to protect the interests of a minor or the privacy of the participants in the proceedings (Art. 322).

502 See: http://www.echr.coe.int/NR/rdonlyres/70EB5DB7-1491-4629-AA7C-8BA70A318037/0/Pendingapplications_affairespendantes31012013.pdf.

503 The ECtHR has already rendered 10 judgments against Serbia regarding the non-enforcement of final court decisions.

504 *Sl. glasnik RS*, 85/05.

505 *Sl. glasnik RS*, 101/05, 116/08 and 11/09.

Under the CPA, the public may be excluded from a hearing also in order to maintain order in the court.

All procedural laws stipulate that the decision on the exclusion of the public must be reasoned and public. Both the CPC and CPA lay down that a judgment must always be delivered publicly, notwithstanding whether the public was excluded from the proceedings, but that the court shall decide whether the public will be allowed to hear the reasoning of the judgment. The Administrative Disputes Act⁵⁰⁶ specifies that the hearings shall as a rule be public and lists grounds for excluding the public, which are in accordance with the ECHR (Art. 35).

5.5. Guarantees to Defendants in Criminal Cases

There are three forms of punishable offences in Serbian law: criminal offences, misdemeanours and economic offences. A criminal offence is an offence defined by the law as a criminal offence which is unlawful and committed with a guilty mind (Art. 14, CC). The legislator does not explicitly state that a criminal offence is socially injurious, like the authors of the prior Criminal Codes had, given that this element is included in the concept of unlawfulness. A misdemeanour is an unlawful act committed with a guilty mind and defined as a misdemeanour in regulations enacted by a competent authority (Art. 2, Act on Misdemeanours).

5.5.1. Presumption of Innocence

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

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

The endeavours to protect the presumption of innocence are justified given its frequent violations in practice, not only by journalists, but by public figures,

506 *Sl. glasnik RS* 111/09.

politicians and even representatives of the state authorities, police and prosecution offices as well. The argument that the law incriminates those “making the statements” and not those quoting, using or publishing them fully justifies the legislator’s intent.

*5.5.2. Prompt Notification of Charges,
in a Language Understood by the Defendant*

Under the Constitution, all persons accused of crimes shall have the right to be notified promptly, in detail and in a language they understand of the nature and reasons for the charges laid against them and the evidence against them (Art. 33). This right is guaranteed by the provisions of the Serbian criminal procedure law. The police are also under the obligation to notify a person that they consider him a suspect in the event they assess as that he may be a suspect during the questioning. The indictment shall be “served to an accused at liberty without delay and within 24 hours to a defendant in custody” and must include, *inter alia*, a description of the committed criminal offence and the circumstances of the offence in greater detail and the proposed evidence to be presented at the main hearing. Notice of indictment is also guaranteed in misdemeanour proceedings (Arts. 85 (2) and 86, Act on Misdemeanours).

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

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

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

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

5.5.3. Prohibition of Trials in Absentia and the Right to Defence

Under the Constitution, any person accused of a crime and available to the court shall be entitled to attend his own trial and may not be sentenced unless he has been given the opportunity to a hearing and defence (Art. 33 (4)).

Pursuant to the CPC a trial *in absentia* is allowed only exceptionally, in the event the defendant is at large or otherwise inaccessible to government agencies and there are compelling reasons for trying him despite his absence. Furthermore, the defendant tried *in absentia* must have a defence counsel from the moment the decision is taken to try him in his absence. At the request of the person convicted *in absentia* or his defence counsel, a new trial may be scheduled.

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

The court is under the obligation to assign a defendant a defence counsel *ex officio* in two instances: in the event the defendant must be represented by a defence counsel and he had not retained one and in the event the defendant cannot afford a lawyer. The court president shall assign a defendant a defence counsel *ex officio*, who shall represent him until the judgment becomes legally effective. In the event the defendant is sentenced to 40 years' imprisonment, the assigned counsel shall also represent him in reviews of extraordinary legal remedies. Article 74 of the CPC explicitly lists the instances in which the defendants must be represented by a defence counsel. As opposed to the prior CPC, under which defendants facing 10 or more years of imprisonment had to be represented by a lawyer, the new CPC stipulates that defendants must be represented by professional counsels if they are charged with a crime warranting eight or more years' imprisonment. The new CPC also stipulates that such defendants must be represented by a defence counsel if they are in custody or under house arrest. Moreover, a court president may dismiss an assigned legal counsel who is not fulfilling his duties.

The CPC lays down that defendant who cannot afford a defence counsel shall be appointed one at their request if they are accused of a crime warranting over three years' imprisonment or in the interest of fairness (Art. 77).

During the pre-investigation proceedings, the police shall advise a suspect of his right to an attorney, who shall attend his further interrogation, and that he is not obliged to answer any questions in the absence of his attorney (Art. 289).

Monitoring the discussions conducted between the suspect/defendant and his defence counsel is especially regulated. The defence counsel has the right to a confidential conversation with the suspect deprived of liberty even before he has been interrogated, as well as with the defendant held in custody. Oversight of this conversation before the first interrogation and during the investigation is allowed only by observation, but not by listening (Arts. 69 and 72 of the 2011 CPC).

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

5.5.4. Prohibition of Self-Incrimination

Under the Constitution, a person accused of or standing trial for a crime is not obliged to make statements incriminating himself or persons close to him or to confess guilt (Art. 33 (7)). A defendant has the right to remain silent and the court or another state authority is under the obligation to warn him before questioning him that anything he says may be used against him. Before questioning the defendant at the main hearing, the court must advise him of his rights to remain silent, not answer any questions and enter a plea if he wishes to. A court judgment may not be based on the defendant's statement if he had not been duly advised of his rights (Art. 85(5) CPC).

The CPC formulates the prohibition of torture more broadly and states that any resort to torture, inhuman or degrading treatment, force, threat, coercion and deception, medical treatment or other means affecting the free will of the defendant or extorting a confession or another statement from or action by the defendant shall be prohibited and punishable. A court judgment may not be based on a statement by the defendant obtained in contravention of this prohibition. The CPC provides for the conclusion of a plea bargain between the defendant and the prosecutor and also allows the defendant and prosecutor to conclude an agreement under which the defendant shall be granted the status of collaborating witness in return for testifying.

5.5.5. Status of Witnesses

A defendant is entitled to question witnesses for the prosecution and require that the witnesses for the defence be questioned under identical conditions and in his presence. The CPC allows the defendant to call new witnesses or court experts or to present new evidence until the end of the main hearing. However, in the interest of procedural economy, the CPC envisages the holding of a preparatory hearing at which the evidence to be presented at the main hearing is elaborated and new evidence is proposed, wherefore the chairing judge may refuse to examine evidence

at the trial which the parties had been aware of but had not proposed at the preparatory hearing without justified reasons.

The CPC does not prohibit the questioning of a police officer in the capacity of a witness on what he had learned in the pre-investigation proceedings. It also allows the court to call to the witness stand persons relieved of the obligation to testify at the request of the defendant or his defence counsel (Art. 93). Persons related to the defendant to a specific degree of kinship are also relieved of the duty to testify, but they may testify if they wish (Art. 94). The CPC also allows witnesses not to answer specific questions if they would thus expose themselves or relatives to a specific degree of kinship to grave humiliation, considerable material loss or criminal prosecution. Persons testifying in court are under the obligation to tell the truth.

Perjury is incriminated by Article 206 of the Criminal Code. The CPC obliges the court to protect a witness from insults, threats and any other attacks. A witness may be granted the status of protected witness in circumstances specified by the law. The CPC also introduces the institute of a particularly vulnerable witness. Apart from the protection afforded by the CPC, the Act on the Protection of Participants in Criminal Proceedings⁵⁰⁷ also envisages witness protection measures under specific conditions.

5.6. Recommendations

1. Establish a court network based on reliable assessments of the caseloads of the individual courts and the objective needs of the population, particularly in densely populated municipalities and those with difficult access to the large city centres.
2. Lay down adequate and sufficiently precise criteria for evaluating judicial competences and qualifications.
3. Adopt a law on free legal aid and establish a free legal aid system.
4. Ensure that defendants are tried without undue delay or dilatoriness.
5. Ensure abundance by the right to a trial within reasonable time, especially in labour and collective agreement disputes.
6. Strengthen the role of private enforcers to ensure the faster and more efficient enforcement of final court decisions
7. Ensure regular advanced training of judges and prosecutors to improve their expertise.

507 *Sl. glasnik RS 85/05.*

6. Right to Privacy

6.1. General

The ECHR and the ICCPR guarantee the right to privacy, which includes the protection of family life, home and correspondence. The ICCPR also guarantees the right to protection of honour and reputation. Although this right is not explicitly listed in the ECHR, the European Court of Human Rights (ECtHR) acknowledged a similar interpretation of the concept of privacy in its judgments.⁵⁰⁸ The ECtHR accepts a wider interpretation of the concept of privacy and considers that the content of this right cannot be predetermined in an exhaustive manner.⁵⁰⁹ According to ECtHR case law, privacy encompasses, *inter alia*, the physical and the moral integrity of a person, sexual orientation,⁵¹⁰ relationships with other people, including both business and professional relationships.⁵¹¹

Serbia is also a signatory of the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,⁵¹² the first binding international instrument on the protection of personal data. The States Parties to the Convention are obliged to undertake the necessary measures to ensure the legal protection of fundamental human rights with regard to the automatic processing of personal data. The Additional Protocol to the Convention, which Serbia also ratified,⁵¹³ obliges states to establish oversight authorities and regulates in greater detail the transborder flow of the personal data to a recipient, which is not subject to the jurisdiction of a party to the Convention.

The Constitution of Serbia does not protect the right to privacy as such but it does guarantee the inviolability of physical and mental integrity, of the home, of letters and other means of communication. However, although the Constitution does not include an explicit provision on the respect for the right to private life, the Constitutional Court is of the view that this right is an integral part of the constitutional right to dignity and the free development of the personality⁵¹⁴ enshrined in Article 23 of the Constitution. The Constitutional Court also found that “the sphere of a person’s private life clearly includes, *inter alia*, a person’s sex, sex orientation and sex life, and that private life entails the right to determine the details of a personal identity and self-determination, and, in that sense the right to change one’s sex to

508 See *Pfeifer v. Austria* App. No. 10802/84 25 February 2007; *Lindon and Others v. France*, 2007

509 See *Costello–Roberts v. the United Kingdom*, ECHR, App. No. 13134/87 (1993); *K. U. v. Finland*, ECHR, App. No. 2872/02 (2008).

510 See *Dudgeon v. the United Kingdom*, ECHR, App. No. 7275/76 (1981).

511 See *Niemitz v. Germany*, ECHR, App. No. 13710/88 (1992).

512 *Sl. list SRJ (Međunarodni ugovori)* 1/92 and *Sl. list SCG*, 11/05.

513 *Sl. glasnik RS (Međunarodni ugovori)* 98/08.

514 Constitutional Court Decision No. *Už – 3238/2011*, p. 9.

match one's gender identity."⁵¹⁵ The Constitutional Court has, thus, recognised a broader interpretation of the right to privacy, which is in accordance with international standards.

The Constitution guarantees the right "to be informed" in Article 51, which prescribes that everyone shall have the right to access data in the possession of the state authorities and organisations vested with public powers and lays down that this right shall be exercised "in accordance with the law", which means that the provisions protecting the right to privacy must be respected.

The Constitution includes a general provision guaranteeing the protection of personal data and prescribing that their collection, keeping, processing and use shall be regulated by the law. The Constitution explicitly prescribes that the use of personal data for any other purpose save the one they were collected for shall be prohibited and punishable as stipulated by the law, unless such use is necessary to conduct criminal proceedings or protect the security of the Republic of Serbia. Under the Constitution, everyone shall have the right to be informed of personal data collected about him, in accordance with the law, and the right to court protection in case they are abused.

Although the Constitutional Court has so far demonstrated that it assesses the provisions of the Constitution strictly in accordance with the ECtHR case law and guarantees of the right to privacy in the ECHR, it would have been much better if the Constitution included a specific provision on the right to privacy instead of the current casuistic approach.

Apart from the protection afforded by the Constitution, the right to privacy is mainly protected by the Criminal Code, which incriminates specific forms of violations of the right to privacy in Articles 139–146 and Article 172, dealing with: inviolability of the home, unlawful search, unauthorised disclosure of secrets, violations of the confidentiality of letters and other mail, unauthorised wiretapping, recording and photographing, unauthorised publication of another's text, portrait or recording, unauthorised collection of personal data and disclosure of personal and family circumstances.⁵¹⁶

6.2. Families and Family Life

According to the ECtHR, family life is interpreted in terms of the actual existence of close personal ties.⁵¹⁷ It comprises a series of relationships, such as marriage, children, parent-child relationships,⁵¹⁸ and unmarried couples living with their children.⁵¹⁹ Even the possibility of establishing a family life may be sufficient

515 *Ibid.*

516 See Articles 139–146 and Article 172 of the Criminal Code.

517 See *K. v. the United Kingdom*, ECmHR, App. No. 11468/85 (1991).

518 See *Marckx v. Belgium*, ECmHR, App. No. 6833/74 (1979).

519 See *Johnston v. Ireland*, ECmHR, App. No. 9697/82 (1986).

to invoke protection under Article 8.⁵²⁰ Other relationships that have been found to be protected by Article 8 include relationships between siblings, uncles/aunts and nieces/nephews,⁵²¹ parents and adopted children, grandparents and grandchildren.⁵²² Moreover, a family relationship may also exist in situations where there is no blood kinship, in which cases other criteria are to be taken into account, such as the existence of a genuine family life, strong personal relations and the duration of the relationship.⁵²³

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

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

The Constitution guarantees everyone the right to freely enter and dissolve a marriage and prescribes that entry into and the duration and dissolution of a marriage are based on spousal equality (Art. 62). The Constitution also envisages that a marriage is valid only with the freely given consent of a man and woman, whereby it effectively renders any legislation allowing homosexual marriages unconstitutional. Although the regulation of this issue is within the jurisdiction of states, the question arises whether it had been necessary to establish it as a constitutional principle, thus impeding any legislative changes. This solution is particularly problematic in cases in which one spouse had undergone a sex change, such as the case the Constitutional Court reviewed.⁵²⁴ These cases also give rise to the problem of recognising the parental rights of the person who had undergone a sex change.

The procedure of entering a marriage in Serbia is administrative in character and relatively simple. Around 35,000 marriages are entered into on average in Serbia every year, i.e. 1% of the total population marry every year.⁵²⁵ Marriages are dissolved in civil proceedings and the procedure is relatively simple and efficient. Between six and nine thousand couples divorce each other in Serbia every year. An average marriage lasts between 12 and 13 years.⁵²⁶ The custody of the children is awarded to the mothers in nearly 80% of the divorces of couples with children.

520 See *Keegan v. Ireland*, ECmHR, App. No. 16969/90 (1994).

521 See *Boyle v. the United Kingdom*, ECmHR, App. No. 16580/90 (1994).

522 See *Bronda v. Italy*, ECtHR, App. No. 22430/93 (1998).

523 See *X., Y. and Z. v. the United Kingdom*, ECHR, App. No. 21830/93 (1997). In its judgment in the case *Schalk and Kopf v. Austria*, App. No. 30141/04 (2010), the ECtHR for the first time took the view that a stable relationship between two persons of the same sex living together fell under the scope of family life protected under Article 8.

524 Constitutional Court Decision Už – 3238/2011.

525 Statistical Office of the Republic of Serbia data.

526 *Ibid.*

Although the Family Act legally equated marital and extramarital unions, numerous regulations governing individual rights arising from family relations have not been aligned with this legal norm yet and the equality of these unions is still merely formal.

The provisions of the Family Act⁵²⁷ are in accordance with international standards in terms of the right to privacy. The Act introduces major improvements in that respect and is the first law to lay down that everyone has the right to the respect of family life (Art. 2 (1)). It also guarantees the children's right to maintain personal relationships with the parents they are not living with, unless there are reasons for partly or fully depriving those parents of parental rights or in case of domestic violence (Art. 61). The children are also afforded the right to maintain personal relationships with other relatives they are particularly close to (Art. 61 (5)). The Family Act is also the first law in Serbia taking into account the parents' interests in their children's education, as it entitles them to provide their children with education in keeping with their ethical and religious convictions (Art. 71).

The Criminal Code incriminates disclosure or dissemination of information of someone's family circumstances that may harm his honour or reputation (Art. 172).

6.3. Abortion

Neither the ICCPR nor the ECHR define the beginning of life. In its judgment in the case *Vo v. France*⁵²⁸, the ECtHR took the view that the issue of when life begins is within the jurisdiction of the member states as there is no consensus in Europe on the scientific and legal definition of the beginning of life. ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of protection of human dignity, but not the status of an individual enjoying protection under Article 2 of the ECHR.

Article 63 of the Constitution guarantees everyone the right to freely decide whether to have children or not, while the Family Act⁵²⁹ specifies that women are free to decide whether or not they will have children.

The question arises how this right can be guaranteed to the prospective father, if the mother decides not to have the baby, a right she is guaranteed under the Constitution and the law. Given that the termination of a pregnancy is a medical procedure violating the woman's physical integrity, it is undisputable that the woman's and only the woman's consent is needed. The European Commission of Human Rights took the view that the right to respect for family life cannot be interpreted

527 *Sl. glasnik RS* 18/05 and 72/11.

528 *Vo v. France*, ECHR, App. No 53924/00, (2004).

529 *Sl. glasnik RS* 18/2005 and 72/2011 – other law.

so widely as to confer on the father a right to be consulted or to make applications about an abortion his wife intends to have performed.⁵³⁰

Abortion is regulated by the Act on Abortion in Medical Facilities,⁵³¹ under which an abortion may be performed only at the request of the pregnant woman and with her explicit written consent. A simple request by the pregnant woman is sufficient up to the tenth week of pregnancy (Art. 6) and only in three instances thereafter.⁵³² The decision on the fulfilment of requirements for the termination of a pregnancy is rendered in every individual case by the health institution performing the termination. Who in the health institution renders the decision depends on the week of pregnancy.⁵³³ The Act is in accordance with international standards in this field.

The Criminal Code⁵³⁴ incriminates illegal termination of pregnancy i.e. an abortion committed, initiated or assisted in contravention of regulations (Art. 120). No data were available on any criminal proceedings regarding illegal terminations of pregnancy.

According to the official data of the Public Health Institute, around 25,000 abortions are performed in Serbia every year. Estimates are, however, that five times as many pregnancies are actually terminated.

6.4. Confidentiality of Correspondence

Article 41 of the Constitution guarantees the right to confidentiality of letters and other means of communication and allows for derogations from this right only on the order of the court and if such derogations are necessary to conduct criminal proceedings or protect the security of the state in the manner prescribed by the law. State interference in the confidentiality of correspondence and other means of communication may be only temporary. The Constitution, unfortunately, does not specify that measures infringing on the confidentiality of communication must be necessary in a democratic society. The Constitutional Court failed to introduce

530 *Paton v. the United Kingdom*, ECHR, App. No 846/78, 19 DR 244, 3 EHRR 408 (1980)

531 *Sl. glasnik RS* 16/95 and 101/05.

532 Exceptionally, a pregnancy may be terminated in the event the medical findings indicate that the life of the mother is at stake or that serious damages to her health cannot be prevented otherwise, in the event it can be concluded on the basis of scientific and medical knowledge that the child will be born with severe physical or mental disorders, and in the event the woman's pregnancy was the result of a commission of a crime – rape, intercourse with a helpless or underage person or by abuse of authority, seduction and incest.

533 The following establish whether the abortion requirements have been fulfilled: until the 11th week of pregnancy – the health institution's specialist in obstetrics and gynaecology; from the 11th to the 20th week of pregnancy – by the medical consultation team of the appropriate relevant institution; after the 20th week of pregnancy – by the Ethical Committee of the health institution.

534 *Sl. glasnik RS* 85/05, 88/05 - corr, 107/05 - corr, 72/09 and 111/09.

this standard in its interpretation in the only case on the matter it has reviewed to date⁵³⁵. Namely, the Constitutional Court ruled that the wiretapping complained of in this case was constitutional merely on the grounds that it had been conducted in accordance with the law, but it did not proceed to assess whether it had also been necessary in a democratic society. The absence of a clear Constitutional Court view on this issue is all the more regrettable given that the solutions in the laws governing surveillance of communication, notably in the Act on the Military Security Agency and the Military Intelligence Agency, the Security Intelligence Agency Act, the Criminal Procedure Code and the Electronic Communications Act⁵³⁶, have given rise to numerous polemics in the recent years.

In April 2012, the Constitutional Court rendered a decision⁵³⁷ declaring unconstitutional the provisions of the Act on the Military Security Agency and the Military Intelligence Agency⁵³⁸ that had entitled the Director of the Military Security Agency or a person he designated to order the application of special procedures and secret collection of data, including, *inter alia*, the secret electronic surveillance of communication and information systems, i.e. surveillance of communication, without previously obtaining a court decision.⁵³⁹ The Constitutional Court reaffirmed that a court decision was the only constitutional ground for restricting the right to confidentiality of letters and other means of communication, but it failed to specify which court had the authority to issue such decisions.⁵⁴⁰

The Constitutional Court commendably gave its interpretation of the “means of communication” concept in Article 41 of the Constitution in its decision. Relying on ECtHR case law,⁵⁴¹ it took the view that this concept entailed not only the content of the communication, but also the data on who had tried or actually communicated with whom, at what time, how long the conversations lasted, the frequency of

535 Constitutional Court of Serbia Decision No. UŽ-88/2008, of 1 October 2009, available in Serbian at: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/188/?NOLAYOUT=1>.

536 Act on the Military Security Agency and the Military Intelligence Agency (*Sl. glasnik RS* 88/09 and 55/2012 – Constitutional Court Decision), the Electronic Communications Act (*Sl. glasnik RS* 44/10), Criminal Procedure Code (*Sl. glasnik RS* 72/11 and 101/11), the Security Intelligence Agency Act (*Sl. glasnik RS* 42/02 and 111/09).

537 Constitutional Court Decision IUZ-1218/2010 of 19 April 2012 available in Serbian at: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/7485/?NOLAYOUT=1>.

538 The BCHR was one of the organisations that filed a motion for the review of the constitutionality of this law. The Constitutional Court declared the following provisions of the Act on the Military Security Agency and the Military Intelligence Agency unconstitutional: Article 13(1) in conjunction with Article 12(1(6)) and Article 16(2) of the Act. (*Sl. glasnik RS* 88/09).

539 “Surveillance of communication” entails surveillance of data on who talked to whom, for how long and from where, without insight in the content of the communication.

540 The Security Intelligence Agency Act is the only law that specifies that such decisions shall be issued by the Supreme Court of Cassation.

541 *Klass and Others v. Germany*, ECHR, App. No. 5029/71(1978); *Malone v. the United Kingdom*, ECHR, App. No. 8691/79 (1984); *Copland v. the United Kingdom*, ECHR, App. No. 62617/00 (2007);

oral, text or written communication within a specific period of time and from which locations. The Constitutional Court thus put an end to numerous restrictive interpretations of this concept that had led to its abuses, both during the adoption and the enforcement of the laws relevant to this field. For instance, the laws governing the work of the police and the Security Intelligence Agency (BIA) do not include provisions regarding the very concept of communication that can be challenged, but these authorities' practices were based on the interpretation that the lists of phone calls, locations of the users and other elements of communication did not fall under the concept of communication and that their inviolability was thus not guaranteed by Article 41(2) of the Constitution.⁵⁴²

Another law governing this field that has given rise to years-long polemics is the Security Intelligence Agency Act. Article 15 authorising the BIA Director to order derogations from the principle of inviolability of letters and other means of communication without court consent is problematic. The initiative to review the constitutionality of this law was submitted back in 2002 and the Constitutional Court suspended the review in September 2012 at the request of the Constitutional Committee for Constitutional and Legislative Issues, which notified the Court that the amendments of this Act were under way.⁵⁴³ The Constitutional Court was expected to rule on the constitutionality of Article 286 of the Criminal Procedure Code by the end of the year⁵⁴⁴. This Article lays down that electronic communication surveillance warrants shall be issued by the public prosecutor, not the court.⁵⁴⁵

The last in this group of laws, the Electronic Communications Act,⁵⁴⁶ comprises all the above-mentioned problematic provisions. Article 128 of this Act obliges operators to retain the electronic communication data of their users for 12 months since the communication took place. An operator is under the duty to retain the data in a manner ensuring that they can be accessed without delay, i.e. forwarded forthwith to the relevant state authority on request, in accordance with the laws governing the work of the internal affairs authorities, intelligence agencies and the laws governing the criminal procedure.⁵⁴⁷ The impugned article apparently relies on the

542 Joint news conference held in July 2012 by the Commissioner for Information of Public Importance and Personal Data Protection and the Protector of Citizens at which they presented the results of the oversight of the enforcement of the Personal Data Protection Act in the March 2011-March 2012 period: <http://www.webtv.rs/play/43737>.

543 Constitutional Court statement available at: <http://www.ustavni.sud.rs/page/view/156-101688/povucen-predlog-odluke-u-predmetu-iuz-2522002>

544 More on the initiative filed with the Constitutional Court is available in Serbian at <http://www.paragraf.rs/dnevne-vesti/250912/250912-vest3.html>.

545 Article 286 was aligned with the Constitution in the Draft Act Amending the Criminal Procedure Code. The Draft Act is available in Serbian at: <http://www.mpravde.gov.rs/cr/articles/zakonodavna-aktivnost/>.

546 *Sl. glasnik RS* 44/10.

547 Article 128, paragraphs 1 and 5, Electronic Communications Act.

relevant provisions of three laws,⁵⁴⁸ precisely the ones that gave rise to motions for reviews of their constitutionality, notably: the provisions allowing state security agencies and prosecutors access to communication without a prior court decision. The Constitutional Court still has not rendered a decision on the motion for the review of the constitutionality of the Electronic Communications Act submitted in 2010.⁵⁴⁹

It needs to be noted that the Constitutional Court's view on this issue had already been well-known at the time of adoption of three of the four disputed laws – the Act on the Military Security Agency and the Military Intelligence Agency, the Criminal Procedure Code and the Electronic Communications Act. Namely, in its 2009 decision,⁵⁵⁰ in which it reviewed the constitutionality of the Telecommunications Act,⁵⁵¹ the Constitutional Court clearly confirmed that only the courts were entitled to allow derogations from the constitutional right to confidentiality of correspondence and other means of communication. The legislators' conduct can thus be qualified as absolutely unacceptable, given that they are obliged to abide fully by all the Constitutional Court decisions.

The enforcement of the disputed legal provisions led to problems in 2012 in overseeing the state authorities' access to data on the communication of citizens, i.e. the data the operators retain. The Commissioner for Information of Public Importance and Personal Data Protection and the Protector of Citizens held a joint news conference in July 2012, at which they presented the results of their oversight of the enforcement of the Personal Data Protection Act in the March 2011-March 2012 period.⁵⁵² They conducted oversight of the operators in order to establish the scope and the way in which the security agencies and the police accessed the retained data on the citizens' communications without a prior court decision. Under the Electronic Communications Act,⁵⁵³ the state authorities may access the data retained by the operators in two ways. The first involves filing an official request. The operators are under the obligation to keep records of these requests. The oversight exercise showed that public authorities filed 4,400 official requests to access the retained

548 Act on the Military Security Agency and the Military Intelligence Agency, the Security Intelligence Agency Act and the Criminal Procedure Code.

549 Protector of Citizens Motion to Review the Constitutionality of the Electronic Communications Act and the Act on the Military Security Agency and the Military Intelligence Agency, available in Serbian at http://www.ombudsman.rs/index.php/lang-sr_YU/zakonske-i-drugenicijative/1151-2010-11-10-11-51-34.

550 Constitutional Court Decision No. Iuz -149/2008 of 28 May 2009, available in Serbian at: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/1877/?NOLAYOUT=1>.

551 *Sl. glasnik RS* 44/03 and 36/06.

552 The Commissioner and Protector issued fourteen legal, organisational and practical recommendations for improving the situation in this area and forwarded them to the Government and National Assembly of the Republic of Serbia. The recommendations are available at: <http://www.poverenik.rs/en/activities/1386-konferencija-za-medije.html>.

553 Under Article 128(5) of the Electronic Communications Act.

data in the given period. The operators provided such access in 90% of the cases, although the authorities had specified the legal grounds for accessing the retained data in only 50% of the requests.⁵⁵⁴

The other avenue involves direct and unlimited access to the operators' databases, without their consent or assistance. Only the BIA, the Ministry of Internal Affairs (MIA) and the Military Security Agency, not all public authorities, are entitled to such access. Given that only one of the four operators in Serbia has a software application recording access to the data on the users, only this operator was able to provide the Commissioner with information on direct access to retained data – 270,000 instances of direct access were registered in the oversight period. This number is extremely concerning from the perspective of constitutional guarantees, particularly if it is borne in mind that the valid laws allow direct access to such data without a court decision and that it does not cover access to the data retained by the other three operators, who do not have the software registering the users of their data and the grounds for their access.

Given that the Electronic Communications Act⁵⁵⁵ obliges the operators to keep records of access to the retained data, the BCHR filed requests for access to information of public importance to the security agencies and the police on how many times they had accessed the retained data on the users' communications directly, without the operators' assistance, in the first nine months of the year. BIA replied that it had accessed data on the telecommunication traffic of the users of three mobile phone operators 12,146 times⁵⁵⁶ while the Military Security Agency (VBA) replied that it was not keeping records of direct access to such communications and that it has been keeping records of court orders for access to the retained data on telephone communications of the mobile operators' clients in accordance with the law since the Constitutional Court rendered its decision.⁵⁵⁷

The police failed to reply to the above-mentioned BCHR request by the time this Report went into print. All of the above considerations lead to the conclusion that records of communication surveillance in compliance with the Constitution are available, while data on anti-constitutional surveillance are absolutely unavailable.

Based on the data the BCHR received from the mobile phone operators,⁵⁵⁸ the law entitles security agencies and the MIA unlimited access to the operators'

554 The footage of the press conference is available in Serbian at <http://www.webtv.rs/play/43737>.

555 Article 128(6).

556 BIA specified that this number regarded the all accesses to the retained data on telecommunication traffic of the three mobile operators, not the number of users whose retained data it had accessed, and that the total number of users was much smaller (*inter alia*, because some users have more than one cell phone numbers) – the memo is available in the BCHR Archive.

557 BCHR Archive.

558 *Ibid.*

databases without their consent or assistance. As far as access to the retained data with the operators' assistance was concerned, some operators said that their workers, who had acted in accordance with the law and refused to act on the requests that did not include reference to the legal grounds, had encountered problems in practice and had even been taken in by the police. This is extremely indicative and directly correlates with the data in the Commissioner's research that the operators provided access in 90% of the cases, although 50% of the requests did not specify the legal grounds of the requests. The only conclusion that can be inferred is that no kind of control, even post hoc, was exercised with respect to the remaining 40% of the requests. Such arbitrary conduct indicates the influence security agencies and the police wield and the lack of will on the part of the operators to act in accordance with the law, which clearly stipulates that state authorities, and, thus, the security agencies and the police, are under the obligation to specify the legal grounds for access to the retained data in their requests.⁵⁵⁹

A by-law that caused polemics in 2011 – the Draft Rulebook on the Technical Requirements for the Equipment and Software for the Lawful Interception of Electronic Communications and Retention of Data on Electronic Communications (hereinafter: Rulebook) – relies on the impugned provisions of the Electronic Communications Act. Its adoption would entitle the security agencies to conduct secret surveillance of the users' locations,⁵⁶⁰ and to intercept and retain data on electronic communications without a court decision. Furthermore, the Rulebook does not regulate the existence of an undeletable trace of who, when, why and on what grounds accessed the data, wherefore it does not provide for any, even a posteriori, control, of such actions. The enforcement of this Rulebook would seriously infringe on the constitutional right to privacy. At the insistence of the Commissioner and the expert public, it remained unadopted in 2012 as well.

Three months after the conference at which the Commissioner and the Protector of Citizens made public the data on the concerning high number of accesses to the operators' retained data and issued recommendations on how to improve the situation in this field, Deputy Prime Minister Aleksandar Vučić said that the BIA had notified him that the MIA issued an order to monitor his electronic communication. According to publicly available information, the investigation of this case was still under way at the end of the reporting period.

Under the Act on the Basis of the Regulation of the Security Agencies of the Republic of Serbia,⁵⁶¹ the National Assembly shall oversee the work of the security agencies both directly and through the competent Assembly committee. That committee, called the Security Committee in the previous convocation of the parliament,

559 Article 128(7), Electronic Communications Act.

560 This Rulebook allows for secret surveillance of the users even at times when they are not engaged in communication.

561 *Sl. glasnik RS* 116/07 and 72/12.

enjoys broad powers⁵⁶² both under the law and under the National Assembly Rules of Procedure⁵⁶³. The constitutionality of all the laws governing the work of the security agencies (the BIA, the Military Security Agency and the Military Intelligence Agency) was reviewed during the mandate of this Committee, entitled to oversee the constitutionality of the laws and submit draft laws governing the security sector. The reports on the Committee sessions⁵⁶⁴ lack any information indicating that it had reviewed the issues regarding access to retained data and the constitutionality of the security agencies' access to such data without a court decision. This fact alone leads to the conclusion that the Committee had not exercised its legal powers nearly as much as it could have and that it had failed to perform civilian oversight of the security agencies.

In the current convocation of the National Assembly, oversight of the security agencies is divided between the Committee for Defence and Internal Affairs and the Security Agencies Oversight Committee. Although it is still early to draw conclusions on their readiness to exercise their legal powers, the Security Agencies Oversight Committee commendably initiated the adoption of a rulebook on its direct oversight of the security agencies which will elaborate its legal powers in greater detail. A three-member working group was established to draft the rulebook.

6.5. Personal Data Protection and Protection of Privacy

Article 42 of the Constitution of the Republic of Serbia guarantees the protection of personal data and sets out that the collection, storage, processing and use of personal data shall be governed by the law. It further sets out that the use of personal data for any the purpose other than the one they were collected for shall be prohibited and punishable in accordance with the law, unless such use is necessary to conduct criminal proceedings or protect the security of the Republic of Serbia, in a manner stipulated by the law. Everyone is entitled to be informed about the personal data collected about him, in accordance with the law, and to court protection in case of their abuse.

In 2012, the Constitutional Court reviewed the constitutionality of the Personal Data Protection Act⁵⁶⁵, the main law governing this field, notably the provisions⁵⁶⁶ allowing processing of personal data of the persons they concern without

562 The Committee may, *inter alia*, oversee the constitutionality and lawfulness of the work of the security agencies and the lawfulness of the application of specific procedures and measures for the secret collection of data, review draft laws, by-laws and general enactments within the purviews of the security agencies, launch initiatives and submit draft laws governing issues within the agencies' purviews.

563 The Assembly Rules of Procedure are available at: <http://www.parlament.gov.rs/national-assembly/important-documents/rules-of-procedure/introductory-provision.1351.html>.

564 Available in Serbian at <http://www.parlament.gov.rs/aktivnosti/narodna-skupstina/arhiva-aktivnosti/saziv-od-11-juna-2008.967.html>.

565 *Sl. glasnik RS* 97/08, 104/09 and 68/12 – Constitutional Court Decision.

566 Article 12 (1(3)), part of Article 13 and Article 14(2(2)), Personal Data Protection Act (*Sl. glasnik RS* 97/08 and 104/09).

their consent in instances prescribed in by-laws. In its Decision⁵⁶⁷, the Constitutional Court found that these by-laws had expanded the constitutionally defined legal ground for processing personal data given that the Constitution explicitly sets out that the collection, storage, processing and use of personal data shall be governed exclusively by the law.

The Constitutional Court in 2012 rendered a decision⁵⁶⁸ on a constitutional appeal claiming a violation of Article 42 of the Constitution. The applicant, *inter alia*, claimed that the MIA authority had violated her right to the protection of her personal data by processing them without notifying her. According to the text of the Constitution, the right to be informed about the collected personal data shall be exercised in accordance with the law. The law regulating this area,⁵⁶⁹ however, allows for the collection of personal data without notifying the person they concern. The Constitutional Court dismissed the appeal as ill-founded and assessed that there were legal grounds for limiting the applicant's right to be notified of the data collected by the police officers in their operational work and field checks, given that the police stated that they were still in need of those data.

The Police Act enumerates the kinds of records of personal and other data the police shall keep.⁵⁷⁰ It, however, does not specify which information shall be entered in these records, leaving the regulation of their appearance, content and keeping to a ministerial enactment.⁵⁷¹ This legal solution is clearly not in compliance with the Constitution given that the Constitution lays down that personal data processing shall be governed only by the law and that the Constitutional Court confirmed this in its decision.

Under the Personal Data Protection Act, personal data shall mean any information about a natural person, regardless of its form or format, the carrier of the information (paper, tape, film, electronic medium, et al) or at whose order, in whose behalf or for whose account it is stored. Information about a natural person shall constitute personal data regardless of the time of creation, place of storage or the means by which they were obtained or of any other features of such data.⁵⁷² The

567 Constitutional Court Decision IUz-41/2010 of 30 May 2012, available in Serbian at: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/7752/?NOLAYOUT=1>

568 Constitutional Court Decision Uz -2669/2009 of 30 May 2012, available in Serbian at: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/7157/?NOLAYOUT=1>

569 Under the Personal Data Protection Act, a public authority is entitled to process a person's data without his consent if such processing is vital for the fulfilment of the tasks within its purview and to restrict the right to notification, insight and a copy in the event that would preclude the authority from performing the tasks within its purview. Under the Police Act (*Sl. glasnik RS* 101/05, 63/09 – Constitutional Court Decision and 92/11), the police shall, *inter alia*, keep records of operational reports, operational sources of information and persons under special police protection; information on the data in these records may be exceptionally provided to the person they concern only once there is no longer a need for them.

570 Article 76, Police Act.

571 Article 193(2(16)), Police Act.

572 Article 3, Personal Data Protection Act.

purpose of collecting data must be specified in advance and clearly. The Act distinguishes between processing of personal data with the consent of the data subject and in accordance with an authority's legal remit. The data subject whose consent for processing his data is sought shall be clearly notified in advance of the purpose of the data processing and is entitled to subsequently withdraw his consent. Data processing is allowed without the consent of the data subject in specific instances.⁵⁷³

The grounds for processing personal data have been set very broadly and the Act allows public authorities to process personal data without the subjects' consent in a large number of instances.⁵⁷⁴

The Act also introduced the category of particularly sensitive data⁵⁷⁵ and charged the Government with regulating how they will be archived and protected. No enactment to that effect has been adopted yet, although four years have passed since the Act was adopted, wherefore there are no safeguards in place and this legal guarantee does not have a foothold in practice. Furthermore, the authorities have failed to enact most of the numerous by-laws required for the implementation of the Personal Data Protection Act, which stipulated their adoption by May 2009.

The Commissioner for Information of Public Importance and Personal Data Protection⁵⁷⁶ (hereinafter: Commissioner) is an autonomous and independent state authority charged with the protection of personal data. The Commissioner is, *inter alia*, tasked with overseeing the process of personal data processing and reviewing

573 Article 12 of the Personal Data Protection Act allows the processing of a person's data without his consent in three instances: when a vital interest, particularly the life, health or physical integrity of the data subject or another person prevails, for the purpose of fulfilling obligations specified in a law, in an enactment adopted in accordance with the law or a contract concluded between the data subject and the controller, and for the purpose of preparing the conclusion of a contract and in other instances specified in the Act to achieve a prevailing justified interest of the subject, controller or user.

574 Under Article 13 of the Personal Data Protection Act, a state authority may process personal data without the consent of the data subject if such processing is necessary to perform the legally-defined duties within its purview laid down in the law or another regulation with the aim of achieving the interests of national or public security, state defence, prevention, detection, investigation and prosecution of criminal offences, economic or financial interests of the state, protection of health and morals, protection of rights and freedoms and other public interests, and in other cases with the written consent of the data subject.

575 Particularly sensitive data are those regarding a data subject's ethnicity, race, sex, language, religion, political affiliation, membership of a trade union, health, welfare benefits, victims of violence, criminal convictions and sex life; these data may be processed pursuant to the freely given consent of the data subject, unless the law prohibits their processing even with the data subject's consent.

576 The Commissioner was established as an authority charged with the protection of access to information of public importance under the Free Access to Information of Public Importance Act (*Sl. glasnik RS* 20/04, 54/07, 104/09 and 36/10). The Commissioner's mandate was expanded to include personal data protection when the Personal Data Protection Act was adopted (*Sl. glasnik RS* 97/08 and 104/09) and he is now the Commissioner for Information of Public Importance and Personal Data Protection Commissioner.

complaints regarding violations of the right to personal data protection. The Commissioner is also entitled to unlimited access to and insight in the collected data, as well as to the documentation, enactments and offices of persons authorised to collect personal data.⁵⁷⁷ Furthermore, the Commissioner keeps a nationwide Central Register of data files and data file catalogues all controllers⁵⁷⁸ processing personal data are under the obligation⁵⁷⁹ to establish in the manner set out in a Government Decree.⁵⁸⁰ The Central Register is electronic, public and available on the Internet;⁵⁸¹ it allows the citizens access to the personal data being processed and simultaneously ensures oversight over the work of the data collectors. Insight in the records on individual files may be denied only in the instances set out in the Act.⁵⁸² The Commissioner, whose work is characterised by a high degree of transparency,⁵⁸³ has been continuously conducting activities and alerting to the need to respect and improve the valid regulations in this field and to adopt new ones to ensure abidance by the constitutional guarantees.

