



In line with Resolution II adopted by the Circle of the Presidents at its meeting held on 13 June 2018 in Prague, the theme of the XVIIIth Congress of the Conference of European Constitutional Courts to be held in Prague from 26 to 29 May 2020 will be:

**HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE
21ST CENTURY**

ANSWER TO QUESTIONNAIRE FOR THE XVIIIth CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS
CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA

I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I International catalogues of human rights (ECHR, UDHR and ICCPR)

- In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

The Basic Principles of the Constitution of the Republic of Serbia¹, which entered into force on 8 November, 2006 (hereinafter referred to as: the Constitution), in Article 16 paragraph 2, establish that generally accepted rules of international law and confirmed international treaties are an integral part of the legal order of the Republic of Serbia and that they are directly applicable, as well as that confirmed international treaties must be in conformity with the Constitution. Article 18 paragraph 2 of the Constitution stipulates that the Constitution guarantees, and as such, directly applies human and minority rights guaranteed by generally accepted rules of international law, confirmed international treaties and laws. The same article states in paragraph 3 that the provisions on human and minority rights are interpreted in favor of promoting the values of a democratic society in accordance with the applicable international human and minority rights standards, as well as in accordance with the practices of the international institutions that monitor their implementation. Article 194 of the Constitution regulates the hierarchy of domestic and international general legal acts. The said provision states that: the legal order of the Republic of Serbia is unique (paragraph 1); that the Constitution is

¹ Official Gazette of the Republic of Serbia, No. 98/2006

the highest legal act of the Republic of Serbia (paragraph 2); that all laws and other general acts adopted in the Republic of Serbia must be in conformity with the Constitution (paragraph 3); that confirmed international treaties and generally accepted rules of international law are part of the legal order of the Republic of Serbia and that confirmed international treaties must not contravene the Constitution (paragraph 4); that laws and other general acts adopted in the Republic of Serbia must not contravene confirmed international treaties and generally accepted rules of international law (paragraph 5).

It follows from the foregoing that the Constitution is above the confirmed international treaties, and that the domestic laws and other general acts are of lower legal force than the generally accepted rules of international law and the confirmed international treaties and that they must be in conformity with them, which further leads to the conclusion that in the case of conflict of domestic law, a confirmed international treaty has the supremacy, unless it is in accordance with the Constitution. Also, the Constitutional Court, within the framework of the constitutionally determined jurisdiction in the procedure of normative control, assesses the conformity of laws and other general legal acts with the generally accepted rules of international law and confirmed international treaties, while confirmed international treaties are subject to the assessment of their conformity with the Constitution (Article 167 paragraph 1 of the Constitution).

It should be emphasized that the former State Union of Serbia and Montenegro (whose legal successor is the Republic of Serbia) on 26 December 2003 ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR²), i.e. before the adoption of the current Constitution of the Republic of Serbia. In addition to the principle that the ECHR is an integral part of the legal order of the Republic of Serbia, as a confirmed international treaty, Part II of the Constitution (Articles 16-81) is dedicated exclusively to human and minority rights and freedoms and contains all the rights guaranteed by the ECHR. Thus, in the Republic of Serbia, the rights guaranteed by the ECHR are simultaneously guaranteed by the Constitution as the highest legal act. In addition, the Republic of Serbia is bound by a great number of international treaties on the protection of human rights and freedoms, ratified during the SFRY and FRY, including: the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Framework Convention for the Protection of National Minorities etc. Therefore, the mentioned, as well as other international treaties are an integral part of the legal order of the Republic of Serbia and are directly applicable.

- What mechanism is used to invoke the international treaties in national court decision-making?

Taking into account the above-cited provisions of the Constitution, it follows that the decisions of the Constitutional Court, other courts and other state bodies, may be based on generally accepted rules of international law and ratified international treaties. Also, by the provision of Article 142 paragraph 2, the Constitution stipulates the independence and autonomy of the courts, as well as the obligation of the courts to decide not only on

² Official Journal of Serbia and Montenegro – International Agreements, Nos. 9&2003 and 5/2005 and Official Gazette of the Republic of Serbia, No. 98/2006

the basis of the Constitution, laws and other general acts, but also on the basis of generally accepted rules of international law and confirmed international treaties. According to Article 145 paragraph 2 of the Constitution, court decisions are based on the Constitution, the law, a confirmed international treaty and a regulation based on law. Thus, national courts may, when making decisions, apply directly the generally accepted rules of international law and confirmed international treaties.

- Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

Yes, as stated above, it is possible to invoke directly to the provisions of confirmed international treaties and generally accepted rules of international law, which is particularly important in a situation where a particular issue is not regulated by national law. Thus, for example, in the constitutional complaint proceedings, the Constitutional Court found that the competent municipal administration, failing to enter into a meritorious decision on the applicant's request to enter a change of gender data in the public register of births, at the same time failed to fulfill its „positive obligation“ harmonizing the legal situation with the facts, thereby violating the applicant's right guaranteed by Article 23 of the Constitution, as well as the right to respect for private life under Article 8 of the ECHR.³

In addition to the reference to the ECHR, the Constitutional Court in its decisions referred also to other sources of international law, such as:

- Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948⁴,
- International Covenant on Civil and Political Rights⁵,
- International Covenant on Economic, Social and Cultural Rights⁶,
- Council of Europe Framework Convention for the Protection of National Minorities⁷,
- Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Elimination of All Forms of Racial Discrimination⁸.

³ Decision UŽ-3238/2011 of 8 March 2012

⁴ Ruling IUz-43/2009 of 9 July 2009, in which the Constitutional Court assessed the provisions of the Law on Judges (Official Gazette of the Republic of Serbia, No. 116/2008) regarding the character of judicial function as public function, and judicial appointment/termination procedures.

⁵ Decision IU-231/2009 of 22 July 2010, in which the Constitutional Court found that the issues regarding the right of establishment of the public media and entry in the register of public media, as well as the sanctions for the specific commercial offenses and misdemeanours prescribed by the Law Amending the Public Information Law (Official Gazette of the Republic of Serbia, No. 71/2009) had not been regulated in compliance with the Constitution and ratified international treaties.

⁶ Decision IU-187/2005 of 23 June 2011, on the disputed provisions of the Labour Law (Official Gazette of the Republic of Serbia, Nos. 24/2005 and 61/2005), governing the organisation of trade unions and specific legal protection of workers' representatives, the right to maternity leave and right to benefits.

⁷ Decision IUz-52/2008 of 21 April 2010, in which the Constitutional Court found that the provisions of the Law on Local Elections (Official Gazette of the Republic of Serbia, No. 129/2007), on the division of mandates won in local self-government assemblies and the „blank resignation“ institute, i.e. the right of the parties on whose lists the councillors ran to dispose of their mandates freely, were not in compliance with the Constitution and ratified international treaties.

⁸ Decision IU-187/2005 of 23 June 2011

As for the courts of general and special jurisdiction, as an example, we note that the Supreme Court of Serbia, even before the adoption of the current Constitution, in certain cases referred to the provisions of ratified international treaties. The judgment of the highest court in the Republic of Serbia, delivered back in 2004, was based on the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination and on the provisions of the International Covenant on Civil and Political Rights⁹. Surveys conducted in the Republic of Serbia show a positive trend with regard to invoking courts of general and specific jurisdiction to the provisions of the ECHR and the ECtHR case law, and in particular higher instance courts.

I.II Supranational catalogues of human rights (the Charter)

- Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?
- Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?
- Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is it conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

The Republic of Serbia is not yet a member of the EU and the Charter cannot be a source of rights for the time being.

I.III National human rights catalogues

- Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

The human rights catalogue is an integral part of the Constitution of the Republic of Serbia and the second part of the Constitution, entitled „Human and Minority Rights and Freedoms“ (Articles 18 to 81), is dedicated to them. This part of the Constitution is divided into three sections. The first section (Articles 18 to 22) contains the basic principles, which determine the direct application of human and minority rights guaranteed by the Constitution, the purpose of constitutional guarantees of human and minority rights, the possibility, basis and scope of human rights restrictions, the general prohibition of discrimination regarding to the enjoyment of all human and minority rights guaranteed by the Constitution and the judicial protection of constitutionally guaranteed rights and freedoms in the domestic legal order and before international institutions. The second section (Articles 23 to 74) establishes personal, political, socio-economic and cultural-educational human rights, while the rights of persons belonging to national minorities are set out in the third section (Articles 75 to 81).

⁹ Judgment Rev. 229/2004 of 21 April 2004

The Constitution of the Republic of Serbia guarantees:

