

GUIDELINES FOR HARMONIZATION OF REGULATIONS WITH INTERNATIONAL STANDARDS OF HUMAN RIGHTS AND THE RULE OF LAW



*Intended for Staff
of the National Assembly of the Republic of Serbia*

Belgrade 2012



YUCOM

Lawyers' Committee for Human Rights



**WESTMINSTER
FOUNDATION FOR
DEMOCRACY**



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„All human beings are born free and equal in dignity and rights.

They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.“¹

„...recognition of the inherent dignity and of the equal and inalienable rights, of all members of the human family is the foundation of freedom, justice and peace in the world.“²

1. Purpose of these Guidelines

1.1 The purpose of these guidelines is to help develop legislative drafting skills with a focus on the influence of human rights and rule of law considerations in the legislative process. The guidelines consolidate and build upon training for senior parliamentary staff delivered on 21st November 2011. The training and these guidelines were devised to assist in strengthening the legislative and oversight capacity of the National Assembly of Serbia with particular focus on accession to the European Union.

1.2 These guidelines are for use by professionals who are well informed on basic human rights provisions and on the provisions of the Constitution of Serbia. They will not therefore set out such provisions in details. The guidelines provide a structure for the analysis of legislation or legislative proposals against human rights standards within the rule of law framework. These guidelines are not a substitute for the advice of trained and experienced lawyers when appropriate.

1 Article 1 of the Universal Declaration of Human Rights, 1948

2 Preamble to the Universal Declaration of Human Rights, 1948

1.3 To maximize their usefulness these guidelines are short and therefore general in nature. They do not deal with particular pieces of domestic legislation but seek to clarify and emphasise principles applicable across the legislative spectrum. A firm grasp of the concepts set out in Part 3 below, in addition to knowledge of the rights enumerated in international treaties and domestic legislation, as interpreted and applied in European and domestic case-law, will assist in placing human rights concepts properly within the rule of law framework. Perusal of the guidelines should help equip parliamentarians and parliamentary staff with the tools to identify basic human rights issues common to political debate and to conduct a basic assessment of the compatibility of bills, government proposals and practices with human rights standards.

2. How to use these guidelines

2.1. Consideration of any specific topic, particularly a legal topic, can often usefully be undertaken using a four-stage analysis: Issue. Rule. Application. Conclusion. (IRAC).

- a) Identify the issue.
- b) Identify the relevant rule
- c) Apply the rule to the facts
- d) Arrive at a conclusion.

2.2. Consideration of human rights issues is a more difficult process because human rights as found in international law³ are stated as expressions of fundamental principles rather than a set of rules. What has to be decided in the application of these principles may therefore involve questions of balance and proportionality⁴ where difficult choices may have to be made by the executive or legislature between the rights of the individual and the needs of society. The laws made pursuant to such choices may then be subject to review by the judi-

3 There is a growing body of international treaties that set out human rights. Of particular relevance are: the United Nations Universal Declaration of Human Rights & Fundamental Freedoms UNDHR; the European Convention On Human Rights ECHR and its Protocols.

4 Principle of proportionality – see Part 3

ary.⁵ Keeping these considerations in mind it can be useful to look at the human rights impact of legislation using the IRAC analysis set out above.

2.3. Example: A new piece of legislation is proposed. The issue is whether or not that piece of legislation may give rise to a breach of one or more human rights. What is the relevant human rights rule (or norm) that pertains? Apply the identified rule to the the proposed piece of legislation. Does this lead to a conclusion that there is a breach, or potential breach of human rights? This analytical process can be used for every issue identified and for every rule applicable.

Relevant human rights rules (or norms) are numerous and may be found in International Treaties, European case law, Serbian domestic legislation and relevant case-law. Bear in mind that human rights are interrelated, interdependent and indivisible so several rights may come into play in relation to any one identified issue.

Then it is possible to take to the next step in the analysis:

2.4. If the conclusion arrived at is that there is a breach or potential breach of human rights that is not the end of the matter.

- A) There may be an exception to the general rule⁶.
- B) If an exception is identified is it a legitimate exception?
- C) Substitute the exception rule in place of the general rule in the IRAC process. What is the conclusion now?

When conducting this type of an analysis, one should bear in mind that human rights are sometimes categorised as „absolute“ or „qualified“. Absolute rights such as the ECHR Article 2 right to life, the Article 3 prohibition on torture, the Article 4 prohibition on slavery and the Article 7 prohibition on punishment outside the law will have a strict application of the proportionality principle in judicial consideration of any action or any claimed exception. Therefore, any legislative proposal dealing with a possible exception must take account of this.