Access to the data in the citizens' criminal records⁵⁸⁴ is governed by the Criminal Code of the Republic of Serbia, under which no one is entitled to seek proof from citizens that they have or do not have a criminal record. Although it prohibits such conduct, the Criminal Code, however, does not penalise it. The Code lays down that citizens may be issued data on the existence or non-existence of a

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- 577 The restrictions of the Commissioner's oversight powers in Article 45 (2–4) of the Personal Data Protection Act, limiting the Commissioner's access to data if such access would seriously undermine the interests of national or public security, defence of the country or actions aimed at the prevention, detection, investigation or prosecution of criminal offences were abolished by the Classified Information Act (Sl. glasnik RS, 104/09, Art. 109) and the Commissioner is now entitled to conduct full oversight.
- 578 Under Article 3(1(5)), a data controller shall denote a natural or legal person or public authority that processes personal data.
- 579 Article 48, Personal Data Protection Act.
- 580 Decree on the Form and Manner of Keeping Records of Personal Data Processing (Sl. glasnik RS 50/09), available at: <http://www.poverenik.org.rs/en/legal-framework/bylaws-zp/781-2009-07-23-07-33-26.html>
- 581 The Central Register is accessible via: <http://www.poverenik.rs/registar/index.php/en/home.html>
- 582 At the request of the collector, the Commissioner shall deny access if necessary to achieve a prevailing interest of preserving national or public security, state defence, the work of public authorities, the state's financial interests or in the event a law, another regulation or enactment based on the law specifies that the records on the data collection shall be confidential – Article 52(7), Personal Data Protection Act.
- 583 The Commissioner's press releases and other information of relevance to the work of this authority are available at www.poverenik.rs.
- 584 Criminal records shall include the personal data of the criminal offenders, the crimes they were convicted of, the data on their penalties, any conditional sentences, court cautions, acquittals or pardons, and data on the legal consequences of the convictions. Subsequent changes to the data in the criminal records, the data on the sentences served and on the expungement of records of wrongful convictions shall also be entered in the criminal records. Article 102(1), Criminal Code (Sl. glasnik RS 85/05, 88/05 - corr., 107/05 - corr., 72/09 and 111/09).

criminal record at their request. On the other hand, state authorities, companies, other organisations or entrepreneurs may obtain such data upon the submission of a reasoned request, in the event the legal consequences of the conviction or the security measures are still in effect and they have a justified and legally based interest in such information. This has in practice often led to frequent violations of the prohibition because these bodies and companies have been asking the citizens to submit proof of the non-existence of a criminal record given that the latter (as opposed to the former) do not need to reason their requests, because their personal data are at issue. Furthermore, these bodies and companies are not deterred from resorting to such practices because no penalties are envisaged for their violations of the law.

The Classified Information Act⁵⁸⁵ entitles persons insight in security check data collected pursuant to the Act (Art. 81) but limits this right by specifying that insight shall not be allowed in data “disclosing the methods and procedures used during the collection of the data or identifying the sources of data obtained during the security check”. Although the need to protect specific methods and sources used by the state authorities during security checks is understandable, the wording of the provision essentially limits the right of insight to a great extent. The security agencies, the BIA and the Military Security and Intelligence Agencies, also have extremely broad powers regarding the collection of data. Although the laws on these agencies oblige their staff and the oversight authorities to preserve the confidentiality of the information, no precise rules have been adopted on their powers to collect data or the instances in which these agencies may apply special operational measures and means for the secret collection of data.

The Act on Free Access to Information of Public Importance⁵⁸⁶ includes a provision protecting the privacy of individuals by laying down that a public authority shall not fulfil a person’s request for information if it would thus violate the right to privacy of the person the information regards. The provision also provides for exceptions.⁵⁸⁷ Provisions relevant to personal data protection can also be found in other laws and regulations, notably those governing labour, tax procedures and the tax administration, health, the banking sector, education, advertising, etc.

In August 2010, the Government of the Republic of Serbia adopted the National Personal Data Protection Strategy⁵⁸⁸ (hereinafter: Strategy) with the aim of

585 *Sl. glasnik RS* 104/09.

586 *Sl. glasnik RS* 120/04, 54/07, 104/09 and 36/10).

587 In the event the person concerned consented, in the event a figure of public interest is at issue (this, above all, pertains to holders of state and political offices and if the information is relevant to the office they are holding) and in the event the person at issue gave rise to a request for information about him by his conduct, particularly regarding his private life – Article 14, Free Access to Information of Public Importance Act.

588 The Strategy is available in Serbian at: http://www.srbija.gov.rs/extfile/sr/137166/strategija_zastite_podataka_o_licnosti0308_cyr.zip.

aligning the national legislation with the provisions in Directive 95/46/EC.⁵⁸⁹ The Strategy, *inter alia*, envisages the review of all regulations of relevance to personal data protection and their alignment with the Personal Data Protection Act and the adoption of new regulations in areas of relevance to personal data protection where there are none, such as video surveillance, use of biometric data, etc. The Government, however, failed to fulfil its obligation to adopt an Action Plan for the implementation of the Strategy within 90 days from the day of its adoption even by the end of 2012.⁵⁹⁰ Given that over two years have passed since the expiry of this deadline, and that technical and technological developments have led to rapid changes in this field and that the EU Directive underlying the Strategy is undergoing reform, the adoption of an Action Plan at this point in time would be inefficient. The BCHR is thus of the opinion that once the EU Directive is amended, the authorities should start designing a new Strategy in compliance with the new standards and subsequently adopt an Action Plan and proceed with its implementation forthwith.

Serbia still lacks regulations governing areas of major significance to personal data protection, which allows for numerous abuses. They include video surveillance, security checks, direct marketing and the private security sector, which is not regulated at all. The Draft Act on Detective Activities⁵⁹¹ (hereinafter Draft) prepared by the MIA was submitted to the National Assembly for adoption in early 2012. Some of its provisions were, however, in contravention of the Constitution and the Personal Data Protection Act. Namely, the Draft charged the MIA with laying down how private detectives may collect information.⁵⁹² This solution is directly in contravention of the Constitution, which clearly sets out that the collection, storage, processing and use of personal data may be governed only by a law. Another problematic provision is the one under which administrative authorities and legal persons vested with public powers to keep records or other collectors of data files are under the obligation to provide the detectives with the citizens' personal data on request.⁵⁹³ The Personal Data Protection Act allows for the processing of personal data only on two grounds, when so specified by the law or with the explicit consent of the data subject; however, under the Draft, the only legal ground for engaging in detective activities is a written contract between the client and the detective. Given that clients are not the data subjects, this provision would allow insight in the personal data of citizens without their consent, pursuant to a contract between a

589 *Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, 95/46/EC, 24 October 1995. available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>.

590 Numerous NGOs, experts and the Commissioner have repeatedly alerted to the Government's failure to fulfil this obligation and thus enable the implementation of contemporary personal data protection standards.

591 The Draft Act on Detective Activities is available in Serbian at: http://www.mup.gov.rs/cms/resursi.nsf/predlog_o_detektivskim_poslovima_lat.pdf.

592 Article 11, Draft Act on Detective Activities.

593 Article 20, Draft Act on Detective Activities.

third party and the detective and would introduce a new, third ground not envisaged by the Personal Data Protection Act. The Commissioner for Information of Public Importance and Personal Data Protection alerted to the numerous shortcomings of the Draft and the Government withdrew the Draft from the Assembly pipeline on 14 February 2012. Detective work is currently in the grey zone. It is impossible to establish how many companies and people are involved in these activities, since detective agencies can be established under the same terms and conditions as any other legal person or entrepreneur as the law does not require special licensing of those engaging in detective activities. The BCHR is of the view that the existence of this legal lacuna is extremely dangerous. The lack of a law governing the work of detective agencies – the powers, techniques and methods of detective work – opens doors to numerous abuses and violations of the right to privacy. Laws governing video surveillance, security checks and direct marketing need to be adopted as soon as possible for these very reasons.⁵⁹⁴

6.6. Recommendations

1. Adopt a new law on personal data protection or thoroughly amend the valid one to ensure that this matter is governed in compliance with international standards.
2. Once the EU Directive is reformed, design a new personal data protection strategy in compliance with the new standards and, subsequently, an action plan and implement it forthwith.
3. Act in accordance with the Personal Data Protection Act, which obliges the Government to adopt an enactment on the archiving and protection of particularly sensitive data.
4. Specify in the Police Act the information on citizens to be entered in records kept by the police.
5. Adopt a law regulating the work of detective agencies.
6. Adopt a law regulating security checks.
7. Amend the Personal Data Protection Act and introduce provisions adequately governing video surveillance.
8. Amend the provisions of the Criminal Procedure Code, the Security Intelligence Agency Act and the Electronic Communications Act that are not in compliance with Article 41 of the Constitution of the Republic of Serbia, which guarantees the right to confidentiality of letters and other means of communication.

⁵⁹⁴ The Commissioner has also been regularly alerting to the legal lacunae in this field: <http://www.poverenik.rs/en/press-releases/1473-inicijativa-za-donosenje-zakona-o-bezbednosnim-proverema.html>, <http://www.poverenik.rs/en/press-releases/1375-obrada-biometrijskih-podataka-o-licnosti-mora-biti-apsolutno-opravdana-svrhom.html>.

9. Improve civilian oversight of the security agencies.
10. Implement the recommendations the Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection submitted to the National Assembly and the Government with a view to protecting the constitutional guarantees of the confidentiality of the means of communication

7. Freedom of Thought, Conscience and Religion

7.1. General

The freedom of thought, conscience and religion is guaranteed by Article 18 of the ICCPR and Article 9 of the ECHR. The Constitution of Serbia states that Serbia is a secular state and prohibits the establishment of a state religion (Art. 11), regulates the issue of individual religious freedoms and freedom of thought and explicitly guarantees the right to change one's religion or belief and the right to manifest one's religion in religious worship, observance, practice and teaching and to manifest religious beliefs in private or public (Art. 43). Under the Constitution, no one is obliged to declare his religion or beliefs. The Constitution explicitly guarantees parents the right to freely decide on their children's religious education and upbringing. The Constitution enshrines the freedom of religious organisation (Art. 44) and the right to conscientious objection (Art. 45).⁵⁹⁵

Freedom of religion *per se* is unlimited. The Constitution only allows for restrictions of the freedom to profess one's religious beliefs. Restrictions must be determined by law and may be imposed only if they are necessary in a democratic society to protect the lives and health of people, other rights enshrined in the Constitution, public safety and public order or to prevent incitement to racial, ethnic or religious hatred. Limitations are allowed also for the protection of the "morals of a democratic society". If correctly interpreted, this phrase ought to indicate a higher degree of acceptance of diverse moral beliefs in a heterogeneous society.

7.2. Legislation and Equality of Religious Communities

The previous BCHR Annual Reports analysed in detail the problematic provisions of the Act on Churches and Religious Communities.⁵⁹⁶ Six years after several initiatives and motions for reviewing the constitutionality of this Act were filed, the Constitutional Court in January 2013 finally rendered a decision dismissing all

595 Compulsory army service was abolished as of 2011 and the Army of Serbia has been fully professionalised.

596 An overview of the problematic provisions is available in the *2011 Report*, I.4.8.

the motions and initiatives.⁵⁹⁷ The text of the Decision in the case of IUz 455/2011 was not made public by the end of the reporting period. The Court's press release indicates that the Constitution declared all the impugned provisions constitutional after interpreting them and finding them in compliance with both the Constitution and the international human rights instruments.

Apart from the provisions that passed the abstract constitutionality review test but may be the subject of individual constitutional appeals and complaints to international bodies in the event they give rise to a breach of the freedom of religion of individuals, the provisions of by-laws governing in greater detail the registration of religious communities are also problematic. The Rulebook on the Register of Churches and Religious Communities⁵⁹⁸ further strengthens the division of the religious communities in Serbia into traditional and other ones. Under the Rulebook, traditional churches and religious communities enjoy the most privileged status. To re-register, they need only to submit an application including the name of the church or religious community, its seat, the name and office of the person authorised to act for and on behalf of the church or religious community, while other religious organisations, including confessional communities, also need to submit the decision founding the organisation with the names, ID numbers and signatures of at least 0.001% of Serbia's citizens of age with permanent residence in Serbia according to the latest official census or foreign nationals with permanent residence in Serbia (Art. 18 (2.1)). The Rulebook specifies that a religious organisation shall be registered if it has 100 founders and that the threshold shall be further harmonised with the legal provisions (Art. 7 (3)). This threshold is excessively high and difficult to reconcile with the constitutional prohibition under which no one may be forced to declare his religious beliefs. Moreover, all religious organisations apart from traditional ones must also submit their statutes or other written documents describing their organisational and management structure, rights and obligations of their members, procedures for founding and dissolving the organisational units, a list of organisational units with the status of legal person and other relevant data. The obligation to submit an outline of religious teachings, religious rites, religious goals and basic activities is particularly problematic as the Act allows administrative authorities to assess the quality of religious teaching and goals, which is absolutely impermissible from the viewpoint of the freedom of thought and religion. Under Article 20(4) of the Act, a religious community's application for registration may be rejected if the state finds that its religious teaching or goals are inadequate. This provision was the ground for rejecting the application of the Hare Krishna community for registration, which had been submitted back in 2006. According to the then Religions Minister Milan Radulović, "pursuant to [Hare Krishna's] Stat-

597 Constitutional Court press release after its session held on 16 January 2013, available in Serbian at: <http://www.ustavni.sud.rs/page/view/sr-Latn-CS/0-101764/odbijeni-predlozi-i-odbace-na-inicijativa-za-ocenu-ustavnosti-zakona-o-crkvama-i-verskim-zajednicama>.

598 *Sl. glasnik RS* 64/06.

ute, they are neither a church nor a religious organisation, but, rather a kind of philosophical society, an Eastern philosophy society, and this is why they were not registered".⁵⁹⁹ In view of the fact that only 17 non-traditional and non-confessional religious communities are registered in Serbia, although their number is estimated at 60, and in view of the fact that communities such as the Sai Centre, Sathya Sai Baba, Sri Chinmoy and other similar Eastern cults are not registered yet,⁶⁰⁰ it is clear that the administration's assessments of the quality and character of religious teachings clearly play a huge role in the absolutely impermissible restrictions of the freedom of religious organisation.

The provision not allowing the registration of religious organisations the name of which includes the name or part of the name expressing the identity of a church, religious community or religious organisation that has been registered earlier or has filed an application for entry into the Register (Art. 19) is also disputable in terms of the equality of religious communities. This ground can be used as an excuse to refuse to register specific non-canonical Christian Orthodox churches, such as the Montenegrin Orthodox Church, the application of which was rejected back in 2008.⁶⁰¹ The authorities provided the following explanation for rejecting the application of the Montenegrin Orthodox Church: "The Act on Churches and Religious Communities lays down that the state may not hinder the enforcement of the autonomous regulations of the churches and, since the Montenegrin Orthodox Church is a civic organisation from the viewpoint of the autonomous regulations of the Orthodox Church, it and its dioceses cannot be included in the system of churches and religious communities in Serbia".⁶⁰² Such an interpretation of the text of the Act indicates that the state has undertaken the obligation to protect the internal organisation of churches and religious communities to the detriment of the freedom of religious organisation, which is in contravention of the principle of state neutrality towards the internal issues of religious communities.⁶⁰³ A similar problem arose during the registration of the Romanian Orthodox Church. The Diocese of the Romanian Orthodox Church Dacia Felix, with its seat in Romania and administrative seat in Vršac was entered in the Register. Banat is defined as the territorial jurisdiction of this Church but it is also present in East Serbia, where its right to hold ser-

599 *Politika*, 1 August, see also: D. Đenović, SERBIA: Report on Religious Freedoms and the Abolition of the Ministry of Religions, Centre 9, available in Serbian at http://www.centar9.info/articles/pdf/SRBIJA_Izve%C5%A1taj_o_verskim_slobodama_i_ukidanje_Ministarstva_vera_-_final.pdf.

600 See the study by: Z. Kuburić, *Religious Communities in Serbia and Religious Distance*, CEIR, Novi Sad, 2009.

601 *Blic*, 8 January 2008, available in Serbian at: <http://www.blic.rs/Vesti/Drustvo/25995/Ministarstvo-odbilo-registraciju-Crnogorske-pravoslavne-crkve>.

602 *Ibid.*

603 See the ECtHR judgment in the case of *Hasan and Chaush v. Bulgaria*, ECHR, App. No. 30985/96 (2000).

vices is considerably limited.⁶⁰⁴ The registration of the Romanian Orthodox Church arose as an issue between Romania and Serbia during the discussions on whether to grant candidacy status to Serbia in 2012. This example merely illustrates that the unwarranted regulation of religious organisations primarily designed to preserve the interests of a limited number of religious communities in a multi-confessional society gives rise to unnecessary problems a state should simply not have to face in the 21st century.

It also needs to be noted that the religious communities have very little interest in registering, given that the practical effects of registration are negligible. The privileges accorded churches and religious communities, such as tax exemption, state aid, payment of pension, health and other types of insurance, etc, are limited only to traditional churches and religious communities. Registration, however, has symbolical importance, particularly in societies in which many minority religious communities are stigmatised and is perceived as an act legitimising a religious teaching. Unfortunately, the valid laws and by-laws are not in the least facilitating religious tolerance or lessening the religious distance, which is quite prominent in Serbian society.

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

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

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

604 See the Centre for the Development of Civil Society press release of 29 May 2012, available in Serbian at: http://cdcs.org.rs/index.php?option=com_content&task=view&id=516&Itemid=33.

7.4. General Assessment of the Law Governing Religious Freedoms in Serbia

Despite the Constitutional Court's assessment that the religious freedoms are adequately protected by the Act on Churches and Religious Communities, a number of provisions in this law and the by-laws elaborating it are simply unacceptable from the perspective of international human rights standards. There is no doubt that international human rights bodies would uphold as admissible individual complaints by specific organisations whose registration has been rejected by the enforcement of the Rulebook on the Register of Churches and Religious Communities. One should not rule out the possibility that the Constitutional Court will adopt the same approach if it has the opportunity to review individual cases of the enforcement of the Act and the Rulebook.

7.5. Recommendations

1. Amend the Act on Churches and Religious Communities and eliminate the differences between traditional, confessional, registered and unregistered religious communities.
2. Align the laws governing taxes and social and health insurance to ensure the equal status of all religious communities.
3. Introduce mechanisms ensuring the full transparency and public availability of information on the provision of assistance to religious communities under different Serbian budget headings.
4. Take measure ensuring the equal right to freedom of religion by improving the valid laws and practices allowing the interweaving of the secular and religious fields and hindering the enjoyment of the right to the freedom of thought, conscience and religion..

8. Freedom of Expression

8.1. General

The right to freedom of expression of opinion is guaranteed by the Constitution (Art. 46). The Constitution guarantees the freedom of the press – publication of newspapers is possible without prior authorisation and subject to registration, while television and radio stations shall be established in accordance with law (Art. 50). Censorship of the press and other media is prohibited (Art. 50 (3)). The competent court may prevent the dissemination of information only if that is “necessary in a democratic society to prevent incitement to the violent change of the constitutional

order or the violation of the territorial integrity of the Republic of Serbia, to prevent propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Art. 50 (3)). The right to correction is guaranteed by the Constitution (Art. 50 (4)), which leaves its detailed regulation to the law.

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

The Public Information Act⁶⁰⁵ governs the right to public information, as the right to the freedom to express one’s opinion. This right particularly encompasses the freedom to express opinion, the freedom to gather, publish and disseminate ideas, information and opinions, the freedom to print and distribute newspapers, the freedom to produce and broadcast radio and television programmes, the freedom to receive ideas, information and opinions, as well as the freedom to establish legal entities engaged in public information (Art. 1). The Act forbids censorship and indirect ways of restricting the freedom of expression, promotes informing about issues of public interest, protects the interests of national and ethnic minorities and persons with special needs, forbids media monopolies and narrows the scope of privacy of state and public officials (Arts. 2–10).⁶⁰⁶

8.2. *Establishment and Operation of Electronic Media*

The Broadcasting Act⁶⁰⁷ governs broadcasting activities and establishes the Republican Broadcasting Agency (hereinafter: RBA) as an independent regulatory authority performing a public office and having the status of a legal person. The decision-making body is the Council. As many as 3 of the 9 Council members are nominated by the parliamentary Culture and Information Committee, whereby political parties practically have major influence on the composition of the Council. On the other hand, media associations may nominate only one member and only with the consent of the professional associations of film and drama artists and composers.⁶⁰⁸

605 *Sl. glasnik RS* 43/03, 61/05, 71/09, 89/10 and 41/11.

606 See the detailed analysis of the Public Information Act in the *2004 Report*, I.4.9.2.

607 *Sl. glasnik RS* 42/02, 97/04, 76/05, 62/06, 85/06 and 41/09.

608 This allows any registered association to nominate candidates and obstruct an agreement on the candidates and, consequently, the Assembly Committee to take the final decision on the NGO

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

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

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

Licences are issued by way of a public tender. The Act stipulates the grounds for revoking a licence before its validity expires.⁶⁰⁹ In such instances, the RBA conducts a procedure in which the broadcaster must be given an opportunity to attend the session debating the revocation of the licence and state its case, after which a reasoned decision shall be taken. The broadcaster has the right to appeal the decision, as well as the right to initiate a judicial review and administrative proceedings against the RBA decision on the appeal (Art. 62).

8.3. Decriminalisation of Libel and Slander

The crime of libel and slander was finally deleted from the Serbian Criminal Code in 2012,⁶¹⁰ but insults are still incriminated (Art. 170). Why insults were not decriminalised as well is not fully clear. Fines are the only penalty that may be imposed for insults.⁶¹¹

list of candidates. A more detailed analysis of the Broadcasting Act is available in the *2004 Report*, I.4.9.3, whilst the amendments to the Act are elaborated in the *2010 Report*, I.4.9.3.

609 A broadcasting licence is revoked if: a broadcaster notifies the Agency in writing that it no longer intends to broadcast its programme; if it is established that a broadcaster presented untrue data in the public tender application; if a broadcaster did not start broadcasting within the set deadline; if a broadcaster failed to conduct a technical inspection of the radio station within the set timeframe; if a broadcaster unduly terminated broadcasts for more than 30 (thirty) consecutive days or for 60 (sixty) days intermittently in one calendar year; if a broadcaster violated the provisions on prohibited concentration of media ownership envisaged by this Act; if the broadcaster did not pay the broadcasting licence fee despite a prior written warning.

610 Act Amending the Criminal Code, *Sl. glasnik* 121/12.

611 A fine for an insult may be replaced by a prison sentence if the fine is not paid. This fate befell anti-Fascist activist Zoran Petakov, who was represented by the Lawyers' Committee

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

Article 49 of the Constitution prohibits incitement to national, racial or religious hatred. The Constitution merely mentions propaganda for war as grounds for restricting the freedom of expression. The Anti-Discrimination Act prohibits hate speech, defining it as “ideas, information and views inciting discrimination, hatred or violence against persons or groups of persons on grounds of their personal features by written and displayed messages or symbols or in another way in the media and other publications, at assemblies and other public venues,” (Art. 11).

The Criminal Code explicitly prohibits incitement to national, racial and religious hate, dissension or intolerance (Art. 317) but limits the prohibition only to “peoples and national minorities living in Serbia”, although the ICCPR prohibits “any” incitement to hate, i.e. against any group no matter where it lives. Article 174 of the CC also incriminates ridicule of a person or a group on grounds of race, skin colour, religion, nationality, ethnic origin or another personal feature. The Criminal Code incriminates incitement to genocide and other war crimes (Art. 375), instigation of or incitement to a war of aggression and ordering a war of aggression (Art. 386), all of which warrant long prison sentences. However, incitement to national, racial and religious hate, and war propaganda have been criminally prosecuted extremely rarely in practice.

Hate speech, which is unfortunately still frequent in both public discourse and the media, is also incriminated. The Criminal Code prohibits any propagation of ideas or theories advocating or inciting hate, discrimination or violence on grounds of race, skin colour, religion, nationality, ethnicity or another personal feature (Art. 387(4)) as well as threats to commit a crime against an individual or group on grounds of their race, skin colour, religion, nationality, ethnicity or another personal feature (Art. 387(5)). Article 344a of the Criminal Code incriminates violent conduct at sports events or public gatherings and prohibits incitement to “national racial, religious *or other* hate or intolerance on any discriminatory grounds” (italics ours). The prohibition applies not only to sports events but to public gatherings in general as well.

The Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia⁶¹² prohibits members and followers of neo-Nazi and Fascist organisations and associations from organising events, displaying symbols or acting in any other way that propagates neo-Nazi and Fascist ideas. The Act prohibits all public appearances, both organised and spontaneous,

for Human Rights YUCOM. After YUCOM’s intervention, the sentence of imprisonment was replaced by the sentence of house arrest, which was enforced although the statute of limitations had expired. See the YUCOM press releases on the Petakov case available in Serbian at: <http://www.yucom.org.rs/rest.php?idSek=22&idSubSek=63&tip=vestgalerija&status=prvi>

612 *Sl. glasnik RS* 41/09.

which incite, encourage or spread hate against persons belonging to any nation, national minority, church or religious community and propagation or justification of ideas, actions or conduct for which persons have been convicted for war crimes. The Act lays down fines for natural persons participating in such events and for the associations and their responsible persons spreading or inciting hate and intolerance (Arts. 7 and 8). Under the Act, a procedure may be initiated to delete from the Register a registered organisation or association acting in violation of the Act (Art. 2 (2)).

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

The Broadcasting Act entrusts the Republican Broadcasting Agency with preventing broadcasting of programmes that incite discrimination, hatred or violence against certain individuals or groups of individuals on the grounds of their sex, religion, race, nationality or ethnicity (Art. 8 (2.3)); only the public broadcasting services have the obligation “to prevent any form of racial, religious, national, ethnic or other intolerance or hatred, or hatred with regard to sexual orientation” in the production and broadcasting of their programmes (Art. 79). With the adoption of the Act Ratifying the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems,⁶¹³ use of computer systems to promote ideas or theories advocating, promoting or inciting hatred, discrimination or violence against individuals or groups on grounds of race, skin colour, descent or national or ethnic origin and religion is now prohibited in Serbia.

8.5. Free Access to Information of Public Importance

The Constitution of the Republic of Serbia regulates the freedom of access to information under a title “Right to Information”. Article 51(1) of the Constitution guarantees persons within the state’s jurisdiction the right to receive true, full and prompt information on issues of public importance and envisages the corresponding duty of the media to enable the exercise of this right. The formulation of the provision is “left hanging” as it corresponds neither to the freedom of expression, from

613 *Sl. glasnik RS*, 19/09.

which the freedom of access to information derives (Art. 46(1), Constitution), nor to the right to participation in the administration of public affairs (Art. 53), as this *sui generis* right may be qualified as the expression of participative democracy. The freedom of access to information in the true sense of the word is regulated by paragraph 2 of Article 51, although this definition of the bodies from which information may be sought is much more restrictive than the one in the Serbian Free Access to Information of Public Importance Act, which governs this matter in greater detail.

The Act precisely defines information of public importance, governs the right of access to information, the obligations of the public authorities with respect to improving the transparency of their work and the procedures for accessing information held by the public authorities. To ensure the realisation of the right of free access to information, the Act establishes the Commissioner for Access to Information of Public Information as an autonomous and independent state authority elected by the National Assembly at the proposal of its Information Committee (Art. 1(2)). Anyone who is dissatisfied with accessing information in a procedure before a public authority is entitled to file a complaint with the Commissioner, who shall render a binding, final and enforceable decision (Arts. 22–28).

8.6. Status of Media and Media Professionals

The status of the media in Serbia has been continuously deteriorating over the past few years. In its 2012 Report, the US organisation Freedom House rated Serbia more poorly than in 2011; it ranked 77th on the list of 197 countries, among partially free countries.⁶¹⁴ Serbia was ranked 80th on the Reporters without Borders World Press Freedom Index for 2011/2012, as a state with visible media problems.⁶¹⁵ Irex ProMedia assessed that the media in Serbia were under the major influence of politicians and added that the media freedoms negligibly improved in 2012 over 2000. Journalists were threatened and pressured in 2012 as well. The chaos on Serbia's media stage has been exacerbated by the delays in the long promised and much needed overhaul of the media legislation, non-transparent media ownership, the state's share in the media and the effects of the economic crisis.

The Strategy for the Development of the Public Information System until 2016 adopted by the Serbian Government at its telephone session in September 2011, envisages the withdrawal of the state from ownership of the media within two years, the urgent changes of the media laws and media ownership transparency.⁶¹⁶ Serbian President Tomislav Nikolić's Cabinet formed a media strategy working group and explained that it would prepare a rough draft of the media law reform.⁶¹⁷

614 See the Freedom House Report at: <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013>.

615 The Reporters without Borders Freedom Index is available at http://en.rsf.org/IMG/CLASSEMENT_2012/C_GENERAL_ANG.pdf.

616 More on the Strategy in the *2011 Report*, p. 297.

617 Belgrade daily *Blic*, 23 September 2012, p. 2.

The move provoked criticisms from the professional and general public and the Ministry of Culture and Information invited the Association of Media to take an active part in drafting the media legislation in November 2012.⁶¹⁸

8.7. State's Role in the Media and Ownership of Media

As many as 26% of the TV and 25% of the radio stations in Serbia are publicly owned, while one of the three news agencies, *Tanjug*, is fully owned by the state. The state's influence is apparent also in the way aid is allocated to the media. Of the five million EUR of aid allocated in 2011, four were spent on funding the ongoing activities of four public broadcasters, while the remaining million was spent on supporting projects of 200 other outlets.⁶¹⁹ The Anti-Corruption Council also dealt with these problems in its 2011 Report on Pressures on and Control of Media in Serbia.⁶²⁰ The Council's conclusion, that the real owners of 18 of the 30 most influential outlets in Serbia remained unknown, demonstrates the gravity of the problem regarding the ownership breakdown of the media in Serbia.⁶²¹

The Republican Broadcasting Agency (RBA) approved around 100 requests for change of ownership of national, regional and local broadcasters.⁶²² Only one of the five TV broadcasters with nationwide coverage has not changed owners since 2006.⁶²³ The RBA revoked the broadcasting licence of one such station, *TV Avala* on 26 October 2012 because of its 30 million RSD debt.⁶²⁴

The sale of the German company WestDeutsche Allgemeine Zeitung's (WAZ) share in the oldest Serbian daily *Politika* (which is co-owned by the state) is a good illustration of the developments on the national media stage. In April 2012, WAZ said it offered to sell its 50% share in *Politika* to the state for 4.7 million EUR and the fulfilment of specific financial obligations.⁶²⁵ The then Prime Minister Mirko Cvetković said that the Government did not receive the offer.⁶²⁶ *Politika* was sold outside the public eye to the Moscow-based company East Media Group in July 2012; this company was registered in January with capital of 250 EUR and is managed by an Uroš Stefanović.⁶²⁷ It transpired later that Šabac pharmaceutical com-

618 *Večernje novosti*, 21 November 2012, p. 5.

619 *Serbia's Media Freedoms in the European Mirror*, Association of Independent Electronic Media (ANEM) report presented in May 2012, available at <http://www.anem.org.rs/en/medijskaS-cena/uFokusu/story/13469/Research+into+media+freedom+in+Serbia+presented.html>.

620 The report is available at: <http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/mediji/IZVESTAJ%20O%20MEDIJIMA%20PRECISCEN%20ENG..pdf>.

621 *Ibid.*

622 *Danas*, 15 October 2012, p. 5.

623 *Blic*, 6 March 2012, p. 5.

624 *Blic*, 27 October 2012, p. 10.

625 *Danas*, 11 April 2012, p. 4.

626 *Danas*, 12 April 2012, p. 10.

627 *Večernje novosti*, 18 July 2012, p. 7, *Danas* and *Politika* 19 July 2012, p. 4.

pany Farmakom owner Miroslav Bogičević was behind the purchase of the stake in *Politika*.⁶²⁸ Allegations were heard that Farmakom had been under political pressure to buy WAZ's shares.⁶²⁹ The media reported in October that the Deputy Director General of *Politika* and representative of the foreign owner resigned and that he was deleted from the Business Registers Agency at his own request, which means that all the decisions in *Politika* are taken by the state via its representative.⁶³⁰

8.8. Financial Status of the Media and Media Professionals

The financial difficulties experienced by the media and journalists are the consequence of political and other pressures, the economic crisis and the lack of order in the media market. A total of 591 dailies and magazines, 214 radio and 11 TV stations were registered in Serbia at the time the Media Strategy was adopted in September 2011. These data, however, should be taken with a grain of salt; the Association of Media, for instance, reported in June 2012 that the number of print media dropped from 497 in 2009 to under 200 at the end of 2011. The situation is exacerbated by the illegal broadcasters. According to the Republican Agency for Telecommunications (RATEL), 34 pirate radio and 5 pirate TV stations are on the air.

Two dailies, *Pravda* and *Press*, halted publication and a new daily, *Informer*, hit the news stands in 2012. A total of 14 daily newspapers were published in Serbia at the beginning of 2013. The developments surrounding the demise of *Press* illustrate all the vulnerabilities of the domestic media. One of Serbia's richest citizens, Miroslav Mišković, gave his 50% stake in the paper to the daily's staff and stopped funding the paper. He explained that this was his contribution to the fight for transparency in the media. Just three days later, *Press*' publisher, *Press Publishing Group*, stopped publishing the print edition of the paper, because its debts exceeded 16 million EUR in early 2012.

The salaries of journalists with college degrees are lower than the average wages in Serbia, and most rookie reporters in large media companies are paid not more than 15,000 RSD a month. Serbian media have often gone on strike over months-long delays in the payment of their miserly salaries. The staff of TV *Avala*, TV *Mozaik*, TV *Čačak*, RTS, *Politika* and the magazine *Ekonomist* went on strike in 2012. The TV *Avala* staff went on strike on 22 December 2011 over unpaid salaries and contributions. This broadcaster aired only movies and series, but no news bulletins, an obligation it has to fulfil as a station awarded a licence for nationwide coverage, for nearly three weeks. Željko Mitrović, officially the owner of 5% of TV *Avala*'s capital and the sole owner of TV *Pink*, with a national frequency, TV *Pink*, officially represented the owners in the talks with the staff and accused them of

628 *Kurir*, 19 September 2012, p. 5.

629 *Politika*, 18 September 2012, p. 1.

630 *Danas*, 18 October 2012, p. 1.

abusing the national frequency. The private security guards blocked the Avala's production control room and the staff were paid part of their overdue salaries.⁶³¹ The staff discontinued the strike after part of their back wages were paid in February but staged it again in May because the company management defaulted on its obligations. The media speculated on who the new owner of this station was and, just as it seemed that the station could start working again, the RBA Council revoked its licence for not paying the broadcasting licence fee.⁶³² In its press release of 26 October 2012, the RBA also said that TV Avala had significantly deviated from its programme concept. One hundred staff members lost their jobs and TV Avala's slot in the cable system was immediately taken over by a new cable operator, TV Pink 2, also owned by Željko Mitrović.⁶³³

The journalists working in the magazine *Ekonomist* also went on strike in 2012. The weekly ultimately went bankrupt. The non-payment of salaries also prompted the strikes of the staff of other media outlets, notably *Politika*, RTS, Novi Sad TV *Mozaik*, as well as TV Čačak, which was switched off because it did not pay the broadcasting licence fee. The Niš TV 5 was taken off the air for the same reason. Belgrade MIP Radio also ceased broadcasts because of its debts.

8.9. Trials of and Assaults and Pressures on the Media

The media the BCHR associates monitored for this Report registered a greater number of attacks on media professionals and their property in 2012.

B92 journalist Tanja Janković and her family were beaten up in a Vranje hotel. One of the assailants was a local police inspector and the police stated that they filed three misdemeanour reports against them and a criminal report against Janković's brother in law. After an explosive device was hurled into the yard of the Janković home a week later, the reporter and her family were provided with police protection. The incidents are investigated by a Belgrade police team. Tanja Janković thinks that she and her family have been targeted because of her reports on the poor performance of the local police.

TV Studio B's crew was attacked in February and the same fate befell the Bosnia-Herzegovina Federal TV crew in Novi Pazar in March. The journalist of As TV was physically assaulted by the Žagubica Mayor in March. A TV Leskovac cameraman was assaulted in April and an RTV Vojvodina crew was attacked in Bečej in July. A Šabac TV crew was assaulted in August.

There were a number of attacks on the property of media professionals and media. An explosive device was thrown into the yard of the Director of the daily *Informer* in Belgrade in October. A Molotov cocktail was thrown at the apartment

631 *Danas*, 31 January 2012, p. 4.

632 *Vreme*, 1 November 2012, p. 5.

633 *Politika*, 6 November 2012, p. 8.

of a TV Kopernikus presenter. A number of less serious incidents were registered in 2012 as well: the car jointly used by three local media outlets in Paraćin was destroyed in May, the car of a Kurir reporter in Novi Sad was set on fire in June, and the tires of a TV Pink company car were slashed in October.

Journalists and media outlets were frequently sued for libel and slander and the courts awarded huge damages. The following media were found guilty of libel or slander in 2012: Blic,⁶³⁴ the newspaper Zrenjanin,⁶³⁵ Novi Sad Radio 21, the daily Dnevnik⁶³⁶ and RTV B92.⁶³⁷ Tomislav Nikolić, who later became the President of Serbia, sued the dailies Blic and Kurir and sought 200 million RSD from each for their reports on his university diploma.⁶³⁸ Nikolić withdrew the lawsuits after he was elected President.⁶³⁹

Retired journalist Laszlo Szasz was sentenced to pay 150,000 RSD for defaming Laszlo Toroczka, the leader of the ultra-nationalist Hungarian organisation 64 Districts. His sentence was replaced by five months' imprisonment because he did not have the money to pay the damages.⁶⁴⁰ Nikolić pardoned Szasz after fierce public protests.⁶⁴¹

Trials against assailants on journalists were not as expedient as those against journalists. Minister Velimir Ilić was at long last found guilty and fined almost 1.4 million RSD for physically assaulting a journalist of the Novi Sad TV Apolo back in 2003.⁶⁴² The assailant on TV B92 cameraman in 2008 was sentenced to one year in jail in 2012.⁶⁴³ The men who threatened to kill the author of the B92 show Insider Brankica Stanković in 2009 were sentenced to 16 months' imprisonment and 6-month and one-year conditional sentences respectively.⁶⁴⁴

Finally, it needs to be recalled that the assassins of journalists Dada Vujasinović, Slavko Ćuruvija and Milan Panić were not identified in 2012 either, despite the oft reiterated promises of the authorities that they would be brought to justice.⁶⁴⁵ The only news on this front was that the authorities formed an international commission to investigate these crimes in September 2012.⁶⁴⁶

634 *Blic*, 21 January 2012, p. B4.

635 Association of Journalists of Serbia (UNS) press release, 9 February, 2012.

636 ANEM press release, 12 July 2012.

637 *Politika*, 22 June 2012, p. 9.

638 *Blic* and *Kurir*, 11 May, pp. 3 and 4.

639 *Kurir*, 14 September 2012.

640 *Politika*, 26 July 2012, p. 1.

641 *Večernje novosti*, 4 August 2012, p. 10.

642 *Večernje novosti*, 9 May 2012, p. 13.

643 *Blic*, 11 February 2012, p. 17.

644 *Politika*, 14 June 2012, p. 9 and *Blic*, 14 July 2012, p. 9.

645 More on the unresolved murders of journalists in the previous BCHR Annual Reports (from 1998 to 2011)

646 *Politika*, 22 September, p. 3.

8.10. Conduct by Media and Media Professionals

Fewer and fewer media in Serbia are abiding by the professional and ethical standards laid down in the Code of Journalists of Serbia, the Public Information Act and other regulations. They have most often violated the presumption of innocence, protection of privacy, the rules on the protection of minors from pornographic and other unsuitable content and the prohibition of discrimination.

The Press Council⁶⁴⁷ is an independent self-regulatory authority rallying publishers, owners of print media and professional journalists. It is tasked with monitoring abidance by the press code of conduct by the print media. The Council marked its first anniversary in 2012 and stated that it reviewed 30 of the 38 complaints it had received in that period and concluded that the Code had been violated in six cases. The journalists have been violating the right to privacy of “ordinary people” the most in their reports on accidents and personal tragedies.⁶⁴⁸

According to a survey conducted by The Association of Journalists of Serbia (UNS) and UNICEF of the reports by seven dailies and four TV stations on violence against and among children in the 15 July – 20 September 2012 period, the Code of Journalists of Serbia and the rights of the child were violated in 30% of the cases. These violations were much more frequent in the print than in the broadcast media: children were fully identified in 30% of the cases and their ethnicity was unnecessarily reported in 15% of the cases. Reports on violence against children were accompanied by the children’s photographs in 40% of the cases. Nine out of ten of the photographs showed the homes of the abused children or their easily recognisable neighbourhoods.⁶⁴⁹

The anti-corruption campaign the new Serbian Government launched served as an excuse for some tabloids to completely ignore the presumption of innocence of the suspects and to exert undue pressures on the judiciary. One former minister⁶⁵⁰ and one political leader⁶⁵¹ were targeted in particular. The tabloids also published sensationalist reports on the “Bacchanalia” of the judicial trade union, full of untruths and gross violations of the right to privacy.⁶⁵²

8.11. Recommendations

1. Put in place mechanisms to ensure the full transparency of media ownership and financing of media.
2. Amend the Criminal Code and decriminalise insults.

647 More on the Press Council in the *2011 Report*, p. 303.

648 *Danas*, 8 November 2012, p. 7.

649 *UNS and UNICEF, Leading news articles on violence against children violate the Journalists’ Code of Ethics*, http://www.unicef.org/serbia/media_20906.html www.uns.org.rs.

650 *Kurir*, 27 September and 1, 8 and 9 October, pp. 8,5,4,6,4 and *Politika* 26 September, p. 7.

651 *Kurir*, 29 September and 12 October, p. 2.

652 *Kurir*, 10-16 and 19 February, pp. 8 and 12.

3. Take measures to improve the financial status of media outlets and professionals.
4. Investigate assaults on media professionals efficiently and effectively and punish those responsible.
5. Solve the murders of journalists Dada Vujasinović, Slavko Ćuruvija and Milan Pantić.
6. Abolish state ownership of the media.

9. Freedom of Peaceful Assembly

9.1. *General*

The freedom of peaceful assembly is guaranteed by the leading international human rights documents that are binding on Serbia as well. This right is enshrined in general terms in Article 20 of the Universal Declaration of Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) govern this right in greater detail.

The European Court of Human Rights (ECtHR) has a well-developed case law on this right and has provided explanations and guidelines for its interpretation in its judgments. On the other hand, the right to freedom of assembly has extremely rarely been reviewed by the UN Human Rights Committee. A panel of OSCE/ODIHR experts prepared useful clarifications of the meanings of specific terms and institutes regarding this right in its Guidelines on Freedom of Peaceful Assembly (hereinafter: OSCE/ODIHR Guidelines).⁶⁵³

In terms of international standards on the freedom of assembly, assemblies entail only assemblies conveying a message (therefore, they are most often closely related to the right to freedom of expression), while, e.g. private celebrations and cultural or sports events do not fall within the scope of this right. Furthermore, protection is accorded only to peaceful assemblies. According to the OSCE/ODIHR Guidelines, an assembly should be deemed peaceful if its organisers have peaceful intentions. The term “peaceful” should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that a particular assembly is promoting. The ECtHR took the same view.⁶⁵⁴

As the ECtHR stated in its judgment in the case of *Christians against Racism and Fascism v. the United Kingdom*, “[T]he possibility of violent counter-demon-

653 <http://www.osce.org/odihr/24523>.

