

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
OL SRB 1/2018

10 December 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the Law on "Free Legal Aid", which includes a number of provisions that could jeopardise the full realization of the right to legal aid for any individual who does not have sufficient financial means to meet the costs associated with judicial proceedings.

According to the information received:

The Law of "Free Legal Aid",¹ adopted by the Parliament on 9 November 2018, implements the provisions of article 67 of the Constitution of the Republic of Serbia, according to which "[e]veryone shall be guaranteed right to legal assistance under conditions stipulated by the law." The Constitution states that legal aid is to be provided by legal professionals and legal assistance offices established in the units of local self-government, and that the law will determine the conditions for providing free legal assistance.

The aim of the law is "to guarantee effective and equitable access to justice" to any person who is entitled to receive free legal aid in accordance with the provisions set out in the law (article 2).

The law includes, inter alia, provisions on the requirements to have access to legal aid (article 4), legal aid providers (articles 8-9 and 12-14), registry of providers (articles 16-19), obligations of providers (articles 20-26), the procedure to have access to legal aid (articles 26-38) and funding for legal aid (articles 39-43). According to article 61, the law will come into force eight days after its publication in the Official Gazette of the Republic of Serbia, and will start to apply on 1st October 2019.

According to information received, lawyers and their representative organisations, non-State legal aid providers and civil society organisations were consulted during the drafting process, but their concerns have not been taken into account in the final text of the law.

¹ The present opinion has been prepared on the basis of an unofficial translation of the draft Law. Inaccuracies may occur in this opinion as a result of incorrect translation.

Before explaining my concerns on this law, I wish to remind your Excellency's Government of its obligations under article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Serbia became a State party by succession on 12 March 2001. Article 14, para. 3 (d), of the Covenant lists, among the procedural guarantees available to persons charged with a criminal offence, the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

In its general comment No. 32 (2007), the Human Rights Committee acknowledged that "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way", and encouraged States to provide free legal aid not only in criminal proceedings, but also in other cases where individuals do not have sufficient means to pay for it.

According to article 6, para. 3 (c), of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ratified by Serbia on 3 March 2004, a person is eligible for free legal assistance when he or she does not have sufficient means to pay for it and the interests of justice so require.

Although the European Convention does not expressly require States to provide free legal assistance in civil matters, the European Court of Human Rights has held that the "interests of justice" may also require free legal assistance in civil cases depending on a number of factors, such as what is at stake for the applicant in terms of the seriousness of the offence and hence the possible sentence that could result from it, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

The right to free legal assistance has also been proclaimed in a large number of United Nations legal instruments, including the Basic Principles on the Role of Lawyers and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

The Basic Principles provide that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings (principle 1), and that any person who does not have a lawyer is entitled, in all cases in which the interests of justice so require, to have a lawyer assigned to him or her, "without [any] payment if they lack sufficient means to pay for such services" (principle 6).

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems aim "to provide guidance to States on the fundamental principles on which a legal aid system in criminal justice should be based and to outline the specific elements required for an effective and sustainable national legal aid system". They

represent “the most comprehensive legal instrument to date for the development and strengthening of legal aid systems at the national level” (A/HRC/23/43, para. 25).

In light of the above-mentioned standards, I am concerned that several provisions of the law on free legal aid could be inconsistent with the obligations of Serbia under international human rights norms and standards.

Scope of the law

According to article 1, para. 1, of the law on free legal aid, the scope of the law is to regulate the instances in which legal aid is provided free of charge, as well as “the ways of accessing and providing free legal aid.” However, the law only regulates Government-funded legal aid services, and not the provision of free legal aid in general.

According to article 8, a free legal aid provider shall be understood to mean “any person authorised by this law to provide free legal aid and included in the relevant registry under this law”. The law also provides that “free legal aid shall be provided by law offices and legal aid services in local government units.” A local government unit may “organise a joint legal aid service in partnership with another provider (...) but it cannot transfer the provision of free legal aid to the provider entirely” (article 9, paras. 1 and 6).