- human dignity and free development of personality (Article 23);
- right to life (Article 24);
- inviolability of physical and mental integrity (Article 25);
- prohibition of slavery, servitude and forced labour (Article 26);
- right to liberty and security (Article 27), obligation to treat a person deprived of liberty humanely and with respect for the dignity of his personality, prohibition of any violence against a person deprived of liberty and prohibition of extorting a statement (Article 28), additional rights of a person deprived of liberty without a court decision (Article 29), the rights of a person remanded to detention on the basis of a court decision (Articles 30 and 31);
- right to a fair trial (Article 32);
- special rights of a person charged with criminal offense (Article 33);
- right to legal certainty in criminal law (Article 34);
- right to rehabilitation and compensation (Article 35);
- right to equal protection of rights and legal remedy (Article 36);
- right to a legal personality (Article 37);
- right to a nationality (Article 38);
- freedom of movement (Article 39);
- right to inviolability of home (Article 40);
- right to confidentiality of communications (Article 41);
- right to protection of personal data (Article 42);
- freedom of thought, conscience and religion (Article 43);
- equality of churches and religious communities (Article 44);
- right to conscientious objection (Article 45);
- freedom of thought and expression (Article 46);
- freedom of expressing national affiliation (Article 47);
- obligation of the state to take measures aimed at fostering the understanding, appreciation and respect of differences that exist because of the particular ethnic, cultural, linguistic or religious identity of citizens (Article 48);
- prohibition of inciting racial, national and religious hatred (Article 49);
- freedom of the media (Article 50);
- the right to be informed (Article 51);
- electoral right (Article 52);
- right to participate in public affairs (Article 53);
- freedom of assembly (Article 54);
- freedom of association (Article 55);
- right to petition (Article 56);
- right of refuge (Article 57);
- right to property (Article 58);
- right to inheritance (Article 59);
- right to work (Article 60);
- right to strike (Article 61);
- right to enter into marriage and equality of spouses (Article 62);
- freedom to decide on birth (Article 63);
- rights of the child (Article 64);
- rights and duties of parents (Article 65);
- special protection of the family, mother, single parent and child (Article 66);
- right to legal assistance (Article 67);
- right to health protection (Article 68);
- rights relating to social security and pension insurance (Articles 69 and 70);
- right to education (Article 71);

- guarantees of university autonomy (Article 72);
- freedom of scientific and artistic creation (Article 73);
- right to healthy environment (Article 74);
- special rights of persons belonging to national minorities - guarantee of individual and collective rights of national minorities (Article 75), prohibition of discrimination against national minorities (Article 76), right to equality in performing public affairs (Article 77), prohibition of forced assimilation (Article 78), right to preservation of specificity (Article 79), right to association and cooperation with compatriots (Article 80) and obligation of the state to encourage and develop a spirit of tolerance among all people living in its territory (Article 81).

- What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

As for the historical development of the creation of the human rights catalogue, Serbia has adopted 13 Constitutions since 1835. The Constitution adopted on 15 February 1935 (*Sretenjski Ustav*) proclaimed the rights and freedoms of citizens (the general rights of the Serbs) - the inviolability of the individual, the right to a lawful trial, freedom of movement and residence, inviolability of the home, the right to choose a profession. The scope of human rights guaranteed by the current 2006 Constitution, in its content, is in fact a continuation of the tendency to guarantee these rights on a wide scale to citizens, as was the case with the 2003 Charter on Human and Minority Rights and Freedoms and the previous Constitution of the Republic of Serbia, as evidenced by the fact that almost a third of the provisions of the Constitution are devoted to human and minority rights and freedoms. In the Republic of Serbia, following the adoption of the 2006 Constitution, the legislative framework for the exercise and protection of human rights and freedoms has been improved, with a reliance on solutions existing in the international human rights instruments. For example, the Law on Prohibition of Discrimination¹⁰, the Law on Prevention of Discrimination against Persons with Disabilities¹¹, the Law on Gender Equality¹², etc. were adopted.

- What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

As stated above, after the adoption of the current Constitution, the Republic of Serbia has adopted a large number of laws and by-laws regulating the area of different human rights catalogues and has continuously worked on improving the legal framework by adopting various strategic documents in order to improve the exercise and protection of these rights in future. As for the Constitution, the procedure for its amendment is prescribed by the provisions of Articles 203 through 205 of the Constitution. If the amendment to the Constitution applies, among others, to human and minority rights and freedoms, the National Assembly is obliged to put the act on the amendment of the Constitution in the Republican referendum for confirmation, in which case, the amendment of the Constitution was adopted if the majority of voters who participated

¹⁰ Official Gazette of the Republic of Serbia, No. 22/2009

¹¹ Official Gazette of the Republic of Serbia, Nos. 33/2006 and 13/2016

¹² Official Gazette of the Republic of Serbia, No. 104/2009

in the referendum voted in favour of the amendment. An act on amendment the Constitution, which was approved in a Republican referendum, enters into force when it is promulgated by the National Assembly.

I.IV The mutual relationship between different catalogues of human rights

- Can you give examples from the case law of your court related to the use of any of the international catalogues?

The Constitutional Court, when deciding on matters within its constitutionally defined competences, both in the procedure of normative review and in proceedings on constitutional complaints, has been referring to international human rights catalogues, in most cases to the ECHR. If the content of the right guaranteed by the international catalogue is identical to the content of the right in the Constitution, the Constitutional Court examines the existence of a violation in relation to the relevant provision of the Constitution. However, if the content of the right is not identical, the Constitutional Court examines the violation in relation to the right guaranteed by a particular international catalogue.

