

Enhancing the Protection of Rights of Accused in Bosnia and Herzegovina

Policy Paper

Unapređenje odbrane po službenoj dužnosti u Bosni i Hercegovini

Policy dokument

BH

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HELSINKI
COMMETTEE FOR
HUMAN RIGHTS
IN REPUBLIKA SRPSKA

July/jul 2016

Helsinki Committee for Human Rights in Republika Srpska in partnership with **The Network of the Committees for Human Rights in Serbia, Helsinki Committee for Human Rights of the Republic of Macedonia and Tirana Legal Aid Society** implementing the project „**Enhancing the protection of rights of accused**“. The project will primarily target attorneys-at-law who appear as ex officio defenders of accused before courts, as well as civil society organizations from all five countries that are active in the field of judicial reforms and rule of law. In addition to the above partners, take part in the project are **Policy Center of Serbia** and the **law office Tojic** as a representative of the Chamber of Attorneys RS. The overall goal of the project is to contribute to the enhancement of the system of legal protection of accused in Bosnia and Herzegovina, Serbia, Macedonia, Kosovo, and Albania through a transparent system of appointment, payment and competence ensuring of ex officio legal defense lawyers. The project is financed from USAID through the Balkan Regional Rule of Law Network Program implemented by American Bar Association Rule of Law Initiative for a period of 12 months.

Publisher:

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The Research on the effectiveness of the legal protection system of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia was conducted by the Helsinki Committee for Human Rights in Republika Srpska and partner organizations in the region in the period of September 2015 - January 2016. This research was realized within the project: **Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia** which aim is to contribute to reinforcing the system of legal protection of the accused in five countries in the region. Implementation of the project is financially supported by the American Agency for International Development (USAID) through the project: **Balkans regional rule of law network** (BRRLN).

Enhancing the protection of rights of the accused in Bosnia and Herzegovina

Policy Paper

1. Summary

This Policy Paper has the intention to offer the best possible solution for the reform of ex-officio defence system in Bosnia and Herzegovina. All the facts and evidence base is taken from the document *Comparative analysis on the criminal defence advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia*, which was created by the Balkans Regional Rule of Law Network (BRRLN) in February 2014.

The policy recommendations from the document refer to several key topics identified by the stakeholders in all five countries which were subject of the research. These topics are: appointment of ex-officio lawyers, payment to ex-officio lawyers and competences of ex-officio lawyers. Each of these topics is crucial for the reform of the entire system as well as for ensuring protection for people who are accused and need legal assistance. The Paper proposes solutions that are formulated based on the feedback received from the broad consultation process conducted by the Helsinki Committee for Human Rights in the Republika Srpska in Bosnia and Herzegovina.

The proposed solutions require certain legislative changes, but far more changes in the existing practice of the ex-officio defence system in BH. The Paper also proposes deeper involvement of the Bar Associations from all parts of BH in decentralizing the ex officio defence system and in securing expertise and efficiency in protecting human rights of people who are before courts.

2. Introduction

The research on the effectiveness of the legal protection system of the accused in five countries in the region was conducted within the project “Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia”. This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the respective countries with the aim to contribute to reinforcing the system of legal protection of the accused in five countries in the region. The starting point for the realization of this research is the document *Comparative Analysis on the Criminal Defence Advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia*, which was conducted in February 2014 within the program “Balkans Regional Rule of Law Network (BRRLN)”. The pursuance of the analysis was used to determine how the establishing of a regional network of defence lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defence. The evidence base for this Paper was this Comparative analysis.

The results of the performed comparative analysis on the criminal defence advocacy in five countries in the region and the work of members of the expert work groups that discussed problems in the functioning of the criminal defence, showed that all five countries in the region are facing serious challenges to ensure the quality of access to justice for all citizens. In accordance with the recommendations of the aforementioned analysis, it is necessary to identify the most important issues affecting the establishment and functioning of a transparent system of ex-officio defence. This is particularly needed in the areas of appointment of ex-officio lawyers, payment of fees to lawyers engaged, ensuring competences of appointed lawyers that are needed for providing effective defence to accused persons as well as exploring possibilities for setting up alternative models in ex-officio defense.