654 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECHR, App. Nos. 29221/95 and 29225/95 (2001), *Alekseyev v. Russia*, ECHR, App. Nos. 4916/07, 25924/08 and 14599/09 (2010).

strations, or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of Article 11(1), but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that provision”.⁶⁵⁵

International standards apply both to static and moving assemblies.⁶⁵⁶

A requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.⁶⁵⁷ An overly complex or demanding advance notice procedure would, however, have a chilling effect on the organisers. Furthermore, international legal standards call for a degree of flexibility and allowing individual assemblies without prior notice, in special circumstances when an assembly is an immediate response to a specific event, which means that its timely prior notification is precluded by its very nature.⁶⁵⁸

International legal standards require that the grounds for restrictions be laid down in the law and that the restrictions are necessary in a democratic society. A restriction must be proportionate to the aim pursued. Furthermore, restrictions are permitted solely in order to protect legitimate interests. According to the ECtHR, the protection of national security or public safety, prevention of crime or disorder, the protection of public health or morals and the protection of the rights and freedoms of others are legitimate interests allowing for restrictions of the freedom of assembly. It elaborated this issue in its judgment in the case of *Baczowski and Others v. Poland*.⁶⁵⁹

The ECHR explicitly lays down that Article 11 enshrining the freedom of peaceful assembly shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. The ICCPR does not include such a provision.

The state is not only under the obligation to refrain from unjustified restrictions of the freedom of peaceful assembly, but also has the positive obligation to protect peaceful demonstrations from violence by third parties opposing the views voiced at the assemblies, to ensure that those who want to exercise their right to the freedom of assembly are not deterred from expressing their opinions out of fear. This means that the state may not use any potential tensions between the opposed

655 *Plattform "Ärzte für das Leben" v. Austria*, ECHR, App. No. 10126/82 (1988).

656 *Christians against Racism and Fascism v. the United Kingdom*, ECmHR, App. No. 8440/78 (1980).

657 UN Human Rights Committee, *Kivenmaa v. Finland* (1994), *Rassemblement Jurassien et Unité Jurassienne v. Switzerland*, ECtHR, App. No. 8191/78 (1979).

658 *Bukta v. Hungary*, ECHR, App. No. 25691/04 (2007).

659 *Baczowski and Others v. Poland*, ECHR, App. No. 1543/06 (2007).

groups as an excuse to prohibit an assembly. A group's right to assembly cannot be limited because another group in society does not support the views promoted at the assembly, even when such views annoy or offend the other group.⁶⁶⁰ According to ECtHR's established case law, "[I]t would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".⁶⁶¹ Nevertheless, although states are expected to take all the adequate measures to ensure the holding of peaceful demonstrations, the ECtHR recognises that they cannot always be capable of ensuring the holding of an assembly and leaves them a broad margin of appreciation.

As noted in the OSCE/ODIHR Guidelines, since all persons and groups have an equal right to be present in public places to express their views, persons also have a right to assemble as counter-demonstrators to express their disagreement with the views expressed at another public assembly; on such occasions, related simultaneous assemblies should be facilitated so that they occur within sight and sound of their target insofar as this does not physically interfere with the other assembly. In its judgment in the case of *Plattform "Ärzte für das Leben" v. Austria*, the ECtHR stressed that the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Moreover, in the event the intention of the organiser of a counter-demonstration is specifically to prevent the other assembly from taking place, effectively to destroy the rights of the others, a counter-demonstration cannot be considered peaceful any longer and cannot enjoy protection afforded to the right to peaceful assembly. The OSCE/ODIHR Guidelines note that the prohibition on conducting public events at the same place and at the same time of another public event is likely to be a disproportionate response and that the authorities should do their utmost to facilitate both assemblies.

Like in the case of other restrictions of human rights, the states have to put in place legal remedies to review whether the restriction of the freedom of assembly is warranted. Any remedy resulting in an *ex post facto* decision allowing an assembly and thus not enabling that it is actually held on the planned date cannot be considered effective.⁶⁶²

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

The right to freedom of peaceful assembly is enshrined in Article 54 of the Constitution, under which citizens are to free to assemble peacefully and indoor

660 *Plattform "Ärzte für das Leben" v. Austria*, ECHR, App. No. 10126/82 (1988), *Alekseyev v. Russia*, App. No. 4916/07, 25924/08 and 14599/09 (2010), and the *United Macedonian Organisation Ilinden v. Bulgaria*, App. Nos. 29221/95 and 29225/95 (2001).

661 *Barankevich v. Russia*, ECHR, App. No. 10519/03 (2007).

662 *Baczowski and Others v. Poland*, ECHR, App. No. 1543/06 (2007).

assemblies shall not be subject to approval or notification. Outdoor rallies, demonstrations and other forms of assembly shall be notified to the state authorities in accordance with the law. The Constitution also states that an assembly may be restricted by the law only if necessary to protect public health, morals, rights of others or the security of the Republic of Serbia.

The Constitution guarantees only the freedom of *peaceful* assembly, which is in accordance with international standards. The Constitution, however, states that *citizens* may assemble freely, i.e. it does not guarantee this right to aliens or stateless persons. The ECHR guarantees the right to freedom of peaceful assembly to “everyone”, while the ICCPR “recognises” this right generally, without limiting it to specific categories of people. The ECHR includes a separate article allowing restrictions of the activity of aliens,⁶⁶³ but only with respect to political activity, wherefore this provision could justify the ban on political assemblies organised by aliens. Assemblies are not necessarily always political and the general exclusion of aliens from the exercise of the right to freedom of assembly, like the one in the Constitution, is unjustified. Furthermore, the ECHR does not mention restrictions of rights of stateless persons. It, however, needs to be noted that in both of its decisions on constitutional appeal cases on the freedom of peaceful assembly, the Constitutional Court of Serbia noted that Article 11 of the ECHR did not substantively differ from Article 54 of the Constitution, which may indicate that the Constitutional Court interprets the right in these articles in accordance with the standards established by the ECtHR, and that it would recognise it also in case of aliens unless political assemblies are at issue. The Constitutional Court has not yet reviewed any cases alleging violations of the right to freedom of assembly because the organiser was an alien, wherefore one cannot draw a conclusion on what its view on that issue would be.

Under the Constitution, the authorities need not be notified of indoor assemblies. On the other hand, the Constitution sets out that the state authorities shall be notified of outdoor assemblies in accordance with the law. It is unclear from this provision whether each outdoor assembly must be reported or whether the law may specify in which cases such an obligation does not exist. The latter interpretation is definitely preferable, for, although the valid law does not envisage exceptions to the pre-notification obligation, the new law might govern the notification procedure more liberally and more in accordance with international standards.

The last paragraph of Article 54, specifying when the freedom of assembly may be restricted, is in accordance with international standards. Article 54 of the Constitution explicitly lays down that the freedom of assembly may be restricted by the law only if necessary, while Article 20 prescribes that human rights may be restricted

663 Article 16 of the ECHR – Restriction on the political activity of aliens: Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

only “to the extent necessary to meet the constitutional purpose of the restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right”. Article 54 lists four grounds on which the freedom of assembly may be restricted: to protect public health, morals, the rights of others or the security of the Republic of Serbia. Therefore, no other grounds except these can justify restrictions of the freedom of assembly, because the list in the Constitution is exhaustive. Of course, the question remains how these grounds are interpreted in practice, i.e. what can be subsumed under them because they are set quite broadly. The standards developed at the international level should definitely be taken into account in this respect.

9.2. Constitutional Court Case Law on the Right to Freedom of Assembly

The Constitutional Court has to date ruled on two cases in which the appellants claimed violations of their right to freedom of assembly and it upheld their appeals in both cases.

One case originated from a constitutional appeal filed by the Lawyers’ Committee for Human Rights (YUCOM) in 2010 over the prohibition of an event to celebrate 8 March 2008 and organised by the non-government organisation Women in Black.⁶⁶⁴ YUCOM claimed that the following rights were violated in the administrative procedure before the Ministry of Internal Affairs and by the subsequent decision of the then Supreme Court of Serbia: the right to a fair trial, i.e. the right to a reasoned decision as an element of the right to a fair trial, the right to a trial within a reasonable time, the right to an effective legal remedy and the right to the freedom of assembly.

The decision to prohibit the assembly⁶⁶⁵ was not reasoned; the authorities merely paraphrased the article based on which they rendered their decision and listed the ground for prohibition in that article, without explaining which specific considerations and circumstances had led them to ban the assembly. The Constitutional Court concluded that the impugned decision was not reasoned in a constitutionally acceptable manner because it was impossible to conclude from the reasoning what the competent authority had based its view on.⁶⁶⁶ This Constitutional Court decision is extremely important because the competent authorities have for years been providing such “reasonings” of their decisions to prohibit assemblies.

The Constitutional Court extensively quoted ECtHR case law in its decision on this case. It, inter alia, stressed that “the intention of the peaceful assembly and not the likelihood of violence due to a response by other groups or factors is relevant

664 See: <http://www.yucom.org.rs/rest.php?tip=vest&idSek=4&idSubSek=4&id=310&status=drugi>

665 Available at: http://www.yucom.org.rs/upload/vestgalerija_99_22/1332758047_GS0_Ustavna_odluka_ZUC.pdf

666 The decision is available at <http://www.ustavni.sud.rs/page/jurisprudence/35/>.

when deciding on the applicability of Article 11 (of the ECHR). (...) Rival groups, willing to resort to violence, cannot, however, be allowed to effectively stifle the freedom of assembly". The Constitutional Court, however, noted that the right to freedom of assembly was not always violated by bans of assemblies that may result in violence even if the organisers and participants do not have violent intentions.

The Constitutional Court also noted in its decision on this case that the respect of the scheduled time of the public assembly may be relevant to the exercise of the right to freedom of assembly and again referred to ECtHR case law, notably the case of *Baczkowski and Others v. Poland*.

The Constitutional Court's readiness to refer to ECtHR case law and apply the principles elaborated in it in its interpretation of the constitutional provisions on human rights is definitely commendable. What, however, gives rise to concern is that, despite the Court's views, the competent authorities have not aligned their practices with the views of the Constitutional Court. Specifically, the police still do not reason their prohibitions of public assemblies but merely paraphrase the relevant article, which is precisely what the Constitutional Court qualified as inadmissible.

The second constitutional appeal had been filed by the organisers of the Pride Parade, an assembly that aimed to promote the rights of LGBT persons.⁶⁶⁷ The Constitutional Court found a violation of the right to freedom of assembly because the event was de facto prohibited by the police, which rendered a decision changing the venue of the event one day before it was to have been held, although the Public Assembly Act does not envisage such a possibility, wherefore there were no legal remedies that the organisers could have applied to challenge the decision.⁶⁶⁸ The Constitutional Court further noted that, even had the appellants applied a legal remedy, it could not be considered effective because a decision on it would have been rendered after the assembly was scheduled to begin. The Court noted the problem of the effectiveness of the legal protection provided by the Public Assembly Act also in its decision on the Women in Black appeal. It is very important that the Constitutional Court clearly set out that decisions *ex post facto* in character do not constitute effective protection given that short deadlines for exercising judicial protection have caused problems in the exercise of the right to freedom of assembly.

9.3. Public Assembly Act

In the Republic of Serbia, the right to freedom of peaceful assembly is governed by the Public Assembly Act,⁶⁶⁹ which was adopted back in 1992. The Act was amended several times in the meantime but its provisions are still obsolete

667 More on the Pride Parade in the *2009 Report*, II.2.9.

668 The Constitutional Court decision in this case is available in Serbia at <http://www.ustavni.sud.rs/page/jurisprudence/35/>.

669 *Sl. glasnik RS*, 51/92, 53/93, 67/93 and 48/94, Sl. list SRJ, 21/01 – Decision of the Federal Constitutional Court and *Sl. glasnik RS* 101/2005 – other law.

and largely incompatible with international standards and, indeed, Article 54 of the Constitution. The previous Government formed a working group to formulate recommendations to align the legislative framework with international standards and asked the OSCE/ODIHR and Venice Commission to render their opinion on the valid law.⁶⁷⁰ The working group completed its work and adopted its recommendations, which took into account the opinion of the OSCE/ODIHR and the Venice Commission, back in 2010. The Ministry of Internal Affairs, which is charged with this field, drafted a new law, which has not been publicly debated yet. Moreover, although there were indications that the new draft law was completed in 2011, it became publicly available only at the end of 2012. The draft includes some improvements over the valid law; however, its authors kept some highly criticised provisions in it as well, and, furthermore, included some new solutions that give rise to concern. The draft can still be amended and improved during a public debate. It would, however, be extremely unfortunate if this long-awaited law were submitted to the Assembly for adoption under urgent procedure like so many other important laws have been in the past.

The 1992 Public Assembly Act, which is still in force, does not define assemblies precisely and merely specifies that a public assembly shall denote the convening and holding of a rally or another event at an appropriate venue (Article 2 para. 1).

The Act does not specify that an assembly in terms of this law denotes only an assembly held to express common claims and goals, which is protected by international human rights law. This has given rise to confusion whether e.g. sports or commercial events fall under legislation on the freedom of peaceful assembly.

The new Draft Act on assemblies defines an assembly as “any organised assembly of more than 10 people held to publicly express, realise and promote political, social and national views and goals, and other forms of assembly”. Other forms of assembly entail public performances i.e. “assemblies organised for the purpose of pursuing state, religious, cultural, humanitarian, sports, entertainment and other interests”. The inclusion of these “forms of assemblies” in a law governing the freedom of assembly is unjustified, because an assembly in terms of the international guaranteed right to freedom of assembly may on occasion require greater tolerance than some other events at which a greater number of people are rallying, because the freedom of assembly protects fundamental democratic values, whereas, a sports event, for example, is not of such relevance to society. Therefore, there is a risk that the police may have greater freedom in assessing whether to allow fans to attend soccer matches than in assessing whether to allow an event conveying a political message. The definition of an assembly in the Draft equates all types of events.

670 [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)031-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)031-e.pdf).

9.3.1. Assembly Venues

The provisions on venues “appropriate” for public assemblies in the Public Assembly Act are also disputable. The Act defines an appropriate venue as a location which is accessible and suitable for gatherings of persons whose number and identity are not established in advance, and in which the assembly of citizens does not cause the disruption of public traffic or threaten the health, public morals or safety of people and property. According to the Act location adequate for a public assembly shall also denote a location in which public transport takes place, when it is possible to ensure the temporary rerouting of traffic by additional measures, as well as the protection of the health and safety of people and property.

The Act thus prohibits assemblies at venues at which an assembly does “not cause the disruption of public traffic”. The grounds for such a restriction do not exist either in the Constitution or international standards and the existence of this provision in the law is unacceptable. Although the following paragraph of this Article allows assemblies at venues where public traffic takes place, it sets out additional requirements (in this and other articles of the Act), which may be regarded as excessive and unjustifiably limiting the freedom of peaceful assembly.

The provision prohibiting assemblies at venues causing traffic disruption is one of the most disputable and criticised provisions of the Act. Lamentably, the new Draft Act includes a nearly identical provision, differing from the valid law only inasmuch as it specifies that the organiser of the assembly shall bear the costs of rerouting the traffic.

Article 2(4) includes another major restriction regarding assembly venues stipulated that public assembly may not be held in the vicinity of the Federal Assembly or the National Assembly of the Republic of Serbia⁶⁷¹ immediately before or during the sessions.”

Although the expression “immediately before or during the sessions” may at first glance lead to the conclusion that assemblies at these venues are prohibited for short periods of time, a “session” actually denotes the entire period the National Assembly is in session and may last weeks. Indeed, participants in assemblies will wish to rally in front of the Assembly at the very time the deputies are in it in order to convey their message to the political stakeholders. Furthermore, the Act does not specify what “the vicinity” of the Assembly entails, which leaves additional room for arbitrariness. The Draft Act does not restrict the organisation of assemblies in front of the National Assembly.

The only registered rally in front of the National Assembly during its sessions in 2012 was the one held at that venue in protest against ICTY judgments and organised by a group which signed the notice only as “students”.⁶⁷²

671 Due to the political changes in the country, the Federal Assembly has in the meantime ceased to exist, but the National Assembly of the Republic of Serbia holds its sessions in that building.

672 http://www.b92.net/eng/news/society-article.php?yyyy=2012&mm=12&dd=04&nav_id=83477

The above-mentioned general prohibitions of assemblies at specific venues laid down in the Public Assembly Act are not in compliance either with the Constitution or international standards. There might well be grounds in specific situations for prohibiting a specific assembly in front of the Assembly, e.g. to protect national security. The existence of such grounds and the necessity of prohibiting such an assembly must, however, be assessed on a case to case basis.

Under the Public Assembly Act, cities and municipalities shall in advance designate the “appropriate” venues at which public assemblies may be held. There is, however, no reason why the authorities should designate only specific venues for assemblies; rather, the organisers should be provided with the opportunity to themselves choose the venues of their assemblies, whilst the authorities should assess whether any of the grounds for restriction are applicable and whether restriction is necessary in each specific case. Furthermore, the Constitution and international instruments allow for restrictions of the freedom of assembly only in accordance with the law. The provision providing the local authorities with the discretionary right to designate appropriate assembly venues allows for restricting the freedom of assembly via local self-government administrative enactments through the back door. The Draft Act commendably does not include this provision.

The Act states that public assemblies may be held at a venue or along a specified route, which is in keeping with international standards. The Act, however, unnecessarily limits public processions by setting out that a public procession along a public traffic route must be continuous. This provision facilitates the work of the police and of the authorities charged with traffic management, but definitely does not constitute sufficient grounds for restricting the right to freedom of assembly. This provision is rightly absent from the Draft Act.

9.3.2. Assembly Notification

Organisers of assemblies in Serbia are under the obligation to notify the authorities of an assembly they are planning to hold, but do not need to wait for their approval, which means that an assembly in Serbia is subject to notification but not to consent. This solution is in accordance with international standards. The deadlines for notification are acceptable as well – static assemblies must be reported at least 48 hours in advance, while public processions must be reported at least five days in advance. If the deadlines are too short, it is extremely unlikely that the courts will be able to decide on appeals of decisions prohibiting assemblies in time for the events to be held as scheduled. It is, however, difficult to strike the right balance to ensure that the freedom of assembly is not restricted by unreasonably long notification deadlines, on the one hand, and to provide the courts with enough time to rule against an unjustified restriction, on the other. The Draft Act stipulates that static assemblies must be reported at least five days and public processions at least seven days in advance. The deadlines it gives courts to rule on any appeals,

however, lack another 24 hours if the goal is to ensure that their final decisions are rendered before the scheduled time of the assemblies.⁶⁷³

According to the valid Public Assembly Act, the organiser shall file an advance notice of an assembly with the Ministry of Internal Affairs and a copy of the notice to the competent city or municipal authority charged with public utility services related to the holding of an assembly. The law, unfortunately, does not specify which local government departments the organiser should contact and with respect to which issues, or how a negative response from these departments affects the holding of an assembly. The collection of the requisite documentation can on occasion incur considerable costs, which restricts the right to freedom of peaceful assembly. The organisers of the Pride Parade have over the previous years regularly collected the extensive documentation they needed for holding their assemblies, which involved a lot of organisation, time and considerable costs. The situation was the same in 2012 as well. They were under the obligation to pay numerous fees and other costs of organising the Parade, such as the costs of the on site ambulance vehicles, temporary mains connections, a professional security service, etc. The organisers were also under the duty to submit traffic rerouting and stage plans, the requirements they had to fulfil the previous years as well. The preparation of such studies incurs significant costs to the organisers (the stage plan must be designed and certified by a licensed engineer).

The law does not require of the organisers to obtain various approvals from the public utility authorities, but these approvals are in practice required under local self-government regulations, wherefore it is occasionally up to the public utility authorities whether an assembly shall be held. The Kragujevac City Communal Affairs and Supervision Department in 2012 prohibited an assembly planned by the Gay Straight Alliance (GSA), after obtaining the opinion of the City Security Council, which was of the view that the GSA event could not be held because the "Movement of Proud Residents of Kragujevac" was scheduled at the same time and at the same place and that "the reputation of the City of Kragujevac as one of the safest cities in Serbia" would be undermined if these events were held simultaneously since the two organisations held opposite views and beliefs, wherefore it decided to prohibit both assemblies. The Communal Affairs Department upheld the City Security Council opinion and rendered a decision to reject the GSA request to hold its assembly.⁶⁷⁴ The GSA assembly was not held. These developments are an illustration of a prohibition of an assembly by a local authority, the Communal Affairs Department, although it is not entitled to prohibit an assembly under the Public Assembly Act. It remains unclear on what grounds the City Security Council conducted its security assessment. Such decisions are inadmissible.

The Draft Act merely obliges the organisers to pre-notify the Ministry of Internal Affairs of their assemblies but does not mention the current obligation to

673 See I.9.5

674 <http://gsa.org.rs/2012/06/zabranjena-akcija-gsa-u-kragujevcu/>.

submit copies of the notices to the local self-governments. Indeed, the current Act does not impose on the organisers the obligation to obtain approval from the local authorities either, just to submit copies of the notices to them and the practice of seeking approval from the local authorities will likely continue under the local regulations although there are no grounds for it either in the valid or the draft law. The Draft Act is unfortunately silent on the duties and powers of local authorities regarding the freedom of assembly, although there are many problems in that field.

The Draft Act poses an additional burden on the organisers of assemblies by stipulating that they must file their notices “personally”. There appears to be no good reason for the imposition of this obligation, particularly in view of the already onerous requirements the organisers have to satisfy.

Under Article 14 of the valid Act, the police shall prevent the holding of an assembly they had not been notified of. This is not in accordance with international standards which accept the existence of an advance notification system in general but also require the existence of exceptions when the character of the assembly precludes its timely notification. The Draft Act regrettably also lays down that the police shall prohibit, i.e. prevent or disperse an assembly “not reported on time or properly”.

Although the Act obligates the police to disperse an assembly they have not been notified of or in the event the notice does not satisfy all the legal requirements, such assemblies are nevertheless held in practice. The police can, of course, always prohibit such assemblies under the law if they want to. That is precisely the problem. Although allowing spontaneous assemblies is commendable from the perspective of the freedom of assembly, such actions by the police are not based on the law (moreover, they are in contravention of the law). The possibility to invoke the law to prohibit one unreported assembly and allow another one to proceed in the same circumstances leaves room for arbitrariness. The police have on occasion demonstrated excessive flexibility, e.g. when they provided protection to an assembly at which discriminatory messages were voiced, such as the protest against the resettlement of Roma in the Belgrade suburb of Resnik. Not only were the police not notified of the protest, which was problematic also in terms of the messages it communicated. Violence broke out at this rally as well and twelve policemen were injured, because the participants pelted them with stones.⁶⁷⁵

Another burden on the organisers is imposed by the provision under which every change in the content of the notice (including also when the organisers are asked to amend or supplement deficient notices) shall be regarded as the submission of a new notice. This may result in the untimely submission of a notice, which had been initially submitted on time but suffered from some negligible shortcomings that the police sought the rectification of. Under the Draft Act, the competent au-

675 See the B92 report on the Resnik events in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=04&dd=08&nav_category=12&nav_id=598573.

thorities, i.e. the police, shall return a deficient notice to the organiser and ask him to supplement it within 24 hours. The Draft commendably does not include a provision specifying that the submission deadline shall be reckoned from the moment the amended or supplemented notice is submitted.

The organisers are under the obligation to specify the estimated number of participants in the notice. The Act does not specify which consequences they shall bear in case their estimate was wrong. In their Opinion, the OSCE/ODIHR and the Venice Commission noted that a mistake in the estimated number of participants should not lead to any consequences for the demonstration. The Draft Act brings no changes in this respect – it, too, requires of the organisers to provide an estimate of the number of participants in the notice and does not specify the consequences of a wrong estimate.

As mentioned in the above overview of international standards, a notice of an assembly should not impose an excessive burden on the organisers. The current notification system in Serbia can be qualified as overly strict given all the notification related requirements set out in the Public Assembly Act. The Draft Act does not bring any improvements; rather, it is even more demanding in some aspects. It does, however, lay down that the competent local authorities may designate one venue for holding assemblies, which the authorities had not been notified of in advance. The local self-governments are not, however, under the obligation to designate such venues, wherefore this option will not exist in practice if they fail to do so, even if the law allows it.

The Draft Act, however, introduces another obligation, which is in contravention of the constitutional provision on the freedom of assembly. Namely it stipulates that even indoor assemblies shall be reported to the police in the event it necessitates “special security measures”. To recall, the Constitution explicitly lays down that indoor assemblies shall not be subject to approval or notification (Art. 54(2)).

9.4. Restrictions of the Freedom of Assembly

The legal provisions on restrictions of the freedom of peaceful assembly are largely incompatible both with the international standards and the Constitution of the Republic of Serbia. Nowhere does the Act mention that the restrictions may be imposed only if they are necessary. Nor do the grounds for restrictions correspond to the international and constitutional standards. The Act also does not provide the possibility of applying a less restrictive measure, such as, e.g. the change in time or venue of the assembly, and envisages only the prohibition of an assembly. Similarly, when an assembly is already under way, the law should lay down that the competent authority shall take all the necessary steps to restore order at the assembly (for instance, by removing the individual or group causing the violence) and disperse the assembly only in the last resort. This would not only be in accordance with international standards but with Article 20 of the Constitution as well.⁶⁷⁶

676 See I.3.

The working group tasked with improving the legal framework on the freedom of assembly proposed the inclusion of a provision stating that the freedom of peaceful assembly may be restricted only in instances specified by the law and when necessary in a democratic society to protect public health, morals, the rights and freedoms of others or the security of the Republic of Serbia, whilst taking into account the standards developed in the practice of international human rights protection bodies. The working group also recommended that the law explicitly lay down that the least restrictive measure always be applied when limiting the right to freedom of assembly and that an assembly shall be prohibited, prevented or dispersed only in the last resort. Neither of these recommendations were, however, included in the Draft, which merely states that the freedom of assembly may be restricted “only on the grounds set out in this Act”, which does not mean much, particularly in view of the fact that the “grounds set out in this Act” i.e. in the Draft do not satisfy international and constitutional standards.

Article 11(1) of the Public Assembly Act allows the police to prohibit a public assembly if they believe it would threaten the health, public morals or safety of people and property or disrupt public traffic. The last ground is in contravention of both international standards and the Constitution and should be struck out from the law.

Apart from these grounds for prohibition, the Act also sets out that the police may temporarily ban an assembly aimed at the violent change of the constitutional order, undermining the territorial integrity or independence of the Republic of Serbia, the violation of constitutionally guaranteed human and civil rights and freedoms, or at inciting and encouraging national, racial or religious hatred and intolerance (Art. 9). The police are under the obligation to submit to the competent court a motion to review the permanent prohibition of such an assembly at least 12 hours before the assembly is scheduled to start.

The organisers of an assembly must be notified of its prohibition 12 hours before the beginning of the assembly both when their assembly is temporarily and permanently prohibited.

Furthermore, in circumstances described in Article 9 and 11 and in the event the assembly is already under way, the police shall order the organisers to disperse the assembly and if they fail to do so, the police shall render a decision on its prohibition and themselves disperse the assembly.

The police rendered 11 decisions prohibiting assemblies in 2012. One decision was rendered by the Šabac and one decision by the Vranje police; the other nine were rendered by the Belgrade Police Administration; two of them regarded the same assembly (why the police rendered two decisions prohibiting the same assembly remains unclear). The organisation Dveri in May announced an assembly to protest against alleged election fraud. The police banned the event, but it was nevertheless held. The police were at the venue but did not try to disperse the assembly.⁶⁷⁷

⁶⁷⁷ See the media reports in Serbian at <http://www.naslovi.net/2012-05-10/radio-021/dveri-ipak-protestuju-u-beogradu/3442175>, <http://www.telegraf.rs/vesti/200912-protest-dveri-uprkos-za-brani-policije>, <http://www.naslovi.net/2012-05-10/akter/dveri-ipak-u-protestnoj-setnji/2540907>

The Vranje police prohibited an assembly of the organisation Fatherland Movement *Obraz* (the work of which was subsequently banned by the Constitutional Court of Serbia) because it had not been reported on time, given that the organisers notified the police of this public procession two instead of five days in advance. With the exception of this decision, all other decisions prohibiting assemblies in 2012 invoked Article 11 of the Public Assembly Act as grounds for the ban. However, despite the above-mentioned view of the Constitutional Court that such decisions had to be reasoned, all of them included only that the assembly might cause the disruption of public traffic or threaten the health (public morals) and safety of people and property.

The text in all the decisions is almost identical, the only difference being that some mention the protection of public morals as grounds and others do not. Although the Constitutional Court established that the adoption of decisions with such reasonings was in violation of the law, this practice has continued without exception.

As many as seven of the eight prohibited events in Belgrade were scheduled for the same day as the 2012 Pride Parade or the day before. The organisers appealed the prohibition of one event scheduled for 5 October. The second-instance decision specified that the appeal was dismissed because it was concluded that a number of public events, including the public event Pride Parade, were scheduled for 5 and 6 October 2012. Given that it was assessed that specific groups and individuals might substantially disrupt public law and order, the view was taken that the holding of any assemblies on those dates might pose a major risk to the safety of people and property.

It is difficult to justify such a general ban on all assemblies planned in a specific period. The competent authorities are apparently of the view that the participants in the Parade and not the hooligans, who wanted to clamp down on them, posed a security risk. The prohibition of all assemblies in Serbia that weekend, including the Pride Parade and all other non-violent assemblies, whose participants may disagree with the holding of the Parade, merely renders the state's interference in the citizens' freedom of assembly even more disproportionate and cannot justify the prohibition the Pride Parade itself on any account.

Of all the prohibited assemblies, the Pride Parade clearly drew the most attention. Organisations promoting and protecting LGBT rights have for several years now been trying to organise a Pride Parade. The 2009 Pride Parade was de facto prohibited by the police decision on its relocation to another venue, which the Constitutional Court ruled unconstitutional and in breach of the right to freedom of assembly. The 2010 Pride Parade was held amid strong police presence but was accompanied by rampage of extremist groups across Belgrade.⁶⁷⁸ The 2011 and 2012 Parades were cancelled just before the dates on which they were scheduled

678 See the *2010 Report*, II.2.3.

although the organisers had submitted proper notices and contacted the police well in advance to ensure the security of the participants, wherefore the organisers were unable to seek judicial protection of their rights on time.

The 2012 Pride Parade, which was to have been held on 6 October, was announced back on 3 May. On 11 May, the organisers submitted to the police an advance notice including the Parade details, such as the route, the dimensions of the stage, the estimated duration of the procession, the organisation of the steward unit, and they contacted the competent city public utility departments to obtain the requisite approvals. In the months preceding the Parade, the organisers maintained contact with the representatives of the police and lobbied for support with various state authorities and political representatives. They, however, largely failed in mustering clear public support for their assembly.

The Pride Parade was to have been part of a broader programme, Pride Week, which was scheduled for 1–7 October. On Wednesday, 3 October, the exhibition *Ecce Homo* by Elisabeth Ohlson Wallin opened in the Belgrade Centre for Cultural Decontamination (CZKD). Despite objections and threats by various groups (the exhibition was opposed by public figures and various institutions and organisations, e.g. Patriarch Irinej, the Meshihat of the Islamic Community of Serbia, the Dveri movement, Prime Minister Ivica Dačić), the exhibition opened without an incident, with strong police presence in front of the CZKD and in the nearby streets.⁶⁷⁹

Although the organisers had obtained all the requisite licences and approvals, the Savski venac police station rendered a decision prohibiting the event on 3 October 2012, three days before it was to have been held. The brief reasoning is almost identical to the ones in other decisions prohibiting events, i.e. it stated that the grounds for the ban in Article 11(1) of the Public Assembly Act of the Republic of Serbia were met. In other words, the decision was incompatible with the Constitution, according to the view taken by the Constitutional Court of Serbia. Even if there had been security grounds for prohibiting the Parade – the only “evidence” of such grounds being the say-so of the Minister of Internal Affairs and his subordinates – such circumstances and facts were never communicated to the organisers of the Parade before the decision to ban it was rendered.

The Pride Parade is an illustration of a twofold breach of the freedom of assembly by the state. First, the state prohibited the holding of the event without a justified reason although it was notified of it properly and on time. The prohibition of a peaceful assembly, the participants of which are non-violent, just because third parties threaten to employ violence against it, is unjustifiable both under international standards and the Constitution. The Pride Parade organisers and participants were not endangering anyone’s rights, but their rights were and, indeed, still are endangered. The state could have and should have prohibited the assemblies of those threatening with violence, but not the Parade itself. Second, the state also violated

679 See the B92 report on the exhibition at http://www.b92.net/eng/news/society-article.php?yyyy=2012&mm=10&dd=03&nav_id=82481.

its obligation to take positive measures to ensure the freedom of assembly. The existence of extremist and violent groups opposing such events is undisputable, but this does not absolve the state from failing to secure conditions for the holding of the assembly in light of the fact that there was absolutely no reason to fear that its participants would turn violent. The fact that the *Ecce Homo* exhibition passed without incident illustrates that the police could have protected the Parade had they wanted to. Aware of the problems in the past, the state should have reacted on time and facilitated the holding of the Parade by protecting the participants of the planned peaceful assembly from the violence of third parties. The state's hitherto failure to punish those threatening Pride Parade participants or those who caused the riots during the 2010 Pride Parade clearly demonstrates the lack of will on the part of the state leadership to confront these groups, which also fuels their strength in society. Even if the state were in principle allowed to prohibit a non-violent assembly just because third parties were threatening to employ violence against its participants, the state cannot resort to such a measure if it itself is to blame for not taking all the adequate preventive measures to thwart the hooligans' intentions and punish them.

With its entire security apparatus and its monopoly on means of coercion, the state surely must have been capable of protecting several hundred people, who would have held their procession within a strictly confined area in the heart of Belgrade. The facts that these security measures would have cost the state and that third parties would have used the peaceful assembly as a motive to employ violence do not entitle the state to prohibit such a peaceful assembly. Constitutional rights and freedoms are meaningless if they apply only when there are no risks involved.

The grounds for prohibiting an assembly in the Draft Act largely coincide with the grounds in the valid law. The former does not mention the protection of public morals as grounds for the ban (although it is listed in the Constitution). Although the disruption of public traffic is not mentioned in the article listing grounds for the prohibition of assemblies, they are practically limited on this ground, too, because the article governing assembly venues specifies that assemblies may be held at venues where public traffic takes place "in the event additional measures can ensure a temporary rerouting of public traffic and the protection of the health of people and the safety of people and property." In other words, disruption of public traffic gives rise to indirect restrictions. The Draft Act also lays down new grounds for the prohibition of assemblies, not present in the valid law. One of them – stipulating the ban of an assembly organised by a prohibited association – is acceptable. The Draft, however, also lays down that an assembly shall be prohibited if the organiser fails to take the additional measures required by the competent authority on time. This provision imposes a substantial burden on the organisers, who, under international standards, may only be obligated to act peacefully and (perhaps) submit advance notices of their assemblies; the Draft envisages the most drastic sanction for the disrespect of the authority's order – the prohibition, i.e. prevention or termination of the assembly. The Draft also allows the police to interrupt an event

if the stewards are unable to maintain peace and order. To recall, such obligations cannot be imposed on the organisers. Maintaining peace and order is the duty of the police. An entire assembly cannot be deemed violent even if individuals attending it are behaving violently. In any case, whenever there are elements of violence, it is up to the police to react; the responsibility should not be passed to the stewards. The police may disperse an assembly if the violence acquires such proportions that it cannot be halted by removing individuals from the assembly.

9.5. Legal Remedies

The organisers may contest a decision on the permanent prohibition of an assembly (pursuant to Article 11) by filing an appeal in administrative proceedings. An administrative dispute may be instituted against a final decision to ban the assembly. Under Article 9 of the Public Assembly Act, the organisers may appeal first-instance court decisions temporarily banning an assembly. The Public Assembly Act sets out that the decision on the prohibition of an assembly shall be rendered by the competent district court and that it may be appealed. The Act has not been aligned with the new organisation of the courts, which is definitely unacceptable. In the new court system, decisions to ban an assembly are rendered by the Administrative Court. The Administrative Court may render a decision rejecting the motion to prohibit an assembly and revoking the decision on the temporary prohibition or a decision prohibiting a public assembly. The parties may appeal the decision within 24 hours from the moment it is served upon them. The appeal shall be reviewed by the Supreme Court of Cassation within 24 hours from the moment of filing.

Given that the organiser is notified of the prohibition at least 12 hours before the event is to begin, it is very unlikely that the court will be able to render a final decision revoking the prohibition and allowing the assembly in time for it to be held as planned. This is why the Constitutional Court, too, concluded that the protection accorded by the law was ineffective.

Legal remedies are governed much differently in the Draft Act. First of all, it does not distinguish between temporary and permanent prohibitions and treats all bans in the same way. Furthermore, it commendably introduces deadlines within which the courts have to act on prohibitions of assemblies. These deadlines are extremely short and it remains to be seen how they will be observed in practice. Under the Draft Act, the police may prohibit an assembly only temporarily and is in such cases under the obligation to submit to the competent Higher Court a reasoned motion for the prohibition of the assembly at least 48 hours before it is due to begin. The court is under the duty to rule on the motion within 24 hours and the parties then have 24 hours to appeal its decision. Nevertheless, even with such short deadlines, the second-instance decision cannot be rendered before the planned time of the assembly. Namely, if the police submit the motion to the court at the last moment, 48 hours before the event, and then the court renders its decision within

24 hours, the parties have another 24 hours to appeal; this deadline expires at the moment the assembly is to start. The second-instance court is also under the duty to rule on the appeal within 24 hours. Therefore, under the deadlines set in the Draft, if the police are to file the motion 72 hours before the scheduled event, the second-instance decision will also have been rendered by the time the event is scheduled to begin. This is why it would be worth considering imposing upon the police the obligation to file its motion 72 hours before the beginning of the event, which should be feasible, given that a notice of a static assembly has to be filed at least two days and a notice of a public procession at least four days before that deadline.

Another problem that has arisen in practice with respect to the effectiveness of the legal remedies regards the failure to act of the authority charged with rendering a decision on the prohibition an assembly. Namely, if the competent authority, for instance, does not prohibit an assembly and proposes its “relocation” because it will not allow it to proceed at the proposed venue, the competent authority cannot formally render any decision restricting the participants’ right, because it cannot render a decision on the relocation of the assembly as there are no legal grounds for such a decision. In such cases, there are no decisions of the competent authority the organiser can appeal. This is precisely what happened in 2009, when the competent authority “proposed the relocation” of the assembly to the organisers of the Pride Parade but had de facto prohibited the event. This issue was also reviewed by the Constitutional Court in its decision on the constitutional appeal.

9.6. Responsibilities of the Organisers and Penalties

Apart from financial obligations arising from the organisation of assemblies in venues with public traffic, the organisers have other obligations to fulfil under the law. In addition to the obligation to file an advance notice of an assembly, the organiser is also under the duty to “take measures to maintain order at the event, that is, organise a steward unit.” As already mentioned, these obligations exceed those allowed by international standards, which only require of the participants to behave “peacefully”.

The Draft Act additionally increases the already substantial burden on the organisers. It does not explicitly mention anywhere that the organisers will bear the costs of the assembly or how the costs will be borne. The Draft introduces the objective responsibility of the organiser for the damage incurred by the assembly participants. Furthermore, it introduces numerous obligations the organiser needs to fulfil – supervise the course of the assembly and manage the work of the stewards, take the necessary measures to ensure peace and order, take measures ensuring that the participants are unarmed and do not incur damage, secure a sufficient number of stewards, take the appropriate health and fire safety measures, etc. All these requirements pose an exceptional burden on the organisers and may have a significant deterrent effect and thus adversely affect the freedom of assembly, wherefore they

may be deemed unacceptable, particularly in view of the fact that it is primarily the obligation of the police to maintain public peace and order.

The valid Act prescribes extremely rigorous penalties, including imprisonment, for assembly organisers who violate the law, even the obligation to pre-notify their assemblies. The Draft Act does not envisage the imprisonment penalty.

The valid law makes no mention of the state's obligation to protect peaceful assemblies, although the problems this issue has to date produced in practice reaffirm the necessity of explicitly obliging the competent authorities to protect peaceful demonstrators and facilitate their assemblies which third parties are trying or threatening to prevent by employing violence. The Draft does not bring any changes in that respect.

The valid Act does not govern the issue of counter-demonstrations at all. Given their practical importance i.e. the need to govern issues arising with respect to counter-demonstrations, i.e. how to handle situations in which two organisers want to hold assemblies in the same place at the same time, the new law should set some guidelines for regulating this issue. The provisions in the Draft Act are unacceptable, as they state that in the event that advance notices of two or more assemblies at the same place and at the same time are submitted, preference will be given to the organiser who first submitted the notice. This provision practically prohibits counter-demonstrations, which is undoubtedly excessive. Even hitherto practice has shown that more than one rally can be held at the same place and at the same time without incident and that there is no need for such a rigid solution.⁶⁸⁰

9.7. The Role of the Police

As the above overview of the Act demonstrates, it includes several problematic solutions and provides the Ministry of Internal Affairs with broad powers to prohibit assemblies. However, most of the assemblies in Serbia take place normally and the conduct of the police is adequate. The year 2012 was an election year and thus marked by an exceptionally large number of assemblies during the election campaign. Apart from rare exceptions, the vast majority of the assemblies were peaceful or with minimal incidents. No inappropriate police response was registered.

However, although the conduct of the police has been beyond reproach in most instances, authorities should not have the leeway to act as they wish as they do now, when the police can decide to prohibit an assembly for a formal reason not in accordance with international standards.

680 Three assemblies were organised with respect to the procedure for the rehabilitation of WWII Chetnik commander Dragoljub Mihailović at a small venue in front of the Higher Court in June 2012 – they organised by the Women in Black, the “partisans” and the “Chetniks”. A large number of policemen were securing the events, which passed without incident. See http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=06&dd=22&nav_category=12&nav_id=620491.