Apart from the aforementioned case, where in the constitutional complaint procedure, in the Decision UŽ-3238/2011 of 8 March 2012, it was found that the failure of the competent municipal administration to decide on merit on the applicant's request for registration of a change of gender data in the registry of births, violated the applicant's right to respect for private life under Article 8 of the ECHR, for example, the Constitutional Court found, by Decision UŽ-9495/2013 of 22 October 2015, that the impugned judgment of the second instance court of general jurisdiction violated the applicant's right to respect for the home under Article 8 of the ECHR. In this Decision, the Constitutional Court stated, *inter alia*, „that the eviction of the applicant in order to achieve a legitimate aim reflected in the protection of the property rights of the State could not be considered necessary in a democratic society and proportionate to that aim within the meaning of Article 8 paragraph 2 of the ECHR“.

On the other hand, in the normative review procedure, the Court adopted Decision IU-187/2005 of 23 June 2011, concerning the disputed provisions of the Labour Law („Official Gazette of the Republic of Serbia“, Nos. 24/2005 and 61/2005), which related to the issues of organizing trade unions and special labour and legal protection of employees' representatives, the right to maternity leave and the right to benefits, basing its assessment also on the relevant provisions of the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The relevant part of this Decision reads as follows:

„According to the Constitutional Court, the disputed provision of the Law is not contrary to the provisions of Article 22, item 1 of the International Covenant on Civil and Political Rights („Official Gazette of the SFRY“, No. 7/1971), Article 2 of the Convention on Trade Union Freedoms and Protection of Trade Union Rights „(Official Gazette of the FPRY - International Treaties“, No. 8/1985), as well as Article 23 of the Universal Declaration of Human Rights of 10 December 1948 (accepted by all UN Member States), because by the disputed provision. universal freedoms and rights to organize trade unions, established by the mentioned international acts, as the proponent wrongly claims, are not limited, but contrary, the disputed provision has already taken over international standards in

this area. As to the authority of the Minister of Labour to decide on the registration of a trade union organization in the register, the Constitutional Court assessed that the authority of the Minister is contained in the provision of Article 55 paragraph 2 of the Constitution, according to which associations are founded without prior authorization, with entry in the register run by a state authority in accordance with the law. The Constitutional Court found that the legislature, in accordance with the provisions of Article 55 paragraph 2, in conjunction with Article 97 item 2 of the Constitution, is empowered to regulate the issue which state body will keep a register for the registration of trade union organizations.

The disputed provision of Article 104 paragraph 3 of the Law, which provides that work of the same value implies work for which the same degree of professional qualification is required, the same work capacity, responsibility and physical and intellectual work, in the opinion of the Constitutional Court, is in conformity with the constitutional principle on the right of everyone to a just remuneration for work referred to in Article 60 paragraph 4 of the Constitution and represents the concretization of this constitutional principle and the intention of the legislator to define precisely the concept of work of the same value as is achieved with the employer. The Constitutional Court finds that the disputed provision of the Law is also not contrary to the provisions of Article 23 item 2 of the Universal Declaration of Human Rights and Article 7 indent (a) sub-paragraph (i) of the International Covenant on Economic, Social and Cultural Rights („Official Gazette of the SFRY“, No. 7/1971), as it assumes international guarantees of the right of everyone to a fair and equal reward for the work of the same value, without any difference.

Invoking of proponents to the provisions of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ratified by the Federal Republic of Yugoslavia on 13 November 2002 („International Treaties“, No. 13/2002) and to the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force on 4 January 4 1969, in the opinion of the Constitutional Court, does not influence the assessment of the constitutionality of the disputed provision of the Law, since it applies equally to all employees, regardless of gender, when they find themselves in the same legal situation prescribed by the disputed legal provision.“

- Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

Since Article 194 paragraph 2 of the Constitution establishes that the Constitution is the highest legal act of the Republic of Serbia, the Constitutional Court, in decisions rendered in proceedings on constitutional complaints, in a situation where the applicants refer to both the provisions of the Constitution and the relevant provisions of the ECHR, which are not substantially different in their content, violation of rights assesses in relation to the said provisions of the Constitution.

In the proceedings on constitutional complaints, the Constitutional Court only considered the mutual relationship, i.e. competition of two rights, one guaranteed by the Constitution and the other by the ECHR. For example, in assessing the allegations of violation of the right to property under Article 58 of the Constitution, in Decision UŽ-2909/2011 of 3 July 2014, it pointed:

“In the view of the Constitutional Court, the restriction of the applicant's property rights in the present case is justified and the delicate balance between the applicant's right to property and the right of tenant under Article 8 paragraph 1 of the ECHR is not impaired.

