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THE CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN SERBIA: CHALLENGES AND PERSPECTIVES[1]

Abstract

Taking into consideration that the protection of human rights is a basic principle of modern constitutions, the purpose of the paper is to address to the constitutional protection of human rights in Serbia. The focus will be on the constitutional law framework, how it deals with the human rights and mechanisms adopted for the implementation and enforcement of these rights.

The Constitution of Serbia devotes considerable attention to the matter of human rights. The fundamental principles which are recognized in the Constitution in this area are the direct implementation of human rights, the purpose of constitutional guarantees, limitation on human and minority rights, prohibition of discrimination, protection of human and minority rights and freedoms.

The protection of human rights in the Serbian Constitution is set up on two pillars: one, national and, the other, international. This article aims at defining the role of the courts and the constitutional courts in protecting the fundamental rights. The core of the national system of human rights protection constitute the courts. This is very important because one of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary.

This article also aims at defining the role of the constitutional courts in protecting the fundamental rights of individuals by relating the importance of constitutional review and constitutional appeal.

The human rights protection system is complemented by functioning international courts. Namely, citizens have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution.

Keywords: Constitution, human rights, Serbia, constitutional court

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1. The constitutional framework for the implementation of human rights

The Constitution of Serbia adopted on 2006 includes standard *materia constitutions*: human rights and state power, which is systematized in such a way that human rights provisions come before the provisions on the organization of state power. Human and minority rights are regulated in the second part of the Constitution, right after the principles of the Constitution; it includes three heads: fundamental principles, human rights and freedoms, and rights of persons belonging to national minorities. The largest number of human rights is concentrated here, but human rights provisions can be found in other parts of the Constitution.[2] Thus, the Constitution devotes more than one-third of the constitutional text to this matter, including all three 'generations of rights', ranging from 'classical' liberal and political rights, through economic, social, cultural rights. Bearing in mind the scope of such constitutional catalog and the different character of rights contained in it, human rights are 'partly exposed as subjective rights, and partly as social program principles'.[3]

At the beginning of the part on human rights, Serbian Constitution sets out the fundamental principles, which are of particular value in the constitutional system of Serbia. They are direct implementation of guaranteed rights, the purpose of constitutional guarantees, restriction of human and minority rights, prohibition of discrimination and protection of human and minority rights and freedoms. These principles maintain the attitude of the constitution-maker on the importance of human rights, and together with constitution principles, above all the principle of the rule of law, constitute the constitutional framework for the implementation of human rights.

The principle of direct implementation of guaranteed rights implies that human and minority rights guaranteed by the Constitution should be implemented directly. The Constitution guarantees, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws.[4] The direct implementation of guaranteed rights means that the law is not a necessary mediator between the constitutional norm and its practical application. This principle applies to all holders of the constitutional authority, but it is primarily aimed at ensuring human rights in relation to the legislature. The Court, as well as any other body, may refer directly to the constitutional norm and may directly apply the constitutional rule to a particular case. In accordance with the general approach that the Constitution is a guarantor and a protector of human rights and that

[2] For example, freedom of enterpreneurship is regulated in part three: Economic system and Public Finance

[3] Stojanović Dragan, *Ustav Republike Srbije* (pogovor), Niš, 2006, s. 111

[4] Article 18 of the Constitution of the Republic of Serbia (''Official Gazette of the RS'', no. 98/2006

the constitutional provisions are applied directly, the quality, scope, and content of the legislator's authority to regulate human rights are limited.

The law may prescribe the manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise specific rights owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right. The direct implementation of guaranteed rights means that the law is not a necessary mediator between the constitutional norm and its practical application. The Constitution does not allow the law to affect the substance of the rights that are the subject of the legislation, and the limits of the legislator's conduct when regulating human rights are set by the Constitution. Provisions of human and minority rights should be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation (article 18 para 3). This means that when interpreting human rights provisions, the attitudes of the European Court of Human Rights and the United Nations contracting bodies should be taken into account.