In accordance with criminal law provisions in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, free legal assistance is provided to all persons that are accused for certain crimes and who are not able to pay for a lawyer. However, the experience so far has shown that all five countries are facing problems of implementing the law in practice and ensuring adequate access to justice for all citizens. The most significant

problems in providing adequate ex-officio defence for the accused are mostly reflected in the lack of transparency in the appointment of ex-officio lawyers, inadequate compensation for the appointed lawyers, as well as in their insufficient competence in providing defence for the suspect/defendant.

The subject of the research is to assess the existing legislation and practice in providing ex-officio defence in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Thus, the focus of the research will be on the appointment, payment and competencies of lawyers, who provide ex-officio defence for the suspect/defendant. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right and to receive adequate legal representation in criminal cases, a special segment of the research will be devoted to these issues.

The aim of the research is to identify the most significant obstacles and challenges to the establishment of a transparent and efficient system of ex-officio defence in accordance with the national and international standards in all five countries and to define recommendations for improving the existing ex-officio defence system in the region in order to improve the quality of legal representation of the suspect/defendant. The basic premise is that the reforms implemented in the field of criminal legislation in all five countries have not achieved the expected results as well as that there are problems in the functioning of ex-officio defence system that significantly harm its efficiency and affects negatively the effective defence of suspect/defendant in criminal proceedings.

Bosnia and Herzegovina, among other countries, accepted the obligation to adjust its legal system with the standards of the Council of Europe and with the EU. The judicial reform in BH started in 2003. Although a number of significant reforms have been conducted, inter alia, in the field of the Criminal procedural law, reports of relevant institutions/organizations indicate that the criminal procedural law system is still not entirely functional and it does not fully ensure adequate protection and assistance to all persons that need legal protection throughout the entire criminal proceeding.

The relationship between the lawyers and their clients is regulated by inter alia the Codes of Ethics of Bar Associations and by the Law on Advocacy.

According to these documents and international standards in this field, lawyers are obliged to provide effective legal assistance for the suspect/defendant who cannot pay for services. When it comes to fulfilment of these obligations in practice, lawyers in BH have been faced with diverse problems. There is no transparent mechanism by which ex-officio lawyers are appointed and paid. Further, their fees are usually not paid on time. Lawyers believe that the appointment, payment and competence development of ex-officio lawyers needs to be enhanced as it is burdened by the lack of transparency, corruption and inequality which harms the profession of lawyers, but far more important it harms the rights of the suspect/defendant to be properly legally represented and protected. Despite the fact that there are some organizations providing free legal aid it is much more often in civil than criminal cases. Further, there is still a significant level of misunderstanding between lawyers and CSOs that provide free legal assistance in the country.

3. Problem description

Appointment of ex-officio lawyers: Although large amounts of money have been allocated for funding ex-officio defence in BH in recent years, the data available from practice indicate that only few favoured lawyers, for whom it is often claimed that they obtain the cases on the basis of personal contacts, have the greatest benefit from providing ex-officio defence. The existing BH legislation does not guarantee a fair distribution of ex-officio defence and it often happens in practice that only few lawyers appear as ex officio defence lawyers. At the same time, there are prominent lawyers with many years of professional experience in the field of criminal law, who have never been appointed as ex-officio defence attorneys. Also, it happened in practice that, even though lawyers are invited by an official body to work as ex-officio attorneys, it is usually emphasized that they have to come to the court immediately, which in most cases is not manageable (due to, for example, geographical distance, the fact they are currently outside the state or have already scheduled trials).

The Criminal procedural codes in Bosnia and Herzegovina stipulate that under certain legally defined circumstances, the suspects/accused must be introduced to a list of ex officio defence lawyers if they can't protect themselves or can't hire a lawyer. This has to take place during the suspect/accused first court appearance, during the discussion whether the sus-

pect/accused will be kept in custody and at the moment when the suspect/accused receives the indictment. The suspects/accused must be given the chance to independently choose a defence attorney who will represent them. Although judicial employees are prohibited from suggesting or influencing the suspects/accused in any way in the choice of the ex-officio defence attorney, in practice it happened that some of the suspects/accused have not had the opportunity to independently choose their defence attorney; they were assigned a defence attorney without their knowledge or the court did not accept their choice of ex-officio legal representative.

Also, it happened in practice that certain officials “suggest” or “promote” certain lawyers to suspects and the suspected individuals often appear before the court with the already pre-selected name of the defence attorney even before he/she was offered the official list. In these cases, it is obvious that the choice of an ex officio lawyer has been suggested to suspects/accused, but these assertions are very difficult to prove. Court transcripts from interrogations often do not contain enough information on the choice of a lawyer. They mainly state two information related to the issue, one is that the suspect/accused was presented with the list of ex-officio defence attorneys and the other that the suspect/accused has chosen ex officio defence by stating the name of the legal representative. As the suspect/accused does not need to confirm the accuracy of these statements by his/her signature, it cannot be argued that his/her right to independently choose ex-officio attorney has been fully respected.

The experience from the current practice shows different examples of irregularities in the appointment of ex-officio attorneys conducted by various official bodies. It has been often stated that the legal provision, which allows the suspect to choose a defence attorney, is actually one of the problems. However, the practice indicates that in fact there is no real possibility for the suspect to choose a lawyer. Situations, in which excellent lawyers have very few or no ex-officio defence cases, indicate that this is not the result of the suspect's/accused independent will but rather a mix of different influences - the influence of the police officers, the prosecutor, the court or of the court police.

All these statements show that there is a justification for perceiving corruption in the process of appointing ex-officio defence lawyers, what harms all those lawyers who perform their job professionally, conscientiously and correctly. However, in this case the court cannot influence the

situation when a suspect/accused appears at the hearing, at which it is being decided on the choice of an ex-officio defence attorney, with the already pre-selected name of defence attorney whom he/she wants to hire. The court must respect the provisions of the Criminal Procedural Code, where the suspect is given freedom of choice of a defence attorney, although in some cases there are indications that this right is abused. Also, in practice there have been cases in which the suspect/accused would hire a lawyer on his/her own, and then, after two or three actions taken by the lawyer, the suspect/accused would declare that he/she does not have money to pay the lawyer. So, the court assigns the same lawyer as an ex-officio defence.

Until 2009 the Criminal Procedural Code of Bosnia and Herzegovina allowed the court chamber to choose an ex-officio defence attorney for the suspect/accused when the suspect/accused refuses to do so. After amendments to the Law, in cases when the suspect/accused refuses to choose an ex officio defence attorney, the attorney will be appointed following the order given in the list of lawyers. Although this amendment to the Law should have allowed equal chances to all lawyers, in practice it still occurs that only few lawyers are appointed again. According to existing legal provisions, one of the arising problems is the possibility that the suspect/accused can have more engaged lawyers while there is a limit when it comes to the ex-officio defence - one suspect, one defence attorney. Thus it happens in practice that there are cases in which there are up to ten suspect/accused, where the defence attorney is paid for each of them, which unnecessarily creates enormous costs.

Although a large number of lawyers appear on the lists of attorneys, in general only a small group of lawyers are known for their ex officio representation in criminal trials and they are the most frequently selected ones by suspects/accused of poor economic possibilities. The lawyers who are frequently selected for ex officio representation take over many cases and thus have an income substantially above the average for a lawyer in BH. Legal representation in hundreds of cases by only one lawyers raises justified doubts on the quality of defence that is offered to defendants.

Payment to ex-officio lawyers: A lawyer is entitled to receive payment for his/her work according to the tariff which is established by the Bar Association in cooperation with the Ministry of Justice. The amount of reward for the work of lawyers is based on the type of procedure, the action

taken, the value of litigation or the prescribed penalty, as well as other parameters established by the tariff. Decisions on court expenses made by the court and other authorities determine the amount of compensation for legal assistance performed by a lawyer, according to the tariff which was in force at the time of providing legal aid. After the completion of a judicial proceeding, a lawyer compiles the amount of expenses for his/her work, which is approved by the relevant court before the payment is done. However, in practice lawyers are waiting to receive payments up to several years due to insufficient budget funds.

Following the practice of some countries in the region, the Law on Advocacy of Republika Srpska foresees that the amount for paying defence lawyers will be determined by the RS Government and in accordance with the proposal of the Minister of Justice. Further, it is foreseen that the Government approves amendments to the Law on the amount of fees and payments of ex-officio lawyers by respecting the deadline of 60 days after the Law has come into force. But these amendments have not been made public, yet. It has been stated that one of the reasons for the delay of publication of the amendments lies in the fact that the costs for ex-officio defence are paid from the entity budget and that the RS Government wants to keep a certain influence on the determination of the amounts as it has in all other cases where the funds are paid from the budget. Further, it has been stated that the ex-officio defence lawyers have certain benefits compared to the lawyers who have not been appointed based on these grounds.