5 For the respective roles of the legislature, executive and judiciary – see Part 3

6 An example of an exception to the absolute right to life can be found International Covenant on Civil and Political Rights which allows for the death penalty provided it is carried out in accordance with the law.

„Qualified“ rights are those that are capable of limitation in the public interest. Examples are ECHR Article 8 right to Privacy, Article 10 freedom of expression, Article 11 freedom of association, Protocol 1, article 1 right to property. The intensity of review for these qualified rights involves the application of the proportionality principle in a balancing exercise. This involves consideration of whether the means to achieve a particular end are justified relative to the impact on the individual's fundamental rights. The ends pursued are nearly always associated with considerations such as pressing social needs, public policy, national security or public good.

2.5 Is there a breach of the principles of equality and non-discrimination⁷?

Does the proposed legislation impact on individuals on the basis of their „status“.

Bear in mind that potential human rights breaches might not always be obvious – indirect discrimination is an example. A provision may apply equally to everyone but indirectly discriminate against a class of person. A blanket minimum height requirement for a job, for instance, will impact disproportionately on women, who are on average smaller than men.

Go through the IRAC process. What is the conclusion now?

If the conclusion is that there is inequality or discrimination on the basis of status is this objectively justified and proportionate⁸.

Go through the IRAC process for each limb of this test. What is the conclusion now?

2.6 Is there derogation⁹ from applicable HR standards? If so, are the circumstances for lawful derogation present?

Derogations may be provided for in International Treaties. The Serbian Constitution also envisages derogations. Derogation from human and minority rights in a state of emergency or war are provided for in Article 202 of the Constitution. However the Constitution provides that measures providing for derogation shall not bring about differences based on race, sex, language, religion, national affiliation or so-

7 Equality & Non-discrimination Principles – see part 3

8 Justified and proportionate difference in treatment – see Part 3

9 Derogation provided for in International Treaties. Also in Serbia Constitution: Derogation from human and minority rights in the state of emergency or war. Article 202

cial origin. Measures providing for derogation from human and minority rights are limited in that they shall cease upon the ending of the state of emergency or war.

3. Key Legislative & Interpretative Concepts

3.1 *Rule of Law, Democracy & the Separation of Powers*

3.1.1 Rule of Law can be stated as the restriction of the arbitrary exercise of power by subjecting it to well-defined law. The rule of law means that all are equal before the law, including the State. Rule of Law considerations require public participation¹⁰ in and access to government and transparency of the legislative process. Public participation in the legislative process is very important. It should enable all the relevant stakeholders to have adequate time to become acquainted with the proposals and to comment.

3.1.2 The principle of democratic rule should also be one of the benchmarks against which proposals should be analysed. The modern concept of democracy is that simple majority rule should not always hold sway, the rights of minorities must be protected. Any legislative proposals should particularly be examined for diminution of the rights of minorities – national, religious, ethnic, sexual etc.

3.1.3 Effective democracy requires government under the rule of law secured by effective separation of powers to provide checks and balances in the exercise of power. With separation of powers state administration resides in three „branches“ of government: the executive, the legislature, and the judiciary. A manifestation of this is that legislative proposals should make provision for judicial review of the legality of individual administrative decisions that determine rights, duties or legal interests.¹¹

10 UNDHR Article 21 Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

11 Constitution of Serbia Article 198

The three branches of government are slightly differently constituted in different states. International treaties are drawn to allow for maximum participation of different states notwithstanding these differences.

3.2 Serbian Legislative Background

3.2.1 A fundamental prerequisite for the Serbian Constitution is the „rule of law ... based on inalienable human rights.“¹² The Constitution provides for balance of and mutual control between the three branches of power, legislative, executive and judiciary and specifically provides for the independence of the judiciary.¹³

In Serbia all domestic laws must be in compliance with the Constitution which provides¹⁴ that „ratified international treaties“ and „generally accepted rules of international law“ shall be part of the legal system and that domestic laws comply with international law. The Constitution also provides that „ratified international treaties may not be in non-compliance with the Constitution“¹⁵. Therefore the Constitution requires consideration from two aspects:

A) Do the provisions of the international treaty reduce the level of human rights protected by the constitution?

Is a proposed legislative provision in line with „ratified international treaties“ and „generally accepted rules of international law“?

These questions may be examined by the way of IRAC analysis.

3.2.2 The purpose of Serbia's Constitutional Court¹⁶ is to „protect constitutionality and legality as well as human and minority rights and freedoms“. The Constitution provides for decisions of the Constitutional Court to be based on „ratified international treaties in addition to domestic law“. Therefore, any analysis of proposed legislation should

12 Constitution of Serbia. Article 3

13 Constitution of Serbia. Article 4

14 Constitution of Serbia. Article 192. Hierarchy of Domestic & international General Legal Acts

15 Article 194.

16 Constitution of Serbia Article 166. The Constitutional Court. Also Part Six Articles 167 – 175

consider the possibility of a Constitutional court finding that a legislative provision is not human rights compliant.

Additionally, any piece of domestic legislation should take account of relevant existing constitutional court decisions. Example: In 2001 a constitutional court case led to the removal of a clause in the Public Assembly legislation that required foreign nationals to have permission to speak in and organize public rallies.¹⁷

3.2.3 The attained level of human and minority rights may not be lowered¹⁸

All legislative proposals should be examined against the constitutional provision that there should be no diminution or reduction in the extent of human and minority rights attained. Non-compliance with this important constitutional standard in legislative provisions may lead to subsequent challenge in the Constitutional court.

3.2.4 Serbia has ratified all major human international rights instruments. In addition Serbia, as a member State of the Council of Europe since 2003, is obliged to observe the ECHR at all times. The Council of Europe consist of 47 Countries. Its primary aim is to create a common democratic and legal area throughout the whole of the continent ensuring respect for its fundamental values human rights, democracy and the rule of law.

3.3 International Human Rights Law

3.3.1 Human Rights Summary

- a) Human rights are rights inherent in human beings simply because we exist. They reflect the dignity and worth of every person. Observing human rights demands that human dignity of all other human beings is respected. Human Rights are universal. This principle means that all people have human rights. It is considered the cornerstone of international human rights law.
- b) Human rights are inalienable. They cannot be taken away, except in specific circumstances and according to due process. Human rights are interrelated, interdependent and indivisible. This means that when one right is denied, it can lead to other rights violations.

17 SUS IU broj 12/97 (The Official Gazette of FRY", No. 21/2001)

18 Constitution of Serbia Article 20 and Section 2 Parts 1 & 2 generally.

Similarly, the improvement of one right facilitates advancement of the others.

- c) The principle of equality & non-discrimination means that we are all equally entitled to these rights without discrimination on the basis of status i.e. regardless of our nationality, place of residence, sex, sexual orientation, national or ethnic origin, birth, age, race, religion, language, or any other status. All difference in treatment is not necessarily discriminatory, however. A difference of treatment based on status must be justified by the State and must be proportionate.
- d) States assume obligations under international law to respect, protect and promote human rights. Human rights entail both entitlements and obligations for governments. Constitutional protections vary from State to State but there is a core of protected rights which most States recognise. Human rights cover a broad range of rights¹⁹ from individual civil and political rights, including circumstances where rights are absolute, limited or qualified, to those that deal with economic, social and cultural rights and the principle of progressive realisation in practice.
- e) The obligation to respect means that the State must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the State to protect individuals and groups against human rights abuses. The obligation to promote means that States must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties Governments undertake to put into place domestic measures and legislation compatible with their tre-

19 Examples of this range of issues covered by the concept of „human rights“ can be found in the UNDHR

Article 21: Right to participate in government

Article 22: Right to social security and recognition of economic, social and cultural rights

Article 23: Right to work

Article 24: Right to rest and leisure

Article 25: Right to an adequate standard of living for health and well-being

Article 26: Right to Education

Article 27: Right to participate in cultural life. Protection of intellectual property

aty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

f) Judicial Review by Courts

Judicial self-restraint is a constitutional imperative in order to avoid the danger that the courts become involved in the decision-making process that is the prerogative of the other branches of government. Courts calibrate the proportionality principle in order to reconcile it with core constitutional understandings.

3.3.2 The Subsidiarity Principle

Subsidiarity is a general principle of European Union law according to which the EU may only act to make laws where the action of individual countries is insufficient. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

3.3.3 The Principle of Proportionality

- a) A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. This principle is a safeguard against the unlimited use of legislative and administrative powers as the administrative authority may only act to exactly the extent that is needed to achieve its objectives.
- b) The proportionality principle means that restriction on a right must be rationally connected to a given objective, that the restriction is no more than necessary to obtain that objective and that the objective is sufficiently important to justify limits to a fundamental right.