Constitutional guarantees of human rights have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open and democratic society based on the principle of the rule of law (Article 19). In this way, the Constitution expresses the value of subjective rights and the need to protect an objective legal order, since the protection of individual citizens' rights is ensured by the protection of public order.[5] Bearing in mind the purpose of constitutional safeguards, it can be concluded that the interpretation of the human rights catalog is presumed to be a general constitutional goal, which is to promote the values of the democratic society. This goal can be achieved through the preservation of human dignity, and the realization of full freedom, and the equality of every individual in a just, open and democratic society, based on the rule of law.

The improvement of the values of democratic society and a just, open and democratic society are new constitutional standards, whose content is not determined by either the Constitution or international documents, but it is established in the practice of national courts, primary constitutional courts, but also international bodies dealing with the protection of human rights. Determining the content and legal value of such legal standards belong to the discretionary rights of the State; they constitute the 'margin of appreciation' developed in the application of the ECHR. This means that state organs, primarily the constitutional court and regular courts, are expected to define the content

[5]Pejić Irena, *Garancije ljudskih prava u nacionalnom poretku:ustavnosudska zaštita*, Ustavne i međunarodne garancije ljudskih prava, Niš, 2008, p. 262

of these standards by their decisions, as the 'local' conditions and needs of the state and thus ensure the rule of law.

The prohibition of discrimination stipulates that all are equal before the Constitution and law; everyone has the right to equal legal protection, without discrimination. Any discrmination, either directly or indirectly, is prohibited on any ground, which means that the Constitutions, as well as ECHR, leaves the possibility of prohibiting discrimination and on the grounds that are not explicitly foreseen. In addition to the general provision on the prohibition of discrimination, the Constitution also contains a special provision guaranteeing the equality of women and men, and establishes the obligation of state to conduct a policy of equal opportunities in the field of gender equality, as well as, a special provision that prohibits any form of discrimination based on belonging to national minority.

'One of the functionsof the constitutions is to lay down the limitations on the exercise of overall state powers in relation to individual citizens. This function of the constitution delas with the relations between the state and the rights of individuals.'[6]The principle of restriction of human and minority rights is one of the fundamental principles that the Constitutions sets in Article 20. Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. The legislature is authorized to regulate restrictions in more detail, but not to introduce a limitation ground. The restriction is possible only if the Constitution allows it for the purposes which Constitution permits. The Constitution sets the 'boundaries' of human rights restrictions and the legislator must respect them. All state bodies, in particular, the courts, in limiting human and minority rights must take into account: 1). the substance of the restricted rights, 2). the pertinence of restriction, 3). nature and extent of restriction, 4). relation of restriction and its purpose and 5). possibility to achieve the purpose of the restriction with less restrictive means. This clearly defines the principle of proportionality, as well as criteria for which, first and foremost, courts must be guided in the interpretation of human rights restrictions.

The formulation of the new Constitution on the restriction on human rights is considerably more complete than ones contained in the previously Serbian Constitution (1990). However, the Constitution does not contain the provision that explicitly prohibits the restriction of human and minority rights guaranteed by generally accepted rules of international law, although it stipulated that the attained

[6]Treneska-Deskoska Renata, *Constitutional protection of human rights (with reference to the Republic of Macedonia)*, Ustavne i međunarodne garancije ljudskih prava, Niš, 2008, p. 276

level of human and minority rights may not be lowered. Also, the lack of such formulated principle on the restriction of human and minority rights means that restriction is not linked to a certain limitate aim, but can be undertaken for any purpose 'allowed by the Constitution' without a list of legitimate aims.[7] Thus, the important principle of the ECHR and ICCPR, according to which certain human rights and freedoms can be legitimately restricted, only if necessary in a democratic society is not consistently transposed into Serbian Constitution. But, given that the provisions on human and minority rights are interpreted in favor of promoting the values of the democratic society, in accordance with the applicable international standards of human and minority rights, as well as the jurisprudence of international institutions, domestic courts are in position to interpret the Constitution in accordance with European standards, especially with ECHR.