Such leeway has given rise to problems, above all with respect to the Pride Parades, when the police have applied a more rigid approach. On the other hand, as the event in Resnik illustrates, the police sometimes display excessive tolerance and allow even assemblies at which violence erupts to proceed. The obligation of the organisers to obtain numerous approvals from public utility authorities and the unregulated powers of these authorities are a problem in itself.

9.8. Recommendations

1. Ensure that the actions of the police and courts are in compliance with the decisions of the Constitutional Court of Serbia – that the reasonings of the decisions prohibiting assemblies are adequate and allow effective appeals.
2. Ensure an effective legal remedy by which the organisers can challenge bans of assemblies.
3. Open a public debate on the Draft Public Assembly Act and improve its provisions in accordance with the above standards before adopting it.
4. Take the requisite positive measures to enable LGBT human rights defenders and the LGBT population to exercise their freedom of assembly.

10. Freedom of Association

10.1. General

The International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantee everyone the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. Both of these international documents allow the States Parties to impose lawful restrictions on the exercise of these rights by members of the armed forces and the police, while the ECHR also allows them to impose such restrictions on members of the administration of the State.

The Constitution of Serbia guarantees the freedom to join and form political, trade union and all other forms of associations (Art. 55). The Constitution lays down that associations shall be formed by entry in a register, in accordance with the law, and that they shall not require prior consent. The Register of Associations of Citizens i.e. of non-government organisations (hereinafter Register) is kept by the Business Registers Agency, while the political parties are entered in the Register of Political Parties kept by the Ministry of Justice and State Administration (Register of Political Parties).

The exercise of the freedom of association is governed in greater detail by the Act on Associations⁶⁸¹ and the Act on Political Parties.⁶⁸² The procedure by which associations are registered is thoroughly regulated by the Business Registers Agency Registration Procedure Act.⁶⁸³

10.2. Associations of Citizens (Non-Government Organisations)

The Act on Associations regulates the establishment, legal status, registration and deregistration, membership, bodies, changes in status, dissolution and other issues of relevance to the work of associations of citizens, as well as the status and activities of foreign associations. The Act defines an association as a voluntary and non-government non-profit organisation based on the freedom of association of more than one natural or legal persons established to achieve and promote a specific common or general goal or interest not prohibited by the Constitution or the law. The Act applies subsidiarily, as a *lex generalis*, to other associations the activities of which are governed by other laws (e.g. religious communities, trade unions, political parties, etc).

An association of citizens may be established by at least three natural or legal persons, one of whom must have residence in the territory of the Republic of Serbia. An association shall pursue its goals freely and autonomously and have legal subjectivity from the moment it is entered in the Register. Regulations on civil partnership shall apply to associations not entered in the Register. Therefore, registration is the *conditio sine qua non* an association has to fulfil to acquire the status of a legal person but it does not have to register to work.

A Registrar's decision may be challenged with the Ministry of Justice and State Administration. An administrative dispute may be initiated against a decision of the Minister. The Business Registers Agency Registration Procedure Act envisages a special legal remedy against a final Administrative Court decision – the submission of a motion for its review to the Supreme Court of Cassation. A motion for the review of a court decision is an extraordinary legal remedy envisaged both by the new Administrative Disputes Act (ADA)⁶⁸⁴ and its predecessor⁶⁸⁵. The new ADA does not envisage appeals of Administrative Court decisions nor motions for the protection of legality, but it expands the list of parties entitled to file motions for review of court decisions by specifying that such motions may also be filed by parties to an administrative dispute⁶⁸⁶ and the competent public prosecutor. The

681 *Sl. glasnik RS* 51/09 and 99/11.

682 *Sl. glasnik RS* 36/09.

683 *Sl. glasnik RS* 99/11.

684 *Sl. glasnik RS* 109/07 and 99/11.

685 *Sl. glasnik SRJ* 46/96.

686 An administrative dispute may be initiated by a party challenging an administrative decision on its rights and obligations; by a public prosecutor in the event an administrative enactment

prior ADA allowed only the parties to file such motions, while the competent public prosecutors were entitled to file motions for the protection of legality. A motion for an extraordinary review of a court decision may be filed over a violation of the law, another regulation or general enactment or procedural violations that may have affected the determination of the administrative matter (Art. 50(3), ADA). Namely, the grounds for resorting to this extraordinary legal remedy are the same as those for submitting motions for the protection of legality set out in the prior ADA, except that motions for extraordinary reviews of court decisions may be filed over procedural violations as well. The role of this legal remedy fully coincides with that of the motion for the protection of legality.

Associations may engage in economic activities but are not entitled to distribute their profits to their members and founders.⁶⁸⁷ An association may use its assets only to pursue its goals. Only a local non-profit legal person founded to achieve the same or similar goal may be designated as the successor of an association's assets in its statute in the event it dissolves. An association's assets shall become the assets of the Republic of Serbia and may be used by the local self-government unit in which the association had been headquartered in the event the assets cannot be transferred in accordance with the law or with the association's statute at the time of its dissolution or in the event it was dissolved pursuant to a decision prohibiting its work or in the event its statute does not specify what will happen to its assets in the event it dissolves.

The Act on Associations lays down that funds will be earmarked in the budget of the Republic of Serbia to encourage the implementation of programmes of public interest⁶⁸⁸ or cover the funds an association lacks to implement them. These funds shall be disbursed through public calls for proposals. Autonomous provinces and local self-government units may also grant funds to associations from their budgets. Associations funded in this manner are under the obligation to publish reports on their work and funding at least once a year and to submit such reports to their donors (Art. 38). Under the Act, the Government shall specify in detail the grant criteria, the grant procedure and the procedure for reimbursing the funds not used for the purpose they had been granted for. The Office for Cooperation with Civil

violated the law to the detriment of public interest; the Attorney General in the event an administrative enactment violates the law to the detriment of the property rights and interests of the Republic of Serbia, an autonomous province or a local self-government (Art. 11, ADA). The defendant in an administrative dispute denotes the authority the enactment or silence of which is disputed (Art. 12, ADA).

687 An association performing an economic activity generating income exceeding the amount it needs to pursue its goals shall be fined between 50 and 500 thousand RSD (Art. 73(1(2))).

688 Programmes of public interest shall, notably, comprise programmes in the fields of social welfare, veteran-disability protection, protection of people with disabilities, social care of children, protection of internally displaced people from Kosovo and refugees, birth rate stimulation, aid to the elderly, health care, human and minority rights protection and promotion, education, science, culture, information, environmental protection, sustainable development, animal protection, consumer protection, anti-corruption, as well as humanitarian and other programmes via which an association is exclusively and directly satisfying public needs.

Society was established by a Government Decree in April 2010.⁶⁸⁹ Its main goals are: to involve civil society organisations (associations of citizens) in a continuous dialogue with the Government institutions and encourage ongoing and open cooperation between the associations of citizens and the state administration authorities. In 2012, the Government enacted a Decree on funding to encourage the implementation of programmes of public interest by associations or cover the funds they lack to implement them⁶⁹⁰, which should increase the transparency of budget allocations and prevent the misuses that had been possible due to existence of legal lacunae. The NGO Centre for the Development of the Non-Profit Sector established a database of organisations funded from the state budget in the 2008–2011 period and the list of republican authorities that funded projects. The database shows that budget funds (budget line 481 designated for NGOs) were allocated also to other entities which were not associations of citizens: e.g. companies and the Serbian Orthodox Church to renovate and repair religious facilities.⁶⁹¹ The Office for Cooperation with Civil Society published its Annual Summary Report on Expenditure of Funding Disbursed to Associations in 2011⁶⁹² which is a good step towards achieving greater transparency in this field.

Under the 2012 Budget Act,⁶⁹³ 7,846,427,575 RSD were allocated for non-government organisations within budget line 481. In February 2013, the Office for Cooperation with Civil Society will start collecting data from state authorities on funds designated for civil society organisations and plans to publish a report its Annual Summary Report for 2012 in the latter half of the year.⁶⁹⁴

The Act on Associations lays down that legal and natural persons that give contributions and donations to associations are entitled to tax exemption. Under Article 15 of the Corporate Profit Tax Act,⁶⁹⁵ a company's outlays – in the amount not exceeding 3.5% of its total revenue – on health care, cultural, educational, scientific, humanitarian, religious, environmental protection and sport-related purposes, as well as on social care institutions established in accordance with the law governing social protection, shall be recognised as expenditure.⁶⁹⁶ These outlays shall be recognised as expenditure only if the funds were paid to legal persons that were

689 *Sl. glasnik RS* 26/10.

690 *Sl. glasnik RS* 8/12.

691 Centre for the Development of the Non-Profit Sector studies, available in Serbian at http://www.crnps.org.rs/wp-content/uploads/Linija-481_Pravni-osnov_web.pdf and at http://www.crnps.org.rs/wp-content/uploads/Linija-481_Opstine-i-gradovi_web.pdf.

692 Available at <http://civilnodrustvo.gov.rs/en/news/annual-summary-report-presented-in-media-center/#more-1740>. A total of 5,782,303,787 RSD were designated under budget line 481 under the Act Amending the 2011 Budget Act; a total of 4,950,323,294 RSD were allocated to associations from this budget line according to the Draft 2011 Final Accounts Act.

693 *Sl. glasnik RS* 101/11 and 93/12.

694 Memo of the Office for Cooperation with Civil Society No 07-00-1/2013-1 of 28 January 2013.

695 *Sl. glasnik RS* 25/01, 80/02, 80/02 – other law, 43/03, 84/04, 18/10, 101/11 and 119/12.

696 The percent of recognised expenditure affects the amount of taxable corporate profit as the taxable profit is calculated in the tax balance by adjusting the company profit declared in accordance with the method of acknowledging, measuring and estimating revenue and expenditure.

registered for those purposes and have been using the funding solely to pursue the above mentioned activities. The tax laws, however, do not include provisions allowing for tax relief on these grounds yet, i.e. direct tax deductions for companies donating funds to associations of citizens. Civil society organisations have filed amendments⁶⁹⁷ to the Draft Act Amending the Corporate Profit Tax Act submitted to the parliament for adoption in 2012. The authors of the amendments proposed the expansion of the list of purposes companies may fund and be granted tax relief on in order to align the tax law with the Act on Associations and the Act on Foundations and Endowments. These activities would include the promotion and protection of human rights, promotion of democratic values, the fight against corruption, EU integration, gender equality etc. The Ministry of Finance and Economy rejected the amendments.

The Budget System Act⁶⁹⁸ was amended in 2012 and the Treasury adopted the Instructions on the application of this law.⁶⁹⁹ These two enactments categorise associations of citizens receiving funding from the budget as beneficiaries of public funds (provided that the public funds granted in the previous year accounted for over 50% of their revenues), whereby these associations are practically equated with state institutions in terms of budget accounting, reporting, financial management, supervision and auditing requirements. This is why the application of the Budget System Act imposes an expensive and complicated administrative procedure on the associations. The NGO Civic Initiatives (supported by 123 associations) submitted its comments on the Budget System Act to the Ministry of Finance and Economy in December 2012. The NGOs were, in particular, dissatisfied with the equal treatment of the associations (categorised as public fund beneficiaries) and state institutions under the Act, because the associations will have to open accounts with the Treasury every time they are granted funds under a public call for proposals published by a state institution, which also constitutes discrimination against associations funded from the budget. The procedure also poses complications to small associations in the interior of Serbia, with no Treasury offices in their vicinity.⁷⁰⁰ Furthermore, the obligation to open an account with the Treasury automatically precludes granting of budget funds to informal associations. Given that Serbia is to introduce a decentralised system for managing EU funded projects, which means that the EU funds will be distributed to associations via the state authorities, the administrative procedures introduced by the Budget System Act will bring on additional complications. The Ministry of Finance and Economy responded to these remarks by notifying Civic

697 Civic Initiatives, European Centre for Not-for-Profit Law and the Balkan Community Initiative Fund. See *Debate on Amendments to Laws Hindering the Work of NGOs*, available in Serbian at <http://www.gradjanske.org/page/news/sr.html?view=story&id=6027§ionId=1>

698 *Sl. glasnik RS* 54/09, 73/10, 101/10, 101/11, 93/12.

699 No. 401-1354-16/12-001-010 of 20 November 2012.

700 The Treasury has 34 branch and 111 local offices across Serbia, but not in all the towns in which the associations can register their headquarters. The overview of the Treasury organisational structure is available at <http://www.trezor.gov.rs/organizational-structure.html>.

Initiatives that associations of citizens were not under an obligation to register as public fund beneficiaries,⁷⁰¹ and, thus, did not need to open separate accounts with the Treasury.⁷⁰² The Act also requires of associations funded from the state budget to publish their financial plans and information booklets on their work on their websites. However, only 24% of the associations in Serbia have websites.⁷⁰³ Why this obligation is introduced for associations is not fully clear given that the Act on Associations already lays down that associations granted funds from the budget shall publish reports on their work at least once a year and submit them to their funders.

The imposition of different accounting and reporting obligations on associations receiving over 50% of their total revenues from the budget and subjecting them to stricter audits and control by the state institutions than those not funded from the budget or to such an extent appears justified. The practical effects of the new provisions on the work of associations are yet to be seen, however, given that the Budget System Act was amended this year. The text of the Act is quite complicated and calls for in-depth knowledge of tax law and public finance, wherefore associations opting to be funded from the budget will apparently have to consult tax experts while they implement projects of public interest.

Civil society organisations had also proposed amendments to the Draft Accounting Act that were initially endorsed by the Ministry of Finance and Economy in 2011 but dismissed in 2012. The authors of the amendments suggested that the application of the Act be extended to foundations and endowments, which the valid Accounting and Audit Act⁷⁰⁴ does not. They also proposed that non-profit organisations be subjected to more favourable treatment than profit-making legal persons with respect to accounting, keeping of business books and charts of accounts and the introduction of simple book-keeping for “small” organisations (with limited account activity or without funds). However, since the amendments were dismissed, the associations now have the same status as legal persons under the Draft Act. The authors of the amendments had also suggested equal treatment of churches and religious communities and other private non-for-profit legal persons. Under the Draft Act, the Serbian Orthodox Church is exempted from all the obligations in this law,⁷⁰⁵ although it had received the most funding under budget line 481 for civil society organisations according to the data of the Centre for the Development of the Non-Profit Sector. The proposed amendments have been supported by the Office for

701 The Minister shall draw up a list of public fund beneficiaries in a separate enactment pursuant to a proposal of the Treasury (Art. 8, Budget System Act).

702 See *Information from the Treasury*, available in Serbian at <http://www.gradjanske.org/page/news/sr.html?view=story&id=5977§ionId=1>.

703 Survey: *Assessment of the Situation in the Civil Sector in 2011*, Civic Initiatives

704 *Sl. glasnik RS* 46/06 and 111/09.

705 The provisions of this Act shall not apply to the budgets and budget fund beneficiaries, churches and religious communities, residential buildings with the status of legal persons or mandatory social insurance organisations unless so specified in other regulations (Art. 3(5) of the Draft Accounting Act).

Cooperation with Civil Society, the Protector of Citizens and the Commissioner for the Protection of Equality, which may lead to their endorsement at a later stage of the legislative process.

10.3. Restriction and Prohibition of the Work of Associations

Freedom of association is not an absolute right, wherefore it may be restricted in the event such restrictions are prescribed by law, necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others (Art. 11(2), ECHR). Art. 22(2) of the ICCPR lays down that freedom of association may be restricted in the interest of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. The Constitution specifies that the Constitutional Court may ban only associations the activities of which are aimed at the violent change of the constitutional order, violation of guaranteed human and minority rights or incitement to racial, ethnic or religious hatred. The Act on Associations further prescribes that an association may be prohibited in the event its goals and activities are aimed at undermining the territorial integrity of the Republic of Serbia, incitement of inequality, hatred or intolerance on grounds of race, ethnicity, religious or other affiliation or orientation, as well as of gender, sex, physical, psychological or other features or abilities.

The Act on Associations thus introduces new grounds for banning an association not recognised in international documents – undermining territorial integrity. On the other hand, it specifies what “protection of the rights and freedoms of others” as grounds for prohibiting an association entail. However, undermining territorial integrity need not necessarily fall under “the interests of national security” grounds. If the activities of an association are peaceful and if it is conducting non-violent political activities and advocating e.g. greater autonomy for cities and provinces, then “undermining territorial integrity” does not constitute legitimate and sufficient grounds for prohibiting its work. The Anti-Discrimination Act prohibits associating to commit discrimination, i.e. activities of organisations or groups aimed at violating the rights and freedoms enshrined in the Constitution, international and national law, or at inciting national, racial, religious or other forms of hatred, dissent or intolerance (Art. 10), whereby it also elaborates the “protection of the rights and freedoms of others” grounds.

Under the Act on Associations, a decision to prohibit an association may also be based on the actions of the association’s members provided that there is a link between their actions and the activities or goals of the association, that the actions are based on the organised will of the members and the circumstances of the case indicate that the association tolerated the actions of its members (Art. 50(2)). Secret and paramilitary associations are prohibited by the Constitution *ex constitutio* and by the Act on Associations *ex lege*.

The Act on Associations prohibits the public use of visual symbols and insignia of prohibited associations (Art. 50(5)). The Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia⁷⁰⁶ further prohibits the activities of organisations reaffirming neo-Nazi and Fascist ideas in their statutes and programmes. Under the Act, a procedure may be initiated to delete from the Register a registered organisation or association advocating neo-Nazi or Fascist goals and disregarding the prohibitions in the Act (Art. 2(2)). The Act, therefore, does not introduce fresh grounds for the prohibition of an association, but grounds for initiating the procedure for deleting it from the Register. Under the Act, a fine shall be imposed upon a registered association the member of which committed the misdemeanour of propagating neo-Nazi or Fascist ideas; the Act however, does not require that the individual acted in the capacity of a member in the specific case or that the association supported, endorsed or tolerated his actions. Such automatic punishment of associations for the activities of their members may jeopardise the freedom of association because associations cannot control or be aware of all the actions of all their members. The Convention on the Elimination of All Forms of Racial Discrimination⁷⁰⁷ lays down that States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination and obliges them to declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and recognise participation in such organisations or activities as an offence punishable by law (Art. 4(1)). The Republic of Serbia has acted in compliance with the commitments it assumed when it ratified the Convention on the Elimination of All Forms of Racial Discrimination by adopting and applying this Act. The Act, however, needs to be elaborated in greater detail with respect to the misdemeanour penalties imposed on associations and it needs to define the concept “neo-Nazi and Fascist ideas and insignia”. Furthermore, the Act prohibits “all activities of neo-Nazi and Fascist associations” without requiring of the Constitutional Court to first qualify the associations as such and prohibit their work or of the Business Registers Agency to dismiss their registration applications, which provides a lot of room for arbitrariness of the misdemeanour courts.

The procedure for prohibiting an association is initiated on the motion of the Government, the Republican Public Prosecutor, the ministry charged with administration affairs, the ministry charged with the field in which the association is pursuing its goals or the registration authority – the Business Registers Agency.

Under Article 51(2) of the Act on Associations, the procedure to prohibit an association may be initiated also against associations that do not have the status of a legal person, i.e. are not entered in the Register. The Constitutional Court does not

706 *Sl. glasnik RS* 41/09.

707 *Sl. list SFRJ* 31/67.

have an unequivocal view on whether it is entitled to ban an unregistered association yet. In 2011, it dismissed the motion of the Republican Public Prosecutor to ban 14 soccer fan groups, explaining that the entry of an association in the Register was the *conditio sine qua non* for establishing its jurisdiction to prohibit an association and that it did not have the jurisdiction to prohibit informal associations. In June 2011, however, the Constitutional Court banned the organisation National Formation, after establishing that it was secret and that its activities were thus prohibited. The Court also prohibited its registration.⁷⁰⁸ The Constitutional Court was of the view that the formal shortcomings were the consequence of the founders' conscious intention to conduct their activities clandestinely precisely because they were aimed at achieving prohibited goals and that this hindered the competent state authorities from taking adequate measures against the association and its members and penalising them. The Constitutional Court Act was amended in December 2011. The new Article 81a lays down that the Constitutional Court shall render a decision to prohibit the work of an association on the motion for its prohibition in the event it finds that the association is secret or paramilitary and entitles the Constitutional Court to order in its decision the measures to be implemented to prevent the activities of that secret or paramilitary association. This Article should leave no room for a dilemma whether or not the Constitutional Court has the jurisdiction to rule on the prohibition of an informal association and should facilitate the alignment of the Court's case law on this issue.

The Constitutional Court in 2012 rendered a Decision prohibiting the work of the association called Fatherland Movement Obraz⁷⁰⁹ on the motion the Republican Public Prosecutor (RPP) filed in 2009. The Court found that its activities aimed at violating human and minority rights and freedoms and inciting national and religious hatred. In its motion, the RPP called for the ban of this association on the following grounds: the association's views voiced in its publicly available statutory documents and the views voiced publicly by its members regarding the incidents in which the members of the association had participated.⁷¹⁰ In the view of the RPP, these views constituted discrimination against different political and social options and introduced hate speech, and listed the conditions for reviving "authentic Serbian statehood" entailing resort to violence to achieve them, the consistent application of the concept of intolerance, etc. The RPP particularly noted the past and ongoing criminal and misdemeanour proceedings with regard to the events the association's members had taken part in and the statements of the association's representatives in

708 More in the *2011 Report*, I 4.11.3.

709 Constitutional Court decision VII U 249/2009, published in *Sl. glasnik RS* 69/12 of 12 July 2012.

710 The following incidents were singled out: assaulting members of the LGBT population; preventing the Pentacostal Church from distributing Christmas presents to children by chanting the slogan "Kill, slay, let not a sectarian live"; interrupting the event organised by the association Women in Black, active participation in the violence that erupted because of the Pride Parade, setting the Vojvodina flag on fire.

print and electronic media that included open threats against the LGBT population. The RPP was of the view that this association was abusing the freedom of association to undermine the constitutional order and that the principles of democracy could not be invoked by those who opposed democracy.

The Obraz Statute lists the following as the goals of this association: promotion of traditional Serbian and Christian Orthodox values, advocacy of the restoration of traditional Serbian statehood, affirmation of the values facilitating the spiritual, national and cultural revival of the Serbian nation. The Constitutional Court assessed that such generally defined goals did not give cause for the prohibition of this association. It, however, found that this association openly demonstrated its intolerance and prejudice against specific members of society whose opinions, moral views and lifestyle it did not share, notably those of atheists, Jews, the LGBT population and other nations in its goals, which were elaborated in detail in the programme documents available on Obraz's website.⁷¹¹ In these documents, the association clearly expressed its intention to resort to all available means, including violence, to achieve its goals. The association's document "To Serbian Enemies" stigmatises, insults and threatens entire social groups which the association perceives as enemies of the Serbian people.⁷¹² The views advocated by Obraz constitute discrimination and hate speech against Serbs who, in the view of the members of this association, are not endowed with the features of "good Serbs" and against members of specific social groups who they qualified as "the evil that must be fought". The Court further established that the actions of the association members confirmed that the views expressed in the programme documents were authentic and constituted the goals the association sought to achieve and the expression of the organised will of its members. The association members had never distanced themselves from any views expressed in the accompanying documents and consider them their most important documents, as the association representative Mladen Obradović confirmed at the public hearing⁷¹³. The Court also concluded

711 Some of these documents are titled: *Main Principles, Proclamation to Friends, To Serbian Enemies*.

712 Incitement of hatred against specific groups was strengthened by the choice of words Obraz used when it addressed e.g., "Ustashas": "you have stolen from us everything you did not have, starting with language and history" or to "Moslem extremists": "by desperately searching for a new identity, you even stole the name of the newly proclaimed nation – Bosniaks and a non-existent language – Bosnian from those you originate from, trying unsuccessfully to overcome the janissary complex, which will torture you until you return into the fold of Serbianhood and the Christian Orthodox faith". Obraz qualified LGBT people as "perverts" in its Proclamation and threatened them with "punishment of utmost severity and eradication".

713 The Belgrade First Basic Court found Obraz leader Mladen Obradović guilty of inciting hatred in the run up to the 2009 Pride Parade and sentenced him to ten months' imprisonment. The Belgrade Appellate Court overturned the judgment and ordered a retrial, finding that the first-instance court had not specified the grounds which led it to establish that Obradović, and not someone else, organised the writing of the threatening and insulting graffiti. On 20 April 2011, the Belgrade Higher Court rendered a first-instance conviction against Obradović and

that the numerous media statements made by the association members, which the association and its members never denied, confirmed the views in the accompanying documents, particularly those demonstrating intolerance and prejudice against the LGBT population.⁷¹⁴

The Court established that the association's activities were not reflected only in its public promotion of illicit goals, but also in the numerous activities of its members that had led to disruptions of public law and peace, and which the association had not distanced itself from whereby it reaffirmed its acquiescence with these activities. Regarding the statement by the association's representative that the members of the association had the legitimate right to express their disagreement with the holding of specific public events at which views contrary to the ones they advocated were voiced, and to exercise their rights to assembly and freedom of opinion and expression, the Court concluded that the members of the association could not claim violations of these rights in these specific events, because they were the ones who had abused these freedoms to deny other individuals and groups of the freedom to exercise them. The Constitutional Court was of the view that the association's programme principles specifying the association's goals and their expression in the statements of the association leaders and the actions the members of the association took part in were aimed at violating the constitutionally guaranteed rights and freedoms of citizens, the principles of the rule of law and civil democracy and commitment to European principles and values. The Constitutional Court explained the existence of the social necessity to restrict the freedom of association in this specific case by stating that the association's views and activities constituted advocacy of a model of society based on the discrimination against specific social groups, use of hate speech, harassment and degrading treatment and its readiness to resort to violence as a means to achieve its goals. The Constitutional Court particularly took into account that the activities of the association took place in Serbia, whose past was fraught with wars instigated by religious and national intolerance and that all developments that may reverse the endeavours demonstrating the Serbian democratic tradition needed to be prevented on time in order to build democracy and pluralism. The Constitutional Court was of the view that the association had to be banned in view of the fact that the actions undertaken by the competent authorities to suppress the illicit conduct by its members, in the form of misdemeanour and criminal proceedings, failed to suppress the illicit activities of the association.

sentenced him to two years' imprisonment for organising the riots in Belgrade during the Pride Parade, held on 10 October 2010.

714 For example: the members of the association brandished the association insignia and patrolled the centre of Belgrade on 17 May 2008 when an LGBT group announced a "street conference". The association issued a statement on its official website, on the webpage titled Activities – *Obraz in Action*, in which it said that scores of its members were part of the so-called "troikas" that had patrolled the central streets of the city to clearly demonstrate to all those dreaming of a Gay Parade that they would not tolerate the public promotion and dissemination of evil and would employ "all means" to prevent it.

The Constitutional Court prohibited the organisation *Obraz* in its Decision and ordered its deletion from the Register, but did not review the admissibility of the RPP motion that the Constitutional Court prohibit all future associations and groups that want to continue with the association's activities in order to prevent *Obraz's* activists from circumventing the Decision on its prohibition and register new associations with the same goals and the activities of which would testify to continuity of *Obraz's* activities. The prohibition of *Obraz* caused vehement reactions in the media. However, although *Obraz* was banned, its members have continued publicly displaying the association's symbols.⁷¹⁵ A letter threatening to kill the judges of the Constitutional Court for prohibiting *Obraz* arrived in the Constitutional Court in December 2012.⁷¹⁶

The Constitutional Court rendered a Decision in November 2012 rejecting the RPP's motion to prohibit the work of the Belgrade-based association Serbian National Movement (SNP) 1389 and the unregistered association of citizens SNP *Naši* from Arandjelovac and dismissing the motion to prohibit the work of the informal association SNP *Naši* 1389.⁷¹⁷ The Constitutional Court took into account the analysis of the associations' programme principles and the measures the competent authorities had already taken against them and their members and assessed that there was no pressing social need to prohibit them because prohibition was "the last line of defence of a democratic society" when the activities of an association "result in extremely severe and intensive violations of constitutionally guaranteed rights and freedoms". These organisations intensified their activities after the Constitutional Court rendered its decision. The organisation SNP *Naši*, for instance, published blacklists of "anti-Serbian" NGOs and media that ought to be banned and launched a campaign against media and organisations promoting human rights. It also lashed out at the Balkan Trust for Democracy and its senior official Ivan Vejvoda, qualifying him as "the best paid foreign agent" involved in anti-Serb activities and demanding his arrest.⁷¹⁸

SNP 1389 advocates the following goals: "achievement of Serbian national interests, protection of Serbia's territorial integrity and sovereignty, liberation and unification of all Serb lands, prevention of economic and cultural globalist tendencies, affirmation of authentic Serbian culture...". One of its programme principles involves fighting against sects and uniating, drug addition, gay movements and other deviant forms of behaviour, and for patriotism, the Christian Orthodox faith, family

715 The banner "Serbian Army with *Obraz* (Honour)" was used during the "Thanksgiving Procession" commemorating the Kumanovo Battle victory, see the report in Serbian at: <http://www.nspm.rs/hronika/u-beogradu-odrzana-qsetnja-zahvalnostiq-u-znak-secanja-na-pobedu-u-kumanovskoj-bitki.html?alphabet=l>.

716 See *Death Threats against Constitutional Court Judges*, available in Serbian at <http://www.ustavni.sud.rs/page/view/156-101746/pretnja-smrcu-sudijama-ustavnog-suda>.

717 Constitutional Court Decision VII U 482/2011 of 14 November 2012.

718 *Danas*, 18 December, p. 4

values... Similar goals are advocated also by the unregistered association SNP Naši. The Court examined the associations' programme principles, their activities and those of their members and the effects and proportionality of the measures the competent state authorities had taken against them both individually and together. The RPP qualified SNP 1389's written statements, graffiti, posters and video recordings the authorship of which is ascribed to this association in the March 2008-November 2011 period as "dissemination of hate speech", "indirect incitement to violence", "expression of discriminatory views against the LGBT population", "ridicule of the victims of the massacre in Srebrenica". The association's representatives stated that the views they had expressed in their written documents and through the association's activities were not directed against the members of other groups, but against the ideas they advocated and more broadly, and that this was how the association was actually exercising its right to freedom of expression.

The Court found that specific provisions of the associations' general enactments might indirectly give rise to anti-constitutional activities but that, in the absence of actual anti-constitutional activities, this did not constitute sufficient grounds to reliably conclude that they were inciting their members to conduct activities aimed at achieving anti-constitutional goals to the extent that would warrant the prohibition of these associations by the Constitutional Court. The PPR presented to the Court data on the criminal and misdemeanour prosecution of individuals believed to be members of the impugned associations. The Court, however, was unable to establish on the basis of the available evidence whether the final decisions in the proceedings against the specific individuals had been rendered or to establish beyond reasonable doubt that they were members of the impugned associations. The representatives of the associations denied that their members had taken part in the events mentioned in the motion for their prohibition. The PPR had not submitted any evidence denying the allegations of the representatives of the associations or confirming the claims that their members had taken part in those events, wherefore the Court could not uphold a mere claim by the PPR that the illicit activities of these individuals had been conducted at the order or with the knowledge or acquiescence of the associations. In that context, the Court concluded that it could not acknowledge as legally relevant evidence the initiated misdemeanour and criminal proceedings in the absence of final court decisions, let alone the criminal reports. The Court was of the opinion that it could prohibit an association only once it was reliably established that all the preceding measures undertaken by the competent authorities had not prevented the continuous activities of the associations aimed at achieving goals prohibited by the Constitution. The Constitutional Court was not satisfied that the state authorities had exhausted all the preventive and penal measures they could have applied against the activities of these associations and their members.

In the view of the Constitutional Court, "the measure of prohibition must be preceded by the indisputable conclusion that the actual activities of an association amounted to abuse of rights and freedoms, which the competent authorities had failed to penalise by imposing adequate continuous and timely measures". There-

fore, the motion for the prohibition of these associations did not pass the proportionality test before the Constitutional Court. The Constitutional Court dismissed the RPP motion to ban the informal association SNP Naši 1389 after it established that the association was not registered or active and that the RPP had not submitted data requisite for identifying the association, wherefore the procedural requirements for conducting a proceeding had not been fulfilled. Such reasoning by the Constitutional Court indicates its ambivalent view towards its jurisdiction to rule on motions for the prohibition of informal associations.

The organisation SNP Naši, the ban of which the Constitutional Court reviewed in this case as well, had in the meantime run in the elections and become part of the local government in Arandelovac. This organisation in 2012 drafted a “Blacklist of NGOs” in the Republic of Serbia which it qualified as unsuitable.⁷¹⁹ SNP Naši is, *inter alia*, publicly known for its extremely discriminatory views against the members of the LGBT community,⁷²⁰ and its ideology based on the programme principles of “Serbian patriotism and good husbandry”.⁷²¹

10.4. Association of Aliens

The Act on Associations allows aliens to establish local associations provided that at least one of the founders resides or is headquartered in the territory of the Republic of Serbia. The Act also governs the status-related issues of foreign associations in Serbia. Under the Act, a foreign association shall denote an association headquartered in another state, established under that state’s regulations to achieve a joint or common interest or goal, the activities of which are not aimed at making profit. A foreign association may pursue activities in Serbia in the event it establishes a representative office entered in a separate register of the Business Registers Agency.

The representative office of a foreign association is entitled to operate freely in the territory of the Republic of Serbia provided that its goals and activities are not in contravention of the Constitution or laws of the Republic of Serbia, international treaties acceded to by the Republic of Serbia or other regulations. The Constitutional Court shall decide on the prohibition of a foreign association on the motion of the same authorities entitled to seek the prohibition of a national association.

719 BCHR is on that list together with another 16 NGOs. None of the state authorities, apart from the Office for Cooperation with Civil Society, reacted to the publication of the list. See more in the *Report on the Work of the New Authorities in the Fields of Human Rights, Transitional Justice and Rule of Law in Serbia, 2012*.

720 The organisation Naši drafted a law prohibiting Gay Pride propaganda in the territory of the Republic of Serbia in 2012. The draft is available in Serbian at its official website <http://nasisrbija.org/wp-content/uploads/2012/10/ZAKONGEJPRAJDPROPAGANDA-NASISRBIAorg.pdf>.

721 The Programme is available in Serbian at <http://nasisrbija.org/index.php/program-3/>.

10.5. Political Parties

The Act on Political Parties defines a political party as a free and voluntary association of citizens established for the purpose of achieving political aims by democratically shaping the political will of citizens and participating in elections (Art. 2). The Act defines a political party of a national minority as a party the activities of which are directed at representing and advocating the interests of a national minority and at protecting and advancing the rights of persons belonging to that national minority. Parties of national minorities enjoy special rights: they need fewer signatures to register, are entitled to use the name of the party in their minority language and to seats in parliament even if they won less than 5% of all cast votes. Membership in a political party is free and voluntary for all adult citizens of Serbia with a legal capacity, with the exception of individuals whose offices are incompatible with political party membership under the law.

A political party shall acquire the status of a legal person by entry into the Register of Political Parties and may begin work on that day (Art. 5). A political party may be established by at least 10,000 adult citizens of Serbia with a legal capacity (Art. 8), while a political party of a national minority may be established by at least 1,000 adult citizens of Serbia with a legal capacity (Art. 9). The Act governs the entry of political parties in the Register of Political Parties and the keeping of the Register. Political parties shall be entered in the Register of Political Parties kept by the ministry charged with administrative affairs. Under Article 30 of the Act, parties are under the obligation to apply for registration every eight years (Articles 35 and 36), unless the candidates they nominated independently or in a coalition of political parties won at least one seat at the national or provincial parliamentary elections, as determined by the competent ministry *ex officio*, whereby their activity is confirmed. Political parties may associate in broader political alliances with other parties and merge with other parties; these new parties shall acquire legal subjectivity, while the individual parties that had merged shall lose their legal subjectivity (Arts. 33 and 34, Act on Political Parties).

There are 91 political parties in Serbia,⁷²² 52 of which are parties of national minorities.⁷²³ Forty-five parties running on 11 election tickets won seats in the Serbian National Assembly at the 2012 parliamentary elections,⁷²⁴ whilst the prior convocation included 22 parliamentary parties.⁷²⁵ Some pursued their political

722 Statement from the Register of Political Parties prepared by the Sector for Registries and the Exercise of the Freedom of Association of Citizens of the Ministry of Justice and State Administration, available in Serbian at <http://www.drzavnauprava.gov.rs/article.php?id=784>. More information on the 2012 election see II.12.5.

723 More on national minority parties see I.6.2.4.

724 See <http://www.parlament.gov.rs/national-assembly/national-assembly-in-numbers.1743.html>.

725 Pursuant to Article 45(3) of the Act on Political Parties (*Sl. glasnik RS*, 36/09), the Ministry of State Administration and Local Self-Government deleted from the Register of Associations, Social Organisations and Political Organisations and from the Register of Political Organisa-

activities and took part in the elections via associations of citizens, whereby they circumvented the provisions on the establishment, activities, dissolution and prohibition of political parties. G17+, for instance, stopped appearing independently in public, giving primacy to its engagement within the United Regions of Serbia.⁷²⁶ The Serbian Convention Dveri reorganised itself into a new association of citizens called the Movement for Life of Serbia and ran in the parliamentary elections on the ticket titled Dveri for Life of Serbia, but failed to pass the threshold.⁷²⁷

10.6. Dissolution and Prohibition of Parties

Under the Act on Political Parties, a party shall cease to exist upon deletion from the Register, which shall ensue in the event a party decides to dissolve, merge with one or more other political parties or in the event the Constitutional Court prohibits its work or it fails to apply for re-registration within the legal deadline. The Act explicitly prohibits the activities of political parties aimed at the violent change of the constitutional order or undermining the territorial integrity of the Republic of Serbia, the violation of guaranteed human or minority rights or incitement or encouragement of racial, national or religious hatred (Art. 4). The procedure for the prohibition of a political party shall be initiated on the motion of the Government, the Republican Public Prosecutor or the ministry charged with administrative affairs, which shall be reviewed by the Constitutional Court (Articles 37 and 38).

10.7. Trade Unions

The freedom to associate in trade unions is the only trade union freedom guaranteed by all four general human rights protection instruments ratified by the Republic of Serbia – Article 22 of the ICCPR, Article 11 of the ECHR, Article 8 of the ICESCR and Articles 5 and 6 of the ESC. This freedom entails the right to establish a trade union and join it of one's own free will, the right to establish associations, national and international alliances of trade unions and the right of trade

tions all political organisations that had not applied for registration in the Register of Political Parties or that had failed to submit the requisite documentation by 23 January 2010; the deletion of hundreds of parties from the Register of Political Parties, however, did not result in the reduction of the number of parties in the Serbian parliament; rather, the number of parties in the National Assembly more than doubled after the 2012 parliamentary elections.

726 The United Regions of Serbia (URS) was registered as an association of citizens in 2010 with the aim of achieving socio-economic development. URS announced in 2012 that it would transform into a political party and that its programme would be based on socially responsible market economy, decentralisation and regionalisation, and the modernisation of all relevant social activities. See the RTS report in Serbian at <http://www.rts.rs/page/stories/sr/story/9/Politika/1221912/URS+postaje+jedinstvena+partija.html>.

727 The list of nominated candidates is available in Serbian at http://www.rik.parlament.gov.rs/latina/proposisi_frames.htm.

unions to act independently, without interference from the state. Serbia has also signed ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, ILO Convention No. 11 Concerning Right of Association (Agriculture),⁷²⁸ ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively⁷²⁹ and ILO Convention No. 135 Concerning Workers' Representatives.

Article 55 of the Constitution guarantees the freedom of association in trade unions. Trade unions may be established by registration with the competent state authority pursuant to the law and do not require prior approval. The Constitutional Court is the only authority entitled to prohibit the work of any association, including a trade union, and only in the cases explicitly laid down in paragraph 4 of Article 55. The exercise of the freedom to organise in a trade union is governed in greater detail by the Labour Act, laws regulating association of citizens and by-laws. The Labour Act defines a trade union as an autonomous, democratic and independent organisation of workers associating in it of their own will to advocate, represent, promote and protect their professional, work, economic, social, cultural and other individual and collective interests (Art. 6). Article 206 of the Act guarantees workers the freedom of organising in trade unions. Trade unions shall be established by entry in a register and do not require prior consent. The register shall be kept by the ministry charged with labour affairs. The trade union registration procedure is governed by the Rulebook on the Registration of Trade Unions.⁷³⁰ Under Article 7 of the Rulebook, an organisation shall be deleted from the register, *inter alia*, pursuant to a final decision prohibiting the work of a trade union (Art 7 (item 2) of the Rulebook)⁷³¹. Under the Act on Associations, only the Constitutional Court may render a decision to ban any association (Art. 50(1)).⁷³²

10.8. Associations of Civil Servants and Security Forces

The Constitution prohibits the judges of the Constitutional Court and other courts, public prosecutors, the Protector of Citizens, members of the police and armed forces from membership in political parties.⁷³³ The Police Act allows police

728 *Sl. novine Kraljevine Jugoslavije* 44–XVI/30.

729 *Sl. list FNRJ (Addendum)* 11/58.

730 *Sl. glasnik RS* 50/05 and 10/10.

731 Article 4 of the ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise explicitly prohibits the dissolution and suspension of work of a trade union by the administrative authorities. According to the ILO Committee on Freedom of Association, this is the most extreme form of interference in the independent operations of trade unions by public authorities.

732 The provisions, which had allowed *municipal administrative bodies* charged with internal affairs to render decisions prohibiting the work of trade unions, were abolished by the adoption of the Act on Associations.

733 Act on Political Parties (Article 21) .

officers to organise in trade unions, professional and other organisations but prohibits their organisation in parties and political activities in the ministry (Art. 134). The Act on Judges and the Act on Public Prosecution Offices allow judges, public prosecutors and their deputies to associate in professional organisations to protect their interests and take measures to protect their autonomy (public prosecutors and their deputies) and their independence and autonomy (judges). The Act on the Army of the Republic of Serbia guarantees professional army members the right to organise in trade unions (Art. 14(3)). In addition to prohibiting army members from membership of a political party, the Act also prohibits them from attending political events in uniform and from engaging in any other political activities apart from exercising their active right to vote (Art. 14(1)). Given that the Constitution of Serbia explicitly prohibits specific civil servants from membership of political organisations in Article 55(5) but does not include a ban on membership of a trade union, the interpretation according to which these categories of civil servants have the constitutionally guaranteed right to associate in trade unions is a correct one.