Ex-officio lawyers' fees in Bosnia and Herzegovina are paid in accordance with the Decision of the Court of BH as well as the tariffs determined by the relevant Bar Associations. Therefore, ex-officio defence lawyers charge their services in accordance with the existing tariffs for criminal proceedings (100%), what represents significant expenses for budgets on all levels in Bosnia and Herzegovina. In accordance with this, BH is an exception compared to other countries of the region, where the fees for defence lawyers are mostly paid in the amount of about 50% of the tariffs established by the Bar Association. Most of the contacted lawyers agree that the existing tariffs for ex-officio defence lawyers are high and put a significant burden on the budgets. They agree that the payments should be adjusted to the economic situation in the country. Further, ex-officio defence seems to be attractive to some lawyers as it offers them the possibility for profit

that is mostly beyond the average income in the country. In spite of different initiatives for decreasing the existing tariffs, started even by lawyers, significant steps in this regard have not been made so far.

The lack of funds in the budgets is one of the main reasons stated for delays of payments to ex-officio defence lawyers. Besides that, some lawyers stated that there is a possibility that some costs will never be paid due to obsolescence of financial claims. However, lawyers are obliged to pay taxes to the state regardless of the delay of payments for conducted ex-officio defence.

The delays of payments of ex-officio defence to engaged lawyers might influence the quality of defence and thus the rights of the suspect/accused to a fair trial and legal representation. Experiences from the practice show that ex-officio defence lawyers that represent the accused in front of cantonal and district courts waited for the refund of their costs for several years and use their own funds to pay the defence. Tariffs for lawyers in the Court of BH are significantly lower in comparison to other courts, although this institution deals with the most serious crimes. However, the compensation for the work of a lawyer before the Court of BH are regular and that is one of the main reasons why certain lawyers more often have accepted the cases before this court. Information received from lawyers show that this tariff is acceptable mostly for colleagues who live in and around Sarajevo, where the seat of the Court of BH is as the trials last shorter, the tariff is significantly lower in comparison to other courts, the presence at hearings is only paid once, what affects the abilities of lawyers who come from other places of BH to participate in the trials.

Competences of the ex-officio lawyers: In accordance with the existing laws, lawyers are obliged to constantly participate in professional trainings and obtain new knowledge and skills that are needed for professional, independent, efficient and ethical conduction of their advocacy work and that are in line with the programs for professional trainings of the Bar Association. The Bar Associations in the Republika Srpska and Federation of BH are primary responsible for the professional training and development of the lawyers. Regarding this issue, FBiH Bar Association organizes training sessions for lawyers, but primarily encourages them to attend seminars organized by relevant institutions on changes in law, including the seminar on criminal law organized by the Court of BH. The RS Bar Association organizes discussions on legal issues at its annual conference.

The list of lawyers who are authorized to represent the suspect/accused before the Court of BH is established and updated by the Criminal Defence Section (OKO) on a monthly basis. In order to ensure the highest standards of representation of the suspect/accused, the Court of BH requires lawyers to demonstrate their knowledge of relevant law before they are included on the list or they are allowed to appear before this Court. The applicant for the list must be member of the Bar Associations in the RS or FBH and must possess at least 7 years of working experience as a lawyer, judge or prosecutor in legal matters in order to be appointed as the only lawyer or primary lawyer. When it comes to the knowledge criteria, lawyers must possess knowledge and expertise in relevant areas of law in accordance with the criteria published by the OKO. The War Crimes Chamber of the Court BH requires all lawyers defending persons charged with war crimes, who have less than seven years' experience and/or have never represented a person accused for war crimes, to complete a special one-day training course. These knowledge criteria can be met by relevant experience or participation in an alternative training that is provided by OKO while it has been required for the War Crimes Chamber lawyers only.

This system has been working for the previous 10 years and it has been considered as one of the best options regarding the criteria for the appointment of defence lawyers in criminal cases in BH. Until now, approximately 250 lawyers have been certified by OKO to participate in war crime trials before the Court of BH. In addition, a number of NGOs have cooperated with the Bar Associations in the RS and FBH as well as with the government bodies in order to provide trainings for lawyers and other legal professionals. In cases when lawyers do not fulfil the standard criteria for appearing in Court of BH, the Law of the Court of BH has a provision for lawyers to be *specialy admitted*. Judges will also be able to specially admit lawyers from BH who are not on the list of authorized lawyers when it is in the interest of justice to do so, and Judges can also specially admit foreign lawyers, when their expertise and fair trial rights demand it. Any application for Special Admission must be submitted to the Court.