In addition to this general clause, the Serbian Constitution explicitly foresees the reasons for restricting certain rights. These reasons are contained in the chapter on human rights and freedoms, specifically within the provisions determining the notion and content of the particular right. For example, freedom of movement and residence, as well as the right to leave the Republic of Serbia may be restricted by the law if necessary for the purpose of conducting criminal proceedings, protection of public order, prevention of spreading contagious diseases or defense of the Republic of Serbia. Freedom of manifesting religion or beliefs may be restricted by law only if that is necessary in a democratic society to protect lives and, health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred.

The Constitution regulates the special regime of human and minority rights in the state of emergency and the state of war. When proclaiming the state of emergency or state of war, the National Assembly may prescribe the measure which shall provide for derogation from human and minority rights guaranteed by the Constitution. Derogations from human and minority rights are permitted only to the extent deemed necessary. Measures providing for derogation should not bring about differences based on race, sex, language, religion, national affilition or social origin.[8] It should be noted that the Constitution determines that measures providing for derogation shall by no means be permitted in terms of certain rights.[9] This principle in combination with

[7] European Commission for democracy through law (Venice Commission): Opinion on the Constitution of Serbia, adopted by the Commision at its 70 th plenary session (Opinion No. 405/2006)

[8] Article 200 and 201 of Constitution

[9] These are: diginity and free development of individuals (art. 23), right to life (Art. 24), inviolability of physical and mental integrity (art. 25), prohibition of slavery, servitutde and forced labour (art. 26), treatment of persons deprived of liberty (art. 28), right to a fair trial (art.

the absolute guarantees of certain human rights significantly limits the ability of the executive to try to use a state of war or emergency to suspend basic rights.

2. Human Rights Protection System

The constitutional catalog of human rights needs the existence of adequate mechanisms for its protection, presented by the highest legal act. One society could be considered democratic if citizens are given the opportunity to protect their rights in appropriate court proceedings, either in relation to oppressive acts of legislation, even democratically elected, but also in relation to the illegal behavior of the administration. In a constitutional system based on the rule of law, democracy can't be reduced only to the elections of representatives, but also should include the protection of the rights of the individual. Thus, human rights should be observed in relation to the appropriate institutions, which are established for its protection. The essential characteristic of the fundamental rights is their special legal protection, which is adequate with a special status of constitutional guarantees. Therefore, it is understandable that special attention is paid to the protection of human rights in constitutional acts. Namely, Serbian Constitution as one of the fundamental principles of human rights recognizes the principle of protection of human and minority rights. Everyone has the right to judicial protection when any of their human or minority rights guaranteed by the Constitution have been violated or denied, they also have the right to elimination of consequences arising from the violation. The citizens have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution (Article 22).

The protection of human rights in Serbian Constitution is placed on two pillars; one, internal, and other, international. The relationship of these two systems is regulated by the principle of subsidiarity. This means that the protection of human rights is primarily provided at the national level and in the procedures before national authorities. Only after exhaustion of all available legal remedies in domestic law, international mechanisms for the protection of human rights may be initiated. The right to address to international institutions is guaranteed by the Constitution as a right of the citizen.

32), legal certainty in criminal law (art. 34), right to legal person (art. 37), right to citizenship (art. 38), freedom of thought, conscience and religion (art. 43), consientious objection (art. 45), freedom of expressing national affiliation (art. 47), prohibition of inciting racila, ethnic and religiuous hatred (art. 49), right to enter into marriage and equality of spouses (art. 62), freedom to procreate (art. 63), rights of the child (art. 64) and right to preservation of specifity (art. 79).