10.9. Recommendations

1. Ensure the transparency of state funding and co-funding of programmes of public interest implemented by associations of citizens.
2. Align the tax laws with the Act on Associations and ensure that the former provide legal persons with incentives and tax relief in the event they donate funds to associations of citizens engaged in promoting and protecting human rights and democratic values, fighting against corruption, et al.
3. Ensure the equal treatment of churches and religious communities and other private non-profit legal persons by the Draft Accounting Act.
4. Hold an association liable for a misdemeanour in the event its member engages in prohibited activities only if a connection can be established between these activities and the association and define the concepts of “Fascist and neo-Nazi/ ideas and insignia” by amending the Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia.
5. Align the Act on Associations with the Act on Political Parties and other regulations governing the financing of political parties to ensure that associations of citizens pursuing political goals and political parties have the same rights and obligations with a view to preventing manipulations and ensuring a level playing election field and the full respect of the freedom of association and voting rights.

11. Peaceful Enjoyment of Property

11.1. General

The right to property guaranteed by Article 1 of Protocol No. 1 to the ECHR is comprised of three different rules. The first rule, expressed in the first sentence of Article 1(1), is general in nature and outlines the principle of peaceful enjoyment of property. The second rule, formulated in the second sentence of the same paragraph, regulates the deprivation of property and subjects it to certain conditions. The third rule, in paragraph 2, recognises the right of state parties to control the use of property based on public interest. According to ECtHR case law, the second and third rules should be interpreted in light of the general principle expressed in the first rule.⁷³⁴

In its case-law, the ECtHR has held that a balance between public interest and the rights of individuals must be found in every case of interference in the right to peaceful enjoyment of property. The question of monetary compensation does not arise only with respect to expropriation and may be sought also in the case of restrictions on the use of property.⁷³⁵

Article 58 of the Constitution of Serbia guarantees the right to property. The Constitution is mostly in compliance with international standards, especially with respect to seizure of property, which, as it explicitly prescribes, shall be allowed only in public interest and if the owners are fairly compensated for the property. However, the provision allowing for the restriction of the right to property does not include a provision on the proportionality of such a restriction, which is in contravention of Serbia's international obligations. Under the Constitution, the seizure or restriction of property to collect taxes and other levies or fines shall be permitted only in accordance with the law.

The enjoyment of the right to property is governed by numerous property-related laws and other laws that affect property. Many of these laws have not been amended for years. Numerous property rights are linked to the exercise of other neighbouring economic and social rights and are, thus, analysed in the sections of the Report focusing on those rights.⁷³⁶ Suffice to note here that the most frequent violations of the right to property in Serbia arise from the non-payment of wages to workers and the non-enforcement of court decisions awarding the claimants specific property rights.

Expropriation is governed by the Expropriation Act, which was last amended in 2009.⁷³⁷ This Act totally ignores the legitimate interests of the property owners

734 See *Holy Monasteries v. Greece*, ECmHR, App. No. 13092/87 (1993). *Kozacioglu v. Turkey*, ECHR, App. No. 2334/03 (2009).

735 See *Sporrong and Lomroth v. Sweden*, ECmHR, App. No. 7151/75 (1982).

736 See II.16.

737 *Sl. glasnik RS* 53/95 and 20/09. A more detailed overview of the Act is available in the 2011 Report, I.4.12.

and gives absolute priority to public interests.⁷³⁸ The lack of the proportionality principle in regulating expropriation in public interest is a feature of laws of countries whose development level is much lower than that of Serbia. The absence of this principle is very difficult to reconcile with Serbia's obligations arising from the ECHR and its membership of the Council of Europe.

11.2. Restitution and Compensation of Former Owners

The Restitution Act was adopted at long last in late 2011⁷³⁹ and BCHR analysed it in detail in the *2011 Report*.⁷⁴⁰ As noted in that *Report*, the Act deals with the restitution of only publicly owned movable and immovable property appropriated after World War Two. The right to restitution is primarily granted to domestic natural persons, but also to foreign nationals under reciprocal terms. Reciprocity is interpreted broadly and entails the possibility of Serbian nationals acquiring property in another state on any grounds. The right to restitution may not be exercised by individuals who had fought in the WWII occupation forces or their heirs. This provision was criticised above all by persons belonging to those national minorities in Serbia whose communities the occupation forces had mobilised by force because of their ethnic affiliation. The Act gives precedence to restitution in kind and compensation shall be offered only when restitution in kind is impossible. State-owned companies are not subject to natural restitution and their former owners may only seek compensation. The total amount of compensation is limited to two billion EUR. Compensation is awarded in the form of state bonds. The right to restitution is exercised in administrative proceedings before the Restitution Agency.

The work of the Restitution Agency was blocked until all its bodies were established and it finally became operational in March 2012. Assessments are that the Agency has been investing great efforts in ensuring that its work is transparent. Its Internet presentation is updated on a daily basis⁷⁴¹ and the information on the website is available in Serbian, English, German, Slovak, Hungarian, Turkish and Romanian. The Agency has been publishing its monthly Information Booklets since October 2012, which has won it the reputation of being one of the most efficient government institutions in terms of transparency.⁷⁴² A total of 9,705 restitution claims were filed the Agency from March to December 2012.⁷⁴³ The Agency reviewed 1,550 claims and rendered 1,120 first-instance decisions from April to December 2012, i.e. it dealt with 11.54% of the filed claims.⁷⁴⁴ A total of 52 appeals

738 *Ibid.*

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

740 See *2011 Report*, I.4.12.3.

741 The Restitution Agency website is available at <http://www.restitucija.gov.rs/index.php>.

742 See the Restitution Agency's Information Booklet available in Serbian at: <http://www.restitucija.gov.rs/informator.php>.

743 Information Booklet of the Restitution Agency, December 2012, p. 47.

744 *Ibid.*, p. 47.

of its decisions were lodged and 16 administrative disputes were initiated in this period. During the first nine months of work, the Agency rendered decisions on the restitution of 313 business premises totalling nearly 21,000 square meters in area, 100 apartments the total area of which exceeds 6,500 square meters, nine residential buildings (with a total area of around 1,500 square meters) 23 business buildings (with a total of 6,500 square meters), five ancillary buildings (with an area totalling 171 square meters) and one cultural building.⁷⁴⁵ In sum, the former owners regained possession of a total of 451 facilities the total area of which exceeds 35,000 square meters. The Agency rendered decisions returning to 393 claimants their plots of construction land totalling 35,000 square meters in area. It also rendered decisions approving the restitution of 521,42,92 hectares of farmland and 162,59,94 hectares of forests and forestland.

Churches and religious communities also regained their former property in 2012. Most of the property was returned to the Serbian Orthodox Church (nearly 400 hectares of farmland, almost 1500 hectares of forests and forestland, around eight hectares of construction land, as well as various buildings with an area totalling over 3,500 square meters). The Roman Catholic Church regained possession of 136 hectares of land and over 5,500 square meters of various buildings. Property was also returned to the Evangelical Christian Church, the Slovak Evangelical Church, the Romanian Orthodox Church and the Jewish community.

The Agency's performance in the first nine months of its existence was satisfactory. Its exceptional transparency and efficiency was also acknowledged by the Restitution Network, an NGO focusing on the just satisfaction of the former owners.⁷⁴⁶ The BCHR will continue monitoring the restitution process and will focus in its 2013 Report on the restitution procedure and the problems the claimants face the most often. Assessments are that there will be enough information for such an analysis by the end of 2013, when the Agency will have been working for almost two years.

11.3. Specially Protected Tenancy

Specially protected tenancy is a specific form of the right to housing created in the former Yugoslavia that applied both to socially and privately owned apartments. The Serbian Housing Act⁷⁴⁷ regulates for the most part the manner in which the institute will gradually disappear from the Serbian legal system.⁷⁴⁸

After the socially owned apartments were bought by their tenants and became private property (in accordance with two housing laws passed in the early nineties

745 *Ibid*, p. 48.

746 See the report in Serbian on RTS: <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1194698/Zakon+ko%C4%8Di+restituciju.html>.

747 *Sl. glasnik RS* 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 48/94, 49/95, 16/97, 46/98, 26/01 and 99/11.

748 See the *2006 Report*, I.4.12.5.

entitling the holders of specially protected tenancy to buy the apartments at favourable prices), specially protected tenancy in Serbia has applied only in cases of privately owned apartments appropriated in an administrative procedure by 1973 and was transformed into the right of rent but specific administrative restrictions were set, notably with respect to rent amounts and termination of tenancy. The position created in Serbian case-law is that the special protected tenancy on privately owned apartments cannot be awarded to persons born after 1973 notwithstanding the fact that they have lived in the joint household with the last holder of the specially protected tenancy right. This institute will therefore naturally “die out”. The question remains whether there will be violations of the right to the peaceful enjoyment of property of a person, who was born after 1973 and has lived his entire life in the apartment but received an eviction order after the death of the holder of the special protected tenancy right because he was unable to transfer this right to himself.

As the issue of restitution was still outstanding at the time, the Housing Act had placed the holders of specially protected tenancy on private apartments at a disadvantage vis-à-vis those with tenancy on socially owned apartments as the latter were entitled to purchase the apartments they were occupying and fully dispose of them.⁷⁴⁹ In the 1945–1990 period, holders of tenancy on privately owned apartments were considered to have solved their housing problems and were unable to apply for socially-owned apartments that were being allocated. Now that the issue of restitution has been regulated by the law in Serbia and that the Restitution Agency has demonstrated exceptional efficiency during the first nine months of work, particularly with respect to the restitution of apartments, the housing problems of holders of specially protected tenancy are likely to become acute in 2013 and 2014.

11.4. Recommendations

1. Amend the Expropriation Act to ensure the respect of the legitimate interests of the owners of property and the proportionality principle.
2. Earmark funds for the financial restitution of property and begin paying it out.
3. Continue consistently applying the Restitution Act.
4. Find a solution to the problems of holders of tenancy rights to housing subject to restitution.
5. Consistently align the case law of the Constitutional Court with that of the ECtHR on all issues regarding the right to peaceful enjoyment of property, which are the subject of an increasing number of constitutional appeals and applications to the ECtHR.

⁷⁴⁹ Specially protected tenancy for these housing units was established by laws valid at the time: the 1945 Act on the Disposition of Apartments and Business Premises, the 1959 FNRJ Act on Housing Relations, and the 1973 Serbian Act on Housing Relations.

12. Political Life

12.1. General

In addition to the right to vote, the ICCPR and the ECHR acknowledge the rights of citizens to be elected.⁷⁵⁰ ICCPR also acknowledges the rights of citizens to participate in the conduct of public affairs and to have access, on general terms of equality, to public service in their country. These rights may be restricted. The ICCPR insists the restrictions cannot be unreasonable, while the ECtHR found that the right of a citizen to be elected may be subjected to qualification requirements as long as they are not discriminatory.⁷⁵¹

The Constitution proclaims the sovereignty of the people and that suffrage is universal and equal (Arts. 2 and 52). Every adult citizen with a legal capacity shall be entitled to vote and to be elected (Art. 52 (1)). The Constitution guarantees all citizens the right to participate in the administration of public affairs, to employment in public services and to hold public office under equal conditions (Art. 53).

12.2. Electoral Rights

Under the Constitution, every adult citizen of the Republic of Serbia with a legal capacity shall have the right to vote and be elected. Elections shall be free and direct and voting shall be by secret ballot and in person (Art. 52). Whether a person may vote and be elected to a public office depends on whether he is entered in the voter registers. Persons fully or partly deprived of legal capacity are not entered in the Single Voter Register. The nationwide voter register, established under the Act on a Single Voter Register⁷⁵², was used in Serbia in 2012 for the first time since the introduction of the multi-party system. Voter registers had been kept and updated by the local self-governments and the authorities updating and inspecting them established, inter alia, that around 150,000 voters had been registered twice⁷⁵³, that Serbia's electorate stood at 7,058,683,⁷⁵⁴ and that the personal identification numbers of 600,000 voters entered in the election rolls were incorrect.⁷⁵⁵ The single voter register entitles citizens to exercise their voting rights in their temporary places of residence as well, provided that they notify the competent authorities at least five

750 This right is deemed to be implicitly recognised by Article 1 of the First Protocol.

751 *Gitonas v. Greece*, ECtHR, App. Nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95 (1997); *Fryske Nasjonale Partij v. The Netherlands* ECmHR, App. No. 11100/84 (1985); *Tanase v. Moldavia*, ECHR, App. No. 7/08 (2010).

752 *Sl. glasnik RS*, 104/09 and 99/11.

753 *Večernje novosti*, 13 April, p. 3.

754 *Politika*, 10 March 2012, p. 1. Interestingly, Serbia's population stood at 7,120,600 people according to the Census; on the other hand, 7,058,063 people are entered in the voter register.

755 *Politika*, 12 January 2012, p. 1.

days before the voter register is closed.⁷⁵⁶ Under the new Act on Ministries, the Ministry of Justice and State Administration is charged with keeping the voter register.⁷⁵⁷

12.3. Electoral Procedures

The electoral procedures are governed in detail by the Act on the Election of Assembly Deputies (AEAD),⁷⁵⁸ the Local Elections Act (LEA),⁷⁵⁹ the Act on the Election of the President of the Republic,⁷⁶⁰ and the Decision on the Election of AP Vojvodina Assembly Deputies (DEVĐ).⁷⁶¹

In addition to the electoral statutes, rules governing the election procedure are to be found also in the decisions of the electoral commissions. These commissions supervise the legality of the election process and the uniform application of the electoral statutes, appointment of the permanent members of the electoral commissions in the election districts, the appointment of members of polling committees (bodies directly administering elections), and hand down instructions for the work of other permanent electoral commissions (if any)⁷⁶² and polling committees. The Republican Election Commission (REC) is also empowered in the first instance to review complaints against decisions, actions or omissions by polling committees (under Art. 95(2)), AEAD). Pursuant to the election laws, bodies administering elections are independent. However, the legal provisions specifying that the bodies charged with conduct of elections shall be accountable to the body that appointed them (Art. 28 (2), AEAD and Art. 11 (3), LEA) are disputable. Since municipal election commission members are appointed by the municipal assemblies, the involvement of political party representatives in municipal commissions was in specific instances perceived as membership on the basis of the political balance in the respective municipality, and resulted in those commissions taking decisions along political lines.

The election commissions establish the overall number of votes received by each election ticket in proportion with the number of votes received, establish the

756 *Sl. glasnik RS* 104/09 and 99/11.

757 *Sl. glasnik RS* 72/12.

758 *Sl. glasnik RS* 35/00, 57/03, 72/03, 18/04, 101/05, 85/05, 104/09 and 36/11.

759 *Sl. glasnik RS* 129/07, 34/10 and 54/11.

760 *Sl. glasnik RS* 111/07 and 104/09.

761 *Sl. list AP Vojvodine*, 12/04, 20/08, 5/209, 18/09 and 23/10.

762 The Republican Election Commission and the polling committees are the authorities charged with implementing the republican parliamentary elections, while the local government election commissions and polling committees are charged with implementing local elections (See Arts. 28–38, AEAD and Arts. 11–17, LEA). All three – the Republican Electoral Commission, the local government election commissions and polling committees – are charged with the implementation of presidential elections (Art. 5, Act on the Election of the President of the Republic).

number of seats each ticket is awarded pursuant to the D'Hondt system. The parliamentary and local elections are held under the proportional system. According to the election regulations applied in the Autonomous Province of Vojvodina, 60 deputies of the Vojvodina Assembly are elected under the proportional system, while the other 60 deputies are elected under the two-round first past the post system, each in one of the 60 election units. The tickets running under the proportional system must collect 6,000 signatures (parties) or 3,000 signatures (minority parties), while each candidate running under the first past the post system in one of the 60 election units must collect 200 signatures.⁷⁶³

Only tickets that won more than 5% of the votes of all the voters who cast their votes in the election unit are awarded seats. The Republic of Serbia is a single election unit. The Act on Political Parties⁷⁶⁴ defines a national minority party as a party the activities of which are aimed at “representing and advocating the interests of a national minority, at protecting and advancing the rights of persons belonging to that national minority in accordance with the Constitution, the law and international standards, and which are regulated in the articles of association, programme or statute of the political party” (Art. 3). A national minority party may be founded by 1,000 adult nationals of Serbia with a legal capacity (Art. 9), which is ten times less than the number of nationals needed to establish a party that is not a national minority party. Furthermore, the so-called election threshold does not apply to national minority parties, which means that they are awarded seats even if they win less than 5% of the votes cast. Paradoxically, the law stipulates that national minority parties must collect and certify 10,000 signatures in support of their tickets,⁷⁶⁵ i.e. just as many as other parties need, which renders meaningless the preferential treatment idea, given that a minority party needs around 15,000 votes in accordance with the natural threshold.

Consequently, none of the Roma national minority parties ran on their own at the 2012 parliamentary elections.⁷⁶⁶ The legislator's intent to prevent the further fragmentation of the party scene by increasing the number of required signatures is clear. The fact is, however, that the collection and certification of the requisite number of signatures is at the verge of violating the freedom of association. Abuses of the Act on Political Parties have been observed in practice,⁷⁶⁷ during the registration of national minority parties, in the absence of a mechanism for verifying that

763 Vojvodina Assembly Decision on the Election of AP Vojvodina Assembly Deputies, Službeni list APV, 12/04, 20/08, 5/09, 18/09, 23/10, 1/12.

764 *Sl. glasnik RS* 36/09.

765 The Constitutional Court revoked the Republican Election Commission Instruction on 18 March 2008, under which minority tickets require 3,000 signatures., see the B92 report in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2008&mm=04&dd=09&nav_category=418&nav_id=293145.

766 The Roma Party was part of the Let's Get Serbia Moving - Tomislav Nikolić coalition.

767 See the Blic report in Serbian at: <http://www.blic.rs/Vesti/Tema-Dana/322971/Velike-prevare-glasaca-Romska-stranka-bez-Roma-vlaska-lista-bez-Vlaha>.

a party actually represents a national minority, apart from its say-so. The deficient provisions on the registration of political parties allowing parties declaring themselves as minority parties to register under milder criteria and thus enter the parliament by applying the natural threshold have enabled the party None of the Above, which formally represents the Vlach national minority, to win one seat in the National Assembly.⁷⁶⁸ Another paradox is that six deputies of the Roma Democratic Party entered the Novi Sad City Assembly although the ticket did not include any persons belonging to the Roma national minority.⁷⁶⁹ There are 91 political parties in Serbia, 52 of which are registered as national minority parties.

12.4. Terms of Office of National Deputies (Termination and Resignations)

The Act Amending the AEAD⁷⁷⁰ replaces the unconstitutional Article by a new Article 84, under which the Republican Election Commission shall allocate all the seats an election ticket won to the candidates by their order of presentation on the ticket within ten days from the day all election results are published. The Assembly adopted amendments to the Local Elections Act⁷⁷¹ in July 2011, which also envisage that the seats in the local parliaments shall be allocated to the candidates according to their order of presentation on the ticket. A councillor shall personally submit his resignation to the local assembly chairperson and his seat shall be allocated to the next candidate on the election ticket.

The 2012 elections were the first that were held since the law was amended in 2011 to ensure the greater independence of the deputies and councillors from their political parties; it now stipulates that the seats shall be allocated to the candidates according to their order of presentation on the ticket. It is, however, difficult to assess whether voters actually take into consideration the order of the candidates for seats in the National Assembly on the tickets they are voting for. The following manipulations are possible – that the parties clinch deals with the deputies in their ranks to cede their seats to the next candidates on the tickets in return for personal gain, which, of course, is difficult to prove. The law also does not deal with the political parties' practice of fielding famous figures as "bait" on their tickets, i.e. does not envisage a penalty for a deputy, who had no intention of sitting in parliament in the first place and agreed to be included in the ticket to boost the party's rating.⁷⁷²

768 *The 2012 Parliamentary Elections in Serbia – Results and Political Consequences*, Milan Jovanović, Belgrade College of Political Sciences, available in Serbian on the website of the Institute of Political Studies, Serbian Political Thought edition <http://www.spmbeograd.rs/autori/spm1.pdf>.

769 See the report in the Belgrade daily *Blic*, available in Serbian at <http://www.blic.rs/Vesti/Tema-Dana/322971/Velike-prezare-glasaca-Romska-stranka-bez-Roma-vlaska-lista-bez-Vlaha>.

770 *Sl. glasnik RS* 36/11.

771 *Sl. glasnik RS* 54/11.

772 See the report in the Belgrade daily *Blic* of 15 March 2012, p. 3.

Parties have also been known to start their tickets with their best known officials, who go on to discharge other senior offices after the elections. The most disputable feature of the current system is that the voters do not have before them all the names on the election tickets when they are voting because the ballots list only the names of the parties and their leaders, which actually means that the voters are voting for the parties, not for their candidates.

The abolition of the “blank resignations” by the 2011 amendments to the election laws also consolidates the independence of the National Assembly deputies. The Vojvodina Assembly rendered a decision amending the Vojvodina Assembly Decision on the Election of AP Vojvodina Assembly Deputies, under which a deputy must have his resignation certified by the competent court and submit it to the Vojvodina Assembly Speaker in person within three days.⁷⁷³ The Serbian Radical Party, however, publicly came out with the idea of “blank promissory notes” under which its deputies have to sign a contract stating that they will owe the party ten million RSD if they cross over to another party group in parliament.⁷⁷⁴ After he was elected President of the Democratic Party, Belgrade Mayor Dragan Đilas called on all the former ministers, now deputies in the National Assembly, to hand back their mandates, explaining that they were, *inter alia*, responsible for the poor results the Democratic Party achieved at the 2012 elections.⁷⁷⁵ Quite a few councillors crossed over to their rivals’ camps in the local parliaments, while the largest parties publicly traded numerous accusations of “horse-trading”.

12.5. Elections 2012

The elections scheduled for May 2012 were regular parliamentary, provincial and partly local elections (the latter were not called in 13 municipalities in which the councillors’ terms in office had not expired yet),⁷⁷⁶ and early presidential elections, wherefore they can be qualified as general elections. The elections were called on 13 March 2012, pursuant to a decision by Vojvodina Assembly Speaker Sandor Egeresi, on the same day Serbian President Boris Tadić called the parliamentary and Serbian Assembly Speaker Slavica Đukić Dejanović called the local elections. Eighteen election tickets, six of them minority tickets, ran at the parliamentary elections. The two most popular parties in Serbia, the Democratic Party (DS) and the

773 Vojvodina Assembly Decision on the Election of AP Vojvodina Assembly Deputies, *Sl. list APV*, 1/12, Article 80(2).

774 Promissory Notes instead of Blank Resignations, see the RTS report in Serbian at <http://www.rts.rs/page/stories/sr/story/1950/Izbori+2012/1063652/SRS%3A++Menice+umesto+blanko+ostavki.html>.

775 Večernje novosti report on Đilas calling on former ministers to hand back their mandates, available in Serbian at <http://www.novosti.rs/vesti/naslovna/aktuelno.289.html:407519-Djilas-Bivsi-ministri-vratite-mandate>.

776 Aranđelovac, Bor, Kula, Vrbas, Kovin, Kosjerić, Negotin, Odžaci, Priština, Peć, Leposavić, Kosovska Mitrovica and Novo Brdo.

Serbian Progressive Party (SNS)⁷⁷⁷ were the main rivals in the election race. The DS rallied six parties in its Choice for a Better Life –Boris Tadić coalition,⁷⁷⁸ while the SNS ticket included 11 parties.⁷⁷⁹ The group of citizens Dveri – Movement for the Life of Serbia, which had started out as an NGO, ran in the parliamentary elections for the first time. The Socialist Party of Serbia (SPS) rallied the Party of United Pensioners of Serbia (PUPS) and United Serbia (JS). Another coalition of parties and civic associations that ran in the election dubbed Turnabout rallied round the Liberal Democratic Party (LDP),⁷⁸⁰ while the ticket of parties rallied round G17+ ran under the name United Regions of Serbia (URS).⁷⁸¹ Serbia's President Boris Tadić resigned and the Serbian Assembly Speaker called the presidential elections for the same day, 6 May 2012.⁷⁸² The parties that ran in the Vojvodina provincial elections went under the same or similar names as those on the tickets that ran at the parliamentary elections. A total of 773 candidates on 14 tickets vied for the 60 seats awarded under the proportional system; four of them were minority tickets. A total of 552 candidates ran for the 60 seats elected under the first past the post system in the 60 elections units.⁷⁸³

The ninth convocation of the National Assembly of the Republic of Serbia was constituted on 31 May 2012. Most of the 250 seats went to the Let's Get Serbia Moving coalition (73), the Choice for a Better Life coalition (67), the SPS-PUPS-JS

777 This was the first time the Serbian Progressive Party ran in the elections. Its coalition comprised also New Serbia, Association of Small and Medium-Sized Enterprises and Entrepreneurs of Serbia, the Coalition of Refugee Associations in the Republic of Serbia, Strength of Serbia Movement – BK, the People's Farmers' Party, the Bosniak People's Party, the Democratic Party of Macedonians, the Roma Party, the Vlach Unification Movement, the Socialists' Movement and the Economic Revival of Serbia Movement.

778 The ticket included the candidates of the Democratic Party, the Christian Democratic Party of Serbia, the League of Social Democrats of Vojvodina, the Serbian Greens, the Social Democratic Party of Serbia and the Democratic Alliance of Croats in Vojvodina.

779 The two parties' leaders were the main contenders for the presidential office.

780 The Turnabout coalition included: the Liberal Democratic Party, the Serbian Renewal Movement, the Social Democratic Union, Rich Serbia, the Vojvodina Party, the Democratic Party of Sandžak, the Green Environmental Party – the Greens, and the Party of Bulgarians of Serbia.

781 After the elections were called, the parties rallied round G17+ named their coalition the United Regions of Serbia (URS). The civic association URS had been involved in promotional activities before the elections were called and the question arose how this association was able to campaign, i.e. how it was funded. G17+ stopped reporting its regular activity costs and began submitting its reports as URS.

782 Reports on Tadić's resignation mentioned that he had decided to cut his term in office short, because the presidential elections could have been held between 15 November 2012 and 15 February 2013. Tadić assumed office on 15 February 2008. This was his second term of office but it was reckoned as his first under the 2006 Act on the Implementation of the Constitution. The head of state is elected at direct elections, called 90 days before the term in office of the outgoing president expires. These elections must be held within the following 60 days.

783 The 2012 Vojvodina Parliamentary Elections, Dušan Vučićević, Belgrade College of Political Sciences, available in Serbian on the website of the Institute of Political Studies, Serbian Political Thought edition, <http://www.spmbeograd.rs/autori/spm4.pdf>.

coalition (44), the Democratic Party of Serbia (21), the Turnabout coalition (19) and URS (16). The new convocation of the parliament also includes the deputies of the Alliance of Vojvodina Hungarians (5), the Party of Democratic Action of Sandžak (2), while the coalitions “All Together” comprising five national minority parties, the coalition of Preševo Valley Albanians rallying four parties,⁷⁸⁴ and None of the Above each won one seat in parliament.⁷⁸⁵ The National Assembly is now the meeting place of a record high number of political parties, citizens’ and other associations – 45, or twice as many as in the 2008–2012 convocation.⁷⁸⁶ This is consequence of the election system, under which all parties, both those running independently and in coalitions, have to pass the same election threshold to be awarded seats in the parliament. The fragmentariness of the parliament is also facilitated by the parties’ freedom to establish deputy clubs after the Assembly is constituted, regardless of which tickets the deputies were elected on. The ruling, i.e. post-election coalition consists of the parties rallied round the SNS, SPS and URS. The Choice for a Better Vojvodina-Bojan Pajtić won the most seats in the Vojvodina Assembly under the proportional election system.⁷⁸⁷ The Vojvodina Assembly was constituted on 22 June 2012, and the President of the Alliance of Vojvodina Hungarians Istvan Pasztor was elected Speaker.⁷⁸⁸ Bojan Pajtić was elected Vojvodina Prime Minister.⁷⁸⁹

Statistical data show that as many as 117 municipalities with a population of 1.5–2 million are not represented in parliament (which is the direct consequence of the election system under which Serbia is a single election unit), while the Belgrade District boasts the greatest number of deputies.⁷⁹⁰ Women account for 82 (32.8%) of the 250 deputies, which satisfies the legal requirement. There are currently 13 caucuses and eight independent deputies in the Serbian Assembly.

The new Government of the Republic of Serbia, formed on 27 July 2012 by the election of SPS leader Ivica Dačić to the office of Prime Minister, has 19

784 The coalition of Preševo Valley Albanians rallied round the leader of Party for Democratic Action (PDD) Riza Halimi will in this convocation be represented by a rotating deputy from the PDD, the Democratic Union of Albanians (DUA) and the Democratic Union of the Valley (DUD). The Democratic Party of Albanians (DPA) boycotted the elections, while the newly-established Democratic Party (DP) was neutral.

785 The breakdown of the Assembly deputies is available at <http://www.parlament.gov.rs/national-assembly/national-assembly-in-numbers.1743.html>.

786 *Blic*, 25 June 2012, p. 3.

787 The results of the Vojvodina parliamentary elections are available in Serbian at the webpage of the Provincial Election Commission. <http://www.pik.skupstinavojvodine.gov.rs/docs/2012izvestajUkupniRezultati.pdf>.

788 See the Vojvodina Government website in Serbian at: http://www.vojvodina.gov.rs/index.php?option=com_content&task=view&id=6849.

789 See the Belgrade daily *Večernje novosti* article of 11 July 2012, entitled “Pajtić and Ješić Heading Government” available in Serbian at <http://www.novosti.rs/vesti/naslovna/aktuelno.289.html:387986-Na-celu-vlade-Vojvodine-Pajtic-i-Jesic>.

790 See the breakdown of deputies by municipality in Serbian at <http://otvoreniparlament.rs/statistika/zastupljenost-opstina-2008-2012/> and in the Belgrade daily *Politika* of 18 June 2012.

members.⁷⁹¹ The new cabinet was voted in by 142 deputies of the parliamentary majority, while 72 deputies of the opposition parties voted against it.⁷⁹² The 2012 election race was marked by a greater number of “white ballots”, a consequence of, *inter alia*, an active campaign conducted by the civic bloc rallied around the weekly radio political show Peščanik to express their dissatisfaction with the electoral offer by this form of civil disobedience. The Republican Election Commission stated that 4.3% of the ballots cast at the parliamentary elections were white⁷⁹³ (compared to around 2.5% at the previous elections, although it cannot be claimed with certainty what had caused the increase in their number); in any case the higher number of white ballots raised the threshold for winning a seat in parliament.⁷⁹⁴ The regularity of the parliamentary elections was brought into question during the campaign before the second round of the presidential elections, but no-one was subsequently officially held responsible for any election fraud; such conduct can be qualified as detrimental to the consolidation of democracy in the Republic of Serbia. Namely, the SNS⁷⁹⁵, an opposition party at the time, alleged that a specific number of ballots had been replaced⁷⁹⁶. The Republican Prosecution Office said in its press release that the sack of ballots went missing after they were counted and after all the election board members signed the records.⁷⁹⁷ The Republican Election Commission declared the final election results on 10 June 2012, but the representatives of DSS, SNS, SRS and PRS refused to sign the minutes.⁷⁹⁸

These parliamentary elections, too, were characterised by attempts of the incumbent ruling political parties to claim credit for the successes of the Government. The greatest number of abuses arose from the public officials’ use of their offices to promote the candidates and use the power levers to influence media reports, as Transparency Serbia noted in its Report entitled Presidential and Parliamentary Election Campaign Financing in Serbia May 2012.⁷⁹⁹ Article 29(2–4) of the Anti-Corruption Agency Act governs this issue in the following terms: “a public official may not use public resources and official events and meetings to promote political

791 See the composition of the Serbian Government at <http://www.srbija.gov.rs/vlada/sastav.php>.

792 See the B92 report on the new Government at http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=07&dd=27&nav_id=81476.

793 See the B92 report on the number of spoiled votes in Serbian at http://www.b92.net/info/izbori2012/vesti.php?yyyy=2012&mm=05&dd=07&nav_id=607173.

794 There were public debates on whether or not the threshold for establishing the required number of votes for winning a seat included the invalid or just the valid ballots.

795 Some other parties also claimed that irregularities occurred at the elections, notably the Alliance of Vojvodina Hungarians and Dveri – Movement for the Life of Serbia.

796 *Večernje novosti*, 11 May 2012, p. 3.

797 *Politika*, 15 May 2012, p. 1.

798 *Večernje novosti* 11 May 2012, p. 4.

799 [http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20\(Final\).pdf](http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20(Final).pdf)

parties or political entities”. According to Transparency Serbia’s research, the public officials’ activity level was 140% higher than in 2011. For example, the Serbian President was five times and the National Assembly Speaker 11 times more active, while the Director of the Serbia Gas public company was seven times more active than in 2011, which indicates that the planned activities were the product of the abuse of resources and public office.⁸⁰⁰ A good illustration is the abuse of FIAT, where political parties, especially URS and the DS claimed credit for this investment.⁸⁰¹

President Boris Tadić’s resignation was interpreted by the media as “shortening” of his term in office although this category does not exist in Serbian law. President Tadić ran for president for the third time on the grounds laid down in Article 18(1) of the Act on the Implementation of the Constitution, which lays down that the first presidential term in office shall begin after the elections that must be held by the end of 2007 (the constitutionality of the Act was not brought into question, because it was part of the agreement that led to the adoption of the Constitution in 2006). Twelve candidates entered the presidential race,⁸⁰² and the two candidates who won the greatest number of votes, Boris Tadić and Tomislav Nikolić, faced each other in a run off two weeks later after none of the contenders won an outright majority in the first round of the election.⁸⁰³ Tomislav Nikolić won more votes in the run off⁸⁰⁴ and was inaugurated on 1 June 2012 as the new Serbian President.

12.6. Financing of Political Parties

A new Act on the Financing of Political Activities was enacted in June 2011.⁸⁰⁵ Financing of election campaigns is also governed by the Rulebook on Donation and Property Records, Annual Financial Reports and Election Campaign Costs of Political Entities.⁸⁰⁶ The Anti-Corruption Agency is the main authority charged with overseeing the funding of political parties. Transparency Serbia’s concluded in its report after monitoring the election campaign that most of the campaign funds came from the state budget, twice as much than during the previous campaign (around 55% for the parliamentary elections and 85% for the presidential

800 *Ibid.*

801 *Danas*, 8 May 2012, p. 1.

802 Mufti Muamer Zukorlić, who heads the Islamic Community in Serbia, also ran in the elections; he was nominated by a group of citizens.

803 The law does not lay down a threshold or a minimum turnout for presidential elections to be valid; all a candidate needs to do is win the majority of votes cast.

804 Tomislav Nikolić won 49.54% and Boris Tadić 47.31% of the votes.

805 *Sl. glasnik RS* 43/11. The Act was analysed in detail in the *2011 Report*, I.4.14.4.

806 *Sl. glasnik RS* 72/11 and 25/12.

elections). Bank loans ranked second – around 30% of the funding was secured in this manner, which raises the issue of how these loans will be repaid.

Bank loans can be problematic, particularly if they are granted at interest rates which are much lower than the market rates, if the borrowers are given longer repayment deadlines or their debts are written off.⁸⁰⁷ Such funding could be treated as donations. If a bank agreed to write off the debt, it would become a donor, provided that the loan does not exceed the statutory ceiling of donations of legal persons i.e. 200 average wages. Additional problems might arise from borrowing funds for the campaign and repayment of the loans in the ensuing years because, at the moment a party submits its report on the sources from which it funded the campaign to the Anti-Corruption Agency and at the moment it is published, neither the public nor the Agency, which checks whether the report is accurate and comprehensive, have full insight in the sources from which the party will repay the loan, i.e. who will have ultimately funded the campaign. Twice as much budget funding was spent on the election campaign than in 2008. While this fact increased the transparency of the sources of funding, the funding raised from private sources was small.⁸⁰⁸ The election campaign on the whole cost around three billion RSD.⁸⁰⁹

12.7. Recommendations

1. Amend the Republican Election Commission regulations and reduce the number of signatures national minority parties need to collect to submit their election tickets because the current solution is in contravention of the preferential treatment afforded national minority parties.
2. Reform the election system to ensure fairer geographical representation in the National Assembly.
3. Regularly update the single voter register to pre-empt speculations that the size of the electorate is blown up and put an end to any manipulations and thus enhance the legitimacy of the entire process.
4. The Anti-Corruption Agency should monitor how political parties repay their bank loans given that they are used to fund a substantial share of the election activities.

807 Transparency Serbia stated in its Report that URS and DS borrowed from banks which are partly owned by the state, whereby they cannot finance political parties under the law.

808 Around 15% for the parliamentary elections and 5% for the presidential elections.

809 The Transparency Serbia Report provides a vivid illustration, specifying that the total amount spent on elections when divided by the number of voters stands at 750 RSD per voter. More at: [http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20\(Final\).pdf](http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20(Final).pdf).

13. Right to Asylum

13.1. General

The Universal Declaration of Human Rights is the first international document that mentions the right of everyone to seek and to enjoy in other countries asylum from persecution. The 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees,⁸¹⁰ include a set of rights and obligations arising from the right to the recognition of the refugee status. Under the Convention, a refugee is any person who has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Art.1 A (2)).

Under the Constitution, any foreign national with reasonable fear of persecution on account of his race, sex, language, religion, nationality or association with a group or political opinion shall be entitled to asylum in the Republic of Serbia (Art. 57(1)). The Asylum Act⁸¹¹ governs in detail the asylum procedure in the Republic of Serbia and the rights and obligations of asylum seekers, refugees and people granted subsidiary protection. Apart from the right to asylum, which includes the right to refuge and the right to subsidiary (humanitarian) protection, the Act also envisages temporary protection provided in case of a large-scale influx of people when it is impossible to conduct individual asylum procedures.⁸¹²

13.2. Access to the Territory of the Republic of Serbia and Access to the Asylum Procedure

BCHR was unable to ascertain whether asylum seekers had access to Serbia's territory via the Belgrade airport given the absence of data on the number of people who had expressed the intention to apply for asylum.⁸¹³ The border au-

810 Serbia also ratified numerous other international treaties directly or indirectly relevant to asylum issues: the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the UN Convention on the Rights of the Child, etc.

811 *Sl. glasnik RS* 109/07, entered into force on 1 April 2008.

812 More in D. Dobrković, *Right to Asylum – Legal Framework in the Republic of Serbia, Comment of the Serbian Asylum Act*, BCHR, 2008, available in Serbian at: http://azil.rs/doc/komentar_zakona_o_azilu_bcljp.pdf.

813 Information received on 27 November 2012 from the Information of Public Importance Office at the Cabinet of the Minister of Internal Affairs.

thorities at the Belgrade airport denied entry to around 1,500 foreigners in 2009 and 2010.⁸¹⁴ In the same period, only one person was admitted into the asylum procedure from the airport, and, in that case, the intervention of UNHCR was required. In contrast, when UNHCR was mandated with refugee status determination⁸¹⁵, more than a dozen individuals expressed their intention to apply for asylum at the airport annually.⁸¹⁶ The Asylum Act explicitly entitles asylum seekers to contact authorised UNHCR staff during all stages of the asylum procedure (Art. 12); people seeking asylum at Belgrade Airport, however, do not have the possibility of contacting the UNHCR in practice.

MIA officers in contact with foreigners at the borders must be adequately trained in the treatment of asylum seekers as a particularly vulnerable category of migrants and in recognising their intention to seek asylum. The BCHR is gravely concerned because of the consistent practice of some Border Police Administration staff at the Serbian-Hungarian border not to recognise as asylum seekers people seeking protection from refoulement to a third country where they fear they will be subject to various forms of persecution unless they explicitly say the word “asylum”.⁸¹⁷

The work of border police officers in contact with irregular migrants, i.e. the way in which the border authorities fulfil their obligation to provide asylum seekers with access to the regular asylum procedure ought to be subjected to independent monitoring. Such monitoring could be performed by non-government organisations, a practice already developed in the other countries in the region.⁸¹⁸

Pursuant to Article 31 of the UN Convention Relating to the Status of Refugees and Article 8 of the Asylum Act, asylum seekers shall not be punished for illegal entry or stay in the Republic of Serbia provided that they apply for asylum without delay and offer a reasonable explanation for their illegal entry or stay. Aliens punished by imprisonment for illegally crossing the state border or illegal residence in the territory of the Republic of Serbia claim that the police have been initiating misdemeanour proceedings also against migrants who express the inten-

814 The obligation to refrain from refoulement arising from Articles 3 and 1 of the ECHR applies also to individuals in airport transit zones, who have not entered the territory of Serbia “in the technical sense”, see the case of *D. v. The United Kingdom* App. No. 30240/96 (1997).

815 Under a 1969 “gentlemen’s agreement”, the UNHCR reviewed the asylum applications in Serbia from 1976 to 2008 and identified the states which would take in persons it had approved protection to.

816 *Serbia as a Country of Asylum Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, UNHCR August 2012, available at: <http://www.unhcr.org/refworld/docid/50471f7e2.html>, paragraph 14.

817 Source: MIA officer BCHR associates spoke to during their visit to the Horgoš border crossing on 22 June 2012.

818 More on border monitoring in Central Europe <http://www.unhcr-centraleurope.org/en/what-we-do/monitoring-the-border.html>; more on border monitoring in Croatia at <http://www.mup.hr/main.aspx?id=79225>.

tion to seek asylum at the time of arrest.⁸¹⁹ The intention of a person to seek asylum can be recognised in the proceedings before the misdemeanours judge, who can suspend the proceedings and instruct him to apply for asylum.⁸²⁰ Until early October 2012, over 2,600 people⁸²¹ were found guilty of illegal entry or stay in the territory of the Republic of Serbia;⁸²² however, only in the case of three foreigners did the misdemeanour judges recognise their intention to seek asylum and suspend the proceedings. Misdemeanour judges need to be provided with training in the right to asylum to enable them to recognise the intention of people to seek asylum and react adequately when they recognise such an intention.⁸²³

In most cases the Asylum Office allows the registration, i.e. the submission of an asylum application only to aliens in the Asylum Centres, and only those staying in the Asylum Centres enjoy unhindered access to the asylum procedure.⁸²⁴ Foreigners renting accommodation and those without shelter and living in open air, due to the lack of room in the Asylum Centres, are deprived of the right to access the asylum procedure. In three cases in which the Asylum Office approved asylum, the asylum seekers had not been living in the Centres but had legally resided in the territory of the Republic of Serbia over a longer period of time or legally lived with their acquaintances, Serbian nationals.⁸²⁵ Aliens, who have certificates of intent to seek asylum and are waiting for a vacancy in an Asylum Centre, may be deported from Serbia unless they are secured accommodation within 72 hours. Namely, once the 72-hour deadline expires, an alien without other grounds for legal residence in the territory of Serbia may be penalised for a misdemeanour and ordered to leave the territory of the Republic of Serbia.⁸²⁶ Information available to the BCHR indicates that the state authorities have not been deporting aliens convicted for misdemeanours, which is encouraging; however, asylum seekers, who have failed to move

819 More in *Report: Status of Asylum Seekers in Serbia (July-October 2012); Serbia as a Country of Asylum*, paragraph 13.

820 See the decision of the Preševo Misdemeanour Court of 11 March 2009, as a good practice example, available at: <http://www.azil.rs/documents/category/judgements>. According to some sources, misdemeanour judges have instructed people, who had expressed the intention to seek asylum, that they could do so only after they served their prison sentences, see *Report: Status of Asylum Seekers in Serbia (July-October 2012)*.

821 Information received in response to requests for access to information of public importance and including statistical data of all Misdemeanour Courts.

822 State Border Protection Act, Articles 65(1(1)) and 65(1(4)); Aliens Act, Art. 85(1(3)).

823 The European Commission also noted the need to raise the expertise of the administrative court judges in the area of asylum in its *Serbia 2012 Progress Report*. The report is available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf.

824 The asylum procedure is initiated at the moment an asylum application is submitted, not at the moment the intention to seek asylum is expressed.

825 MIA Asylum Office Decisions Ref. No. 03/9-26-2324/11 of 19 December 2012, Ref. No. 03/9-4-26-2326/11 of 20 December 2012 and Ref No. 03/9-26-17/12 of 6 December 2012.

826 Aliens Act (*Sl. glasnik RS* 97/08) Arts. 42 and 85.

into an Asylum Centre within the legal deadline, fear mass deportations by bus to the territory of the Republic of Macedonia reportedly conducted by the police.⁸²⁷

13.2.1. Principles

The principles in Chapter II of the Asylum Act lay down the procedural safeguards applied during the asylum procedure – the principles of directness, to be informed, confidentiality and free legal assistance, as well the principle of free translation/interpretation. Asylum seekers are entitled to legal assistance free of charge and representation by the UNHCR or non-government organisations the goals and activities of which focus on the provision of legal aid to refugees (Art. 10). The following two NGOs provided asylum seekers with free legal aid in 2012: the Belgrade Centre for Human Rights⁸²⁸ and the Asylum Protection Center (APC).⁸²⁹ The principle of free interpretation/translation (Art. 11) into the asylum seeker's native language or a language he understands is consistently abided by thanks to UNHCR funding; the Serbian authorities have not earmarked any funding from the state budget for this purpose yet.⁸³⁰ Although guaranteed by Article 14 of the Act, the principle of gender equality, under which every asylum seeker is entitled to be interviewed by an officer of the same sex, i.e. with the help of an interpreter or translator of the same sex, is not honoured as a rule. It cannot, however, be concluded that the disrespect of this principle is necessarily illegal, given that the Act clearly lays down that this principle may be derogated from in the event it is impossible to designate a staff member of the same gender or in the event abidance by this principle would cause disproportionate difficulties to the authority conducting the asylum procedure. One nevertheless has the impression that this "impossibility" is largely due to the competent authorities' personnel policy. Namely, the MIA always hires male interpreters although there are qualified female interpreters as well; the Asylum Office has both men and women on staff, but does not take the principle of gender equality into consideration when it assigns asylum cases.⁸³¹

The information obtained about an asylum seeker in the course of the asylum procedure shall constitute a state secret and access to it shall be allowed only to persons authorised by law (Art. 18).⁸³² In view of the relevance of its decision on a constitutional appeal filed by an asylum seeker in Serbia for the protection of constitutionally guaranteed human rights, the Constitutional Court decided to publish

827 Information BCHR lawyers obtained in interviews with aliens living outside the Asylum Centre in Bogovada in 2012; similar allegations of mass deportations were reported also by the UNHCR, see *Serbia as a Country of Asylum*, paragraphs 75-76, and other NGOs, see *Challenges of Forced Migration in Serbia*, p. 10.

828 More at www.azil.rs

829 More at www.apc-cza.org.

830 *Serbia as a Country of Asylum*, paragraph. 18.

831 Based on the experience of BCHR lawyers, who extended legal aid to asylum seekers in 2012.

832 Information about asylum seekers may not be disclosed to their countries of origin unless they have to be deported there after the rejection of their asylum applications.

the decision⁸³³ in the Official Gazette of the Republic of Serbia. It, however, failed to conceal the asylum seeker's personal data, the individual circumstances of his application or the circumstances that led him to seek asylum although the asylum procedure was still under way. The Constitutional Court thus ignored the confidentiality principle in the Asylum Act and jeopardised the asylum seeker's safety.

13.2.2. First-Instance Procedure

The entire first-instance procedure and all the decisions on asylum applications and the termination of the right to asylum are within the purview of the Asylum Office. The asylum procedure is initiated by the submission of an asylum application on the prescribed form that can be obtained only from an authorised officer of the Asylum Office (Art. 25). In practice, however, asylum seekers file their applications in their statements for the record to the Office staff.⁸³⁴ The authorised Asylum Office officers interview the asylum seekers to establish all facts of relevance to the decisions on the asylum applications, particularly the seekers' identity, the grounds for asylum, their movement after they left their countries of origin and whether they already sought asylum in another state (Art. 26).

The Asylum Office shall render a decision upholding the asylum application and recognising the alien the right to refuge or grant him subsidiary protection or a decision rejecting the asylum application and ordering the alien to leave the territory of the Republic of Serbia within a specific deadline unless he has other grounds for residence. Under the Act, the Asylum Office may decide to suspend the asylum procedure (Art. 27). Article 33 of the Act specifies the instances in which the Asylum Office shall dismiss asylum applications without reviewing whether the asylum seekers satisfy the asylum eligibility requirements.⁸³⁵

Appeals of first-instance decisions on asylum applications may be lodged within 15 days from the day they are served (Art. 35).

13.2.3. Appeals Procedure

The Asylum Commission that reviews appeals of Asylum Office decisions is comprised of nine members appointed by the Government to four-year terms of office. The Asylum Act lays down that the Commission shall render its decisions by a majority vote (Art. 20), but does not specify the deadline within which it has to render them.⁸³⁶ The terms of office of the first Commission⁸³⁷ expired on 17 April

833 Constitutional Court Decision in the case of Už-5331/2012 of 28 December 2012, paragraph 12.

834 Based on the experience of BCHR lawyers, who extended legal aid to asylum seekers in 2012.

835 More below, under 3.5. Application of the Safe Third Country Concept and Violations of the Prohibition of Refoulement

836 The general 60-day deadline prescribed in Article 208 of the General Administrative Procedure Act is to be applied accordingly.

837 The RS Government Decision on the Appointment of the Commission Members No. 119-1643/2008 of 17 April 2008 (*Sl. glasnik RS*, 42/08).

2012 but the new Commission members were not appointed until 20 September 2012.⁸³⁸ The authorities partly upheld the suggestions of the NGOs and appointed to the Commission one representative of the academia with experience in human rights protection. They did not, however, heed the suggestion to appoint to it representatives of NGOs promoting and protecting human rights.⁸³⁹ Although there was no one to review the first-instance decisions by the Asylum Office from 17 April to 20 September 2012, the Constitutional Court was not of the view that this constituted a violation of the right to an effective legal remedy.⁸⁴⁰

An Asylum Commission decision may be challenged in an administrative dispute before the Administrative Court, which rules on the claims in three-member judicial panels. The Administrative Court has to date mostly limited itself to reviewing whether the procedural aspects of the asylum procedure had been observed.⁸⁴¹

13.2.4. Application of the Safe Third Country Concept and Violations of the Prohibition of Refoulement

Apart from the duty to honour the prohibition of refoulement in the Convention Relating to the Status of Refugees (Art. 33),⁸⁴² the competent Serbian authori-

838 The RS Government Decision on the Appointment of the Commission Chairperson and Members No. 119-6141/2012, of 20 September 2012.

839 See “Statement on the Expiry of the Terms of Office of the Asylum Commission Members” of 12 April 2012, available at <http://www.azil.rs/news/view/expiry-of-the-terms-of-office-of-the-asylum-commission-members>.

A key procedural safeguard essential to the fairness and efficiency of the asylum procedure is that the appeal be considered by an authority different from and independent of that making the initial decision (see UNHCR, *‘Asylum Processes (Fair and Efficient Asylum Procedures)’ in Global Consultations on International Protection (31 May 2001)*, UN Doc. EC/GC/01/12, paragraph 43). The Assistant to the Head of the MIA Border Police Directorate was appointed Chairman of the Asylum Commission. The authority rendering first instance decisions reviewed on appeal operates within this Directorate, which may give rise to doubts about its independence, *Serbia as a Country of Asylum*, paragraph 45.

840 Constitutional Court Decision in the case of Už-5331/2012 of 28 December 2012, paragraph 6.

841 The Administrative Court did not uphold any claims by asylum seekers in 2011 and the first half of 2012. It annulled two decisions of the first Asylum Commission due to formal shortcomings in the minutes on the Commission’s deliberation and vote, *Challenges of Forced Migration*, p. 27. The Court in 2011 rendered only one judgment on the merits (more in the *2011 Report*, I.4.16.2.4). Selected Administrative Court judgments are available at <http://www.azil.rs/documents/category/judgements>.

842 The prohibition of expulsion or return (non-refoulement) entails the prohibition of transferring a person to a state where he risks a real danger of serious human rights violations or of being transferred to a third state where he would be subject to such risks. Abidance by the principle of non-refoulement also entails the state’s obligation to do its utmost to prevent the return of asylum seekers to their countries of origin without the substantive examination of their asylum applications – so-called direct refoulement and the transfer of an asylum seeker to a third country that may transfer him elsewhere, to a place where he fears persecution – so-called indirect refoulement.

ties are also bound by Article 6 of the Asylum Act, which prohibits the expulsion of people against their will to a territory where their lives or freedom would be in danger on account of their race, sex, language, religion, nationality, membership of a particular social group or political opinion.

Under the Act, the state may, inter alia, invoke the concepts of a safe third country and a safe country of origin and dismiss an asylum application without reviewing whether the applicant satisfies the asylum eligibility criteria (Articles 2 and 33). It is crucial that the state is reassured in all these cases that the protection an asylum seeker will enjoy in another state is truly effective and that it in any case provide the asylum seeker with the opportunity to dispute the allegations that the other state is safe for him.

Ever since the Asylum Act came into effect, the competent authorities have systematically abused the safe third country rule practically and have almost automatically applied⁸⁴³ the Government Decision on Lists of Safe Countries of Origin and Safe Third Countries.⁸⁴⁴ Authorities reviewing asylum applications are of the view that applications are to be reviewed on the merits in the event the applicants entered Serbia legally, with visas in valid passports or from countries not listed in the Government Decision on Lists of Safe Countries of Origin and Safe Third Countries. The Asylum Office granted asylum for the first time in 2012 in three cases. However, in these cases, all the asylum seekers had entered Serbia legally, with valid documents, by plane, or had been residing legally in its territory for a long time before the armed conflicts and political changes in their countries, wherefore the concept of a safe third country could not be applied.⁸⁴⁵ Given that the states Serbia borders with and through which nearly all asylum seekers enter Serbia are considered safe countries, this condition is impossible and renders meaningless the entire procedure for exercising the right to asylum in Serbia.

The solution under which the Government unilaterally defines safe third countries in a Decision is also problematic. The valid Decision was adopted in 2009 and has not been revised since. When it was drawing up the list of safe countries, the Government did not obtain guarantees that asylum applications were reviewed in a fair and efficient procedure in the countries it was designating as safe. In determining whether a particular country was safe, the Government only took into consideration the opinion of the Serbian Ministry of Foreign Affairs, whether the country ratified the 1951 Refugee Convention, and whether it had a visa-free regime for Serbian citizens.⁸⁴⁶ The Decision listing the safe third countries should be

843 In 2011, the Asylum Office reviewed 55 asylum applications, but only two of them on the merits.

844 *Sl. glasnik RS* 67/09. The BCHR filed an initiative for the review of the constitutionality of this provision with the Constitutional Court of Serbia. The Court did not render a decision on the initiative by the end of the reporting period.

845 MIA Asylum Office Decisions Ref. No. 03/9-26-2324/11 of 19 December 2012, Ref. No. 03/9-4-26-2326/11 of 20 December 2012 and Ref No. 03/9-26-17/12 of 6 December 2012.

846 *Serbia as a Safe Third Country: Revisited*, p. 7.

reviewed periodically, with due account being taken of the situation in the countries and the degree of protection of rights of asylum seekers, including the views of the ECtHR,⁸⁴⁷ the UNHCR and reports by the relevant international organisations, such as the Council of Europe⁸⁴⁸ and international NGOs focusing on the international protection of refugees and asylum seekers.

The provisions of the Asylum Act should be interpreted in the following manner: the designation of a country as safe in the Decision should be a rebuttable presumption, i.e. the authority reviewing an asylum application should not render its decision by relying merely on the presumption that the applicant will be treated in accordance with the standards of the Refugee Convention in a third country, but has to establish how the authorities of the safe third country apply their regulations.⁸⁴⁹ The asylum authorities ought to take into account all the relevant sources, such as UNHCR and NGO reports or the decisions of international human rights tribunals, above all the ECtHR. This view was taken also by the Constitutional Court of Serbia, which, although it has not found a violation of the principle of non-refoulement in any of the cases yet, noted that the prohibition of expulsion and other relevant provisions of the Asylum Act “lead to the conclusion that the list of safe third countries is, inter alia, formed also on the basis of the reports and conclusions of the UN High Commissioner for Refugees. Furthermore, this Court assesses that the reports of that organisation contribute to the proper application of the Asylum Act by the competent authorities of the Republic of Serbia, insofar as they shall not dismiss an asylum application in the event the asylum seeker arrived from a safe third country on the Government list if that country applies its asylum procedure in contravention of the Convention.”⁸⁵⁰

13.2.5. Statistics and General Assessment

A total of 2,723 people expressed the intent to seek asylum in Serbia in 2012.⁸⁵¹ A total of 601 asylum seekers were registered and 336 asylum applications were submitted in this period. The Asylum Office rendered 64 decisions dismissing

847 For instance, Greece is on the list of safe countries, although it has not been considered a safe third country since the ECtHR judgment in the case of *M.S.S v. Belgium and Greece*, App. No. 30696/09 (2011).

848 The impugned Decision, for instance, declares Belarus a safe country of origin although its CoE membership was suspended in 1997 because of its poor human rights protection standards; the situation in this country deteriorated further in the meantime. See, e.g. CoE Parliamentary Assembly, *The Situation in Belarus*, AS/Pol (2012) 29, of 3 October 2012.

849 See *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, App. No. 30696/09.

850 Decision in the case of Uż-1286/2012, of 29 March 2012, available at: <http://www.azil.rs/documents/category/judgements>.

851 Information obtained from the UNHCR Office in Belgrade. Of them, 292 applied for asylum at the border, 2,392 in the regional police administrations, 34 in the Centre for Minor Aliens and five in the Aliens Centres – data obtained from the MIA Asylum Office.

asylum applications, three decisions approving asylum and 350 conclusions suspending the asylum procedure in this period. The Office did not reject any applications on the merits in 2012.⁸⁵²

The Asylum Commission rejected 22 and upheld 27 of the 56 appeals filed with it in 2012. Seven were pending at the end of the year.⁸⁵³

The collected data, the analysis of the legal regulations and their implementation in practice lead to the impression that the asylum system in Serbia is inefficient. The legally guaranteed rights are for the most part illusory because the asylum seekers' applications are hardly ever examined on the merits. The prohibition of refoulement to third countries is not observed in practice because the authorities are formalistically and mechanically applying the rigid legal norms, thus enabling chain refoulement, i.e. the return of asylum seekers to third countries where they face the real risk of being subject to persecution, inhuman treatment and other grave forms of human rights violations.⁸⁵⁴ In August 2012, the UNHCR recommended that, given the current situation in the asylum system, Serbia not be considered a safe third country and called on the states parties to the Convention to refrain from sending asylum seekers back to Serbia on this basis.⁸⁵⁵

13.3. Rights and Obligations of Asylum Seekers, Refugees and People Granted Subsidiary Protection

These rights are governed by Chapter VI of the Asylum Act and include the right to residence, accommodation, basic living conditions, health care, education, etc. These provisions, too, suffer from shortcomings, the most significant of which is that specific rights are guaranteed to persons granted the right to asylum but not to beneficiaries of subsidiary protection.⁸⁵⁶

13.3.1. Accommodation

The Asylum Centres in Banja Koviljača and Bogovađa are charged with accommodating asylum-seekers until final decisions on their applications are rendered. The Centres are in the jurisdiction of the Commissariat for Refugees and funded from the Serbian state budget. The relevant by-laws governing in detail their

852 Data obtained from the Bureau for Information of Public Importance at the Cabinet of the Minister of Internal Affairs.

853 Data obtained from the Bureau for Information of Public Importance at the Cabinet of the Minister of Internal Affairs on 26 February 2013.

854 See similar assessments in the *Serbia as a Country of Asylum* and *Serbia as a Safe Third Country* reports.

855 *Serbia as a Country of Asylum*, paragraph 4.

856 See more in the *2011 Report*, I.4.16.2.5.

work have been enacted.⁸⁵⁷ The Banja Koviljača Centre has the capacity to take in up to 85 and the Bogovađa Centre up to 150 people, but they have accommodated as many as 98 and 213 people respectively.⁸⁵⁸ Priority is given to families with children and people with health problems. The living conditions in these open Centres are satisfactory.

The Asylum Centres lack the capacities to take in all the asylum seekers and between 30 and 195 asylum seekers remain unaccommodated on an everyday basis. Although it appeared in March 2012 that the lack of capacity problem would finally be addressed,⁸⁵⁹ a large number of asylum seekers, sometimes as many as 200, have been living outside, in the woods near the Bogovađa Asylum Centre since June.⁸⁶⁰ The Refugee Commissariat has not been providing them with emergency accommodation or humanitarian aid although they occasionally include unaccompanied minors, pregnant women, families with small children and asylum seekers in need of medical care.⁸⁶¹ Apart from the lack of room, the Bogovađa Asylum Centre also suffers from problems regarding the organisation of accommodation for the asylum seekers, the timely provision of medical assistance; moreover, asylum seekers who violate the House Rules are denied meals and accommodation.

There was talk of a Serbian government decision to cede the army barracks in the village of Mala Vrbica at Mladenovac to the Refugee Commissariat⁸⁶², which was to have renovated it to accommodate the asylum seekers.⁸⁶³ The residents of the neighbouring villages protested against the decision and the Mladenovac Municipal Assembly rendered a decision opposing the construction of the Asylum Cen-

857 Rulebook on Medical Examinations of Asylum Seekers on Admission to an Asylum Centre (*Sl. glasnik RS*, 93/08); Rulebook on Accommodation and Basic Living Conditions in Asylum Centres (*Sl. glasnik RS*, 31/08); Rulebook on Social Assistance to Asylum Seekers and People Granted Asylum (*Sl. glasnik RS*, 44/08); Rulebook on Records of People Accommodated in Asylum Centres (*Sl. glasnik RS*, 31/08); Rulebook on Asylum Centre House Rules (*Sl. glasnik RS*, 31/08).

858 Statistical data the BCHR collected from the competent authorities on a weekly basis throughout 2012.

859 Between 70 and 145 people were waiting to be accommodated in the Banja Koviljača Centre every day until March. The Centre management kept updated records of asylum seekers waiting for accommodation and issued them certificates that they had tried to find accommodation in the Centre within the 72-hour legal deadline. More on asylum seekers living outside the Banja Koviljača Centre in the *2011 Report*, II.4.7.

860 The Bogovađa Centre management does not keep records of people waiting for accommodation in the Centre.

861 Based on the information collected by the BCHR lawyers, who provided legal aid to asylum seekers in 2012.

862 This Government Decision is not publicly available, but a representative of the Refugee Commissariat confirmed that part of the army barracks in Mala Vrbica would be renovated to accommodate asylum seekers at a round table “Towards Europeanisation of Serbia – monitoring established policies and practices in the asylum and readmission related areas in the Republic of Serbia,” organised by Group 484 on 30 August 2012.

863 *Challenges of Forced Migration*, p. 29.

tre in the municipality.⁸⁶⁴ There are no indications that a Centre will soon be built to permanently address the accommodation of asylum seekers although the Refugee Commissariat was provided with funds from the budget for that purpose back in 2011.⁸⁶⁵

13.3.2 Integration

Article 46 of the Asylum Act lays down a general obligation of the Republic of Serbia to, commensurate with its capacities, ensure conditions for the integration of refugees in social, cultural and economic life and facilitate the naturalisation of the refugees. Nothing has yet been done to enable their integration. Nor have funds in the budget been earmarked for that purpose. The Migration Management Act⁸⁶⁶, however, charges the Refugee Commissariat with the accommodation and integration of people granted asylum or subsidiary protection (Arts. 15 and 16).

13.4. Unaccompanied Minor Asylum Seekers⁸⁶⁷

As provided for by international standards, the Asylum Act lays down that asylum seekers with special needs, including minors separated from their parents or guardians, shall be provided with special care (Art. 15). There are no particular norms or protocols for establishing the age of aliens seeking asylum in Serbia.⁸⁶⁸ When an asylum seeker declares that he is a minor, the MIA contacts the local social work centre, which designates him a temporary guardian. The guardian escorts the minor to the Institution for Children and Youths Vasa Stajić in Belgrade or the Institution for Children and Youths in Niš, which have special high security wards looking after minor asylum seekers. The minors are appointed new guardians in the institutions and provided with the opportunity to declare whether they want to seek asylum in Serbia; if they do not, they are returned to the border of the country from which they entered the territory of Serbia.⁸⁶⁹ Unaccompanied minors who apply for asylum are referred to the Asylum Centres in Banja Koviljača and Bogovađa, where they live until a final decision on their asylum application is rendered.

In keeping with the principle of representing unaccompanied minors (Art. 16), the social work centres appoint guardians for the minors before they apply for asylum. These guardians ought to be trained in working with unaccompanied

864 *B92*, 15 May. See also the article “Uncertainty in Vrbica”, 16 May 2012, www.mladenovac.rs.

865 See the *2011 Report*, II.4.6.

866 *Sl. glasnik RS* 107/12.

867 Unaccompanied minors are aliens under 18 years of age who arrived in the Republic of Serbia unaccompanied by their parents or guardians or were separated from them upon arrival in the Republic of Serbia (Art. 2, Asylum Act).

868 *Serbia As A Safe Third Country*, p. 10.

869 See more in *Status of Asylum Seekers in Serbia (July-October 2012)*, available at: http://www.azil.rs/doc/ENG_ASYLUM_3_FINAL_rev.pdf.

minors. The obligation in the Act that the guardians attend interviews of unaccompanied minors is consistently honoured by.

The Niš institution can accommodate up to eight minor asylum seekers, who live in a separate room in very bad shape.⁸⁷⁰ The living conditions in the Niš Institution are totally inadequate, as the Council of Europe Committee for the Prevention of Torture noted in its Report as well.⁸⁷¹ The underage asylum seekers can use the sports grounds and spend time in the institution's yard during the day but the institution does not implement any organised programmes for them. The Belgrade Institution can take in 12 minor asylum seekers. The living conditions in this facility are satisfactory.

Both Centres accommodate only boys, which they justify by the fact that there are hardly any girls among minor asylum seekers.⁸⁷² The minor aliens are provided with meals observing their religious customs. Minor asylum seekers are free to walk around the grounds of the institutions but cannot leave them unless they are escorted by their guardians.

13.5. Recommendations

1. Introduce training of police officers on the treatment of asylum seekers as a vulnerable group and on the right to asylum
2. Introduce independent monitoring of access to the asylum procedure at border crossings
3. Introduce training on the right to asylum for misdemeanour judges
4. Consistently refrain from punishing asylum seekers for illegally entering the country
5. Provide asylum seekers with unhindered access to the state territory and the asylum procedure
6. Enable the registration of asylum seekers not living in Asylum Centres due to lack of room
7. Define the deadline by which the registered asylum seekers must be issued IDs

870 *Status of Asylum Seekers in Serbia (July-October 2012)*, available at: http://www.azil.rs/doc/ENG_ASYLUM_3_FINAL_rev.pdf.

871 The CPT Report is available at <http://www.cpt.coe.int/documents/srb/2012-17-inf-eng.pdf>. In its response to the CPT Report, the Republic of Serbia stated that it agreed with the CPT's assessment and that the Ministry would allocate funds for the refurbishment and adaptation of the Niš Centre "depending on the amount of the funding in the budget for 2012" (paragraph 149 of the Response by the Republic of Serbia). The renovation of the Niš facility will ultimately be funded by the UNHCR.

872 *Status of Asylum Seekers in Serbia (July-October 2012)*, available at: http://www.azil.rs/doc/ENG_ASYLUM_3_FINAL_rev.pdf

8. Allocate funds in the budget to cover the costs of interpretation during the asylum procedure
9. Ensure consistent abidance by the principle of gender equality in the asylum procedure during the assignment of cases to the Asylum Office staff and by engaging interpreters of both sexes
10. Ensure consistent abidance by the prohibition of refoulement in accordance with international human rights protection standards
11. Set adequate criteria for updating the Government list of safe third countries and revise the valid list
12. Ensure adequate accommodation for all asylum seekers (and provide accommodation for unaccompanied girls)
13. Facilitate the integration of people granted asylum or temporary protection.

14. Right to Education

14.1. General

Under the Constitution, everyone shall have the right to education. Article 71 sets out that primary and secondary education shall be free of charge. In addition, primary education shall be mandatory. Under the Constitution, all citizens shall have equal access to tertiary education; the state shall provide free tertiary education to successful and talented students, who are unable to pay the tuition, in accordance with the law.

The Act on the Bases of the Education System⁸⁷³ provides for the non-segregated inclusion of children in education and continuous schooling, extends the duration of the mandatory and free Preschool Preparatory Programme from six to nine months, governs the inclusive education approach and envisages mechanisms to support the children and the teaching staff.

The Preschool Education Act⁸⁷⁴ gives priority to enrolment of children from vulnerable groups and provides for the implementation of separate, specialised and alternative programmes. Children under 6 need not attend the preschool program, whilst the local governments shall provide transportation for the children and the persons accompanying them.

The Act on Pupil and Student Standards⁸⁷⁵ governs the rights related to pupil and student standards, the establishment of organisations and the work of pupil and student standard institutions.

873 *Sl. glasnik RS* 72/09 and 52/11.

874 *Sl. glasnik RS* 18/10.

875 *Ibid.*

In 2010, the Government of Serbia established the Vocational and Adult Education Improvement Council, which is chaired by the Serbian Chamber of Commerce.⁸⁷⁶

Education laws comprise provisions protecting groups and individuals from discrimination and protection from corporal punishment and verbal abuse of students. They thus reaffirm the provisions of the Convention on the Rights of the Child related to non-discrimination, protection from abuse and school discipline in terms of the way it can be exercised (Arts. 2, 19(1) and 28(2), Convention on the Rights of the Child).⁸⁷⁷ These prohibitions are supported by appropriate protection mechanisms and their breach constitutes the grounds for dismissal of teachers or associates from the teaching process (Art. 73 (1), Act on Primary Schools and Art. 80 (1), Act on Secondary Schools). These are also the grounds for dismissal of school principals who do not take appropriate action in case of improper conduct of the teachers (Art. 88(3), Act on Secondary Schools), and penalties have also been prescribed for the schools, which are fined for the offences if they fail to take action against such conduct (Art. 109 (11 and 12), Act on Primary Schools and Art. 140 (1 and 2), Act on Secondary Schools).

The Constitution of Serbia explicitly guarantees the autonomy of the universities, colleges and scientific institutions (Art. 72). Under paragraph 2 of the Article, they shall decide freely on their organisation and work in accordance with the law. Article 73 of the Constitution also guarantees the freedom of scientific and artistic creation.

This area is regulated by the Higher Education Act.⁸⁷⁸ In its introductory provisions, the Act says that higher education is of special relevance to the Republic of Serbia and constitutes part of international, notably European education, science and arts (Art. 2). Higher education is based *inter alia* on the principles of academic freedoms, autonomy, respect of human rights and civil liberties, including prohibition of all forms of discrimination, participation of students in management and decision making, especially on issues of relevance to quality of instruction (Art. 4).

A Committee for the Rights of the Child was established as a working body of the National Assembly of the Republic of Serbia for the first time in 2012.⁸⁷⁹ The Committee is chaired by the Assembly Speaker. The Committee also comprises the Deputy Speakers, representatives of MP groups and the Chairman of the Committee for Labour, Social Affairs, Inclusion and Poverty Reduction.

876 *The First National Report on Social Inclusion and Poverty Reduction*, March 2011, Government of the Republic of Serbia, p. 121.

877 See *Campbell and Cosans v. the United Kingdom*, ECtHR, App. No. 7511/76 and 7743/76 (1982). Re corporal punishment of minors see also the case *Tyrer v. United Kingdom* ECmHR, App. No. 5856/72 (1978).

878 *Sl. glasnik RS* 76/05, 100/07, 97/08 and 44/10.

879 See the National Assembly Rules of Procedure: <http://www.parlament.gov.rs/national-assembly/important-documents/rules-of-procedure/working-bodies-of-the-national-assembly.1355.html>.

Under Article 47 of the Assembly Rules of Procedure, the Committee for the Rights of the Child shall review draft laws in the light of child rights protection; monitor the implementation and enforcement of laws and other enactments governing the status of children and the protection of their rights; ensure the alignment of national law with international child rights standards; cooperate with national and international bodies and institutions and the local governments; initiate amendments to regulations and recommend the adoption of specific enactments and measures to protect the rights of the child; promote the rights of the child; and review other issues of relevance to the protection of children.

The Republic of Serbia began drafting its Second and Third Periodic Reports on the enforcement of the Convention on the Rights of the Child. Given that the Committee on the Rights of the Child particularly appreciates the involvement of children in the reporting process, the Serbian NGO Child Rights Center prepared the Report on the Rights of the Child in the Republic of Serbia from the Aspect of Children and Youths in cooperation with Save the Children and groups of children and youths in Belgrade, Niš and Užice.⁸⁸⁰ The Report states that the situation regarding children's and youth's views on human rights has deteriorated because they were now less familiar with the human rights concept than five years ago. Their support to an ethnically clean state has increased, as has their intolerance and readiness to resort to violence against people of a different sexual orientation. The Child Rights Center also concluded that boys were more willing to resort to violence than girls, that participation in school was still insufficient and that the pupils' interest in taking part in the decision-making was alarmingly low.

A working draft of a law on the rights of the child was presented in early 2012. This bill was drafted by the Protector of Citizens with the aim of comprehensively regulating the rights of the child by national law.⁸⁸¹ The experts, media and general public, however, fiercely reacted to the draft, particularly to the provisions prohibiting corporal punishment and those regarding the accountability of parents and other people involved in raising and educating children.

Children took part in focus groups in the consultations on the working draft.⁸⁸² It transpired that children and youths had different views on corporal punishment; quite a few of them said they approved of milder forms of corporal punishment as a method of upbringing. Nevertheless, all of the participants preferred talking things over to the other methods of upbringing but had different opinions about the effectiveness of that approach. Children and youths in the focus groups said that their opinions were acknowledged the most at home and the least in school. They

880 The report is available at: http://www.cpd.org.rs/en/home/news/_params/newsplus_news_id/1295.html.

881 The lists of experts that drafted the law is available at: <http://www.zastitnik.rs/index.php/lang-sr/component/content/article/2103>.

882 A total of 779 children took part in the focus groups. See http://cpd.cmass3.info/home/news/_params/newsplus_news_id/1122.html.

were extremely grateful for the opportunity to take part in the focus groups and to give their views on the law that directly affected them and noted that they would like to be more involved in the adoption of laws dealing with children.

The BCHR will continue monitoring the developments regarding the adoption of the law on the rights of the child in 2013 and analyse it in detail when it is adopted.

In mid-2012, the Government of the Republic of Serbia adopted the Education Development Strategy until 2020⁸⁸³. The Strategy focuses on improving the quality, fairness and efficiency of the education system. It, inter alia, defines the measures for preventing dropping out, defines the education policy reflecting the labour market demands and envisages comprehensive support to inclusive education and inclusion of children from marginalised groups.

According to the 2011 Census results published by the Statistical Office of the Republic of Serbia (SORS),⁸⁸⁴ the number of people without any schooling has practically halved since the 2002 Census and now stands at 164,884 citizens or 2.68% of the population. College graduates account for 10.59% of the population in Serbia. The number of citizens over 15 years of age who have not completed primary school is, however, still high — 677,499 or 11% — but their number has dropped since 2002, when over one million (16.18%) of the population over 15 years of age had incomplete primary education.⁸⁸⁵ Most of the population — around three million or 48.93% — has a high school degree.

The five municipalities with the highest shares of residents who have no schooling or did not complete primary school, Ražanj (37.92%), Osečina (36.98%), Gadžin Han (35.85%), Rekovac (35.14%) and Crna Trava (34.84%), are simultaneously the poorest municipalities in Serbia. The following municipalities have the greatest shares of residents with higher education: the Belgrade municipalities of Vračar (52.34%), Stari grad (50.2%), Savski venac (46.62%), New Belgrade (40.61%) and the Niš municipality of Medijana (34.73%).

There are 127,463 illiterate people in Serbia; over 80% of them are women. The 2011 Census was the first to cover computer literacy, i.e. whether the respondents were familiar with text processing, creating tables, sending and receiving e-mail and using the Internet. The results show that nearly half of the citizens above 15 years of age are computer literate; the shares of computer literate men and women are almost the same.⁸⁸⁶

883 *Sl. glasnik RS* 107/12. The Strategy is available in Serbian at <http://www.mpn.gov.rs/prosveta/page.php?page=307>

884 See the 2011 Census results on Educational Attainment, Literacy and Computer Literacy, available at <http://webzrs.stat.gov.rs/WebSite/public/PublicationView.aspx?pKey=41&pLevel=1&pubType=2&pubKey=1565>.

885 *Ibid.*

886 *Ibid.*

The Council of Europe on 15 February 2012 adopted a new Strategy for the promotion of children's rights and the protection of children from violence "Building a Europe for and with children".⁸⁸⁷ The strategy is a response to the needs expressed by governments, professionals working with children, civil society and children themselves who asked for more efforts to be made in implementing the existing standards. The goal of the "Building a Europe for and with children 2012–2015" programme is the full implementation of the UN Convention on the Rights of the Child in Europe by achieving the effective application of the existing standards in the field of the rights of the child.

The Coalition for Monitoring the Rights of the Child, which rallies 18 civil society organisations and promotes child rights in the Republic of Serbia, prepared a Report on the Analysis of the General Measures for the Implementation of the Convention on the Rights of the Child in the Republic of Serbia. The Report provides an overview of the research and analysis of the extent to which the general measures for the enforcement of the Convention on the Rights of the Child are applied in the Republic of Serbia.⁸⁸⁸ The Coalition for Monitoring the Rights of the Child in Serbia⁸⁸⁹ in 2012 drafted for the first time a submission for the UPR (Universal Periodic Review on the rights of the child)⁸⁹⁰ which was forwarded to the UN Human Rights Council.

The Coalition in 2012, *inter alia*, advocated for the children's right of access to education, notably free transportation for all children. Namely, Article 71 of the Constitution of the Republic of Serbia guarantees everyone the right to an education and sets out that primary education shall be mandatory and free of charge. Article 138 of the Act on Primary Schools elaborates this constitutional norm and specifies that cities and municipalities shall ensure funding for the transportation of pupils living four or more kilometres away from the nearest school and for the transportation of pupils with disabilities regardless of the distance from their homes to their schools. The Coalition departed from the presumption that the poorest municipalities in Serbia had the hardest time fulfilling this obligation and collected data regarding the 46 municipalities⁸⁹¹ falling in the 4th group of extremely un-

887 The Strategy is available at <http://www.coe.int/t/dg3/children/>.

888 The Report is available in Serbian at www.cpd.org.rs.

889 The Coalition for Monitoring the Rights of the Child is comprised of 18 civil society organisations focussing on child rights in Serbia. The Coalition rallied in 2007 and drafted the Shadow Report on the Implementation of the Convention on the Rights of the Child in Serbia in the 1992-2007 period. The Coalition has since taken part in reporting to the Committee on the Rights of the Child, monitored the implementation of the Committee recommendations, etc. More on the Coalition's activities is available at http://www.cpd.org.rs/en/home/news/_params/newsplus_news_id/1060.html.

890 The submission is available at http://www.cpd.org.rs/en/home/news/_params/newsplus_news_id/1060.html.

891 The Coalition members sent each of the 46 municipalities requests for access to information of public importance. Thirty-three municipalities responded to the requests.

derdeveloped local self-government units, the development level of which is lower than 60% of the state average.⁸⁹² The data showed that the municipalities applied different approaches⁸⁹³ to planning funds for supporting education and ensuring the transportation of school-children.

The survey showed that over 400 pupils walked over four kilometres to school and that urgent intervention was needed to provide free transportation for pupils in poor and devastated municipalities and that authorities and institutions at all levels had to act in concert to address the problem. The survey indicated that the municipalities perceived the free transportation of pupils as a social issue, rather than as support to education, that they did not keep adequate records of the number of pupils using free transportation, of the number of pupils who have to walk over four kilometres to school and that they have not been earmarking funding for the most cost-effective transportation of pupils in areas without public transportation.

The Republic of Serbia made the first steps towards improving access to education with the Act on the Bases of the Education System, which came into force in September 2009, and the Inclusive Education Roadmap adopted earlier, which provide for a fairer enrolment policy ensuring greater inclusion of children with disabilities and marginalised groups in the education system. The law has thus specified the measures and instruments allowing the adjustment of the curricula to the individual children with disabilities and ensuring that they can learn and develop in an inclusive environment.

The education reform has, however, been severely criticised by the experts. According to a survey conducted by the Institute for Educational Research⁸⁹⁴, most teachers in Serbia think that the education reforms were too ambitious and that the Ministry of Education had not done enough to prepare them for their implementation well. The survey covered 1,824 teachers in 150 primary schools in Serbia, who were asked to assess the success of introducing inclusive education, the teachers' advanced training and the schools' development planning.

As many as 70% of the teachers claimed that the Ministry had not asked them what they perceived as the greatest problems in education, while between 40 and 50 percent were of the view that the education authorities had not had proper insight in the situation in the field before they launched the reforms. The teachers were of the view that the reforms were launched primarily for political reasons and

892 Pursuant to a Government Decree Establishing a Single List of Regions and Local Self-Government Units by Degree of Development for 2010 (*Sl. glasnik RS* 51/2010). Available in Serbian at the website of the National Agency for Regional Development http://narr.gov.rs/index.php/narr_en/Documents/Legal-Corner/Uredbe.

893 The Coalition established that funds for the transportation of school-children were being planned under different budget lines: 463 – transfers to other government levels, 472 – family and child budget allowances or 422 – travel expenses, 411 – workers' wages, allowances and benefits, 424911 – other specialised services and 423911 – other general services.

894 Source: <http://www.ipisr.org.rs>.

that inclusion was initiated under pressure from foreign institutions, while the needs and wishes of the teachers were taken into account the least.⁸⁹⁵

The reforms have mostly been implemented through the adoption of laws and by-laws and training. Most of the teachers agree that they would have been more successful had there been greater oversight and monitoring and if the teachers were held more accountable for their performance. Half of the teachers thought that inclusion and school development planning training were inappropriate while one out of three respondents said that the regulations were unclear.

The survey also showed that the teachers were dissatisfied with the state's treatment of education – 75% believed that education was at the bottom of the state priority list, 86% said that not enough money was earmarked for education, while 78% thought that the continuity of the reforms was undermined by the frequent changes at the helm of the Ministry. Most teachers are also dissatisfied with their salaries, the volume of administrative duties they have to fulfil and think that the system does not recognise or acknowledge quality performance. The primary school teachers, principals and pedagogues and psychologists are also of the view that the education system is poorly organised and that the situation has been exacerbated by the launch of a number of reforms.⁸⁹⁶

The authors of the survey also noted that 70% of the respondents thought the schools they worked in were well organised and efficient and supportive of the teachers. Although over half of them said that the reforms had not fulfilled their expectations, 90% said they were still willing to take an active part in the reforms.

14.2. Recommendations

1. Step up the reform of the professional and advanced professional training of teachers in accordance with the inclusive education standards.
2. Put in place the requisite capacities and resources for education activities within the remit of the local governments.
3. Align the network of schools and satellite schools with the demographic changes in society.
4. Introduce systemic measures to support poor pupils, e.g. provide free textbooks to pupils in all grades.
5. Focus on the social dimension of the Bologna process and improve measures of support to under-represented students (poor students, students with disabilities, Roma students)
6. Ensure that municipalities keep records on the number of pupils using transportation free of charge and walking over four km to school and use these records to plan budget funding for the transportation of pupils in the absence of organised public transportation.

895 See the Belgrade daily *Danas* report on the survey, available in Serbian at http://www.danas.rs/danasrs/drustvo/nastavnici_razocarani_reformom_obrazovanja.55.html?news_id=243319.

896 *Ibid.*

15. Right to Work

15.1. General

Serbia is a member of the International Labor Organization (ILO) and a signatory of a large number of conventions adopted under the auspices of this organisation,⁸⁹⁷ including Convention No. 122 Concerning Employment Policy⁸⁹⁸, Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation⁸⁹⁹ and ILO Convention No. 100 Concerning Equal Remuneration.

According to the case law of the Committee for Economic, Social and Cultural Rights (CESCR), the right to work does not imply the right of a person to be provided with a job he wants, but the state's obligation to take necessary measures to achieve full employment.⁹⁰⁰ The right to work entails the right to employment, the right to the freedom of choice of work, i.e. prohibition of forced labour⁹⁰¹ and the prohibition of arbitrary dismissal.

