BAR ASSOCIATION OF SERBIA

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COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE

47th EUROPEAN CONFERENCE OF PRESIDENTS OF BAR ASSOCIATIONS

INFORMATION OF THE BAR ASSOCIATION OF SERBIA ON ACTIVITES AND THE STATUS OF THE ADVOCACY IN 2018

Dear colleagues,

After finalizing the elections in the Bar Association of Serbia in 7 out of 8 bar associations within its composition in 2017 and constitution of the newly elected bodies, the attention of the practicing lawyers has been focused on a number of avenues:

1. Amendments to the Constitution of the Republic of Serbia in the area of the judiciary and the status of practicing lawyers

The motion for amendment to the Constitution of the RoS in the area of the judiciary was adopted at the session of the Government of the RoS, which was held on 29 Nov. 2018. This motion was supposed to improve the independence of the judiciary and the amendments to the Constitution in the part that is related to the influence of the legislative and the executive powers on the process of election of the judicial office holders and elective members of the High Judicial Council and the State Prosecutorial Council.

The Bar Association of Serbia deems that exclusion of the representatives of practicing lawyers from the composition of the High Judicial Council and the State Prosecutorial Council is a wrong step, lowering of the reached level of rights prescribed by the Constitution of the RoS, because practicing lawyers in functional terms are part of the judiciary and, therefore, a representative of the advocacy, as an autonomous and independent service providing legal assistance, would improve the quality of the work and decisions of those bodies, under the condition that practicing lawyers alone designate their representatives in those bodies. The Venice Commission in its expert opinion also referred to such a solution.

The Bar Association of Serbia continues to propose that the provision that would define the advocacy in the following way: „The advocacy as a part of the judiciary is an autonomous and independent service providing legal assistance that is regulated by the law" is introduced in the amendments to the Constitution of the RoS in the part that deals with the judiciary. Such a provision would confirm the fact that the advocacy is by all means a part of the judiciary and would emphasize the essential difference between practicing lawyers and services in the market, and the consequence of which would be its classification, in the accession negotiations, into Chapter 23 where it actually belongs.

2. The Proposed Bill on Services and the advocacy

In the course of 2018, the Government of the Republic of Serbia adopted the Proposed Bill on Services, which was later withdrawn from the parliamentary procedure. This proposal envisaged that this regulation is to be applied to practicing lawyers as well, although the Services in the Internal Market Directive stipulates that advocacy is a regulated profession the functioning of which is regulated by separate regulations. The above mentioned Proposed Bill also envisaged the supervisory function of the Ministry of Trade, Tourism and Telecommunications with regard to practicing lawyers, although the Ministry of Justice is in charge of the area of judicial professions, including the advocacy. After a strong objection of the Bar Association of Serbia to the proposed solutions, the Proposed Bill on Services was temporarily withdrawn from the procedure.

The Bar Association of Serbia is particularly concerned that the Initial Draft of the revised Action Plan for Chapter 23 planned the activities for harmonization of the regulations that govern the area of the advocacy, for the purpose of the prevention of blocking of the judicial system in the future, particularly with: the Services in the Internal Market Directive – the Directive 2006/123/EC of 12 Dec. 2006 on services in the internal market; the Directive of the Council of the European Union of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC), the Directive of the European Parliament and the Council of the European Union 98/5/EC of 16 Feb. 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, the Directive 2005/36/EC of the European Parliament and the Council of 7 Sept. 2005 on the recognition of professional qualifications; the Recommendation of the European Commission REC (2013) 8179/2 on the right to legal aid in criminal proceedings.

Practicing lawyers are pointing out that the Services in the Internal Market Directive – the Directive 2006/123/EC of 12 Dec. 2006, which regulates services in the internal market, cannot be applied to the advocacy since it is related to the services from an economic activity, and the advocacy is not that, nor can it be that.

In the revised Action Plan for Chapter 23, the Ministry of Justice points to the blocking of the judiciary due to the protest of lawyers from September 2014 to January 2015, and designates that protest as the cause for slowed down implementation of certain reform tasks. The Bar Association of Serbia is pointing out that the protest of lawyers was justified and that it was the consequence of the adoption of the Law Amending and Supplementing the Law on Public Notaries in 2014, which introduced the monopoly of notaries over the compilation of contracts on real estate transactions in the form of a notarial record, whereby the rights of the citizens to make private legal transactions and the right to legal assistance by lawyers were violated. The Ministry of Justice, by announcing the prevention of the blocking of the judicial system by amendments to the regulations on the advocacy, is drawing a red herring, because the protest of lawyers was the consequence of the actions of the Ministry of Justice, and not the cause of the blocking of the judiciary. Also, it is unacceptable that practicing lawyers in the Initial Draft of the revised Action Plan for Chapter 23 are exclusively mentioned as a disturbing factor that can cause blocking of the judiciary and that one of the objectives of this Action Plan is to somehow prevent practicing lawyers from blocking the judiciary in the future.

When the above stated is born in mind, the fact that the advocacy, in the accession negotiations of the RoS with the EU, is classified into Chapter 3 – Services, has the character of a retaliation of sorts for the justified protest of lawyers and positions of criticism it is rightfully presenting.

By this solution, the Ministry of Justice in addition to violating the Constitution of the RoS, also violates the Law on Ministries (the *Official Gazette of the RS,* 44/2014, 14/205, 54/2015, 96/2015, 62/2015) in such a way that, by classifying the advocacy into Chapter 3 – Services, it is displacing it from its own competence to the competence of the Ministry of Trade, Tourism and Telecommunications.

3. Accession negotiations of the Republic of Serbia and the advocacy

We are referring to the provision of Article 67 of the Constitution of the RoS in the Chapter entitled „Human rights and freedoms“ where the citizens of Serbia are guaranteed the right to legal assistance that is provided by the advocacy, as an autonomous and independent service and by the legal aid services in the local self-government units.

We are reminding that the UN Universal Declaration on Human Rights and the European Convention on Human Rights, which have been ratified by the state of Serbia, guarantee to all the right to legal aid by an independent legal expert in the defence of human rights and interests. That independent legal expert is a lawyer.

Bearing in mind the constitutional and legal status of practicing lawyers in Serbia and the indisputable fact that the advocacy is the only autonomous and independent service providing legal assistance, the basic task of which is the protection and defence of human rights and freedoms of the citizens and their interests, we are pointing out that it is impermissible that practicing lawyers and the Bar Association of Serbia are not a part of the Action Plan for Chapter 23 of the accession negotiations with the EU.

We are emphasizing that it is unacceptable to practicing lawyers of Serbia not to participate in the procedure of harmonization of regulations of the RS in the course of the accession negotiations for the area of the judiciary and human rights and that their legal status, the role, and tasks are analyzed outside Chapter 23. Practicing lawyers of Serbia do not accept that the legal assistance and normative regulation of the advocacy are discussed in Chapter 3 – Services, because legal assistance is not and cannot be a service in the market.

We are pointing out that all the states in the region, in the accession negotiations with the EU, have harmonized the regulations on the advocacy within the Chapter for the area of the judiciary and human rights, due to which classification of the advocacy, in the accession negotiations of the RS, into Chapter 3 – Services, is an impermissible experiment that is contrary to the position and interests of the citizens in a competent, efficient, and independent judiciary.

Without the participation of practicing lawyers in the Action Plan for Chapter 23, the same cannot be implemented in the interest of the citizens of Serbia, because, without the participation of practicing lawyers in the reform processes, there is no independent, competent, and efficient judiciary.

4. The reform of the judiciary in Serbia

It is undisputable that it is necessary to carry out the reform of the judicial system in Serbia in order to enable the citizens to have equal access to justice and efficient and effective protection of their rights and interests.

As the measures that should be implemented for that purpose, the activities on the improvement of the competence of the judicial office holders, improvement of the network of courts, provision of conditions for independence and permanence of the judicial office, enhancement of accountability of the judicial office holders have been recognized.