2.1. Judicial protection of human rights

The core of the national system of human rights protection consists of the courts, which are expected to submit the largest 'burden' in terms of protecting human rights. Judicial protection is the primary and the most important form of human rights protection. In this regard, the constitutional provisions that set judiciary principles are of key importance. Judicial power is unique on the territory of the Republic of Serbia (art. 142 para.1) and it belongs to courts of general and special jurisdiction (art. 143 para.1). Supreme Court of Cassation established as the highest court in the Republic of Serbia. Courts of general jurisdiction are the basic courts, the higher courts, and the appellate courts. Courts of special jurisdiction are the commercial courts, the Commercial Appellate Court, the Misdemeanor Appellate Court, the misdemeanor courts and the Administrative Court[10]. In addition to the Supreme Court of Cassation, the Commercial Appellate Court, the Misdemeanor Appellate Court and the Administrative Court are the courts of the Republic level. The seats of those courts are in Belgrade; the Misdemeanor Appellate Court, and the Administrative Court also have departments in Kragujevac, Niš and Novi Sad.

The Constitution sets out that the courts are separated and independent in their work and they perform their duties in accordance with the Constitution, Law and other general acts when stipulated by the Law, generally accepted rules of international law and ratified international contracts. Establishing, organization, jurisdiction, system, and structure of courts are regulated by the Law.

The necessary precondition for the realization of the proclaimed independence of the judiciary is the principle of division of power, that is, the distinction between the legislative, executive and judicial authorities, which are entrusted to various state bodies. The judicial power is entrusted to the courts, that are institutionally separated from other branches of government, thus excluding any hierarchical superiority of other organs. The independence of the judges is ensured by a series of constitutional guarantees. The Constitution determines that in performing his/her judicial function, a judge is independent and responsible only to the Constitution and the Law. Any influence on a judge while performing his/her judicial function is prohibited (art. 149). This principle should ensure independence within the judicial branch of government and implies that judge must be free from any 'external and internal' pressure in the establishment of facts and the application of the right. Judicial independence should

[10]The appellate courts are immediately superior to the higher courts and the basic courts. The Commercial Appellate Court is immediately superior to the higher courts and the basic courts. The Commercial Appellate Court is immediately superior to the commercial court, and the Misdemeanor Appellate Court is immediately superior to the misdemeanor court. The higher courts are immediately superior to the basic courts when so stipulated in the Law on Organization of Courts.

be perceived in terms of shielding the judge from executive pressures or legislative interference, but also encompass internal independence, namely, the independence of the judge from his or her judicial colleagues or superiors.[11]

In the exercise of judicial office and the pronouncement of justice, the courts are independent and obliged to comply only with the objective law, which arises from the principle of legality. The courts decision are based on the law, ratified international treaty and regulation passed on the grounds of the Law. When deciding on issues of human rights protection the courts could rely on ratifyng international treaties, first and foremost, the ECHR.

Judicial office is permanent. As an exception, persons elected as judges for the first time are elected for a period of three years. A judge has the right to exercise judicial office in the court to which he/she was appointed and can be transferred or referred to another court only with his/her consent. In the case of abolition the court or the substantial part of the jurisdiction of the court to which a judge was appointed, as an exception, he/she may be permanently transferred or referred to another court without her/his consent, in accordance with the law. A judge’s tenure of office terminates at his/her request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law, as well as if he/she is not elected to the position of a permanent judge. The decision on the termination of judicial office is taken by the High Judicial Court. A judge has right to file an appeal with the Constitutional Court against this decision. Such appeal excludes the right to submit a constitutional appeal. Proceedings, ground, and reasons for the dismissal of judges, as well as the reasons for the dismissal of Court Presidents, are regulated by law (art. 148).