The Constitution guarantees the right to work and free choice of occupation (Art 60). Under the Constitution, everyone shall have the right to fair and favourable working conditions and equal access to all jobs. The Constitution does not include a provision under which the state is obliged to ensure that everyone can make a living by work, which is the main purpose of the right to work.⁹⁰²

Labour law is regulated primarily by the Labour Act⁹⁰³ and the Employment and Unemployment Insurance Act.⁹⁰⁴ The General Collective Agreement⁹⁰⁵, which regulated relations between employers and workers in greater detail, ceased to be effective in May 2011⁹⁰⁶. Pursuant to the decisions of the Labour and Social Policy Minister, it will be replaced by a number of collective branch agreements each of which will apply to all employers in a specific professional branch.

897 Serbia has to date adopted 77 ILO Conventions.

898 Sl. list SFRJ (Međunarodni ugovori i drugi sporazumi) 34/71.

899 Sl. list FNRJ (Međunarodni ugovori i drugi sporazumi), 3/61.

900 General Comment No. 18, UN doc. E/C.12/GC/18.

901 More on the prohibition of forced labour in II.3.5.

902 Article 4 of the ESC guarantees the right to a fair remuneration. See *Digest of the Case Law of the European Committee of Social Rights*, pp. 44–48 and General Comment No. 18, paragraph 1.

903 *Sl. glasnik RS* 24/05, 61/05 and 54/09.

904 *Sl. glasnik RS* 36/09 and 88/10.

905 *Sl. glasnik RS* 50/08, 104/08 – Annex I and 8/09 – Annex II.

906 After the expiry of General Collective Agreement in May 2011, the relations with the trade unions and workers are to be regulated exclusively by branch agreements in those branches of the economy in which the majority of the employers have an interest in concluding such collective agreements, source: City of Belgrade Association of Accountants and Auditors available in Serbian at: <http://urrgb.com/index.php?topic=3778.0>

The National Employment Strategy for the 2011–2020 Period was adopted in May 2011⁹⁰⁷. The primary goal of the employment policy is to establish an efficient, stable and sustainable trend of employment growth and fully align the employment policy and the labour market indicators with the practices of EU member states. The Strategy envisages a rise in employment from 45.5% to 66%.

The unemployment rate stood at 25.5% in April 2012, that is, 3.3% more than in April 2011. This was the highest rate of unemployment in Serbia since 1998, when the Statistical Office of the Republic of Serbia (SORS) started registering the unemployment rate.⁹⁰⁸ According to the latest SORS data, 22.4% of Serbia's population were registered as unemployed in 2012⁹⁰⁹, i.e. three percent less than in April 2012. To compare, according to Eurostat, the unemployment rate in the Eurozone countries currently stands at 11.1%, with Greece and Spain topping the list with 21.9% and 24.6% respectively. Croatia's unemployment rate stands at 14.5% and Slovenia's at 8.8%. Austria has the least unemployment rate – 4.1%.⁹¹⁰

The valid Labour Act was amended in 2012 and a new Labour Act is to be adopted in 2013. The working group of the Social-Economic Council, which is involved in the process of drafting the new provisions, recommended that the fixed-term contracts be extended from 12 to 36 months, but the legislators laid down that fixed-term employment may last up to 24 continuous months in the draft law.⁹¹¹ According to the latest Labour Force Survey⁹¹², as many as 243,808 of the 2,157,618 workers who are regularly paid, are working under fixed-term contracts. The IMF and the American Chamber of Commerce supported the proposal to extend the fixed-term contracts to 36 months.

The Ministry of Labour, Employment and Social Policy's Labour Inspectorate⁹¹³ performed a total of 13,177 checks in the first five months of the year and rendered 1,746 decisions, 608 of which regarded recruitment – fixed-term contracts are usually signed with workers engaged on seasonal jobs, specific projects or when companies need additional staff to help out with excessive workloads for shorter periods of time.

The employers hire the workers for a year, but, in practice, they usually change the systematisation of jobs to keep the workers in the same jobs without having to send them off on one-month breaks. A lot of workers have thus been

907 *Sl. glasnik* RS 55/05, 71/05 – corr, 101/07, 65/08 and 16/11).

908 The Statistical Office of the Republic of Serbia published on 29 June 2012.

909 SORS Latest Indicators: <http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=2>

910 Source: Večernje novosti "One out of Three Will Lose Their Jobs", available in Serbian at: <http://www.novosti.rs/vesti/naslovna/aktuelno.290.html:389737-Svaki-treci-ostace-bez-posla>.

911 According to Assistant Labour Minister Radmila Bukumirić Katić, available in Serbian at <http://www.novosti.rs/vesti/naslovna/aktuelno.290.html:388035-Svaki-deseti-ima-posao-na-odredjeno>.

912 SORS: http://webrzs.stat.gov.rs/WebSite/repository/documents/00/00/61/71/SB_550_ARS2011_SAJT.pdf.

913 Labour Inspectorate Report, available in Serbian at <http://www.minrzs.gov.rs>

working under fixed-term contracts up to six years continuously, which clearly constitutes an abuse of this kind of contract.⁹¹⁴

The greatest shortcoming of the valid Labour Act is the absence of a provision specifying how many times a fixed-term contract may be extended. The Act merely states that a fixed-term contract may be concluded for a maximum of 12 months (Art. 37(1)) and that a 30-day break must be made between two fixed-term contracts (Art. 37(2)). This is precisely why the Labour Inspectorate has identified few violations of labour rights arising from extensions of fixed-term labour contracts although the employers are obviously abusing the legal lacuna. It is therefore instrumental to extend the duration of fixed-term contracts from 12 to 36 months, above all in order to afford protection to the workers.

Serbia in 2010 adopted the Act on Volunteering,⁹¹⁵ which regulates the rights and obligations of persons providing services or performing activities to everyone's benefit or the benefit of another person free of charge. The category of volunteering, legally distinct from other forms of free service provision, such as internship and traineeship, was thus finally introduced in Serbia's legal system. The Labour and Social Ministry in 2012 established the National Committee for Volunteering, rallying the representatives of the Government, non-government organisations and employers associations. The Committee is to support the institutional development of volunteering in Serbia, which is to facilitate the implementation of the main principles of volunteering and cooperation between the state institutions and the NGO sector. Although it goes without saying that the practical benefits of volunteering are enormous and that volunteering is the only way in which many young people can acquire working experience, strong oversight mechanisms need to be applied to prevent the employers from abusing the work of volunteers.

15.2. Right to Assistance in Employment and in the Event of Unemployment

Employment is regulated in greater detail by the Employment and Unemployment Insurance Act⁹¹⁶. Job seekers are provided assistance in finding employment free of charge by the National Employment Service (NES) and recruitment agencies. The NES has been headquartered in Kragujevac since 2010. The NES is under the obligation to provide its services to the unemployed free of charge. Job seekers can also look for employment through private recruitment agencies. The costs of the recruitment agencies' services are fully borne by the employers. The NES is duty-bound to publish a job vacancy within 24 hours from the moment it is notified of the vacancy. The definition of job seekers now includes an additional

914 Večernje novosti available in Serbian at <http://www.novosti.rs/vesti/naslovna/aktuelno.290.html:388035-Svaki-deseti-ima-posao-na-odredjeno>.

915 *Sl. glasnik RS* 36/10.

916 *Sl. glasnik RS* 36/2009 and 88/2010

category apart from the existing categories (the unemployed) – that of persons who want to change jobs. This category covers persons who cannot be categorised as unemployed on legal grounds (high school and university students, pensioners) and provides them with the opportunity to avail themselves of the NES' services.⁹¹⁷ At the end of November 2012, 755,442 people were registered as unemployed by the NES; 363,594 of them were men and 391,848 were women. A total of 1,412 people (90 of whom were persons with disabilities) found jobs in the January-September 2012 period; 742 people were covered by the new jobs measures and 3,549 were engaged in public works.⁹¹⁸

Article 33 of the Act stipulates that a job seeker is duty-bound after 12 months to accept a job requiring lower qualifications but within the same profession and taking into account the job seeker's prior work experience and circumstances in the labour market. This provision is in keeping with the practice of international bodies monitoring economic and social rights.

The Act includes an extremely important provision entitling jobless individuals to unemployment allowances, which are within the jurisdiction of the NES. The unemployment allowances are paid out for a maximum of 12 months, exceptionally 24 months in the event the unemployed person lacks two years of service to retire (Article 72). The amount of the monthly unemployment allowance has been reduced and now ranges from 80 to 160 percent of the minimum wage.

The Serbian 2013 Budget⁹¹⁹ earmarked 3.4 billion RSD for active employment measures and 13.7 billion RSD for the NES. Of the 172 million EUR the European Union donated to Serbia within the Instrument for Pre-Accession Assistance (IPA), 24 million have been set aside for employment and social inclusion.⁹²⁰

Informal employment has been an endemic problem in Serbia. According to the Centre for Democracy surveys, as many as one million people are working in the grey economy. Most of them appear to be working in the manufacturing, construction and hospitality industries, et al. Young, unqualified, uneducated, inexperienced workers and workers over 40 years of age are particularly vulnerable categories.⁹²¹ These workers do not enjoy any labour-related rights because they do not fall under the employed category pursuant to the Labour Act. In its General Comment 18, the CESCR underlined that states parties must take the requisite measures, legislative

917 First National Report on Social Inclusion and Poverty Reduction, March 2011, Government of the Republic of Serbia. Available at: <http://www.inkluzija.gov.rs/wp-content/uploads/2011/04/First-National-Report-on-Social-Inclusion-and-Poverty-Reduction.pdf>.

918 Official NES data, forwarded by the Department for Inter-State Agreements and Allowances on 6 December 2012.

919 The 2013 Budget Act is available in Serbian at <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2012/3472-12%20Lat.pdf>.

920 Fourteenth Newsletter on Social Inclusion and Poverty Reduction, available at <http://www.inkluzija.gov.rs/wp-content/uploads/2009/11/14th-Newsletter-English2.pdf>

921 *Decent work in the Republic of Serbia, putting equality in the heart of EU integration*, Centre for Democracy, 2011, p. 5, http://www.solidar.org/IMG/pdf/35_serbia_decent_work_english.pdf.

or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.⁹²² The Labour Act provisions on employment contracts need to be amended to that effect. One of the possible solutions would be to oblige the employers to register the employment contracts with the competent NES units or the competent municipal administration authorities before the workers begin working and to keep the employment contracts and the mandatory social insurance registration forms in their offices.⁹²³ On the other hand, the labour inspectors' endeavours to combat the grey economy have been inefficient, *inter alia*, because the Labour Act provides room for manipulations in registering workers. The amendments to the Labour Act to be adopted in 2013 are expected to address this issue.

15.3. Workers' Rights Concerning Termination of Employment

According to Article 179 of the Labour Act, employment may be terminated against the employee's will for a just cause relating to his working ability (if the worker does not perform or does not have the necessary knowledge or ability to perform the assigned duties), his conduct (if the worker violates the duties laid down in the employment contract, violates work discipline, if his conduct precludes his further work for the employer, commits a criminal offence at work or related to work, fails to return to work within 15 days from the day of expiry of the period of unpaid leave or dormancy of employment or abuses the right to sick leave). Termination of employment may also ensue if the employer's needs or circumstances change (if a particular job becomes redundant or the volume of work is reduced due to technological, economic or organisational changes). The Labour Act also allows for termination of employment if the worker refuses reassignment to another appropriate job for work organisation or process reasons, transfer to another work location or to an appropriate job with another employer. Under the Act, an appropriate job means a job requiring the same type and degree of qualifications laid down in the employment contract. In addition, employment may be terminated against the employee's will in the event he disagrees with an annex to the provisions in the employment contract regarding remuneration. A worker who consents to the annex to the contract is still entitled to contest the legality of the contract in civil proceedings (Art. 172(4)). There is no reason why this right cannot be exercised by a worker whose employment contract was terminated because he refused to sign the relevant annex to the employment contract, although the Act does not explicitly provide for such a right. Workers can demand their rights in civil proceedings.

922 See paragraph 10 of General Comment 18.

923 Draft amendments to Articles 32 and 33 of the Labour Act proposed by the Centre for Democracy, more at http://www.politickiforum.org/tribina_stampa.php?naredba=stampa_teksta&id=646.

Employers may not dismiss workers without prior notice or if they can offer them another job or re-training. Article 183(4) prohibits discrimination in dismissal, including dismissal on the grounds of political opinion, which is in accordance with the case-law of the Committee for Economical, Social and Cultural Rights (CESCR).⁹²⁴ An unlawfully dismissed worker enjoys judicial protection and the right to compensation of damages.

With the aim of providing special protection to specific groups, the Labour Act comprises provisions banning the dismissal of employees during pregnancy, maternity or child care leave, and the protection of the representatives of employees during their terms in office and in the subsequent year, if the representatives of the employees have acted in keeping with the law, general enactments and the employment contract. This is in keeping with both with the Committee's principle of free trade unionist activities and ILO Convention 135 on workers' representatives.

A number of Labour Act provisions are devoted to the termination of employment against the workers' will, on grounds of redundancy caused by technological, economic or organisational changes in the company, and to the realisation of the workers' rights due to the bankruptcy of the company.

The employer has to adopt a redundancy programme, which will in particular specify: the reasons why there is no need for the jobs, the number of and other data on the redundant workers, the possibility of their requalification or advanced training, transfer to another employer or reassignment to another job, funds for regulating the social and economic status of the redundant workers and the deadline within which their employment contracts will be terminated. The employer shall pay the redundancies to the workers prior to the termination of their employment contracts. The Act lays down the minimum redundancy payments.

The Bankruptcy Act⁹²⁵ additionally ensures the payment of the workers' claims against their bankrupt company by transferring them from the second to the first rank of creditors (Art. 54). It also increases the amount of debt to be paid to the workers in bankruptcy proceedings by including in it the interest rates from the date of maturity to the day the bankruptcy proceedings are opened. The provisions also provide for the coverage of the unpaid private pension and disability insurance contributions borne by the employer.

The Constitutional Court dealt with termination of employment⁹²⁶ in situations in which only part of the severance package was paid and the worker had waived the rest of the sum on behalf of the employer and failed to seek the invalidation of the decision on the termination of employment within the statutory deadline.

924 See *Concluding Observations on the Report of Germany*, E/C.12/1993/17, paragraph 8.

925 *Sl. glasnik RS* 104/09.

926 Constitutional Court Decisions No. Už 3281/2010 of 22 October 2012 and No. 789/2009 of 17 November 2011.

The Constitutional Court established a breach of the right to legal protection in case of termination of employment, because the payment of redundancy is one of the statutory forms of legal protection of workers whose employment was terminated due to technological, economic or organisational changes. Under Article 158 of the Labour Act, employment may be terminated only on condition that the redundancy set in a general enactment or the employment contract had been paid in advance. In the view of the Constitutional Court, the fact that the worker had been paid only part of the redundancy at the time his employment was terminated, that he had waived the rest of the sum on behalf of the employer and that he had not sought an invalidation of the decision within the statutory deadline did not deprive the worker of the right to demand the payment of the rest of the redundancy from the employer.

The Constitutional Court also dealt with the termination of employment of former Ministry of Internal Affairs (MIA) staff at the Ministry's discretion, which had been provided by the Act on Internal Affairs⁹²⁷. Under the provision of the Act valid at the time, the competent MIA authority had been entitled to terminate the employment of a staff member criminally prosecuted for a crime prosecuted *ex officio*. The Constitutional Court assessed that the MIA had been provided with this discretionary power primarily with the goal of protecting the specific scope of affairs within the purview of the MIA, i.e. its staff. It established that any exercise of that power and any abuse of it should have been reviewed in a procedure before the competent authorities when the worker's employment was actually terminated, which had not been the case in practice.⁹²⁸

Although the impugned provision has been amended in the meantime, many former MIA workers, who had been dismissed under the prior regulations, are obviously still seeking satisfaction before the Constitutional Court.

Over 170,000 people lost their jobs in 2012 according to NES data. Of them 34,866 were declared redundant. A survey showed that 103,917 people lost their jobs in Serbia in 2011; most of the pink slips were handed out in Vojvodina, Belgrade, Šumadija and Western Serbia.⁹²⁹

The Republican Agency for the Peaceful Settlement of Labour Disputes has to date reviewed around 5000 individual labour disputes regarding dismissals, minimum wage payments, mobbing and discrimination. An average labour dispute lasts around four years and more and more workers have been taking their cases to the Constitutional Court and the European Court of Human Rights.⁹³⁰

927 *Sl. glasnik RS* 44/91,79/91, 54/96, 17/99, 33/99, 25/00 and 8/01.

928 Constitutional Court Decisions No. UŽ 753-08 of 19 January 2011 and No. UŽ 1757- 2009 of 27 September 2012.

929 See: the Radio Television of Serbia report, available in Serbian at: http://www.rtv.rs/sr_lat/ekonomija/preko-170.000-otkaza-u-2012._359131.html.

930 See more on the website of the Black on White campaign for advancing dignity at work, available in Serbian: <http://www.cmonabelo.com/kako-spreciti-rad-na-crno/>.

15.4. Employment Related Lawsuits

A worker is entitled to complain against a violation or denial of his employment rights to the labour inspection (Arts. 268–272, LA), launch proceedings before the competent court (Art. 195, LA) or require the arbitration of the disputed issues together with the employer (Art. 194, LA). The provisions of the Peaceful Settlement of Labour Disputes Act apply to individual and collective labour disputes.⁹³¹ Serbia also needs to adopt as soon as possible a law on labour inspection in order to improve protection at work and the prevention of the abuse of employment contracts, particularly the concealment of the existence of such contracts.

The Trade Union Confederation *Nezavisnost* filed an initiative for the adoption of an Act on Labour Courts with the competent state institutions in 2012.⁹³² It argued that the trade unions distrusted the regular courts, that the proceedings before regular courts were long, expensive and complicated, which resulted in the courts' inefficiency, and that most of the judges were insufficiently educated and specialised in workers' collective rights.

Given that Serbia does not have Labour Courts, the Republican Agency for the Peaceful Settlement of Labour Disputes is the only institution apart from the regular courts dealing with labour disputes, both individual and collective ones. Arbiters and conciliators specialised in labour law settle the disputes rapidly (within the one-month statutory deadline) and free of charge.

The decisions on individual labour disputes are final and enforceable and the absence of the right to appeal is explained by the parties' voluntary engagement in alternative dispute resolution. The Agency has resolved over 4,500 individual and 65 collective disputes to date. According to available data, there is only one final court judgment on mobbing (rendered by a regular court), while the Agency has to date issued over 50 final and enforceable decisions regarding harassment at work.⁹³³

According to *Nezavisnost*, the main features of the labour courts would include flexibility, informality and greater accessibility (due to lower court costs). Such courts would, above all, ensure the simpler, cheaper and speedier resolution of labour disputes, relieve the labour dispute departments of the regular courts of their workloads, put in place professional judges specialised in labour disputes and ultimately improve the quality of adjudication. The Centre for Democracy Foundation in 2012 conducted a survey on the effectiveness of misdemeanour courts in the field of labour relations and protection, safety and health at work and the role of the labour inspectors in identifying violations of workers' rights.⁹³⁴ The survey

931 Sl. glasnik RS 125/04 and 104/09.

932 See the Black on White website in Serbian: <http://www.crnonabelo.com/ugs-nezavisnost-podneli-inicijativu-za-donosenje-zakona-o-sudovima-rada/>.

933 *Ibid.*

934 The survey is available at http://www.centaronline.org/en/?stranica=kom_dokument&naredba=publikacije&id_kategorija=60&id_menu=5.

showed that the courts and inspectorates' practices were not uniform, that the penal policies varied and that they were much too mild, that a large number of cases were dismissed because the statute of limitations had expired and that the records on the course and outcomes of the misdemeanour procedures were inadequate. The disproportionately large number of acquittals and numerous penalties below the statutory minimum indicate that the penal policies are much too mild given the relevance of the protected rights and the gravity of the established violations.

The survey qualified the fines for specific misdemeanours envisaged in the Labour Act and the Safety and Health at Work Act as too high (they range between 800.000 and one million RSD), but established that the maximum fines were handed down in two out of a 100 cases in which the courts found the parties guilty of these misdemeanours.

The collected data indicate that numerous cases had been dismissed because the statute of limitations had expired in various stages of the misdemeanour proceedings, relieving the unconscientious employers of liability for violating the workers' rights. In 2010, notably, around 60% of the cases ended with convictions while 33.5% were dismissed because the statute of limitations had expired.

The survey noted that the strategy for improving the courts' performance should be based on normative changes, systemic work on aligning the case law and introducing more complex and uniform records, which are prerequisite for the effective protection of the workers' rights and interests.

The first final verdict under the Anti-Discrimination Act regarding discrimination at work on grounds of sexual orientation was adopted in Serbia. The Gay Straight Alliance (GSA) Litigation Department, which represented the injured party, launched the proceedings in April 2011. The Appellate Court ruled that the defendant, D.A., pay 180,000 RSD to the injured party, M.A., for the mental anguish he had suffered due to violations of his right to a personality, honour and reputation and reimburse the GSA Legal Department's court expenses. This is definitely an example of positive court practice.⁹³⁵

The unreasonably long proceedings in Serbia, which can last up to ten years in case of labour disputes, has led more and more dissatisfied workers to take their case to the European Court of Human Rights. A large number of applications filed with the ECtHR regard the non-payment of wages. Transition and privatisation have been used as an alibi to violate human rights, especially economic and social rights. This is why the fact that the number of labour disputes has soared does not come as a surprise.

The number of judgments against the state and the compensation it has been ordered to pay from the budget has also risen. In 2012, the ECtHR rendered two major judgments against Serbia: one in which it ruled that Serbia should pay *per di-*

935 See GSA press release at: <http://en.gsa.org.rs/2013/01/first-final-verdict-for-severe-discrimination-at-the-workplace-based-on-sexual-orientation/>. A more detailed analysis of the judgment will be provided in the BCHR 2013 Report.

ems to around 8,500 reservists who served the Army in 1999,⁹³⁶ which may cost the state around two billion RSD, and another in which it ruled that Serbia should pay the back wages to former workers of the socially-owned companies and pay 6,200 EUR for non-pecuniary damages and court fees and expenses.⁹³⁷

15.5. Recommendations

1. Improve judicial efficiency and ensure courts urgently rule on labour disputes.
2. Put in place mechanisms to ensure stricter and more effective oversight of the employers' actions, and, in particular, boost the capacities of the labour inspectors to ensure that they punish employers committing discrimination and violating labour rights more efficiently.
3. Raise the awareness of the workers and employers of the existing mechanisms for protecting the workers' rights.
4. Lay down stricter penalties for employers violating their workers' rights.

16. Right to Just and Favourable Conditions of Work

16.1. Fair Wages and Equal Remuneration for Work

Serbia is a signatory of the ILO Minimum Wage Fixing Convention (No. 131) and the ILO Equal Remuneration Convention (No. 100), but has not yet ratified ILO Minimum Wage-Fixing Machinery Convention (No. 26) and the ILO Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99).

The Constitution guarantees the right of workers to fair remuneration for their work (Art. 60(4)), although it does not include a provision explicitly prescribing equal remuneration for work of equal value.

The Labour Act prescribes that an appropriate wage shall be fixed in keeping with the law, a general enactment or an employment contract and that an employee shall be guaranteed equal wage for the same work or work of the same value, adding that the employment contract violating this principle shall be deemed null and void. The Act defines work of the same value as work requiring the same qualifications, abilities, responsibility and physical and intellectual work.

936 *Vuckovic and Others v. Serbia*, ECtHR, App. No. 17153/11, (2012) available at <http://www.echr.coe.int/echr/en/hudoc>.

937 *D. Radivojević and others v. Serbia*, ECtHR, App. No. 32635/10, 2012, <http://www.echr.coe.int/echr/en/hudoc>.

With a view to ensuring financial and social security of employees, the Labour Act envisages the right of employees to minimum wages. The minimum wage shall be set by a decision of the Social-Economic Council established for the territory of the Republic of Serbia (Article 112, LA). The Social-Economic Council set the new minimum wage in its Decision of March 2012. The minimum wage for the April 2012-February 2013 period was set at 115.00 RSD net per working hour.⁹³⁸

Under the Labour Act, overtime work shall be paid at a rate at least 26% higher than the wage base. The same rate is paid for work in shifts or at night, in the event the employment contract does not specify remuneration for such work. The Act also lays down a 0.4% progressive annual increase in wages for every year of service (Art. 54). The Act does not oblige employers to keep records of overtime. This has greatly obstructed the checks by the labour inspectors because most employers do not render decisions on overtime or keep records of their staff's overtime. Labour inspectors have a hard time establishing the facts regarding overtime and whether the employers paid the staff for it. In practice, workers tend not to report violations of their labour rights in fear of losing their jobs; such violations are reported only once they no longer work for the employer.⁹³⁹

Under the Act on Civil Servants and General Service Employees⁹⁴⁰, civil servants shall be entitled to salaries, allowances and other income pursuant to the law regulating remuneration in the state authorities (Art. 13). Under the Act, police officers and other Ministry of Internal Affairs (MIA) staff are entitled to a salary comprising a wage base to be set by the Government and basic and additional coefficients reflecting their titles, working conditions, risks, responsibilities and the complexity of their jobs. Their salaries may be between 30 and 50 percent higher than those of other civil servants in the event they work on weekends and holidays, in shifts, at night and overtime (Art. 146(1)).

The case law of the Constitutional Court of Serbia includes a number of judgments in which it found breaches of the right to fair remuneration for work. In its Decisions Nos. U \check{z} 2472/2010 and U \check{z} 2570/2010⁹⁴¹, the Court found that the MIA staff's overtime, night shift and holiday work had not been reckoned when their salary coefficients were calculated. The Constitutional Court established that the workers may not be deprived of the right to higher remuneration which all workers in Serbia working on holidays, at night, in shifts or overtime have. It found violations of the right to fair remuneration for work in both cases and referred the cases back to the Appellate Court for a retrial.⁹⁴²

938 Data from: <http://www.socijalnoekonomskisavet.rs/minimalnazarada.html>.

939 More is available in Serbian on the Black on White website at <http://www.crnonabelo.com>.

940 *Sl. glasnik RS* 79/05, 81/05, 83/05, 64/07, 116/08 and 104/09.

941 The Constitutional Court rendered a similar decision also in the case U \check{z} 2007/2010 of 13 June 2012.

942 Constitutional Court Decisions in the cases of U \check{z} 2472/2010 of 23 May 2012 and U \check{z} 2570/2010 of 3 October 2012.

The Labour Act introduced the possibility of the employer ordering the employee to take a leave of absence exceeding 45 days with adequate compensation of wages, which shall not be lower than 60% of the average wage in the past three months in the event the undertaking halts work or reduces the volume of work; such compensation may not be lower than the minimum wage set in accordance with the Act (Art. 116).

The Constitutional Court also ruled on the increasingly frequent problem arising from the workers' consensual waiver of their right to unpaid wages owed them by their former employers. One of the Constitutional Court 2012 decisions⁹⁴³ brought to light one of the frequent violations of the workers' rights by their former employers. In this decision on a constitutional appeal, the Constitutional Court found that the applicant had signed an agreement with her employer that governed their mutual rights and obligations in the event her employment terminated and by which the applicant had waived all her rights and claims vis-à-vis her employer. Although the agreement did not entitle the applicant to seek court protection, the Constitutional Court rightly concluded that workers could not be deprived of their rights enshrined in Article 60(4) of the Constitution, including the right to fair remuneration for work and court protection in the event their employment terminated. The Constitutional Court established that the agreement, which, inter alia, specified that the applicant waived her right to court protection, was incompatible not only with the Constitution but also with the Labour Act, under which workers may initiate a dispute before the competent court in the event their labour-related rights have been violated.⁹⁴⁴

16.2. Right to Rest, Leisure and Limited Working Hours

Serbia ratified nearly all ILO conventions regarding weekly rest and paid leave. Serbia withdrew from ILO Holidays with Pay Convention (No. 52) and Holidays with Pay (Agriculture) Convention (No. 101). Serbia never ratified ILO Hours of Work (Commerce and Offices) Convention (No. 30) or the Forty-Hour Week Convention (No. 47).

Article 60(4) of the Constitution explicitly guarantees the right to limited working hours, daily and weekly rest, and paid annual vacations. The Labour Act stipulates a five-day working week (Art. 55) and a 40-hour full-time working week (Art. 50). However, in the event the employer reschedules the working hours, an employee may work up to 60 hours a week (Art. 57(3)). The rescheduling of working hours shall not be reckoned as overtime work (Art. 58). This provision is in accordance with the case law of the European Economical and Social Committee, which considers that a working week exceeding 60 hours under certain conditions is unreasonable.⁹⁴⁵

943 Constitutional Court Decision in the case of Už 94/2010 of 26 September 2012.

944 *Ibid.*

945 *Conclusions XIV-2, The Netherlands*, pp. 535–536.

Employees have the legal right to a break during working hours and the right to daily, weekly and annual rests, as well as to paid and unpaid leave in keeping with the law. Employees may not be deprived of these rights. The Labour Act provisions on paid leave are in keeping with minimal European and UN standards. According to European standards, a worker is also entitled to paid leave during public holidays (Art. 2.2 European Social Charter [ESC]) and work performed on a public holiday should be paid at least double the usual rate.⁹⁴⁶ Under Article 108 of the Labour Act, an employee shall be entitled to an increase in pay for work during a public holiday amounting to a minimum 110% of the wage base.

Although the right to fair and favourable working conditions has declaratively been adopted as a universal standard, workers in Serbia have faced numerous problems at their workplaces. Many employers have not been paying the workers their salaries or their mandatory contributions. According to the Centre for Democracy and the Black on White campaign for advancing dignity at work in Serbia, over 5000 active undertakings have not been paying their workers' taxes and contributions and owe them over 95 billion RSD. Furthermore, over 60,000 workers in Serbia were not paid for their work in 2012. Between 300,000 and one million workers in Serbia are working in the grey economy and their health, pension and unemployment insurance dues have not been paid, wherefore they cannot exercise their right to a pension. The key problem lies in the state's ineptitude, lack of systemic mechanisms and political will to address this problem.

At the proposal of the trade unions, the state Social-Economic Council filed an initiative with the Ministry of Labour and Social Policy seeking the amendment of the Criminal Code and the introduction of criminal sanctions against solvent employers who do not pay their workers.⁹⁴⁷ It remains to be seen what will happen with this initiative in 2013.⁹⁴⁸

16.3. Occupational Safety

Serbia has ratified all chief ILO conventions on occupational safety and compensation for work-related accidents or professional diseases, health care and occupational health services. The following two ILO Conventions are the most relevant in that respect: Convention No. 187 on a Promotional Framework for Occupational Safety and Health⁹⁴⁹ and Convention No. 167 on Safety and Health in Construc-

946 *Conclusions XVIII-1*, Croatia, p. 116.

947 Source: *Blic*, available in Serbian at: <http://www.blic.rs/Vesti/Ekonomija/362623/Ko-zaradjuje-a-ne-isplacuje-plate-mogao-bi-u-zatvor>

948 For example, the new Croatian Criminal Code, which came into force on 1 January 2012, treats the non-payment of salaries as a criminal offence, unless the employers are unable to pay them because they have no money in their accounts. This offence carries up to three years' imprisonment. The new Croatian Criminal Code is available in Croatian at: <http://www.zakon.hr/z/98/Kazneni-zakon>.

949 *Sl. glasnik RS (Međunarodni ugovori)* 42/09.

tion.⁹⁵⁰ The ESC specifically guarantees the right to safe and healthy working conditions in Article 3.⁹⁵¹ The ratification and effective implementation of the ILO Convention No. 167 is very important given the many accidents experienced by construction workers in Serbia.⁹⁵²

Article 60(4) of the Constitution guarantees everyone the right to occupational safety and health and the right to protection at work. Paragraph 5 of the Article guarantees special protection at work to women, the young and persons with disabilities.

Under the Labour Act, an employee has the right to health and safety at work. The Act introduces in Article 80(2) the obligation of the employee to abide by safety and health protection regulations so as not to endanger his own health and safety and those of other employees and people. An Occupational Safety and Health Directorate has been set up within the Ministry of Labour and Social Ministry. It is charged with monitoring the implementation of occupational safety and health regulations and measures, overseeing the work of employers with respect to safety and health at work, collecting and analysing data on work-related injuries, organising counselling and professional training for the employers and informing the public of the state of health and safety at work.

The Serbian Occupational Safety and Health Act⁹⁵³ complies with the ratified ILO Conventions and the main Directive 89/391/EEC and the directives deriving from it by adhering to all the guidelines in these directives to the extent and in the form reflecting the national circumstances. Apart from the Occupational Safety and Health Act, the following laws also deal with various aspects of safety and health at work: the Labour Act, the Health Protection Act⁹⁵⁴, the Health Insurance Act⁹⁵⁵, the Pension and Disability Insurance Act⁹⁵⁶, etc. The legislative framework of the system of health and safety at work has been completed by the adoption of the requisite by-laws.⁹⁵⁷

Inspectorial supervision of the implementation of the laws and other safety regulations, measures, norms and technical measures, company enactments and

950 *Ibid.*

951 More in *Digest of the Case Law of the European Committee of Social Rights*, pp. 35–43.

952 The majority of injuries at work take place in the spheres of industry and construction. Thirty seven percent of the workers whose injuries at work were fatal had fixed-term contracts, while 22% had worked in the informal economy. More in: *Decent work in the Republic of Serbia, putting equality in the heart of EU integration*, Centre for Democracy, 2011, p. 7, available at http://www.solidar.org/IMG/pdf/35_serbia_decent_work_english.pdf.

953 *Sl. glasnik RS* 101/05.

954 *Sl. glasnik RS* 107/05, 88/10, 99/10 and 57/11.

955 *Sl. glasnik RS* 107/05, 109/05 and 57/11.

956 *Sl. glasnik RS* 34/03, 64/04, 84/04, 85/05, 5/09, 107/09 and 101/10.

957 Portal Quality, Occupational Safety and Health, http://kvalitet.org.rs/index.php?option=com_content&view=article&id=166&Itemid=82

collective agreements shall be performed by the labour inspectors in the ministry charged with labour affairs (Art. 60, Occupational Safety and Health Act). The Act also prescribes penalties for violating the provisions of the Act or the relevant norms, standards, regulations and directives.⁹⁵⁸

The Occupational Safety and Health Directorate⁹⁵⁹, has alerted to the problem it has identified – most employers consider allocations for occupational health and safety an outlay rather than an investment; furthermore, many workers ignore the occupational health and safety instructions and perform their duties unprofessionally and without taking the precautionary safety measures.⁹⁶⁰ Workers in Serbia injured at work or suffering from an occupational disease exercise their rights in accordance with the Health Insurance Act and the Pension and Disability Insurance Act. They can, however, claim (pecuniary and non-pecuniary) damages in civil proceedings. This type of protection is declaratively afforded also to workers in the informal economy, who can turn to the labour inspectors in the event they suffer an injury at work and claim their labour-related, health, pension and disability insurance rights. Only a few have, however, done so in practice. The Republic of Serbia has to look into the possibility of introducing special insurance covering work-related injuries and occupational diseases in the forthcoming period.⁹⁶¹

In its latest Report⁹⁶², the Labour, Employment and Social Policy Ministry stated that the Labour Inspectorate performed 15,194 checks in the area of occupational health and safety, covering 333,974 workers from January to November 2012. In the reporting period, the Inspectorate rendered 4,577 decisions instructing the employers to eliminate the shortcomings and 374 decisions prohibiting the work of companies due to hazards to the workers' health and safety. It also performed 1,109 checks after fatal work-related injuries; notably, 25 checks ensued after fatal injuries, 15 were prompted by grave injuries resulting in death, 901 checks ensued after the workers sustained grave work-related injuries and 142 were prompted by light work-related injuries. The greatest numbers of work-related injuries were registered in the fields of construction, heavy metal, machinery and other equipment and transportation.⁹⁶³ A comparative analysis of the statistical data over the past five years leads to the conclusion that the number of fatal and grave work-related

958 Chapter XI Occupational Safety and Health Act. Sl. glasnik RS, 101/05.

959 More information about the powers and work of the Occupational Safety and Health Directorate is available in Serbian at <http://www.minrzs.gov.rs/uprava-za-bezbednost-na-radu.php>.

960 See the interview with the head of the Occupational Safety and Health Directorate Vera Božić Trefalt on 25 May 2012 available in Serbian on the Black on White website: <http://www.crnonabelo.com>.

961 *Ibid.*

962 Available in Serbian at <http://www.minrzs.gov.rs/index.php>.

963 Labour and Social Policy Ministry Information Booklet, available in Serbian at <http://www.minrzs.gov.rs/index.php>.

injuries has declined slightly. However, these positive changes should be taken with a grain of salt given that the Serbian industry is not working at full capacity and that many people are working in the informal economy.

16.4. Right to Strike

The right to strike is guaranteed by Article 61 of the Constitution. Workers are entitled to stage strikes in accordance with the law and the collective agreement. The right to strike may be restricted only by law and in accordance with the type and nature of activity.

Under the Strike Act⁹⁶⁴ the right to strike is limited by the obligation of the strikers' committee and workers participating in a strike to organise and conduct a strike in a manner ensuring that the safety of people and property and people's health are not jeopardised, that direct pecuniary damage is not inflicted and that work may continue upon the termination of strike. Besides that general restriction, a special strike regime is also established: "in public services or other services where work stoppages could, due to the nature of the service, endanger public health or life, or cause major damage" (Art. 9 (1)).⁹⁶⁵

A working draft of the new Strike Act presented in 2011 was criticised by many trade unions and professionals, both because of its deficient provisions and the fact that it was prepared in a non-transparent manner. Many trade unions and associations of citizens noted that the 2011 draft deprived them of the existing right to strike and gave more rights to the employers and the state, whereby it denied the workers of their constitutional rights and freedoms of association, assembly and expression. Specific provisions, like the one prohibiting a strike outside company grounds, directly restrict the freedom of assembly and the freedom of expression. Given that the freedom of assembly is governed by a separate law, its additional restriction by a law on strikes is unjustified. Under the draft, the decision to go on strike may be taken by the competent trade union body or most of the workers. This article may lead to limiting the right to strike in the absence of a decision of the trade union since it is clearly difficult to persuade most workers in large companies to support the decision to go on strike. Furthermore, the draft law clearly defines the minimum service, which had earlier been defined by the employers or did not exist at all. The new draft law prohibits Army, Security Intelligence Agency and Flight Control staff and paramedics from staging strikes.

The Act was not submitted to parliament for adoption in 2012.

964 *Sl. list SRJ* 29/96.

965 More on the right to strike in the *2011 Report*, I.4.11.

16.5. Recommendations

1. Ensure greater transparency during the drafting and adoption of new laws impacting on social and economic rights and, in addition to the trade unions and employers, involve the civil sector in the legislation process, particularly in the preparation of a new Labour Act.
2. Increase funding for active employment measures.
3. Further cooperation among all relevant institutions, employers associations, trade unions and civil society with a view to protecting the rights of workers.
4. Take the necessary legal and other measures to minimise informal employment
5. Amend the Labour Act to tailor the flexicurity and dignity at work concepts to the national circumstances.
6. Strengthen the local social-economic councils.
7. Modernise the education system to respond to the labour market needs to reduce unemployment in the longer term.
8. Design individual employment plans for less employable categories of job-seekers.

17. Right to Social Security

17.1. General

Under Article 69 of the Constitution, citizens and families in need of welfare to overcome their social and existential difficulties and begin providing subsistence for themselves shall be entitled to social protection, the provision of which shall be based on the principles of social justice, humanity and respect for human dignity. In its Opinion on the Constitution of Serbia, the Venice Commission commented that social protection was not granted generally but only to citizens and families by the Constitution.⁹⁶⁶

The Constitution also guarantees the rights of the employed and their families to social protection and insurance, the right to compensation of salary in case of temporary inability to work and to temporary unemployment allowances. The Constitution also affords special social protection to specific categories of the population and obliges the state to establish various types of social insurance funds. Article 70 of the Constitution specifically guarantees the right to pension insurance.

⁹⁶⁶ See Venice Commission, *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, paragraph 41.

Social security comprises pension, disability, health and unemployment insurance. The issues are regulated by a number of laws.

Social insurance against old age and disability is regulated by the Pension and Disability Insurance Act⁹⁶⁷ and the Act on Voluntary Pension Funds and Pension Plans.⁹⁶⁸ Compulsory insurance encompasses all employees, individual entrepreneurs and farmers. This insurance ensures the rights of the insureds in old age, or in the event of disability, death or corporal injury caused by a work-related accident or occupational disease.

The law also provides for voluntary insurance for persons who are not covered by the compulsory insurance arrangements, in the manner prescribed by a separate law (Art. 16, Pension and Disability Insurance Act). At the same time, the insured persons may secure a wider scope or other form of rights for themselves and their families through voluntary insurance, other than those prescribed by the Act. The Pension and Disability Insurance Act provisions related to voluntary insurance resolved the dilemma whether an employer-pension fund agreement (so-called pension plan) may be concluded on behalf of third parties i.e. employees.

The 2010 amendments to the Pension and Disability Insurance Act⁹⁶⁹ lay down stricter retirement requirements and envisage a gradual increase of the retirement ages of men and women until 2023.⁹⁷⁰ As of 2013, women will be able to retire if they are at least 53 years and four months old and have at least 35 years and four months of pensionable service. The main old-age requirement has not changed: men must be at least 65 years old and have at least 15 years of pensionable service and women must be at least 60 years old and have at least 15 years of pensionable service. Serbia has around 1,690,000 pensioners.

The non-government organisation Lawyers' Committee for Human Rights (YUCOM) alerted to the discriminatory practice of the Serbian Pension and Disability Insurance Fund (hereinafter: SPDIF) with the support of banks in Serbia. Numerous citizens have complained to YUCOM, which provides free legal aid, about the problems they have had with the SPDIF, which has been suspending payments of their pensions under the explanation that they had not withdrawn the money for more than six months. Such a practice raises two issues: the first regards age-based discrimination and the second the protection of the personal data in the possession of the banks, which they have been forwarding to the SPDIF in contravention of the law. The citizens' complaints prompted YUCOM to file a complaint with the Commissioner for Protection of Equality, claiming age-based discrimination.⁹⁷¹

967 *Sl. glasnik RS* 34/03, 64/04, 84/04, 85/05, 5/09, 107/09 and 101/10.

968 *Sl. glasnik RS* 85/05 and 31/11.

969 *Sl. glasnik RS* 101/10.