In addition, the Constitutional Court notes that, apart to indicating to the position in which she is, as well as other owners of apartments burdened with the right to lease in favor of third parties, the applicant in no way indicated that the duration of the previously established restriction of her property rights is an excessive burden for her due to personal, residential or social circumstances or other reasons (for taking into account the personal circumstances of a person who claims that his/her right to property has been violated when assessing whether the proportionality requirements are fulfilled, see judgment *Scollo v. Italy*, of 28 September 1995).“

We emphasize that in the procedures for individual protection of human rights (proceedings on constitutional complaints) the Constitutional Court is bound by the request of the complainant. This means that the alleged violations of rights are examined in relation to those provisions of the Constitution or the international catalogue of human rights pointed by the applicant himself. Bearing in mind that the Constitutional Court cannot determine for itself in relation to which right it will examine whether there is a violation, but the applicant does, in practise it does not raise the issue of competition or hierarchy of different human rights catalogues. In a normative sense, all international human rights catalogues have equal legal force.

On the other side, in the process of abstract control of general legal acts, the Constitutional Court equally treats all international human rights catalogues, taking into account their applicability to a particular case if between them there is a different angle of protection they provide.

- Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

No.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

- What is the original wording of the provision protecting this right in your national catalogue?

The right to life is guaranteed by Article 24 of the Constitution:

„Human life is inviolable.

There is no death penalty in the Republic of Serbia.

Cloning of human beings is prohibited.“

- Is it possible to restrict the right? If so, how and under what conditions?

No. The right to life belongs to a group of absolutely protected rights.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

By its Decision UŽ-4527/2011 of 31 January 2013, the Constitutional Court upheld the constitutional complaint of two applicants and found that their right to life under Article 24 of the Constitution (procedural aspect) had been violated, and established the right to compensation for non-pecuniary damage in the amount of € 5,000 each. The relevant part of this Decision reads as follows:

„Bearing in mind the above, and also the facts that from the procedural aspect of the right to life, under the circumstances of this case, it is in principle required to undertake the investigating activities of the nature that can lead to discovering the identity of the responsible persons, and also that even after eight years from the death of the sons of the applicants the preliminary criminal proceedings have not been completed yet, nor can it be known under which circumstances they lost their lives and who could be responsible, the Constitutional Court established that the fundamental purpose of such „investigation“, which should ensure efficient implementation of the law protecting the right to life is not fulfilled, although the obligation of the competent authorities to conduct urgent and efficient „investigation“ in view of protection of the right to life is of vital importance for maintaining the public confidence into the rule of law and legal safety.“

In the aforementioned Decision, the Constitutional Court also referred to the ECtHR views expressed by that Court in cases in which a violation of the right under Article 2 of the ECHR was considered - e.g. the judgments *Mladenović v. Serbia*, of 22 May 2012, *Branko Tomašić and Others v. Croatia*, of 15 January 2009, etc.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No, in the aforementioned *Mladenovic v. Serbia* case, the ECtHR found a violation of the procedural aspect of the right to life under Article 2 of the ECHR for the same reasons that the Constitutional Court upheld a constitutional complaint in case UŽ-4527/2011.

II.II Freedom of expression

- What is the original wording of the provision protecting this right in your national catalogue?

Freedom of thought and expression is guaranteed by Article 46 of the Constitution:

„The freedom of thought and expression, are guaranteed, as well as the freedom to seek, receive, and disseminate information and ideas through speech, writing, picture or otherwise.

Freedom of expression may be restricted by law, if it is necessary to protect the rights and reputation of others, to safeguard the authority and impartiality of the court and to protect public health, moral of a democratic society and national security of the Republic of Serbia.“

- Is it possible to restrict the right? If so, how and under what conditions?

Yes. Article 46 paragraph of the Constitution provides that freedom of expression may be restricted by law, if necessary to protect the rights and reputation of others, to safeguard the authority and impartiality of the court and to protect public health, moral of a democratic society and the national security of the Republic of Serbia.

Thus: 1) the restriction of freedom of expression can be provided only by law (and not by an act of lower legal force) and 2) the freedom of expression can be restricted only for the reasons set out in the Constitution.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes, in a number of cases in constitutional complaints procedures, the Constitutional Court found a violation of freedom of expression under Article 46 of the Constitution.