Political activities of judges are prohibited. The law regulates what other offices, activities or private interests are incompatible with the judicial office. Judges cannot be members of political parties. The judges enjoy immunity and there are not responsible for expressed opinion or voting in the process of passing a court decision, except in cases when he/she committed a criminal offense by violating the Law. Without the approval of the High Judicial Court, a judge may not be detained or arrested in the legal proceedings instituted due to a criminal offense committed to performing their judicial function.

The Republic of Serbia is fully committed to the process of European integration and aware that this process requires substantial and fundamental changes in the judiciary, anti-corruption system and the protection of basic rights. Concerning independence of judiciary, the National Judicial Reform Strategy for the period 2013-2018 has identified the need of amending the Constitution in the part which deals with the

[11]Lee H. P. , *Judiciaries in Comparative Perspective*, Cambridge University Press, 2011, p. 3

interference of legislative and executive powers in the process of appointment and dismissal of judges, court presidents, public prosecuros and deputy public prosecutors, elected members of the High Judicial Council and State Prosecutorial Council, and the need for precision the role of the status of Judicial Academy. Serbia should adopt new Constitutional and judicial laws, which, taking into account the recommendations of the Venice Commissions and European standards, ensures the independence of the judiciary from political influence, maximally restricting influence of legislative and executive powers in the process of recruitment, selection, appointment, transfer and termination of the judge's office, presidents of the courts, and (deputy) public prosecutors, which must be based on the precise criteria[12].

Serbia should particular strengthen the independence, accountability, professionalism and overall efficiency of the judicial system. One of the first steps, in order to fulfill this aim, is to exclude the National Assembly from the process of electing court presidents, judges, public prosecutors and deputy public prosecutors, as well as members of the High Judicial Council and the State Prosecutorial Council.

In accordance with obligations assumed by the Republic of Serbia by adopting the Action Plan for Chapter 23, Ministry of Justice introduced the working draft of the amendments to the Constitution concerning the judiciary in January 2018.[13]The working draft of the amendments to Serbia's highest legal act is the result of a 6-month public debate which included six roundtables in several Serbian cities. The working draft was discussed at the public debate, which began on 22 January. The Ministry also invited all interested parties to review the working draft and to give their comments and opinions at the upcoming public debate.[14] Serbian Government adopted the draft amendments on 12 April 2018 and sent them to the Venice Commission. The draft includes certain views given to the Ministry of Justice during the public debate. Venice Commision adopted the opinion on draft amendments to constitutional provision on the judiciary of Serbia during the 119 th plenary session held on June 22. Following the official opinion of the Venice Commission, the Ministry of Justice will align the Draft amendments with its recommendation and forward it to the Government for adoption. After that, the formal procedure of amending the

[12]https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023%20Third%20draft%20-%20final1.pdf

[13]https://www.mpravde.gov.rs/en/vest/17921/working-draft-of-the-amendments-to-the-constitution-published-new-round-of-public-debate-and-the-venice-commission-opinion-next.php

[14]A total of 34 comments were sent to the address of the Ministry of Justice by civil society organizations, professional associations, state bodies, professors, lawyers, and citizens. Four roundtables were organized during the second round of a public debate-in Belgrade, Novi Sad, Niš, and Kragujevac.

Constitution will be opened. The National Assembly should adopt an act on amending the Constitution by a two-third majority of total number of deputies. It should be noted that the last word in this proces will have the citizens. The National Assembly is obliged to put forward the act on amending the Constitution in the republic referendum to have in endorsed. The amendment to the Constitution shall be adopted if the majority of voters who participated in the referendum voted in favour of the amendment (art. 203).

2.2.**Constitutional Court protection of human rights**

The Constitutional Court of Serbia, established by the Constitution of 2006, has received a number of new competencies and has become one of the pillars of the constitutional system, which has the great responsibility in terms of preserving the principles of constitutionality and legality and with regard to the protection of human rights. The protection of human rights in the proceedings before the Constitutional Court is exercised in the procedure of constitutional review and in the constitutional appeal procedure.

