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COMMENTS ON THE CONSTITUTION OF SERBIA (Part II)

by

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1. Preliminary remarks

Section II of the new Serbian Constitution deals with "human and minority rights and freedoms". The section comprehends Articles 18 to 81; it is subdivided into three parts, i.e. Fundamental Principles (1., Articles 18 to 22), Human Rights and Freedoms (2., Articles 23 to 74), and Rights of Persons Belonging to National Minorities (3., Articles 75 to 81). Moreover, in Part III of the Constitution (Economic System and Public Finances) there are a number of additional guarantees which are – on the basis of their content – to be qualified as fundamental rights as well (Articles 82 to 90).

In sum, nearly 70 Articles are dedicated to fundamental rights, i.e. approximately one third of the 206 Articles of the Constitution. From a international and a comparative perspective this number is quite remarkable, in absolute and in relative terms. It shows that Human Rights form an integral and important part of constitutional law and it makes it clear that attention is paid to this element and basic feature of a democratic society in the sense of European Standards such as the European Convention on Human Rights.

From a general historical perspective Section II bears wide resemblance to the previous Charter on Human and Minority Rights and Freedoms of the State Union which is no longer in force following the dissolution of the State Union. This resemblance becomes obvious through virtually the same number of articles and the structural tripartition into fundamental principles, concrete human rights and freedoms and finally rights of persons belonging to national minorities.

It must be recalled at the outset, that the Charter of the State Union was very positively assessed by the Venice Commission in 2003[1] Despite of these similarities there exist quite a number of – partly substantial – differences. For this reason a new analysis seems to be appropriate and necessary.

2. Fundamental Principles

The first part of Section II establishes "fundamental principles". This general wording is followed by rather general articles, dealing in particular with their application and interpretation and conditions of restriction.

According to Article 18, para. 1 human and minority rights guaranteed by the Constitution "shall be implemented directly". This wording – the former Charter of the State Union provided for "directly exercisable" rights – is not only unusual in this context but also ambiguous since it is open for different ways of interpretation. It may be read as allowing citizens to rely directly on constitutional rights in particular administrative or court proceedings. The wording may also be understood as a directive to the legislature to implement human rights which allows the citizens their fundamental rights by relying on the ordinary laws. Article 18 para. 1 may be interpreted as basis for a third party application ("Drittwirkung") of fundamental rights. Another possibility is to qualifiy the Article as programmatic norm.

The doubts on the actual meaning of Article 18, para. 1 are to a large extent removed by its para. 2, according to which the Constitution shall guarantee, "and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws". The term "direct implementation" refers to the Constitution, its guarantees are not subject to a further act of the legislature in order to be applicable. This view is confirmed by the second sentence of the same paragraph which

[1] See document CDL(2003)10fin.

states: “The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution.” Although this provision makes also reference to international law it focuses on the fundamental rights guaranteed by the Constitution. Thus, the legislature may only enact laws in this field if there is an explicit basis in the Constitution. The terms “necessary” and “substance” of a right are common in constitutional texts and legal doctrine on fundamental rights in Europe.

When it comes to the question who is protected by the fundamental rights, Article 17 gives an answer which is in line with the usual standards in European constitutions. The general rule is that the rights guaranteed by the Constitution protect also foreign nationals with the exception of rights “to which only the citizens of the Republic of Serbia are entitled under “Constitution and law”. The reference to “law” might lead to the (wrong) conclusion that the legislature may define which rights are open to foreigners also. A reference in the text of the Constitution which makes this clear seems advisable.

In fact, most rights in the Constitution are granted to “everyone” or “any person”; some entitle merely the citizens (e.g. freedom of assembly - Article 54; social protection – Article 69). Still others are formulated without mentioning a certain group of beneficiaries. In view of Article 17 the latter guarantees are likely to apply also to everyone. This general approach of the Constitution is in line with the tendencies in modern constitutions. However, the restriction of the freedom of assembly to citizens in Article 54 is problematic in view of Article 11 ECHR. In this Article we find a human right of assembly not restricted to nationals. The “political clause” in Article 16 ECHR seems to be to narrow for a justification since it covers only political activities of aliens whereas there are also assemblies that are not “political” in a narrower sense. Most constitutions in Europe do not restrict the right of free assembly to nationals anymore. If the text stays as it is some effort in applying the “interpretation clauses” in Articles 18 para. 3 and 19 will be necessary in order to reach a result in conformity with the ECHR.

According to Article 18 para. 3 “provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.” This provision has to be seen as a positive signal, as a commitment to international and European standards although - from a legal point of view - the wording “to the benefit of promoting values of a democratic society” is rather general. It has to be welcomed that reference is also made to supervisory institutions. From a European perspective this means that above all the case law of the European Court of Human Rights is of highest significance for the interpretation of fundamental rights in the Constitution of Serbia.