These provisions are problematic.

In line with existing legal standards relating to the provision of legal aid, States adopt all appropriate legislative, judicial, administrative, budgetary, educative and other measures towards the full realization of the right to legal aid. While it is up to the individual State to identify the legal aid model that is most appropriate in line with the specific characteristics of its justice system, States bear the primary responsibility to ensure that any individual within its territory and subject to its jurisdiction has access to legal aid services when he or she does not have sufficient financial means to pay for legal aid or to meet the costs associated with judicial proceedings. Furthermore, access to legal aid must be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees and migrant workers (A/HRC/23/43, para. 43).

State-run legal aid programmes, in which legal aid is provided by State agencies or authorities that provide, administer, coordinate and monitor legal aid services, are only one among the various models for the provision of free legal assistance. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems list several additional models, in which legal aid schemes are based on a public-private partnership with bar associations, non-governmental or community-based organizations, faith-based groups or the academia. In this regard, the Basic Principles expressly provide that professional associations of lawyers shall cooperate with States in the organization and provision of legal services, facilities and other resources to the poor and, as necessary, to other disadvantaged persons (principle 3).

In a report on legal aid, Ms. Gabriela Knaul, former Special Rapporteur on the independence of judges and lawyers, encouraged States to recognize and support the contribution of non-State actors in providing legal aid, and recommended that they adopt all appropriate measures to ensure that non-State legal aid providers are able to carry out their work effectively, freely, autonomously and independently, and without any intimidation, harassment or improper interference.

While States are free to set quality standards and establish monitoring and evaluation mechanisms to ensure the quality of legal aid services by non-State legal aid service providers, these measures should never result in an unreasonable limitation of the right to have access to a legal counsel of one's choosing and the right of lawyers to offer their services on a pro bono basis. Furthermore, excluding the provision of free legal services by non-State legal aid providers may result in a breach of article 14 of the ICCPR in cases where State-run programmes are not sufficient to respond adequately to the needs of the national population.

Definition of legal aid

The law defines 'free legal aid' as including "the provision of legal advice, the filing of motions, representation and defence" (article 6, para. 1). The respective terms are defined in the following paragraphs. In particular, 'defence' is interpreted narrowly as "any representation of a suspect, a defendant or an indicted person during preliminary investigation, investigation and criminal proceedings conducted on suspicion that a criminal offence has been committed for which mandatory defence and representation in misdemeanour proceedings conducted on suspicion that a misdemeanour entailing a prison sentence has been committed" (para. 4).

The law also contains a definition of 'free legal support', intended as the provision of general legal information, assistance in filling out legal applications, the filing of notarial deeds and mediation in dispute resolution (article 11, para. 1). The respective terms are defined in the following paragraphs.

These definitions are narrower than the internationally agreed definition contained in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, according to which 'legal aid' is deemed to include "legal advice, assistance and representation for victims and for arrested, prosecuted and detained persons in the criminal justice process," as well as "legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes" (para. 8).

I consider that the aim of legal aid is to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people otherwise unable to afford legal representation and access to the court system. Accordingly, the mandate has stated on a number of occasions that the definition of legal aid should be as broad as possible, and include not only the right to free legal assistance in criminal proceedings, as defined in article 14, para. 3 (d), of the International Covenant

on Civil and Political Rights, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations (see for example A/HRC/23/43, paras. 27-28).

The right to legal aid can be construed as both a right and an essential procedural guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial. Owing to its importance and considering its potential scope, the right to legal aid should be recognized, guaranteed and promoted in both criminal and non-criminal cases.

Legal aid providers

As noted above, only law offices and legal aid services in local government units can provide legal aid services under the law (articles 8 and 9). Non-State legal aid providers can participate in the provision of legal aid services, but only under the overall control and responsibility of local government units (article 9, para. 6). The law does not identify the organisations or individuals who can collaborate with local government units in the provision of free legal services. It only indicates that “associations” can only provide free legal aid services in the areas of “right to asylum” and “discrimination” (article 9, para. 2).