Practicing lawyers of Serbia deem that the first election of judges should remain within the competence of the National Assembly of the RoS, which is the symbol of sovereignty of the people in whose name judgments are actually passed. We are convinced that such a solution would contribute to the strengthening of the judicial function and guarding the reputation of the judicial profession, under the condition of permanence of judicial office, and that the High Judicial Council (the HJC) as the independent body should decide on the issues of further career advancement and, when public prosecutors and deputy public prosecutors are in question, the State Prosecutorial Council (the SPC) should decide thereon.

The Bar Association of Serbia deems that the initial training at the Judicial Academy and exemption of the candidates who have completed that training from the obligation to take the examination that is administered by the HJC/ SPC for the election of candidates who are, for the first time, elected for a judicial/prosecutorial function, aggravates the access to the candidates from the ranks of practicing lawyers to judicial functions. We deem that such a solution will additionally fortify the barriers between the judicial professions and contribute to nepotism and internal protectionism in the procedure of election to judicial functions. This is particularly so because the Judicial Academy, in its so far operation, has not demonstrated the required capacities for the provision of the initial and the continuous training of the judicial office holders.

A particular problem of the judiciary in Serbia is related to the backlog, the so-called old cases (which last for several decades). The Ministry of Justice, as the measures for the improvement of the efficiency, recognizes the activities on the enhancement of the competence of the judicial office holders through the development of the system of quality of the initial, continuous, and specialized training, and the implementation of the single programme of disposal of old cases, which is a positive approach. However, the Ministry of Justice, as the reason for the failure to implement the single programme of disposal of old cases, specifies the establishment of the new network of courts and the protest of lawyers, as objective circumstances that prevented courts to work to the full capacity.

The established new network of courts does not meet the actual needs of the citizens and it will be necessary, after the adoption of the amendments to the Constitution of the RoS and the adoption of the laws in the area of the judiciary, to establish a different network of courts that will take into consideration a more balanced workload of the judicial office holders, which can also be done by procedural laws – by the provisions on the territorial jurisdiction of courts.

The judgment from the Initial Draft of the revised Action Plan for Chapter 23 that one of the reasons for failure to implement the single programme of disposal of old cases was the protest of lawyers from 17 Sept. 2014 to 26 Jan. 2015 is unacceptable. The fact that the protest of lawyers lasted for 4 months did not have any impact on the disposal of the cases that are as old as several decades and in which, even nowadays, hearings are scheduled twice a year in the regular course of business, although the protest of lawyers was finalized 4 years ago, and a part of the court jurisdiction has been transferred to notaries and public enforcement officers.

Improvement of the efficiency of the work of the judiciary can be achieved through continuous education of the judicial office holders, provision of adequate conditions for their work, by employment of the required number of judicial assistants, by the accountability of the judicial office holders, and by sanctioning of the irresponsible ones.

The intent is to improve the efficiency of the judiciary by introducing new judicial professions – notaries and public enforcement officers and their introduction into the judicial system has not yielded the expected results. Establishing of an efficient and quality notaryship and public enforcement officers who will be able to reduce the workload in courts has not happened, because the members of the new judicial professions are not sufficiently competent and, within their respective organizations, there is not a functional professional body that supervises and controls their work, establishes professional standards, and conducts disciplinary proceedings when required. Lawyers identify, on a daily basis, that notaries and public enforcement officers in their actions go beyond the scopes of their respective competences prescribed by the law to the detriment of the citizens. Despite the amendments to certain provisions of the notary tariff by which the fees of notaries were reduced, those fees are still considerably higher as compared to the period when the citizens administered such affairs before courts. Particular problem poses the tariff for the work of public enforcement officers, which must be amended, because it enables public enforcement officers getting huge earnings by charging tariffs for acts that are unnecessary for conducting of enforcement procedures or that are unnecessarily multiplied for the purpose of becoming entitled to a reward.

Prior to entrusting cases to notaries to deal with them under the Law on Non-contentious Proceedings, a comprehensive analysis must be made of both the number of cases, the number of

notaries and their professional competence and the expected impact on the efficiency of the judiciary from the aspect of the citizens. Efficiency of the judiciary cannot become an end in itself and imply that efficiency is achieved by the reduction of the number of cases in courts. Efficiency must be analyzed as compared to the efficiency in exercising of the rights by the citizens and whether they have effective legal means and procedure for exercising and the protection of their rights and interests.

The revised Action Plan is bringing secondary and auxiliary factors into the focus, such as effective software and electronic solutions. No technology will in itself bring progress to the judiciary without autonomous and independent judges, or the denying the opportunity to lawyers to carry out their work faster and to a better quality using exactly such software and electronic solutions. In this respect, practicing lawyers advocate that lawyers should be provided the possibility to have insight into the course of a case, scanned documents in a case, to search cases by the name of the party, to submit petitions and legal remedies in all the cases, and sound recording of the course of a trial. If acceptance of new technologies is an imperative, all the participants in proceedings must have the same status in the use of such technologies.

Practicing lawyers of Serbia are also pointing out a long-term problem of the unstandardized case law that has impact on the quality of justice, equality of the citizens, and on fair trial. Provision of the standardized case law should have to be the prime objective in the domestic legal system, because it provides for the constitutional principle of legal security and legal equality through a high degree of predictability of court decisions. The case law in our legislation is not the source of law, but the legislator has not been consistent and, therefore, the provision has been retained on the sessions of the Supreme Court of Cassation at which legal standpoints are taken, which are binding upon all the panels of judges of court departments. Also, the competence of the General Session of the Supreme Court of Cassation includes the competence „to review the application of laws and other regulations and the work of courts ".

Practicing lawyers deem that the jurisdiction of the Supreme Court of Cassation outside the administration of justice is unconstitutional, because it is in contravention of the division of power, judicial independence, and the role of courts. Taking a legal standpoint constitutes the adoption of a general legal norm and that is the activity that is similar to the legislative one for which the Supreme Court of Cassation is not authorized under the Constitution of the RS. The organization of the judiciary must be thoroughly reformed in compliance with the Constitution of the RoS, by ensuring that the Supreme Court of Cassation is available to participants in proceedings through an effective legal remedy, so that, through the exercising of the judicial authority, the Supreme Court of Cassation could take the standpoint and have impact on the standardization of case law. Therefore, it is necessary to analyze the procedural laws and enable the standardization of case law through effective legal remedies and through the exercising of the judicial authority in the concrete case.

The Bar Association of Serbia is pointing out that it is absolutely unacceptable that the bar association, as the mandatory professional association of lawyers, which exercises public authorities, is not involved in the process of planning and monitoring of reform activities in the area of the judiciary.

5. Adoption of the Law on Free Legal Aid

In 2018, after almost 15 years of work, the Law on Free Legal Aid was adopted, which stipulates that lawyers are the ones who shall provide legal aid to the citizens, whereby conditions are created for the exercising of the guaranteed human right to legal aid provided by practicing lawyers.

The commencement of the application of the Law on Free Legal Aid has been scheduled for the second half of 2019 and, in the meantime, it would be necessary to adopt a series of bylaws indispensible for its application.

We assess the adoption of the above Law as a positive step that will provide to the citizens of Serbia equal access to justice regardless of their economic status or any special properties they have

(minors without parental protection, victims of domestic and other violence, persons invalids, marginalized groups, etc.).

Finalizing this summary overview of the activities in 2018, practicing lawyers of Serbia are requesting and expect the support of the European Bars lawyers for the amendment to the Stabilization and Accession Agreement of the Republic of Serbia, in such a way the regulation of the advocacy and harmonization of local regulations with the EU regulations will be reviewed within Chapter 23 – the judiciary, and not within Chapter 3 – Services.

Yours faithfully,

PRESIDENT OF THE
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