Thus, for example, the Constitutional Court upheld two constitutional complaints of the same person - a journalist and editor-in-chief of a print media and found a violation of the designated right by different judgments of a civil court which obliged the applicant to compensate for non-pecuniary damage due to violation of honor and reputation caused by publishing information in the newspaper articles concerning the spending of funds from the local budget¹³. In assessing whether there was a violation of the aforementioned right, the Constitutional Court applied a test that also applies the ECtHR in its case law (whether interference with freedom of expression occurred, whether interference was prescribed by law, whether it served a legitimate purpose and whether it was necessary in a democratic society) and referred to the relevant ECtHR case law in such cases. In its decisions, the Constitutional Court assessed:

„... that the reasons given by the acting courts to justify the restriction on freedom of expression in question were not relevant and sufficient, and that such restriction was not necessary in a democratic society.“

In addition to these two examples, the Constitutional Court, by Decision UŽ-6600/2015 of 1 December 2016, upheld the constitutional complaint and found that the judgments of civil courts which obliged the applicant to compensate a private individual for non-pecuniary damage for violation of honor and reputation, due to criticism of his work during the parliamentary debate, violated the freedom of expression of the applicant - the councilor of an municipal assembly. In this decision, the Court emphasized that, in the present case, there were two conflicting legitimate rights - the right to protect the reputation and honor of a private individual on the one hand and the right to political expression of the opposition councilor in the local parliament on the other, and that the decision as to which of these rights should prevail depends on whether the restriction of freedom of expression was necessary in a democratic society and whether it was proportionate to a legitimate aim. Finally, the Constitutional Court concluded that „given the topic of the parliamentary debate, which concerned the functioning of the health service in the local environment, therefore, issues of public interest to citizens, and the context in which criticism of the work of the plaintiff as a health care worker was stated, ... that the applicant's contested statements and the terms he used could not be

¹³ Decisions UŽ-4162/2014, of 6 October 2016 and UŽ-7387/2015 of 8 February 2018

considered excessive, especially given that they were stated by a councilor who was legitimately expected to convey the problems of his constituents and defend their interests ... and therefore considered that the impugned judgments did not give convincing reasons to justify that restriction of the freedom of political expression of the complainant was necessary in a democratic society.“

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No, because in its decisions the Constitutional Court proceeds from the positions and established case law of the ECtHR. In support of this is the fact that on 17 September 2019 the ECtHR issued a decision on the inadmissibility of the application in the case *Marković v. Serbia*, application number 53661/13, due to the applicant's failure to properly exhaust domestic remedies. Namely, the applicant did not correctly present the facts in his constitutional complaint before the Constitutional Court, which was dismissed by Ruling UŽ-2608/2010 of 5 March 2013, because he had made no reference to the criminal proceedings, nor did he supplemented the complaint in question after he was served with the acquittal on 24 January 2013.

II.III Right to privacy/right to respect for private life/right to private life

- What is the original wording of the provision protecting this right in your national catalogue?

The Constitution does not proclaim the right to respect for private and family life in the same way as this right is guaranteed by Article 8 of the ECHR. The Constitution guarantees certain aspects of the right to private life such as the inviolability of home (Article 40), the confidentiality of communications (Article 41), and the right to protection of personal data (Article 42).

Article 40

„A person’s home shall be inviolable.

No one may enter a person’s home or other premises against the will of their tenant nor conduct a search in them. The tenant of the home or other premises shall have the right to be present during the search in person or through his legal representative together with two other witnesses who may not be under age. If the tenant of the home or his representative are not present, the search is allowed in the presence of two adult witnesses.

Entering a person’s home or other premises, and in special cases conducting search without witnesses, shall be allowed without a court order if necessary for the purpose of immediate deprivation of liberty of a perpetrator of a criminal offence or to eliminate direct and grave danger for people or property in a manner stipulated by the law.“

Article 41

„Confidentiality of letters and other means of communication shall be inviolable.

Derogation shall be allowed only for a specified period of time and based on decision of the court if necessary to conduct criminal proceedings or protect the safety of the Republic of Serbia, in a manner stipulated by the law.“

Article 42

„Protection of personal data shall be guaranteed.

Collecting, keeping, processing and using of personal data shall be regulated by the law.

Use of personal data for any purpose other than one they were collected for shall be prohibited and punishable in accordance with the law, unless this is necessary to conduct criminal proceedings or protect safety of the Republic of Serbia, in a manner stipulated by the law.

Everyone shall have the right to be informed about personal data collected about him, in accordance with the law, and the right to court protection in case of their abuse.“

- Is it possible to restrict the right? If so, how and under what conditions?