The procedure for assessing the constitutionality or illegality is initiated on the basis of a proposal submitted by an authorized propounder or a ruling on initiation of the procedure. This procedure may be initiated by the Constitutional Court itself, on the basis of a decision taken by a two-thirds of the votes of all its judges. (art. 51 Law on Constitutional Court). When the Constitutional Court establishes that a law, statue of autonomous province or local self-government unit, other general act or collective contract do not comply with the Constitution, generally accepted rules of international law and ratifies international agreement, such law, statute of autonomous province or local self-government unit, other general act or collective contract shall cease to be valid on the day Constitutional Court decision is published in the Official Gazette of Republic of Serbia. Such an intervention of the Constitutional Court has the character of indirect protection because it does not directly reflect on the subjective positions.[15]

In the constitutional appeal procedure, direct protection of the constitutional rights is ensured. From the aspect of human rights, special constitutional law protection of fundamental rights confirm their high rank and their superiority in relation to ordinary legislation. The constitutional appeal may be filed against individual acts or actions of state authorities or organizations vested with the public authority that violate or deny human and minority rights and freedoms guaranteed by the Constitution, when other legal remedies are exhausted or are not prescribed or where the right to their judicial protection has been excluded by law. (Art. 170 Constitution) The constitutional appeal has the status of an extraordinary legal remedy, which can be stated only after all available legal remedies have been used. Deciding on constitutional appeals, the

[15] Stojanović Dragan, Ustavno pravo (prva knjiga) Niš, 2004, s. 478

Constitutional Court acts as a special instance of citizens' appeals on the principle of inter partes, which is an exception to the general erga omnes rule.

By establishing the jurisdiction of the Constitutional Court to decide on constitutional appeals, the Republic of Serbia became part of a large 'family' of European states led by Austria and Germany. At the same time, the Constitutional Court's decision on a constitutional appears as a specific 'point of attachment' of the national constitutional court and the European Court of Human Rights. Namely, the constitutional appeals appear as the last legal remedy to be used before the eventual address to the European Court of Human rights. It should be emphasized that the ECtHR is of the opinion that a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced as of 7 August 2008, that being the date when the Constitutional Court's first decision on the merits of the said appeals had been published in the respondent State's Official Gazette.[16]This means that the European Court of Human Rights has recognized Constitutional Court of Serbia as a partner on a joint task.

Constitutional appeals are perhaps the most powerful among the mechanisms for the legal protection of human right. They provide a judicial remedy against violations of constitutional rights. They can be lodged by the person who is directly affected by the challenged act. The Constitutional Court has the power to restore to the victim his or her rights.[17]

Protection in the proceedings on a constitutional appeal is very broadly set both in the personal view, both in relation to the protected rights body. The right to file a constitutional appeal has everyone, both the domestic or foreign citizens if they are the rightsholder. But, the constitutional complaint is not an *actio popularis*, and the potential appellant must be the victim of a breach of a constitutionally guaranteed human rights or freedom. The list of the rights, where are protected under constitutional appeals, is wide sets and covers all human and minority rights and freedoms, individual and collective, guaranteed by the Constitution, irrespective of their place in the Constitution. This broadly established jurisdiction of the Constitution Court to decide on constitutional appeals results that these proceedings form 2/3 of total number cases. This is expected situation because the citizens of Serbia started submitting constitutional appeals immediately after the adoption of the constitution of Serbia and much before the adoption of the Constitutional Court Act.

[16]Case of Vinčić and others v. Serbia, judgment Strasbourg 1 december 2009

[17] Dannemann Gerhard, *Constitutional complaints: the European perspective*, International and Comparative Law Quarterly, 1992, Vol. 41, July 1992, Issue: 3, p. 142

The Constitutional Court provides equal protection for all rights, including procedural rights. It should be mentioned then from the aspect of procedural rights, the ordinary court could be in dual position. First one concerns their position as a protector of human rights, but they could also violate human rights by their procedure or by its act.

When Constitutional Court finds that the challenged individual act or action violated or denies a human or minority right or freedom guaranteed by the Constitution, it may annual the individual act, prohibit the continuation of such action or order taking other measures or actions that eliminate the harmful consequences of the violation or denial of guaranteed rights and freedoms and determine the manner of just satisfaction for the propounder (Art. 89 law on Constitutional Court). When the challenged act is a judicial decision, it could also be annulled by the Constitutional Court. This issue casts more light on the relationship between the Constitutional Court and regular courts in constitutional complaint proceedings. If the ordinary court's decisions will be omitted from annulment this means that all acts of public authorities are not subject to the same review. Besides, the Constitution does not recognize differences which may be based on the type of a disputed act, in terms of the branch of government it has been issued by.[18]

The Constitutional Court, in the procedure under the constitutional complaint, examines only the existence of a violation and denial of constitutional rights, and not the legality of the disputed individual act or action.[19] In this procedure, the Constitutional court is not competent to refer to the assessment of the regularity of the facts. This is the jurisdiction of the administrative and judicial authorities, in the proceedings which proceeds the constitutional complaint.[20] It is far too obvious that the purpose of the Constitutional Court is not to replace the ordinary courts, not to interfere with the independence of the judiciary.

The Constitutional Court considered that if we want constitutional appeal to accomplish its purpose and objective, it is necessary to remove the consequences arising from the disputed act, including judicial decision. The Constitutional Court emphasised that on this way the basic constitutionally guaranteed human rights could be protected; it did not intend to become a super appellate court.[21] From the aspect of human rights is very important to end up the possible rivalry between these courts. The constitutional complaint is extraordinary legal remedy, which is used in

[18]. Nastić Maja, *The relationship between the Constitutional court and Regular court: a commentary on a decision of the Constitutional Court of Serbia*, Zbornik radova Pravnog fakulteta u Nišu, br. 65, 2013, s. 386

[19]The Judgment of the Constitutional Court of Serbia Už 2663/2009 (navesti još neku)

[20]The Judgment of the Constitutional Court of Serbia Už 2371/2009

[21] The Judgment of the Constitutional Court of Serbia IUz 97/2012, 'Official Gazette',No. 18/2013

exceptional cases. Besides, the decisions of the Constitutional Court are subject to the reassessment of the European Court of Human Rights.

In the screening report, it is recommended to clarify the rules for terminating the mandate of Judges of the ConstitutionalCourt.[22] Tenure of office of the Constitutional court justice terminates upon expiry of the period for which he/she had been elected or appointed, at his/her own request, after meeting the requirements regulated by the Law for obtaining the old age pension or by relief or duty. A justice of the Constitutional Court shall be relieved of duty if he/she violated the prohibition of conflict of interest, permanently loses the ability to discharge the funcion of a justice of the Constitutional Court, or is convicted of a penalty of imprisonment or criminal offence which makes him/her ineligible for the post of the Constitutional Court justice. The National Assembly decides on the termination of a justice's tenure office, on request of movers authorized for elections, as well as an appointment for the election of a justice of the Constitutional Court. It seems questionable to give to the National Assembly the right to decide on the termination of office of Constitutional Court judges. While in the process of appointing judges of the Constitutional Court all three branches of government participate, in the process of termination decides the National Assembly.