The list of providers of ‘free legal support’ is wider, and includes notaries, mediators and law schools (article 12, para. 1). The law explicitly states that “[p]roviders of free legal support shall not offer free legal aid” (article 12, para. 5).

Article 16 requires that providers of free legal aid be included in the State Registry of Free Legal Aid Providers, to be maintained by the ministry responsible for judicial affairs as a public electronic database. The registry will keep separate records of providers of free legal aid and providers of free legal support. The Serbian Bar Association will compile the list of lawyers providing free legal aid and forward to the ministry.

These provisions are too restrictive, even if the scope of the law was only that of regulating free legal aid provided by State agencies or bodies.

In this regard, I would like to point out that the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems list a wide range of stakeholders as legal aid service providers, including non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academia. Other legal instruments also highlight the important contribution that private lawyers and civil society organisations play in facilitating access to justice for individuals who do not have sufficient financial means.

The law requires lawyers who wish to provide legal aid be approved by the Serbian Bar Association and be included in a list maintained by the Ministry of Justice. These requirements constitute additional obstacles to individuals and organisations wishing to provide free legal aid, and risk limiting the pool of available legal aid providers even further. It also creates an additional gatekeeping function for the Bar Association, that goes beyond its already established role in supporting an independent legal profession.

The law remains silent as to the conditions for being included in the registry or the obligation of the Bar Association to maintain the list in a neutral and timely manner. The lack of clear and objective criteria may expose lawyers to any sort of arbitrary – and even discriminatory – decisions with regard to their inclusion in the registry.

Finally, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide that the legal aid body or authority to provide, administer, coordinate and monitor legal aid services should be “free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid” (para. 59). Establishing law offices and legal aid services in local government units risks subjecting legal aid providers to intimidation or interference from the executive branch of power, and ultimately affect the independence of legal aid providers.

Beneficiaries of free legal aid

Article 4 identifies the conditions to have access to free legal aid.

Free legal aid is available to citizens, stateless persons legally residing in Serbia, foreign nationals domiciled in Serbia or any other person entitled to free legal aid under any other law or ratified international treaty, provided that the person seeking free legal aid is either eligible for social welfare or child allowance, or would become eligible for public assistance if he or she had to pay for legal services him or herself. Individuals belonging to certain vulnerable groups (e.g. children, persons with psychosocial disabilities, asylum seekers, victims of torture or domestic violence) are eligible for free legal aid regardless of their financial situation.

At the same time, article 7 includes categories of cases where free legal aid is not available, notwithstanding eligibility established under article 4. These cases include commercial disputes, registration of legal entities, compensation for damage to integrity and reputation, proceedings before misdemeanour court if the statute the person is charged under does not entail a prison sentence, proceedings in which the costs disproportionately outweigh the value of the dispute, proceedings, where it is evident (based on the facts and the law) that the applicant has no chance of succeeding, or where there is obvious attempt to abuse the right to free legal aid.

Such a stipulation could constitute a breach of the right to free legal aid.

In accordance with the opinion expressed by previous mandate holders, I am of the view that access to legal aid must be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party (A/HRC/23/43, para. 43).

The right to legal aid is subject to two conditions. First, the beneficiary must lack “sufficient means” to pay for legal aid services. Second, in criminal proceedings, legal aid should be provided “where the interests of justice so require”. The interests of justice take into consideration a number of factors, such as what is at stake for the applicant in terms of the seriousness of the offence and hence the possible sentence that could result from it.

In accordance with the jurisprudence of human rights treaty bodies, I consider that the notion of beneficiaries of legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel (A/HRC/23/43, para. 35). This concept also includes (a) any person whose rights or freedoms have been violated as a result of an act, or a failure to act, perpetrated by a State actor, and (b) any person who participates in judicial or extrajudicial procedures aimed at determining rights and obligations “in a suit at law”.

Principle 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems sets out generous criteria for legal aid eligibility. It encourages States to provide legal aid at all stages of the criminal justice process “regardless of the person’s means”, if the case is particularly urgent or complex, or if the penalty the person faces is very severe.