The following Article 19 (Purpose of constitutional guarantees) has a programmatic character when it refers to “guarantees for inalienable human and minority rights” in the Constitution which 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”.

According to Article 22 “everyone shall have the right to judicial protection when any of [his or her] human or minority rights guaranteed by the Constitution have been violated or denied”. Furthermore, “citizens shall have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution.” The awareness in the context of judicial protection has to be assessed positively. The further reference to international institutions is – from a strict legal point of view – not absolutely necessary as long as the Republic of Serbia is a party to the respective international instruments. Access to international institutions does not depend on constitutional provisions but on the respective international treaties. Nevertheless, this Article is a again a constitutional commitment which shows a positive attitude towards international control of human rights protection which is not at all common in European constitutions. The right to apply to international authorities was not

provided for in the previous Charter of the State Union, which in turn stipulated explicitly the implementation of their decisions – which the new Constitution does not.

Article 20 is worth a more detailed analysis. Para. 1 reads as follows: "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 previous Charter also referred the constitutions of the member states which is not necessary anymore following the dissolution of the State Union.
In any event, this provision may raise difficult questions and cause problems. In contrast to the restrictions clauses in the ECHR (Articles 8 to 11 ECHR) Article 20 does not bind the restriction of the rights and freedoms to a specific legitimate aim, but to any purpose "allowed by the Constitution" without a list of legitimate aims. However, bearing in mind the general interpretation clause and the rest of the wording in Article 20 para. 1, national courts are in the position to interpret the Constitution in conformity with European law, especially with the ECHR.

According to Article 20 para. 2 "attained level of human and minority rights may not be lowered." Provisions of this kind are common in international and European documents in order to secure coherence and a high level of human rights (e.g. Article 53 ECHR, Article 53 Charter of Fundamental Rights of the European Union). Its significance is less clear in a national constitutional document. It seems difficult to define an "attained level" in general, it is not clear which level is relevant in (quite frequent cases) of colliding positions of fundamental rights (e.g. privacy vs. freedom of the press).

Article 20 para. 3 defines the principle of proportionality as follows: "When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means."
This paragraph repeats and specifies the prerequisites of paragraph 1 and of Article 18, para. 2. It may be suggested that the various types of restriction clauses are put in a more systematic and clear order. However, this is not an absolute prerequisite, courts and practice will undoubtedly be able to deal with the current version as well.

Besides this general restriction clauses the Constitution provides for specific conditions of interference in the context of the provisions of different fundamental rights. This legislative approach, which was also the approach of the previous Charter, has the consequence of a a coexistence of a general provisions and concrete provisions, or to put it otherwise: a coexistence of the ECHR-system (concrete clauses) and the EU-Charter-system (one general restriction clause). The impact of this dual system is not easy to assess in advance. Much will depend on the practice of the courts. Therefore, it is to early for a final assessment of this point.

The previous Charter of the State Union included the possibility of derogation from human and minority rights under certain conditions and "upon the official declaration of the state of war or other public emergency, threatening the survival of the state union or a member state […]". This rule has been abolished without substitution. This step has to be welcomed.

3. The Rights and Freedoms in particular

The second part of Section II deals with the particular fundamental rights. The number of rights in the Constitution is large, compared to other national constitutions, the ECHR and the Charter of Fundamental Rights of the European Union. This is primarily due to the fact that the Constitution provides for several articles where in other documents there is only one article. Some examples: five articles (Articles 27 to 31) are dedicated to the right of liberty and security;

guarantees of a fair trial and of criminal proceedings are found in five articles (Articles 32 to 36), the inviolability of the privacy in three articles (Articles 40 to 42), the freedom of thought, conscience and religion in four articles (Articles 43 to 46), fundamental rights on the freedom of thought and the media in five articles (Articles 47 to 51). This system corresponds to the previous Charter of the State Union.

Besides this question of pure technique of legislation the rights in this part cover all areas of "classical" human rights. Their content is at least in line with European standards and goes in some respect even beyond that.

This articles are followed by a series of fundamental rights of the so-called second and third generation ranging from health care, social protection, social security, pension insurance, right to education to the right to healthy environment as well as protection of consumers (Articles 68 to 71, 74, 90). Their implementation will be subject to the practice in administration and before Courts and there is little experience in this respect on European level. In the Charter of the European Union we can find most of these rights, sometimes in a similar wording. However, this Charter is currently far from being a binding document. In particular, the Court of Justice of the European Union does not apply this Charter.