Quality defence of the accused persons can be provided only by lawyers who have relevant professional knowledge and experience. In order to increase both the competence of lawyers and the quality of defence, it is necessary to organize trainings for lawyers at lower courts (district

and cantonal) and create mandatory continuous legal education. When it comes to the quality of ex-officio defence, it happens in practice that lawyers have more hearings during a day, so it is practically impossible to prepare an adequate defence for each case. In such a situation, a suspect/accused cannot have a quality defence.

Information or facts that might be of relevance for the defence have to be made available to the defence lawyer. The defence lawyer, suspect or the accused have the right to make copies of all files or documents after the sentence has been issued. However, in practice, lawyers involved in defending the suspect or the accused persons pointed out that the prosecutor does not allow them access to the case file or the evidence prior to the issuance of the verdict. For instance, lawyers that are involved in defending suspect/accused in war crimes trials before the Court of BH asserted that the case related documents have been given to them on CD during the hearing while lawyers are not allowed to bring their laptops to court rooms. In addition, some evidence has been declared as classified pursuant to the Law on the Protection of the classified data. Based on this, only the prosecutor and court are allowed to see this evidence what could be a serious problem for the suspect/accused because it is impossible for the lawyer to present the defence without seeing the evidence against the defendant. All these factors could affect the quality of defence.

4. Proposals for improvement

► **Introducing standards on limiting the number of ex-officio defences taken over on the annual basis**

Within the already existing ex-officio defence system, in order to solve the problems related to the appointment, it is necessary to limit the number of the ex-officio defences at taken over on the annual basis by one lawyer. This annual limitation would influence the following:

- A more transparent usage of the list of ex-officio defence attorneys, which would imply that the defence attorneys would be chosen according to the fact whether and to what extent they realised the allowed annual number of cases, which they took over ex-officio defence attorneys. That would influence the decrease in choosing only “several favored lawyers”.

- The lawyers are not able to realise the quality in individual legal proceedings if they are preoccupied by a great number of cases they have taken over. The limitations in the number of allowed cases on the annual level would provide enough time for defence attorneys to qualitatively prepare themselves for cases which they are chosen for as ex-officio defence attorneys.

Establishment of one of the two ways of controlling the record of the limited number of cases per year, which an ex-officio lawyer takes over:

- I. The record on the number of the taken over ex-officio defences itself is managed by the court, so according to this, it is necessary to improve the CMS in the way that it includes the following data:
 - Data on the current engagement/availability of the lawyers from the list;
 - Data on the number of ex-officio cases taken over by one lawyer (taking into consideration the allowed number of cases on the annual level);
 - Data on the duration of the taken over ex-officio cases before the courts.

The choice/appointment of an ex-officio defence attorney should be performed in the following way – the Court would take a randomly-sorted list of available lawyers from the CMS (this way, the arrangement of lawyers listed by name/surname would be avoided). In this case the judge, who is in charge of the case, would provide a suspect/defendant with a list of lawyers taken from the CMS and enable the suspect/defendant to choose an ex-officio defence attorney from the offered list.

- II. The other way of recording the number of the ex-officio defences taken over is managed by the Bar Association (FBIH) via computer software in the following way:
 - To connect the courts in Bosnia and Herzegovina and Bar Association in Bosnia and Herzegovina by the designed computer software, in a way that the record on the appointment of ex-officio lawyers is entered in the aforementioned mentioned software. Admission to the software would be given to courts and the Bar associations. The results on the record and the number of the cases taken over by lawyers would be updated and uploaded on the Bar Association

website. This way there would be a more transparent insight on the list of the ex-officio cases taken over by the individual lawyers.

- ▶ **Introducing the so called “conflict of interests” in choosing an ex-officio defence attorney and increased control by the Court for checking the property card of the suspect/accused**

It happens in practice that the suspect/accused chooses his/her lawyer by his own choice by given mandate to an attorney, where the suspect/accused himself pays for the services of the lawyer/defence attorney. After the primarily choice of a lawyer, during the proceeding before the court, the suspect/defendant cancels the mandate given to his/her lawyer and requests from the court to appoint him/her an ex-officio lawyer. While choosing from the list of the offered lawyers, he/she chooses the same lawyer who he/she had chosen primarily due to a given mandate to a lawyer. In these cases it is needed to perform a detailed analysis of the suspect/accused personal property in order to truly determine his property status and avoid fraud by the suspect/accused and the lawyer. When the ex-officio lawyer is chosen, the payment of this legal representation is made by the state/entity.