Yes, but the restriction is possible only for the reasons and under the conditions contained in the above mentioned constitutional norms.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes. The Constitutional Court by the aforementioned Decision Už-3238/2011 of 8 March 2012 adopted a constitutional complaint and found that the Municipal Administration of the Municipality Z, in reaching a conclusion on non-competence, failed to decide on the request of the applicant to change the gender data and thereby violated his right to dignity and free development of personality guaranteed by Article 23 of the Constitution of the Republic of Serbia, as well as the right to respect for private life guaranteed by Article 8 of the ECHR. In this case, the competent authority dismissed the request of the person to enter the change of gender data in the Civil Registry.

In a number of its decisions, the Constitutional Court also found a violation of the right to respect for the home under Article 8 of the ECHR in which, following the ECtHR's case law, it applied the test of justification for interference with the right to home. Thus, for example, in Decision Už-9495/2013, adopted on the basis of the constitutional complaint of a person who was ordered to be evicted from the premises, which the State, as a then active military official, granted him as necessary accommodation until the housing issue was resolved, concluded that „... unlike the State's right to exercises ownership powers on the property of which it is the owner in full possession, the applicant's interest in continuing to reside with the family in the premises in question is of existential importance to him ... and therefore, in the light of the circumstances of the particular case, the Constitutional Court found that the applicant's eviction pursuit to a legitimate aim reflected in the protection of the property rights of the State could not be considered

necessary in a democratic society and proportionate with that aim within the meaning of Article 8 paragraph 2 of the Convention.“

In addition to the application of the ECHR and the reference to Article 8, the Constitutional Court in its case law has also considered the issue of protection of the right to private life from the aspect of Article 40 paragraph 1 of the Constitution. By Decision UŽ-1327/2010 of 20 October 2011, the Constitutional Court found the violation of the designated right of the applicant - the right to inviolability of the home - by a search of the apartment (undertaken by the Ministry of the Interior). In the aforementioned Decision, the Constitutional Court found „that in the present case there was no order or other court decision on the basis of which authorized officials of the interior bodies could enter the applicant's apartment and search it, nor was there any exception which the restriction of his right to the inviolability of the home would make constitutionally permissible, that is, there were no the cases stipulated in the Constitution, and in more detail prescribed by law, in which the search of the applicant's home could be carried out without a court decision and without the presence of witnesses.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No, regarding the protection of this right, the Constitutional Court also follows the standards established by the ECtHR in its case law.

II.IV Freedom of religion

- What is the original wording of the provision protecting this right in your national catalogue?

Freedom of thought, conscience and religion

Article 43

„Freedom of thought, conscience, beliefs and religion shall be guaranteed, as well as the right to stand by one’s belief or religion or change them by choice.

No person shall have the obligation to declare his religious or other beliefs.

Everyone is free to exercise his or her religion or belief, by performing religious services, attending religious services or classes, individually or in community with others, as well as privately or publicly displaying his or her religious beliefs.

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, moral of democratic society, freedoms and rights of citizens guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred.

Parents and legal guardians shall have the right to ensure religious and moral education of their children in conformity with their own convictions.“

- Is it possible to restrict the right? If so, how and under what conditions?

Yes, under the conditions laid down in Article 43 paragraph 3 of the Constitution - by law, only if it is necessary in a democratic society, for the protection of the life and health of people, the moral of a democratic society, the freedoms and rights of citizens guaranteed by the Constitution, public security and public order, or for the prevention of provoking or inciting religious, national or racial hatred.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes, in the procedure of normative control of the disputed provisions of the Law on Churches and Religious Communities where a review of constitutionality was required in relation to Article 43 of the Constitution and Article 9 of the ECHR. In the Decision adopted on that occasion IUz-455/2011 of 16 January 2013, the Constitutional Court, "assessing the constitutionality of the provisions of Art. 10 to 15 of the Law, which designate which churches and religious communities are considered traditional, and on the basis of which laws that were once in force in the Principality of Serbia, the Kingdom of Serbia and the Kingdom of Yugoslavia, this law recognized a continuity of legal subjectivity of the said churches and religious communities, taking in the account the provisions of the Constitution on the prohibition of discrimination (Article 21), freedom of thought, conscience and religion (Article 43) and equality between churches and religious communities (Article 44 paragraph 1), and starting firstly from the allegations in the proposal and initiative, noted that by the disputed provisions of Art. 10 to 15 of the Law the constitutional guarantees of equality and equality of churches and religious communities, nor the freedom of every believer to exercise his or her religion or belief, are in no way violated." In this Decision, the Court also referred to the ECtHR's positions in the application of Article 9 of the ECHR, according to which „although the Court (ECtHR) recognizes that in situations of a division in a religious or any other community a tension may arise, the Court considers this to be one of the inevitable consequences of pluralism. The authority's role in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that particular groups tolerate one another ... and react when there is an acute social need for interference.“

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No, as in the present example, the Constitutional Court followed the ECtHR's case law in this case as well.