- c) The principle of proportionality means that any measure by a public authority that affects a basic human right must be:
 - i. appropriate to achieve the intended objective
 - ii. necessary to achieve that objective i.e. there are no less severe means of achieving the objective, and
 - iii. reasonable, i.e. the person concerned can reasonably be expected to accept the measure in question.

3.4 European Court of Human Rights (ECtHR) Jurisprudence

3.4.1 ECHR norms are elaborated in case law of the ECtHR. The ECtHR was set up in Strasbourg by the Council of Europe Member States in 1959. It deals with alleged violations of the ECHR. Particular attention should also be paid to the concept of „margin of appreciation“ as applied by the Court in deciding on the cases brought before it. The concepts of subsidiarity and margin of appreciation are similar but distinct.

3.4.2 The proportionality principle is one of the fundamental principles of the jurisprudence that has been developed by the European Court of Justice. The concepts of subsidiarity and margin of appreciation are similar but distinct. Subsidiarity relates to administrative action, the „margin of appreciation“ is a doctrine applied by ECtHR when considering alleged breaches of human rights by a State.

3.4.3 Margin of Appreciation²⁰

„Margin of Appreciation“ can also be described as the „range of discretion“ allowed for State action. The doctrine allows the court to take into consideration the fact that the Convention will be interpreted differently in different States according to the cultural, historic and philosophical differences of the State in question.

„Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest...

20 The doctrine was used for the first time in the case of *Handyside v The United Kingdom* 5493/72, Council of Europe: European Court of Human Rights 4 November, 1976

There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights.²¹

4. How to Highlight Human Rights Issues: Sample Questions²² to test the implementation of International, European HR Standards

4.1 Human Rights Issues Generally

4.1.1 Full consideration of the questions in Part 4 can be a highly sophisticated task that require wide knowledge of, and the ability to interpret, national and international laws and the cases decided under these laws. Therefore, they should be considered by trained and experienced lawyers where the human rights implications of the implementation of domestic or international law, or the application of national or international case law, to any particular set of circumstances is in issue.

4.1.2 These questions provide a basic, introductory framework for analysis and further research. Where a provision of national legislation is not in line with ECtHR case law this should be pointed out if staff happen to be aware of that fact.

4.1.3 As staff with a specialist human rights or legal background will not always be available lay staff and members may ask themselves: How do I identify a genuine human rights issue?

The suggested questions below under individual categories should help identify whether a domestic law or practice raises a significant risk of incompatibility with domestic or international human rights law.

Two preliminary questions:

a) Are the human rights established in national and international documents (rights in principle) actually enjoyed by individual and groups in nation states (rights in practice)?

21 Dickson v United Kingdom [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007).

22 The majority of these questions are taken from the publication „Human Rights & Parliaments: A Handbook For Members And Staff“ produced by The Westminster Consortium in conjunction with the International Bar Association Human Rights Institute.

b) Do official statistics provide information to inform measures related to the human rights?

Official statistics, when available, may give an insight in the implementation of human rights standards and therefore aid legislative process as to indicate necessary measures to be implemented. Any legislative proposal should consider the effectiveness of proposed measures for actual enjoyment by individual and groups of recognized rights. Example: Right of housing for Roma people.

4.1.4 Increasing awareness of Human Rights issues & the work of the National Assembly.

- a) Are there induction programmes for new members of staff to provide information on the constitution, domestic and international human rights standards?
- b) Do staff routinely monitor human rights issues in the media?
- c) How are human rights issues brought to the attention of legislators & government?
- d) Are there effective working relationships with government officials, NGOs civil society & academia?
- e) Is any ongoing assessment of compliance with international human rights standards carried out?
- f) How are adverse human rights judgements promulgated?
- g) How accessible is information about the work of the National Assembly to the public?

4.2 Equality & Non-discrimination²³

- a) Does a law, policy or practice provide for different rules for different groups or types of people, or have a greater impact on certain groups of people?
- b) If so, has the government provided a reasonable, objective & legitimate reason to justify the difference?
- c) Is there a policy designed to secure and promote equality and equal treatment in public services?
- d) Is the impact of new laws, policies and practices monitored for their effects on equality?

23 Article 2 ECHR