In its general comment No. 32 (2007), the Human Rights Committee noted that the concept of “suit at law” was based on the nature of the rights in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights (CCPR/C/GC/32, para. 16). The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, and (b) equivalent notions in the area of administrative law, such as the termination of employment of civil servants or the determination of their social security benefits.

The jurisprudence of the European Court of Human Rights has adopted a similar position. Although article 6 of the European Convention does not expressly require States to provide free legal assistance in civil matters, the Court found such an obligation in article 6, paragraph 1, in its guarantee of access to the courts, holding that “indigent applicants are entitled to free counsel when such assistance is indispensable for effective access to the courts and a fair hearing”. In *Airey v. Ireland*, the Court found a violation of article 6 (1) where the applicant was unable to obtain a judicial separation from her husband without legal assistance. The Court found that she had effectively been denied access to the courts, highlighting the complexity of the proceedings and the fact that

marital disputes often entail emotional involvement that is scarcely compatible with the degree of objectivity required for advocacy in court.

Procedure for requesting legal aid

The procedure for requesting free legal aid is outlined in articles 27 to 38 of the law.

Following a request to obtain free legal aid, the competent municipal or city administrative authority has the duty to establish whether the applicant satisfies the requirements for the provision of free legal aid set out in article 4, and adopt a decision within eight days from the receipt date of the application.

According to article 32, para. 3, if the competent authority fails to adopt a decision within the eight-day timeframe, the application is deemed rejected. This provision, however, seems to contradict the provisions of article 34, para. 2, which provide that decision rejecting the application must be reasoned.

The law provides that the decision rejecting the application may be appealed before the ministry within eight days from the receipt date of the decision or within eight days from the expiry of the time limit whereupon the application shall be deemed rejected. The ministry shall decide on the appeal within 15 days from the receipt date of the appeal. The decision on the appeal shall be final in the administrative proceedings (article 32, paras. 3 to 5).

These provisions are problematic.

First of all, I have already noted that the establishment of legal aid providers within local government units risks undermining the independence of legal aid providers. In this regard, the United Nations Principles and Guidelines on Legal Aid provide that States should adopt all appropriate measures to ensure that legal aid providers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference”.

The provisions concerning the appeal against decisions rejecting the request for free legal aid are also in breach of international legal standards, since the authority to decide on the appeal is vested with the executive branch of power, and not with the judiciary.

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to recommend that your Excellency’s Government review and amend the law on free legal aid in order to:

1. clarify that its scope is only to regulate the provision of State-run legal aid services, and not the provision of free legal services more broadly.

2. recognise and support the contribution of non-State actors in providing legal aid, so as to ensure that non-State legal aid providers are able to carry out their work effectively, freely, autonomously and independently.
3. bring the definitions of ‘free legal aid’ and ‘free legal support’ in line with the internationally agreed definition of legal aid.
4. ensure that the definition of providers of legal aid/legal support include, in line with relevant international standards, all individuals and organisations that legal aid services in the country, including non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academia.
5. ensure that the provisions concerning the inclusion in a registry maintained by the Ministry of Justice as a pre-condition for the provision of free legal aid are only applicable to State-run legal aid services.
6. clearly identify the conditions for being included in the registry and the obligation of the Bar Association to maintain the list in a neutral and timely manner, so as to ensure non-discriminatory inclusion of all lawyers willing to provide free legal services in the registry.
7. ensure that the definition of beneficiaries of legal aid include, in line with existing legal standards and the jurisprudence of international and regional mechanisms, any person who comes into contact with the law and does not have sufficient means to pay for counsel.
8. ensure that decisions rejecting the request for free legal aid are always reasoned and subject to judicial review.

I would also like to recommend that any such review is carried out in close consultation with lawyers and their professional organisations, as well as other categories on non-State legal aid providers and civil society organisations, so as to ensure that their legitimate expectations and concerns are taken into account and reflected in the text of the law.

Finally, I would like to inform your Excellency’s Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers