

Country report 2020

Bar Association of the Federation of Bosnia and Herzegovina

Members of the Bar Association of Federation of Bosnia and Herzegovina (hereinafter referred to as: Bar) have faced many issues in recent years while performing their professional activity, especially when it comes to the process of adopting the new Law on Attorneys' Profession of the Federation of Bosnia and Herzegovina (hereinafter: Law) and the Law on Notaries, and at the same time the authorized bodies of the Bar are not able to establish cooperation with the competent authorities to resolve problems. The CCBE has been informed about these problems on several occasions.

Visit by the President of the CCBE President and the Regional Secretary of the UIA

In order to contribute to a faster resolution of the problems of the attorneys' profession, as part of the judicial system, especially in terms of meeting the conditions of Bosnia and Herzegovina for accession to the European Union, the President of the CCBE Mr. Ranko Pelicarić and the Regional Secretary of the UIA Mr. Nenad Janicević visited the Bar in March 2020, and on the same occasion had meeting with the representatives of the Bar and Federal Minister of Justice Mr. Jozić Mato (hereinafter: Minister). During the meeting, they discussed further activities regarding adoption of the new Law, focusing on the elements guaranteeing autonomy and independence of attorneys' profession, as well as legal ground for unobstructive practice of attorneys' profession, which is one of the pillars of human rights and freedoms protection.

Current Law on Attorneys' Profession of the Federation of Bosnia and Herzegovina was imposed by the High Representative for Bosnia and Herzegovina in 2002. As it was necessary to adjust it with the current situation and obligations of Bosnia and Herzegovina arising from the European integration process, the Bar drafted new Law and at the end of 2017 submitted it to the Federal Minister of Justice for further enactment procedure. Although the Bar addressed the Prime Minister and the Minister in 2018 and 2019 a number of times, the Minister submitted to the parliamentary procedure a new draft Law which was substantially amended in comparison to the draft Law prepared by the Bar, and without any prior consultation with the Bar submitted also several amendments to the current Law to the parliamentary procedure, which represented direct attack to the autonomy and independence of the attorneys' profession and which were not in accordance with the general principles of advocacy laid down in international documents guaranteeing its autonomy and independence. After numerous interventions of the Bar, the draft Law and amendments to current Law proposed by the Minister were withdrawn from the parliamentary procedure. In the second half of 2019, the Minister appointed working group responsible for the preparation of the new draft Law and invited one representative of the Bar to participate in its work.

In the meantime, the Bar informed CCBE about problems, and after the Deontology Committee carefully analysed the new Law developed by the Bar in 2017, the CCBE fully endorsed the draft Law developed by the Bar and concluded that it is in line with the CCBE Code of Conduct for European Lawyers and the CCBE Charter of Core Principles of the European Legal Profession. On January 27, 2020, the CCBE addressed a letter directly to the Prime Minister and the Minister, and called for full cooperation between the Ministry and the Bar in the preparation of a new legal ground for the attorneys' profession.

In the meeting held in March 2020 between the President of the CCBE, the Regional Secretary of the UIA, the Bar representatives and the Minister, the Minister promised to ensure full cooperation with

the Bar in the preparation of the new Law. The Bar representative and working group appointed by the Minister continued to work together on the preparation of the new Law throughout 2020, and finalized the new draft Law. However, to this day the Law has not been submitted to the parliamentary procedure.

During the meeting with the Minister Jozić, the CCBE President and the UIA Regional Secretary also pointed out problem that Federal Ministry of Justice, the Government and the Parliament of the Federation of Bosnia and Herzegovina still have not enforced the Judgment of the Constitutional Court of FBiH No. U-15/10 of 2 December 2015 establishing that certain provisions of the Law on Notaries of the FBiH are unconstitutional, including, inter alia, Article 73 of the Law on Notaries, which regulates for which legal activities the notarization of documents is obligatory. Pursuant to this Judgment, the Law on Notaries had to be amended in such a way that attorneys could perform all their services prescribed by law again, i.e. prepare all kinds of contracts. The Bar has made a number of proposals for amendments to the Law on Notaries, mainly by implementing the practice of neighbouring Croatia and Serbia and submitting them to the Federal Ministry of Justice, but no amendments to the Law have been made.

By the Judgment of the FBiH Constitutional Court of 15 May 2019, it was established that certain provisions were not determined in accordance with the FBiH Constitution, e.g. provisions of the Law on Proprietary Rights, the Law on Land Registries, the Law on Registration of Legal Entities, the Family Law and the Law on Inheritance, whose legal ground for adoption was Article 73 of the Law on Notaries, which requires the validity of contracts, power of attorney, statements, statutes, articles of association and registration of their changes in the registry of the competent court to be drafted in the form of a notarized document. The same Judgement sets a six-month deadline for the FBiH Parliament to harmonize provisions of laws that have been found unconstitutional.