Turning to some specific provisions a number of (non exhaustive) remarks can be made. First, the Constitution tends to grant more and more detailed rights the previous Charter of the State Union. A few examples shall show this tendency:

- *Human dignity* is not only protected as a fundamental principle within the purpose of constitutional guarantees (Article 19), but also as a specific right (Article 23). Obviously, the scope of these provisions has to be clarified by the courts.
- The right to a fair trial in the Constitution corresponds widely to the requirements of the ECHR although it is formulated in a different way. Article 32 (fair proceedings) makes reference only to "rights and obligations" and does – like the EU Charter - not reduce the guarantee to civil an criminal proceedings. Furthermore, the terms "grounds for suspicion" and "accusations" are used instead of "any criminal charge".
- The catalogue of rights provides for a right to legal person (Article 37). Such a right is not included in most texts of other constitutions. Problems in specific contexts are dealt with under the head of the respective right (e.g. the refusal of legal personality of a religious group or church is dealt with under the freedom of religion).
- Protection of personal data is granted explicitly (Article 42). This is in line with the development of modern constitutions and the Charter of the European Union.
- The right to dissolve a marriage is granted explicitly (Article 62). This right is not very common in European constitutions as it seams not disputed. It may be the answer to some specific conflicts in national law in this particular field of law.
- A child born out of wedlock shall have the same rights as a child born in wedlock (Article 64, para. 4). The European Court of Human Rights has developed such a right very early on the basis of Articles 8 and 14 ECHR (e.g. the *Marckx* case). A similar right can be found in Article 6 para. 5 of the German Basic Law.
- The freedom "to procreate" is established by Article 63. This right is unusual in modern constitutions as this right is not interfered with by the State in general.
- Universities and other scientific institutions shall have autonomy (Article 72). In many constitutions, such a right forms an integral part of the right of sciences.
- Everyone shall have a right to legal assistance (Article 67). In this respect the Constitution goes beyond Article 6 para. 1 ECHR which has to be welcomed.

Inversely, there are some lacunas as well:

- Article 27 on the right to liberty and security allows a restriction without quoting the justified objectives.
- Articles 40 and 41 deal with the inviolability of home and the confidentiality of letters and other means of communication whereas they do not protect the respect for private and family life. Therefore, Article 8 ECHR is not reproduced entirely by the Constitution. In particular, there is no explicit and general guarantee of respect for private and family life as it is guaranteed by Article 8 ECHR.
- Social protection is not granted generally, but only to citizens and families (Article 69). In turn, pension insurance is named explicitly (Article 70).
- Electoral rights are not guaranteed with respect to local self-governance authorities (Article 52).

In general, compared to the ECHR one can see that the guarantees of the Constitution are in principle covered by the Constitution. However, some areas of potential conflicts arising from the catalogue of concrete rights and freedoms shall be described below. As far as potential conflicts are the result of the general provisions they are discussed in more detail in chapter *Fundamental Principles* (see above 2.).

However, with regard to these discrepancies, one has to take into account Article 18 according to which the Constitution is "to be interpreted […] pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation". In this way, conformity may be achieved despite numerous differences in the wording.

4. Rights of Persons Belonging to National Minorities

The third part of Section II grants additional and special rights to persons belonging to national minorities, which are partly are partly already inherent in the "general" fundamental rights. Insofar as these rights have the function of ensuring character. Nevertheless this chapter has to be welcomed and is important bearing in mind the difficulties encountered in the Balkans during the nineties of the last centuries.

Article 75, para. 3 entitles persons belonging to minorities "to elect their national councils in order to exercise the right to self-governance in the field of culture, education, information and official use of their language and script […]."
Article 79 establishes amongst others the right to "have proceedings also conducted in their languages before state bodies, organizations with delegated public powers, bodies of autonomous provinces and local self-government units, in areas where they make a significant majority of population […]", and the right to "education in their languages in public institutions and institutions of autonomous provinces; founding private educational institutions […]."

Article 78 provides for a prohibition of forced assimilation and of measures causing artificial changes in ethnic structure of population. It appears difficult to find concrete restrictions. Again it seems justified and perhaps necessary for a constitutional consensus, given the history of the western Balkans.

5. Conclusion

The comprehensive and far-reaching catalogue of fundamental rights shows the significance of their protection within the Serbian legal order and the weight, which is dedicated to them in the constitutional order. The demonstration of equality and respect of ethnic minorities is also expressed clearly.

In substance, the catalogue reaches up to the second and third generation of fundamental rights granting specific rights in an abstract manner in this regard. These types of fundamental rights, were already to be found in the previous Charter.

The guarantees of the ECHR are basically covered by the Constitution. At present, however, it is impossible to assess in detail to what extent the practice of the courts in particular as to the fundamental principles will promote the guarantees of the ECHR or stay behind them.