970 Detailed information about the retirement eligibility requirements is available on the website of the Serbian Pension and Disability Insurance Fund <http://www.pio.rs/eng/>.

971 YUCOM press release of 18 December 2012, available in Serbian at <http://www.yucom.org.rs/rest.php?tip=vestgalerija&idSek=4&idSubSek=36&id=133&status=drugi>.

The European Court of Human Rights in 2012 delivered its judgment in a case regarding the so-called “Kosovo pensions”. The applicants, who had permanently resided in Kosovska Mitrovica and in Novi Pazar since 2005, had been paid their pensions regularly until 9 June 1999 and 15 January 2000 respectively. In response to the applicants’ requests to resume with the payment of their pensions, the SPDIF adopted formal decisions to suspend payment of their pensions, noting that Kosovo was now under international administration which was why the pensions could no longer be paid. The decisions were based on the opinions of the Ministry for Social Affairs (subsequently the Ministry of Labour, Employment and Social Policy) that the pension system was based on the concept of “ongoing financing” and that since the Serbian authorities have been unable to collect any such contributions in Kosovo as of 1999, persons who had already been granted SPDIF pensions in Kosovo also could not expect, for the time being, to continue receiving them. Further, the Ministry noted the adoption of Regulation 2001/35 on pensions in Kosovo, providing for a separate pension system for persons living in the territory. The Novi Pazar District Court annulled the impugned decisions. Its decision was subsequently upheld by the Supreme Court of Serbia, but the SPDIF again rendered decisions suspending the proceedings instituted on the basis of the applicants’ requests for the resumption of payment of their pensions until such time when the entire issue was resolved between the Serbian authorities and the international administration in Kosovo. The ECtHR found Serbia in breach of Article 1 of Protocol No. 1 to the ECHR. Since the SPDIF had suspended payments on the basis of a ministry opinion, the ECtHR noted that these opinions had never been officially published and thus did not constitute a source of law and concluded that the applicants’ right to peaceful enjoyment of property had been interfered with. It awarded each applicant 7000 EUR in respect of non-pecuniary damages.⁹⁷²

In its latest Progress Report on Serbia⁹⁷³, the European Commission noted that no progress could be reported in the area of social protection in 2012. It said that the pension and health fund deficits had increased further as a result of the deterioration of the Serbian economy, which had affected many businesses, but also due to insufficiently developed mechanisms of enforcement and control and that, in the absence of sufficient funds for the payment of pensions, transfers from the budget had become the largest single item on the expenditure side. The European Commission noted that the Health Insurance Fund had accumulated debt which was estimated to stand at about 790 million EUR in February 2012 and concluded that comprehensive restructuring and reforms were needed in order to regain sustainability.

The National Assembly of the Republic of Serbia adopted the new Social Protection Act⁹⁷⁴ in March 2011. Article 17 of the Act commendably allows not only state, provincial and local authorities but natural and legal persons fulfilling

972 See the ECtHR judgment in the case of *Grudić v. Serbia*, ECtHR, App. No. 31925/08 (2012).

973 The European Commission’s Serbia 2012 Progress Report is available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf

974 *Sl. glasnik RS* 24/11.

the legal requirements, as well, to provide social protection services, and thereby affirms the plurality of social protection service providers. The local self-governments may establish social work centres, while the state and province may establish social protection institutions.

Social security rights include the right to welfare benefits, outside assistance and care allowances, job training allowances, home care, day care, placement in an institution or another family, social welfare services, preparatory work for the placement of beneficiaries in a social institution or another family, and one-off assistance.

The Act lists the forms of material support, including, among others, outside assistance and care allowances and increased outside assistance and care allowances (Art. 79). These allowances are granted people who are in need of the assistance and care of another person to perform basic everyday activities because of a physical or sensory impairment, intellectual disability or health problems (Art. 92(1)). The Act introduced major changes in the institutional and regulatory spheres. It provides for the introduction of a social protection chamber, licensing of professionals and service providers, introduction of the public procurement of services, redesign of the oversight, supervision and inspection mechanisms. Furthermore, the Act envisages targeted transfers from the state budget for funding community-based services within the remit of the local self-governments (Arts. 206 and 207).

The Ministry of Labour, Employment and Social Policy in 2012 began designing a system for licensing social protection organisations and professionals. The licensing is to take place throughout 2013 and cover around 2,200 professionals and all state, local and private social protection organisations, as well as NGOs providing social services. There are nearly 500,000 beneficiaries of social services in Serbia; over 400 various social services are provided and over 45 state and 90 private old people's homes are operational.⁹⁷⁵

In its 2012 Serbia Progress Report, the European Commission noted some progress in the field of social inclusion and stated that the adoption of implementing legislation on welfare allowances and the introduction of earmarked transfers to local municipal governments for community services have provided a basis for the implementation of the Social Protection Act. It noted that the law had introduced new concepts in terms of accessibility to social services, including the right for beneficiaries to complain.

17.2. Protection Accorded to Family

Apart from the ICESCR, Serbia is a signatory of the Convention on the Rights of the Child, the Optional Protocol to the Convention on Sale of Children, Child Prostitution and Pornography, and the ILO Conventions on Maternity Protec-

975 See the Social Inclusion and Poverty Reduction Unit's Fourteenth Bulletin, available at <http://www.inkluzija.gov.rs/wp-content/uploads/2009/11/14th-Newsletter-English2.pdf>.

tion (No. 3); Medical Examination of Young Persons (Sea) (No. 16), Underground Work (Women) (No. 45), Night Work (Women) (Revised) (No. 89), Night Work of Young Persons (Industry) (Revised), (No. 90), Maternity Protection (Revised) (No. 103), Minimum Age (No. 138), Workers with Family Responsibilities (No. 156) and Worst Forms of Child Labour (No. 182).

By ratifying the ESC, Serbia undertook also to fulfill the obligations regarding the full protection of children and young people (Art. 7) and the right of employed women to protection of maternity by defining the legal minimum obligations of employers towards pregnant women (Art. 8). Furthermore, it undertook to promote the economic, legal and social protection of family life by such means as social and family benefits (Art. 16) and to take measures to ensure the protection of children and young people from negligence and violence, provide them with free education and provide special aid to young people deprived of their family's support (Art. 17)

Article 66 of the Constitution guarantees special protection to the family and the child, mothers and single parents. In paragraph 2 of this Article, it guarantees support and protection to mothers before and after childbirth and, in paragraph 3 of this Article, it guarantees special protection to children without parental care and children with physical or intellectual disabilities. The Constitution prohibits employment of children under 15; minors over 15 are prohibited from performing jobs that may adversely affect their health or morals. Article 64 of the Constitution is devoted to the rights of the child.

The Labour Act does not afford special protection to employed women, except in case of pregnancy, which is in conformity with European trends to equate treatment of men and women at work, although Serbia did not denounce the relevant ILO conventions.⁹⁷⁶

Maternity leave is a fundamental right of working women. Pregnant women and women with children under the age of three may not work overtime or at night. Exceptionally, a woman with a child over the age of two may work at night but only if she specifically requests this in writing. Single parents with a child under seven or a severely handicapped child may work overtime or at night only if they make a written request to this effect (Art. 68, Labour Act).

If the condition of a child requires special care or if it suffers from a severe disability, one of the parents has the right to additional leave. One of the parents may choose between leave and working only half-time, for 5 years maximum (Art. 96, Labour Act). Under the Labour Act, one parent may take leave from work until

976 Namely, all EU member states apart from Slovenia have denounced Convention 89 Concerning Night Work of Women Employed in Industry at ECtHR's indirect suggestion (see: *Stoeckel C-345/89* and *Levy C-158/91*). Some European states denounced Convention 45 on hiring women to work underground in mines of all categories (UK, The Netherlands, Finland, Sweden, Ireland and Luxembourg) while Denmark, Norway, Latvia, Lithuania and Cyprus never signed it.

the child's third birthday and his labour rights and duties will remain dormant during this period. (Art. 100 (2), Labour Act).

The law guarantees to an extent a woman's job during pregnancy, maternity leave and additional leave (and to a man exercising the right to ordinary and additional child care leave). The Labour Act provides for extensive protection of employees on the basis of exercising the above-mentioned rights (Art. 187 (1)). The only exception regards employees with fixed-term contracts if their employment contract expires while they are exercising the rights. The Protector of Citizens and the Commissioner for Protection of Equality have received numerous complaints claiming discrimination of pregnant women and women on maternity leave.

Furthermore, according to the Labour Force Survey conducted by the Statistical Office of the Republic of Serbia in 2010,⁹⁷⁷ care for children or dependant adult family members is one of the reasons why jobless people are inactive in the labour market: 78,200 women and 2,273 men (i.e. 97% v. 3%) quoted this as the reason why they were not looking for a job. Most of them cited the lack of child care services as the reason why they were not looking for a job actively.⁹⁷⁸ Furthermore, the SORS 2010 Labour Force Survey showed that more women than men quit their jobs to look after the children. Over three quarters of working women (around 77%) as opposed to nearly one quarter (23%) of the employed men had not worked at least a month to look after their youngest children.

The system of flexible working hours is underdeveloped in the Republic of Serbia. Few people work shorter working hours or half-time. As many as 83.4% of the workers had not made use of these opportunities when their regular child care services were unavailable. By allowing their workers to adjust their working hours to their family obligations, the employers would facilitate the application of state policies and measures aimed at reconciling family and professional life.⁹⁷⁹ Some companies in Serbia provide their workers with special bonuses for their first- or third-born children, while some opened day care centres for their workers' children on company grounds.⁹⁸⁰

Under the Act on Financial Support to Families with Children,⁹⁸¹ parental benefits shall be paid only for the first four children to mothers who are citizens of Serbia, have residence in Serbia and state health insurance. Parents are not en-

977 Women and Men in the Republic of Serbia, SORS, Belgrade, 2011, p. 63, available at: http://www.gendernet.rs/files/RR_u_brojka/WomenAndMen.pdf.

978 *Gender Equality Directorate, Reconciliation of Family and Professional Life*, Belgrade 2012, p. 40, available at: http://www.gendernet.rs/files/Publikacije/Publikacije/URR-Studija-ENG_LR1.pdf.

979 Pursuant to Article 13 of the Gender Equality Act and Article 4 of the Rulebook on the Content and Submission of the Plans of Measures for Eliminating or Alleviating Unequal Gender Representation and Annual Reports on the Implementation of the Plans (*Sl. glasnik RS* 89/10)

980 Such as VIP Mobile in Serbia, see <http://www.vipmobile.rs/about-vip/corporate-social-responsibility/our-employees.656.html>.

981 *Sl. glasnik RS* 16/02, 115/05 and 107/09.

titled to benefits for their successive children, unless the mother gives birth to twins or more children the next time (with the special consent of the ministry charged with social affairs). The adequacy of protection of the poorest families with children through child allowance, however, remains an outstanding issue, as all hitherto surveys have demonstrated that the Republic of Serbia has not been earmarking sufficient funding for social welfare, that the coverage of the poor is low and that the amounts of assistance are insufficient.⁹⁸²

The Act on Infertility Treatment by Bio-Medically Assisted Fertilisation Procedures⁹⁸³ defines the principle under which the medical justifiability of bio-medically assisted fertilisation shall be applied in the event infertility treatment by other procedures is impossible or has considerably lesser chance of success unless bio-medically assisted treatment leads to unacceptable risks to the health, life and safety of the mother or child.

Specific provisions in the bill, however, are not in conformity with modern trends, given that contemporary families do not always comprise the mother, father and children, but single mothers and fathers as well. The Act on Infertility Treatment allows artificial insemination of women who are not in a union with a man but lays down special criteria (Art. 26 (3)). A single woman shall exceptionally be entitled to fertility treatment with the consent of the ministers charged with health and family relations if there are justified reasons for such treatment. This provision discriminates against women who want children but do not have male partners.

17.3. Recommendations

1. Increase child allowances to improve the protection of poor families with children.
2. Encourage employers to introduce flexible working models.
3. Improve the system of services provided to children with families, conduct campaigns and activities promoting the reconciliation of family and professional life.
4. Amend the Act on Infertility Treatment to all women have an equal right to infertility treatment.

982 First National Report on Social Inclusion and Poverty Reduction in the Republic of Serbia, Government of the Republic of Serbia, March 2011, available at: <http://www.inkluzija.gov.rs/wp-content/uploads/2011/04/First-National-Report-on-Social-Inclusion-and-Poverty-Reduction.pdf>.

983 *Sl. glasnik RS* 72/09.

18. Right to Highest Attainable Standard of Physical and Mental Health

18.1. General

The first international documents on human rights attached great relevance to the preservation of human health. Under Article 25 of the Universal Declaration of Human Rights, the standard of living entails medical care, while the international documents adopted subsequently⁹⁸⁴ mention health care as one of the grounds for derogating from freedoms. Furthermore, practice has shown that the inaccessibility of health care may be the consequence of a violation of the prohibition of discrimination, which is why international documents regulating this area specify that everyone shall have the right to health on an equal footing regardless of their personal features.⁹⁸⁵ The entire aspect of health care includes two extremely important segments – physical and mental health. This concept is regulated in the International Covenant on Economic, Social and Cultural Rights (Art. 12).

The Constitution of the Republic of Serbia (Art. 68) guarantees the protection of physical and mental health. This Article in particular entitles children, pregnant women, mothers on maternity leave, single parents of children under seven and the elderly to free medical aid even if they are not beneficiaries of mandatory health insurance. This provision is in accordance with the principles of absolute solidarity and equality in the health system.

Two basic laws govern the health care system in Serbia – the Health Care Act (HCA)⁹⁸⁶ and the Health Insurance Act (HIA)⁹⁸⁷. The Health Care Act governs the state's health care of the population, the organisation of the health authorities and patient rights. The Health Insurance Act regulates the health insurance system, the general rights and responsibilities of the beneficiaries and the realisation of the right to health insurance. It could be concluded that the regulations on health care are simple and accessible to the citizens. Both laws are, however, accompanied by a large number of decrees and rulebooks contributing to the bulkiness of the health legislation.

18.2. Health Insurance

There are several health care models in the world, which differ among themselves by modes of funding, the ways decisions on rights and responsibilities are taken, the coverage of the population, the degree of solidarity and planners. Four

984 ECHR (Arts. 8-11), ICCPR (Arts. 18-19 and 21-22).

985 The International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5) and the Convention on the Elimination of All Forms of Discrimination against Women (Arts. 10 and 12).

986 *Sl. glasnik RS* 107/05, 88/10, 99/10, 57/11 and 119/12.

987 *Sl. glasnik RS* 107/05, 109/05, 57/11 and 119/12.

models can be distinguished under these criteria: the Bismarck, Beveridge, Semashko and the market models. The health care system in Europe is based on mandatory insurance and absolute solidarity and equality. There are mandatory and voluntary health insurance arrangements in place.

The HIA governs health insurance and has since 2005 provided for voluntary insurance (Arts. 236–268). Voluntary health insurance is governed in greater detail by the 2008 Voluntary Health Insurance Decree.⁹⁸⁸ The Decree provides for three types of voluntary insurance – simultaneous, supplementary and private (Art. 30), which may be established and managed by the Republican Health Insurance Fund (RHIF) and insurance companies. Voluntary insurance is still in its early days, wherefore it does not account for a major share of the health insurance system.

The greatest problem regarding mandatory health insurance in Serbia is the absence of a clear list of services citizens may be provided under the mandatory health insurance scheme, for which they pay a contribution amounting to 12% of their monthly salaries. A comparative analysis of the annual financial plans, decisions amending them, and the annual financial reports of the Republican Health Insurance Fund (RHIF) indicate that the citizens have been provided with fewer and fewer services every year, while the cost of insurance has remained the same. Furthermore, citizens are often provided with contradictory information about the costs and services at their disposal.

The RHIF's financial difficulties have had the greatest impact on the lists of medications updated every six months, lists of people waiting for operations and the lack of the requisite equipment in the out-patient health clinics and hospitals. People wait up to ten years to be operated on in some hospitals. That is the case in the Kragujevac Clinical Hospital Centre, which is now scheduling hip operations for 2021.⁹⁸⁹ The rulebook envisaging that mandatory insurance cover only one preventive gynaecological check-up every three years provoked a public outcry. This would be absolutely unacceptable. Fortunately, the authorities decided that the purpose of primary health care could be achieved only if women could have access to such check-ups at least once a year.⁹⁹⁰

Health care spend per capita ranges between 220 and 270 EUR a month⁹⁹¹ which is insufficient to satisfy all the needs of the population and keep up with the treatment standards. The 2012 RHIF Financial Report was not published by the end of the reporting period. According to the 2011 RHIF Financial Report, which used the Tax Administration data for its table of debtors and debts, the debt to the RHIF amounted to nearly 85 billion RSD in 2011.⁹⁹²

988 *Sl. glasnik RS* 108/08 and 49/09.

989 *Politika*, 25 December 2012, p. A1.

990 *Blic*, 8 December 2012, see the report in Serbian: http://www.b92.net/zdravlje/vesti.php?yyyy=2012&mm=11&nav_id=661262.

991 See the report on the RHIF's debts in Serbian at <http://pharmanetwork.rs/vesti-iz-farmacije/domace-vesti/628-republiki-fond-svima-duan>.

992 The RHIF 2011 Financial Report is available at http://www.rfzo.rs/download/fin_izvestaj2011.pdf.

18.3. Reports on the Quality of Health Care in Serbia

Serbia was included in the Euro Health Consumer Index survey for the first time in 2012.⁹⁹³ According to this report, Serbia ranks last, 34th, by the quality of health care. The survey covered 42 indicators and Serbia had 451 of the maximum 1000 points (Croatia had 655, Slovenia 638 and Macedonia 527).

According to the European Commission's Serbia 2012 Progress Report⁹⁹⁴ no headway was achieved in several areas: public health (the EC mostly criticised the financial unsustainability of the health system), the enforcement of the Transplantation of Organs Act and mental health care. The EC concluded that efforts needed to focus on implementing the existing legislative framework and further aligning with the *acquis*.

Taking into account all the relevant parameters, the quality of health care can be qualified as extremely poor. The frequent partial amendments to the health laws (rulebooks and decrees) have exacerbated the existing problems. It is impossible to attain the health care standards set in the EU, because the state institutions playing the key role in decisions on the operation of the health system have not defined a national plan.

18.4. Patient Rights

Patient rights are governed by the section of the HCA on human rights protection. Articles 25–40a define patient rights and the work of the protectors of patient rights. This area is not regulated by by-laws in detail wherefore the patients have encountered problems in exercising their rights in practice. Apart from problems in enforcing the valid HCA provisions, the protection of patient rights is also hindered by the lack of a separate law on patient rights. Serbia is the only country in the region that has not enacted such a law.

The Health Ministry organised public debates on the pre-draft laws on patient rights and protection of people with intellectual disabilities⁹⁹⁵ in the latter half of 2012. All the activities were conducted in the four largest health centres (Kragujevac, Niš, Novi Sad and Belgrade). The Health Ministry expected a law on patient rights to be adopted by the end of 2012 and enforced as of June 2012, but these plans did not materialise.

Several major problems regarding the protection of patient rights have emerged in practice: the lack of independence of the protectors of patients, the pa-

993 The EHCI survey is available at <http://www.healthpowerhouse.com/files/Report-EHCI-2012.pdf>.

994 The Serbia 2012 Progress Report is available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf.

995 The pre-draft laws are available in Serbian at <http://www.zdravlje.gov.rs/showpage.php?id=185>.

tients' low level of awareness of their rights and the inadequacy of the protector's complaint review procedure.⁹⁹⁶

Under the HCA, the protectors of patients are to be fully independent. This provision aims to ensure that they will act impartially on the complaints, but it is contradicted by the provisions on the appointment of the protectors of patients. Under Article 39 of the HCA, a protector of patients shall be appointed by the director of a health institution from among the institution's staff. This is why it can be concluded that the protection of the patients is merely a semblance.

The patients are extremely poorly informed of their rights and the work of the protectors of patients. Most are unaware that their rights are violated and thus of the chance to seek protection and from whom. This lack of knowledge has resulted in large numbers of ill-founded complaints, because patients often contact the protectors of patients seeking the protection of their rights falling within the remit of the Republican Health Insurance Fund.

Ever since the institute of protector of patients was introduced, the Health Ministry conducted only one campaign, in 2007, to raise public awareness of patient rights. However, even the patients informed of the powers of the protectors are of the view that they cannot realise their rights by filing complaints with them, because they distrust them. This conclusion is corroborated by the number of complaints filed since 2005: the number of complaints filed to the protectors of patients continuously grew from 2005 until 2009 and began falling as of 2010.

The HCA governs the procedure before the protectors of patients in a general manner. Only three paragraphs are devoted to the complaint review procedure. Each protector of patients decides on the format of his reply and many of them do not advise the complainants of the legal remedies they may apply if they are dissatisfied with the replies, which constitutes a breach of the patients' right to adequate legal protection.

18.5. Recommendations

1. Provide the citizens with clear and accurate information about services available under the compulsory health insurance
2. Align the laws on the transplantation of organs and mental health protection with European standards in these areas
3. Adopt a law on the protection of people with intellectual disabilities
4. Adopt a law on patient rights that will ensure the independence of protectors of patient rights, adequate public awareness of patient rights and govern in detail the procedure before the protector of patient rights.

⁹⁹⁶ Report of the NGO Legal Scanner on the protection of patient rights, available in Serbian at <http://www.pravniskener.org/pdf/ZASTITA-PRAVA-PACIJENATA-ALL-FINAL.pdf>.

5. Improve public self health care programmes, particularly health prevention programmes
6. Impose stricter penalties for health service providers violating patient rights.
7. Put in place more effective measures to penalise employers not paying their workers' mandatory health insurance contributions.

Appendix I

The Most Important Human Rights Treaties Binding on Serbia

- Act Amending the Act on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 5/05.
- Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature and committed through computer systems, *Sl. glasnik RS*, 19/09.
- Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows, *Sl. glasnik RS (Međunarodni ugovori)*, 98/08.
- Additional Protocol to the Criminal Law Convention on Corruption, *Sl. glasnik RS*, 102/07.
- Agreement between the Republic of Serbia and the European Community on the Readmission of Persons Residing without Authorisation, *Sl. glasnik RS*, 103/07.
- Agreement between the Republic of Serbia and the European Community on Visa Facilitation, *Sl. glasnik RS*, 103/07.
- Agreement on Amending and Accessing the Central Europe Free Trade Agreement – CEFTA 2006.
- Civil Law Convention on Corruption, *Sl. glasnik RS*, 102/07.
- CoE Convention on Action against Trafficking in Human Beings, *Sl. glasnik RS*, 19/09.
- CoE Convention on Laundering, Search, Seizure and Confiscation of of the Proceeds from Crime and on the Financing of Terrorism, *Sl. glasnik RS*, 19/09.
- Convention against Discrimination in Education (UNESCO), *Sl. list SFRJ (Dodatak)*, 4/64.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ (Međunarodni ugovori)*, 9/91.
- Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Convention Concerning Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *Sl. list SFRJ (Dodatak)*, 13/64.
- Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Sl. list SRJ (Međunarodni ugovori)*, 1/92 and *Sl. list SCG*, 11/05.

- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Sl. glasnik RS*, 38/09.
- Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SFRJ (Međunarodni ugovori)*, 11/81.
- Convention on Environmental Impact Assessment in a Transboundary Context, *Sl. glasnik RS*, 102/07.
- Convention on the High Seas, *Sl. list SFRJ (Dodatak)*, 1/86.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *Sl. list SRJ (Međunarodni ugovori)*, 7/02 and 18/05.
- Convention on the Nationality of Married Women, *Sl. list FNRJ (Dodatak)*, 7/58.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Sl. list SFRJ (Međunarodni ugovori)*, 50/70.
- Convention on Police Cooperation in South East Europe, *Sl. glasnik RS*, 70/07.
- Convention on the Political Rights of Women, *Sl. list FNRJ (Dodatak)*, 7/54.
- Convention on the Preservation of Intangible Cultural Heritage, *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- Convention on the Prevention and Punishment of the Crime of the Genocide, *Sl. vesnik Prezidijuma Narodne skupštine FNRJ*, 2/50.
- Convention on the Protection and Promotion of Diversity of Cultural Expression, *Sl. glasnik RS*, 42/09.
- Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *Sl. glasnik RS (Međunarodni ugovori)*, 12/10.
- Convention Relating to the Status of Refugees, *Sl. list FNRJ (Dodatak)*, 7/60.
- Convention Relating to the Status of Stateless Persons and Final Act of the UN Conference Relating to the Status of Stateless Persons, *Sl. list FNRJ (Dodatak)*, 9/59 and 7/60 and *Sl. list SFRJ (Dodatak)*, 2/64.
- Convention on the Rights of the Child, *Sl. list SFRJ (Međunarodni ugovori)*, 15/90 and *Sl. list SRJ (Međunarodni ugovori)*, 4/96 and 2/97.
- Convention on the Suppression of Trade in Adult Women, *Sl. list FNRJ*, 41/50.
- Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others, *Sl. list FNRJ*, 2/51.
- Criminal Law Convention on Corruption, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- European Charter of Local Self-Government, *Sl. glasnik RS*, 70/07.
- European Convention on the International Validity of Criminal Judgments, with appendices, *Sl. list SCG (Međunarodni ugovori)*, 18/05.

- European Convention on Extradition with additional protocols, *Sl. list SRJ (Međunarodni ugovori)*, 10/01.
- European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, *Sl. glasnik RS (Međunarodni ugovori)*, 13/10.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, *Sl. list SRJ (Međunarodni ugovori)*, 1/02.
- European Charter on Regional and Minority Languages, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- European Framework Convention on the Value of Cultural Heritage for Society, *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- Framework Convention for the Protection of National Minorities, *Sl. list SRJ (Međunarodni ugovori)*, 6/98.
- ILO Convention No. 3 Concerning Maternity Protection, *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 11 Concerning Right of Association (Agriculture), *Sl. novine of the Kingdom of Yugoslavia*, 44-XVI/30.
- ILO Convention No. 14 Concerning Weekly Rest (Industry), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 16 Concerning Medical Examination of Young Persons (Sea), *Sl. novine of the Kingdom of Serbs Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 17 Concerning Workmen’s Compensation (Accidents), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 18 Concerning Workmen’s Compensation (Occupational Diseases), *Sl. novine Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 19 Concerning Equality of Treatment (Accident Compensation), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 29 Concerning Forced Labour, *Sl. novine of the Kingdom of Yugoslavia*, 297/32.
- ILO Convention No. 45 Concerning Underground Work (Women), *Sl. vesnik of the Presidium of the Assembly of the Federal People’s Republic of Yugoslavia (FNRJ)*, 12/52.

- ILO Convention No. 81 Concerning Labour Inspection, *Sl. list FNRJ (Addendum)*, 5/56.
- ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ (Dodatak)*, 8/58.
- ILO Convention No. 89 Concerning Night Work of Women (revised), *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 90 Concerning Night Work of Young Persons in Industry (Revised) *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 7/67.
- ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *Sl. list FNRJ (Dodatak)*, 11/58.
- ILO Convention No. 100 Concerning Equal Remuneration, *Sl. list FNRJ (Međunarodni ugovori)*, 11/52.
- ILO Convention No. 103 Concerning Maternity Protection (Revised), *Sl. list FNRJ (Dodatak)*, 9/55.
- ILO Convention No. 105 Concerning Abolition of Forced Labour, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), *Sl. list FNRJ (Dodatak)*, 12/58.
- ILO Convention No. 109 Concerning Wages, Hours of Work and Manning (Sea), (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 10/65.
- ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *Sl. list FNRJ (Dodatak)*, 3/61.
- ILO Convention No. 121 Concerning Employment Injury Benefits, *Sl. list SFRJ (Međunarodni ugovori)*, 27/70.
- ILO Convention No. 122 Concerning Employment Policy, *Sl. list SFRJ*, 34/71.
- ILO Convention No. 129 Concerning Labour Inspection (Agriculture), *Sl. list SFRJ (Međunarodni ugovori)*, 22/75.
- ILO Convention No. 131 Concerning Minimum Wage Fixing, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 132 Concerning Holidays with Pay Convention (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 52/73.
- ILO Convention No. 135 Concerning Workers' Representatives, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 138 Concerning Minimum Age for employment, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.

- ILO Convention No. 140 Concerning Paid Educational Leave, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 144 Concerning Tripartite Consultation (International Labour Standards), *Sl. list SCG (Međunarodni ugovori)*, 1/05.
- ILO Convention No. 155 Concerning Occupational Safety and Health, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 156 Concerning Workers with Family Responsibilities, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 161 Concerning Occupational Health Services Convention, *Sl. list SFRJ (Međunarodni ugovori)*, 14/89.
- ILO Convention No. 167 concerning safety and health in construction, *Sl. glasnik RS*, 42/09.
- ILO Convention No. 182 Concerning the Worst Forms of Child Labour, *Sl. list SRJ (Međunarodni ugovori)*, 2/03.
- ILO Convention No. 183 of the Maternity Protection, *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- ILO Convention No. 187 concerning the promotional framework for occupational safety and health, *Sl. glasnik RS*, 42/09.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, 7/71.
- International Covenant on Economic, Social and Cultural Rights, *Sl. list SFRJ*, 7/71.
- International Criminal Court Statute, *Sl. list SRJ (Međunarodni ugovori)*, 5/01.
- International Convention on the Elimination of All Forms of Racial Discrimination, *Sl. list SFRJ (Međunarodni ugovori)*, 6/67.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, *Sl. list SRFJ*, 14/75.
- Kyoto Protocol to the UN Framework Convention on Climate Change, *Sl. glasnik RS*, 88/07.
- Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 16/05.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *Sl. list SRJ (Međunarodni ugovori)*, 7/02.

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, *Sl. list SRJ (Međunarodni ugovori)*, 7/02.
- Optional Protocol to the UN Convention on the Rights of Persons with Disabilities, *Sl. glasnik RS*, 42/09.
- Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *Sl. glasnik RS (Međunarodni ugovori)*, 1/10.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Protocol Amending the Slavery Convention Signed at Geneva 25 September 1926, *Sl. list FNRJ (Dodatak)*, 6/55.
- Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 5/05 and 7/05.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Protocol on Relating to the Status of Refugees, *Sl. list SFRJ (Dodatak)*, 15/67.
- Revised European Social Charter, *Sl. glasnik RS*, 42/09.
- Second Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Slavery Convention, *Sl. novine Kraljevine Jugoslavije*, XI–1929, 234.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Sl. list FNRJ (Dodatak)*, 7/58.
- Third Additional Protocol to the European Convention on Extradition, *Sl. glasnik RS (Međunarodni ugovori)*, 1/11.
- UN Convention Against Corruption, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- UN Convention for the Protection of All Persons from Enforced Disappearance, *Sl. glasnik RS (Međunarodni ugovori)*, 1/11.
- UN Convention on the Reduction of Statelessness, *Sl. glasnik RS (Međunarodni ugovori)*, 8/11.
- UN Convention on the Rights of Persons with Disabilities, *Sl. glasnik RS*, 42/09.

Appendix II

Legislation in Serbia Concerning Human Rights and Mentioned in the Report

- Act on Abortion in Medical Facilities, *Sl. glasnik RS*, 16/95 and 101/05 – other law.
- Act on Administrative Disputes, *Sl. glasnik RS*, 111/09.
- Act Amending the Criminal Code, *Sl. glasnik* 121/12.
- Act Amending the Non-Contentious Procedure Act, *Sl. glasnik RS* 85/12
- Act on the Anti-Corruption Agency, *Sl. glasnik RS*, 97/08, 53/10 and 66/11 – CC decision.
- Act on Assembly of Citizens, *Sl. glasnik RS*, 51/92, 53/93, 67/93, 48/94 and *Sl. list SRJ*, 21/01 – decision FCC and *Sl. glasnik RS*, 101/05 – other law.
- Act on Associations, *Sl. glasnik RS*, 51/09.
- Act on the Basis of the Education System, *Sl. glasnik RS*, 72/09 and 52/11.
- Act on Broadcasting, *Sl. glasnik RS*, 42/02, 97/04, 76/05 62/06, 85/06 and 41/09.
- Act on the Constitutional Court, *Sl. glasnik RS*, 109/07 and 99/11.
- Act on Churches and Religious Communities, *Sl. glasnik RS*, 36/06.
- Act on Defence, *Sl. glasnik RS*, 116/07, 88/09 – other law and 104/09 – other law.
- Act Establishing the Jurisdiction of the Autonomous Province of Vojvodina, *Sl. glasnik RS*, 99/09.
- Act on Expropriation, *Sl. glasnik SRS*, 40/84, 53/87, 22/89 and *Sl. glasnik RS*, 53/95 and 20/09.
- Act on Financing of Political Parties, *Sl. glasnik RS*, 72/03, 75/03 and 97/08.
- Act on Financing of Political Activities, *Sl. glasnik RS*, 43/11.
- Act on Free Access to Information of Public Importance, *Sl. glasnik RS*, 120/04, 54/07, 104/09 and 36/10.
- Act on Freezing and Writing Off Overdue Compulsory Health Insurance Contributions, *Sl. glasnik RS*, 102/08 and 31/09.
- Act on Health and Safety at Work, *Sl. glasnik RS*, 101/05.

- Act on Infertility Treatment by Biomedically Assisted Fertilisation Procedures, *Sl. glasnik RS*, 72/09.
- Act on Judges, *Sl. glasnik RS*, 116/08, 104/09 and 101/10.
- Act on the Judicial Academy, *Sl. glasnik RS*, 104/09.
- Act on Lawyers, *Sl. glasnik RS*, 31/11.
- Act on Legal Status of Religious Communities, *Sl. glasnik SRS*, 44/77, 12/78, 12/80 i 45/85.
- Act on Local Elections, *Sl. glasnik RS*, 129/07, 34/10 – decision CC and 54/11.
- Act on Mediation, *Sl. glasnik RS*, 18/05.
- Act on Ministries, *Sl. glasnik RS* 72/12.
- Act on Misdemeanours, *Sl. glasnik RS*, 101/05, 116/08 and 111/09.
- Act on the National Councils of National Minorities, *Sl. glasnik RS*, 72/09.
- Act on the Non-Contentious Procedure, *Sl. glasnik SRS*, 25/82 and 48/88 and *Sl. glasnik RS*, 46/95 – other law and 18/05 – other law.
- Act on the Official Use of Languages and Scripts, *Sl. glasnik RS*, 45/91, 53/93, 67/93, 48/94 and 101/05.
- Act on Organisation of Courts, *Sl. glasnik RS*, 116/08, 104/09 and 101/10.
- Act on Peaceful Settlement of Labour Disputes, *Sl. glasnik RS*, 125/04 and 104/09.
- Act on Pensions and Disability Insurance, *Sl. glasnik RS*, 34/03, 64/04, 84/04, 85/05, 5/09, 107/09 and 101/10.
- Act on Police, *Sl. glasnik RS*, 101/05, 63/09 – decision CC and 92/11.
- Act on Political Parties, *Sl. glasnik RS*, 36/09.
- Act on Prevention of Discrimination against Persons with Disabilities, *Sl. glasnik RS*, 33/06.
- Act on the Prevention of Harassment at Work, *Sl. glasnik RS*, 36/10.
- Act on Preventing Violence and Unbecoming Behaviour at Sports Events, *Sl. glasnik RS*, 67/03, 90/07 and 111/09.
- Act on the Professional Rehabilitation and Employment of Persons with Disabilities, *Sl. glasnik RS*, 36/09.
- Act Prohibiting Events of Neo-Nazi or Fascist Organisations and the Use of Neo-Nazi and Fascist Symbols and Insignia, *Sl. glasnik RS*, 41/09.
- Act on the Protection of Participants in Criminal Proceedings, *Sl. glasnik RS*, 85/05.

- Act on Protection of Rights and Freedoms of National Minorities, *Sl. list SRJ*, 11/02 and *Sl. list SaM*, 1/03 and *Sl. glasnik RS*, 72/09 – other law.
- Act on Pupil and Student Standards, *Sl. glasnik RS*, 18/10.
- Act on the Restitution of Property to Churches and Religious Communities, *Sl. glasnik RS*, 46/06.
- Act on Seats and Jurisdictions of Courts, *Sl. glasnik RS*, 116/08, 104/09 101/10, 31/11 – other law, 78/11 – other law and 101/11.
- Act on Seats and Jurisdictions of Courts and Public Prosecution Offices, *Sl. glasnik RS*, 116/08.
- Act on a Single Electoral Roll, *Sl. glasnik RS*, 104/09 and 99/11.
- Act on Social Security, *Sl. glasnik RS*, 24/11
- Act on Textbooks and Educational Tools, *Sl. glasnik RS*, 72/09.
- Act on Travel Documents, *Sl. glasnik RS*, 90/07, 116/08, 104/09 and 76/10.
- Act on Voluntary Pension Funds and Pension Plans, *Sl. glasnik RS*, 85/05 and 31/11.
- Act on Volunteering, *Sl. glasnik RS*, 36/10.
- Aliens Act, *Sl. glasnik RS*, 97/08.
- Anti-Discrimination Act, *Sl. glasnik RS*, 22/09.
- Asylum Act, *Sl. glasnik RS*, 109/07.
- AP of Vojvodina Statute, *Sl. list APV*, 17/09.
- Blood Transfusion Act, *Sl. glasnik RS*, 72/09.
- Budget Act 2012, *Sl. glasnik RS* 101/11 and 93/12.
- Budget System Act *Sl. glasnik RS* 54/09, 73/10, 101/10, 101/11, 93/12.
- Civil Procedure Act, *Sl. glasnik RS*, 125/04, 111/09 and 72/11.
- Classified Information Act, *Sl. glasnik RS*, 104/09.
- Code of Police Ethics, *Sl. glasnik RS*, 92/06.
- Complaints Procedure Regulation, *Sl. glasnik RS*, 54/06
- Constitution of the Republic of Serbia, *Sl. glasnik RS*, 83/06.
- Constitutional Act on the Implementation of the Constitution, *Sl. glasnik RS*, 98/06.
- Corporate Profit Tax Act, *Sl. glasnik RS* 25/01, 80/02, 80/02 – other law, 43/03, 84/04, 18/10, 101/11 and 119/12.
- Criminal Code, *Sl. glasnik RS*, 85/05, 88/05, 107/05, 72/09 and 111/09.
- Criminal Procedure Code, *Sl. glasnik RS* 72/11, 101/11 and 121/12.

- Culture Act, *Sl. glasnik RS*, 72/09.
- Decree on funding to encourage the implementation of programmes of public interest by associations or cover the funds they lack to implement them, *Sl. glasnik RS* 8/12.
- Directive on Updating Election Rolls, *Sl. glasnik RS*, 42/00 and 118/03.
- Election Act, *Sl. glasnik RS*, 35/00, 57/03 72/03, 75/03, 18/04, 101/05, 85/05, 104/09 and 36/11.
- Elections of the President of the Republic Act, *Sl. glasnik RS*, 111/07.
- Electronic Communications Act, *Sl. glasnik RS*, 44/10.
- Employment and Unemployment Insurance Act, *Sl. glasnik RS*, 36/09 and 88/10.
- Family Law, *Sl. glasnik RS*, 18/05 and 72/11 – other law.
- Enforcement Procedure Act, *Sl. glasnik RS*, 125/04.
- Enforcement and Security Act, *Sl. glasnik*, 72/11.
- General Collective Agreement, *Sl. glasnik RS*, 50/08, 104/08 – Aneks I and 8/09 – Aneks II.
- Gender Equality Act, *Sl. glasnik RS*, 104/09.
- Health Care Act, *Sl. glasnik RS* 107/05, 88/10, 99/10, 57/11 and 119/12.
- Health Insurance Act (HIA). *Sl. glasnik RS* 107/05, 109/05, 57/11 and 119/12.
- Health Protection Act, *Sl. glasnik RS*, 107/05, 88/10, 99/10 and 57/11.
- Higher Education Act, *Sl. glasnik RS*, 76/05, 97/08 and 44/10.
- High Judicial Council Act, *Sl. glasnik RS*, 116/08 and 101/10.
- Housing Act, *Sl. glasnik RS*, 50/92, 76/92, 84/82, 33/93, 53/83, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01 and 101/05 – other law.
- Juvenile Justice Act, *Sl. glasnik RS*, 85/05.
- Labour Act, *Sl. glasnik RS*, 24/05, 61/05 and 54/09.
- Medical Insurance Act, *Sl. glasnik RS*, 107/05, 109/05 and 57/11.
- Migration Management Act, *Sl. glasnik RS* 107/12.
- National Action Plan to Combat Trafficking in Human Beings for the 2009–2011 Period, *Sl. glasnik RS*, 35/09.
- new Civil Procedure Act (CPA), *Sl. glasnik RS*, 72/11.
- new Criminal Procedure Code, *Sl. glasnik* br. 72/11.
- Notaries Public Act, *Sl. glasnik RS*, 31/11.
- Official Birth, Death and Marriage Registries Act, *Sl. glasnik RS*, 20/09.

- Pardons Act, *Sl. glasnik RS* 107/12.
- Penal Sanctions Enforcement Act, *Sl. glasnik RS*, 85/05, 72/09 and 31/11.
- Personal Data Protection Act, *Sl. glasnik RS*, 97/08, 104/09 and 68/12 – Constitutional Court Decision.
- Planning and Construction Act, *Sl. glasnik RS*, 47/03.
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- Privatisation Act, *Sl. glasnik RS*, 38/01, 18/03, 45/05 i 123/07 – other law.
- Public Information Act, *Sl. glasnik RS*, 43/03, 61/05, 71/09, 89/10 and 41/11.
- Public Prosecution Act, *Sl. glasnik RS*, 116/08, 104/09 AND 101/10.
- Regulations on Circumstances and Manner of Use of Means of Coercion, *Sl. glasnik RS*, 133/04.
- Referendum and Popular Initiative Act, *Sl. glasnik RS* 48/94 and 11/98.
- Rehabilitation Act, *Sl. glasnik RS*, 92/11.
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- Rulebook on Medical Examinations of Asylum Seekers upon Arrival at the Asylum Centre, *Sl. glasnik RS*, 93/2008.
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- Republic of Serbia 2012 Budget Act, *Sl. glasnik RS*, 101/11.

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- Strikes Act, *Sl. list SRJ*, 29/96, *Sl. glasnik RS*, 101/05 – other law.
- Tax Procedure and Tax Administration Act, *Sl. glasnik RS*, 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 61/07, 20/09, 53/10 and 101/11.
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