The parliamentary procedure for amending the said laws was launched in October 2019 and is still in progress. In the draft laws, the Federal Ministry of Justice suggested that mandatory solemnization should be prescribed for the validity of jobs for which notarization of documents was previously required. The House of Representatives of the FBiH Parliament adopted the amendments appealed against the proposed Draft Law, while at its session held on 14 November 2019, the House of Peoples of the FBiH Parliament rejected the proposal for a debate under urgent procedure and returned the proposal in the form of a draft with the order for the competent ministry to hold a public debate within 30 days. On 26 November 2019, the Federal Ministry of Justice has announced the Public debate on draft laws. The Bar's Board of Directors has determined the remarks and the proposal on the aforementioned laws and submitted them to the Federal Ministry of Justice during a public debate. The remarks refer to the introduction of a legal concept of solemnization, as an obligation for the validity of legal activities, and the text of the proposal of the Bar's Board of Directors suggested to statutorily prescribe a mandatory authentication of the notary's signature for all legal activities prescribed as activities of the notary public under the Law on Notaries (including all contracts in the field of real and property rights, contracts in the field of inheritance and family law, power of attorney and declarations, statute and founding acts of legal entities as well as their amendments), and solemnization and processing of acts can be done at the request of a party. This means that natural and legal persons shall have the right to decide for themselves if they wish to apply this concept. The final session of the public debate was held on 20 December 2019 and since then the Federal Ministry has not taken any action.

During 2020, the Bar addressed the Minister a number of times, requesting information about activities undertaken in relation to the adoption of the above mentioned laws, but to this day laws have not been submitted to the parliamentary procedure.

Furthermore, the joint Commission of the Federal Ministry of Justice and representative of the Bar, responsible for the preparation of the new Tariff on Fees and Remuneration of Attorneys for the Provision of Legal Services, was formed in 2020. After number of several-hours long meetings, the joint Commission agreed on the proposal of the new Tariff, but after the Bar sent letter about unlawful conduct of the Minister in relation to the submitting the Law on Notaries to the parliamentary procedure, on the same day the Minister informed the Bar that he refused his consent to the proposed Tariff.

Problems in practicing attorneys' profession / endangering the independence and autonomy of the attorneys' profession by the courts

In addition to the aforementioned serious problems which threaten the autonomy and independence of the attorneys' profession, attorneys continued to face problem of being summoned as witnesses in criminal proceedings against their clients.

During the year 2020, the Bar again addressed courts requesting protection of attorneys' right to work and protection of defence attorney institute, urging them to respect the defence attorney institute in criminal proceedings, as well as mandatory legislative provisions, in order to ensure the practice of attorneys' profession.

It was pointed out that the provisions of the Criminal Procedure Code of Federation Bosnia and Herzegovina (CPC FBiH) explicitly provide that a defence attorney of the suspect or accused shall not be heard as witnesses with respect to the facts that became known to him in his capacity as a defence attorney. Therefore, there is an absolute prohibition of hearing a defence attorney with respect to the facts that became known to him in his capacity as a defence attorney. It was especially emphasized that the Law on Attorneys' Profession of Federation of Bosnia and Herzegovina provides that violation of keeping professional confidences is considered to be a serious violation of the duty of conscientious performance of the practice of law and preservation of the reputation of the attorneys' profession.

According to the Charter of Core Principles of the European Legal Profession and The Code of Conduct for European Lawyers, the independence and trust are considered to be some of core principles of attorneys' profession, which are violated in case of hearing defence attorney as witness. Furthermore, Parliamentary Assembly of the Council of Europe adopted Recommendation 2121 (2018) and in Article 3 expressed utmost concern because of cases of „interrogation of lawyers as witnesses in their clients' criminal cases“, which is considered to be harassment and attack against attorneys and attorneys' profession.

Introducing the practice of summoning defence attorney as witness in criminal proceedings would create absolute legal uncertainty and would deeply undermine defence attorney/client confidence, and would lead to a situation that client would not be able to exercise his right to confidential communication with the attorney, which is protected by the attorney-client privilege. A decision to allow the Prosecution to summon defence attorney as a witness in all stages of the proceedings would create extremely dangerous precedent. Such a precedent would also affect other participants in the proceedings, so it would be justified to raise a question whether the Panel would allow acting prosecutors to be heard as witnesses if any of the witnesses mentioned them during the main trial or investigation, or even members of the adjudication Panel in the proceedings. Such practice would most certainly lead to undermining the rule of law, and also the efficiency of the criminal procedure and the fairness of the procedure itself.



It should also be emphasized that, despite the fact that the equality of the parties in the proceedings is provided by the CPC FBiH, when it comes to this issue, the position of the defence attorney and the prosecutor is not the same even from the legal aspect. Namely, Article 56, paragraph 2 of the CPC provides that "Defence attorney who has been summoned or heard as a witness" cannot act as a defence attorney, and at the same time provisions regulating reasons for disqualification of a judge apply also to prosecutors and they provide that the prosecutor cannot perform his duties as a prosecutor if he was heard as witness (Article 39, item d) of the CPC FBiH). There is a clear difference in the treatment of defence attorney and prosecutors, especially given the fact that during the investigation, defence attorneys are not authorized to hear witnesses in such a way as to make records that could be used during the main trial, as prosecutors do.

In addition to these problems, the president of the Municipal Court in Sarajevo, the largest court in the FBiH, issued an order in November 2020 allowing lawyers to enter the Municipal Court in Sarajevo at a separate entrance from 9 am to 1 pm, but only when they have a hearing scheduled in Court. Therefore, without any explanation attorneys are forbidden to enter the court building using their separate entrance if they do not have a scheduled hearing, which means they cannot enter the offices, they cannot access attorneys' boxes to pick up mail, which prevents them from providing professional service to their clients. At the same time, without any explanation or justification, prosecutors and Attorney General may enter a separate entrance intended for use by attorneys, prosecutors and Attorney General.

Nikica Gržić

President