2.2. Protector of citizens (the Ombudsman)

This is an independent public body, introduced in the legal order of Republic of Serbia in 2005 when it was adopted the Law on Protector of Citizens. When Serbia got the new Constitution next year, the Ombudsman was recognized by it. The Protector of citizens is independent state body who protects citizens' rights and monitor the work of public administrative bodies, body in charge of legal protection of property rights and interests of the Republic of Serbia, as well as other bodies and organizations, companies and institutions to which public powers have been delegated. The Protector of Citizens has a duty to control activities of the public administration institutions, the body authorized to protect proprietary rights and interests of the Republic of Serbia (the Republic Attorney-General), as well as the activities of other bodies and organizations, enterprises and institutions with public authority.[23]The Ombudsman plays a key role in protecting citizens' right to good administration. But, this institution has not the power to control the work of the National Assembly, President of the

[22] Screeing report Serbia: chapter 23- Judiciary and fundamental rights, https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf

[23]Article 1 para. 1 of the Law on Protector of Citizens (''Official Gazette'' No. 79/2005, 54/2007)

Republic, Government of Serbia, Constitutional Courts, courts and public prosecutior's office.[24]

Everyone who considers that public administration institutions act irregular or incorrect could initiate the proceeding before the Ombudsman. A complaint is free of charge and is submitted in a written or oral form on the record. The Ombudsman can initiate the procedure on his/her own initiative, also. The role of the Ombudsman is to collect relevant evidence, determines the facts and circumstances important for the case and to decide is the complaint justified or not. If there are determined the deficiencies in the work of public administration institutions, the Protector of Citizens will note them and recommend their correction. In exercising its competence, the Ombudsman makes the recommendation, attitudes, and opinions. The public administration body has obligation to inform the Protector of Citizens in term of 60 days, or earlier, whether the recommendation has been respected and the deficiency corrected. If the public administrative body refused to act upon the recommendation, the Ombudsman should inform the public, the National Assembly, and the Government.

The Protector of Citizens acts preventively by offering good services, mediating and giving advice and opinions related to the issue within its authority, with the objective of improving the work of administrative authorities and protection of human rights.[25]

The Protector of Citizens can contribute to the protection of human rights submitting the legislative initiatives and the proposals for assessing[26]the constitutionality of the Law[27]. Along with this, the Ombudsman is entitled to give opinions to the Government and the Parliament on regulations which are in process of preparation.[28]

[24]Art. 138 para. 2 Constitution
[25]Art. 42, para 2 of the law
[26]The Protector of Citizens submit to the Ministry of Interior the Initiative for regulation of the use of the means of coercion; the Initiative for Amending the Law on Games of Chance to the Ministry of Finance, the Initiative for amending the law on non-contentious procedure; the Initiative for Amending the Criminal Code to Exclude the Possibility of Mitigating the Punishment for Perprerators of All Crimes against Sexual Freedom.
[27]The Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection submitted to the Constitutional Court proposal for assessing the constitutionality of Article 128 of the Law on Electronic Communication (Official Gazette of RS, No. 44/2010).
[28]Art. 18 para. 1 of the Law on Protector of Citizens

In ten years of existence, the Protector of Citizens has been addressed by nearly 150,000 citizens filling over 35,000 complaints.[29] But, Serbia has not established yet a functional system for remedying irregularities in the work of public authorities.

In addition to the Ombudsman, the Commissioner for Information of Public Importance and Personal Data Protection and the Commissioner for the Protection of Equality, as institutions established and functioning under the law, have a significant role in the realization of human rights.

Conclusion

The Serbian Constitution has established a good normative and institutional framework for the protection of human rights. It recognized the importance of human rights and presented the new constitutional solutions within the system of human rights protection. However, it is necessary to implement constitutional norms in practice. It should be noted that there's exist the gap between the normative and the real, that is between what the Constitution proclaimed and what is being realized in practice. This is the biggest problem of protecting human rights in Serbia. Courts do not recognize sufficient the importance of the constitutional provisions on human rights. This is one of the reasons why constitutional complaint in transferred from extraordinary to legal remedy which is used very often. It is necessary to strengthen the role of ordinary courts. Independent and impartial courts must be a main 'pillar' for human rights protection. They need to reduce the ''pressure' on the constitutional court, who should be a 'filter' for appeals before ECtHR deciding. We hope that constititional amending process, which is in progress, will be a certain step forward in achieving this aim.

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