II.V Prohibition of discrimination

- What is the original wording of the provision protecting this right in your national catalogue?

Article 21

„All are equal before the Constitution and law.

Everyone shall have the right to equal legal protection, without discrimination.

All direct or indirect discrimination based on any grounds, particularly

on race, gender, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures which the Republic of Serbia may introduce in order to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination."

In addition to the general provision on prohibition of discrimination, the Constitution also contains a special provision guaranteeing equality between women and men and establishes the obligation of the state, in the field of gender equality, to pursue an equal opportunities policy (Article 15), as well as a special provision prohibiting all forms of discrimination based on belonging to a national minority (Article 76 paragraph 2).

- Is it possible to restrict the right? If so, how and under what conditions?

No.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes. By decision UŽ-8760/2014 of 9 November 2016, the Constitutional Court upheld the constitutional complaint and found that, in addition to the right to a fair trial the principle of non-discrimination under Article 21 of the Constitution had been violated to the applicant. In this case, the civil courts' judgments rejected the applicant's claim seeking annulment of the employer's decision terminating her employment contract after the expiration of the period for which it was concluded. In the aforementioned judgments, the courts assessed that the respondent employer „because of the applicant's pregnancy, was authorized to hire another person from the National Employment Service's register, despite the contractual obligation to retain trainees employed after 12 months of professional training for at least another 12 months in the same degree of education.“ On this occasion, the Constitutional Court concluded that „from the constitutional point of view, it is disputable whether the applicant was denied the right to work on the grounds of pregnancy ... and that the challenged judgments, above all the Supreme Court of Cassation judgments, did not contain reasoning that met the standard of fair trial regarding the allegations of the applicant during the civil proceedings on alleged discrimination, which led to the lack of an assessment of the courts as to whether the different treatment of the applicant compared to 63 persons who had been employed for another 12 months was based on a reasonable and justified basis, to the detriment of the applicant, the principle of non-discrimination under Article 21 of the Constitution was also violated. "

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No.

II.VI Right to liberty

- What is the original wording of the provision protecting this right in your national catalogue?

„Right to liberty and security

Article 27

Everyone has the right to personal liberty and security. Deprivation of liberty shall be permissible only for the reasons and in the procedure provided for by law.

A person deprived of liberty by a state body shall be informed promptly in a language which he understands about the reasons for his deprivation of liberty, charges brought against him, as well as on his rights, and he has right to inform any person of his choice about his deprivation of liberty without delay.

Any person deprived of liberty shall have the right to appeal to a court, which is required to urgently decide on the lawfulness of deprivation of liberty and to order the release if the deprivation of liberty was unlawful.

Any sentence which includes deprivation of liberty may be proclaimed solely by the court.“

In particular, we indicate that the Constitution of the Republic of Serbia protects the right to liberty not only by the provision of Article 27, but also by the provisions of Art. 28, 29, 30 and 31 of the Constitution, because these provisions elaborate on the rights of persons deprived of their liberty. Moreover, in the Republic of Serbia, the Constitution guarantees that a person can be remanded by police authorities for a maximum of 48 hours, then if the court orders a person suspected of having committed a criminal offense detention, the court's decision on detention must be served on the detainee no later than within 12 hours of detention, and the decision to appeal the detention must be rendered and served within 48 hours.

- Is it possible to restrict the right? If so, how and under what conditions?

Yes. Pursuant to paragraph 1 of Article 27 of the Constitution, deprivation of liberty is allowed only for the reasons and in the procedure prescribed by law, which means that in the Republic of Serbia, as in other countries, the reasons for deprivation of liberty and the procedure of deprivation of liberty are prescribed by the law governing criminal law procedure.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes, in a number of cases the Constitutional Court has examined constitutional complaints regarding violations of rights relating to deprivation of liberty. The Constitutional Court most often found a violation of the right to a duration of detention. In addition, the recent Constitutional Court case law may set aside decisions in case UŽ-3366/2016 of 8 November 2018, which found a violation of the right to liberty and security, since no lawful decision on deprivation of liberty was issued when police remanded the applicant, as well as in case UŽ-2900/2016 of 4 July 2019, in which the Constitutional Court found that by the action of the competent police administration, the

applicant's right to liberty and security under Article 27 of the Constitution was violated, since the competent court decided on his appeal against a police decision on retention after the expiry of the prescribed period, and during which the applicant had been deprived of liberty.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No.

Explanatory notes:

ECHR	– European Convention on Human Rights
Charter	– Charter of Fundamental Rights of the EU
UDHR	– Universal Declaration of Human Rights
ICCPR	– International Covenant on Civil and Political Rights