According to the above mentioned problems which are happening in practice, it is necessary to introduce a rule which would forbid that a once chosen lawyer by mandate cannot later be the ex-officio lawyer in the same case and proceeding before the court (“conflict of interests”). The court would be the control mechanism in the implementation of this standard. The introduction of this standard would influence the following:

- The significant decrease of financial means from the state budgets for payments of ex-officio lawyers;
 - The proper usage of the list of ex-officio lawyers in order to decrease the appointment of only several “chosen and favoured lawyers”;
 - Control by the court would be consistent in the field of checking the property card delivered by the suspect/accused.
- ▶ **The greater responsibility of the courts in Bosnia and Herzegovina**

The most obvious question when it comes to the protection of defendant’s rights is the appointment of an ex-officio lawyer. The existing practice enables the appearance of corruption and seriously endangers the defen-

dant's rights. This topic requires public discussion and a full participation of all actors. In order to prevent corruption and unequal treatment of lawyers, one of the possible solutions would be a strict prevention of corruption practice, as well as a greater involvement of courts in preventing and sanctioning corruptive actions. This implies a rigorous struggle against corruption, frequent contacts between the court and the Bar Association, as well as the administrative and criminal proceedings against the court officials and lawyers, who are part of illegal actions. This solution is fast and does not require changes of the existing laws and it does not impose additional expenses to the budgets. On the other hand, this solution requires a high level of integrity and awareness when it comes to the significance of the rule of law among all the relevant persons, who are making decisions in courts and Bar associations. This is hard to expect in countries where the level of democracy and legal tradition is not sufficiently developed. Unfortunately, all Balkan countries belong to this group of countries, including Bosnia and Herzegovina.

► **Updating the lists of ex-officio lawyers in the Bar Associations**

The other possible solution requires certain legal changes and introduction of new mechanisms for the improvement of appointment practice of ex-officio lawyers. The most important part of this solution is to strengthen the role of the Bar Associations. Firstly, it is necessary to update the list of ex-officio lawyers more regularly (several times per year). The Bar associations need be a constituent part of appointment process and their role is very important in providing a fair appointment system. The system which provides a fair treatment of lawyers is not important only for lawyers, but for the rights of defendants, as well. A defendant needs to have the possibility to be represented before court by lawyers chosen in a fair and transparent process and not through a process based on corruption. The corrupted appointment system produces a lower level of quality and seriously endangers the rights of persons who are part of a court proceeding. It also breaks the whole system of the rule of law and the protection of human rights in the country.

► **Introducing the criteria for registration of lawyers on the list of ex-officio defences**

Another important thing is the establishment of a special list of lawyers in criminal proceedings. This list would enable the suspect/accused to choose the most qualified lawyers and in that way their rights to the most professional legal defence would be met. The undisputed right of every person is to choose a lawyer of the highest quality who will represent that person in court. The fact that a certain person cannot (for any reasons) pay for a lawyer does not mean that the quality of service should be lower or not the same as for the person who can afford a lawyer. While creating the best possible list, it is necessary to establish the criteria based on which only those lawyers, who fulfil these criteria, would be included on the list of lawyers who can be appointed as ex-officio lawyers. These criteria should include the following:

- Work experience as a lawyer;
- Presence at obligatory educations which are realised by the Bar Association in Bosnia and Herzegovina, as well as by other institutions for the education of lawyers (for example, the Department for Criminal Defence).

The establishment of criteria should be regulated by the Law on Criminal Proceeding or other legal provisions, as well as adequate entity laws on advocacy.

► **Identical fees for all ex-officio lawyers in the whole country**

In order to improve the overall situation in the ex officio defence, it is necessary to change the payment procedures for ex officio lawyers. The majority of problems in the current practice could be solved by a consistent law implementation. Some problems, however, require new legal provisions. Also, the tariff should be uniform in the whole country and all the courts should have the same tariff for the same legal actions. The tariff should be considered in details due to the fact that currently there are certain inconsistent solutions (certain legal actions taken by lawyers are not paid at all, however, some others are too expensive). The existing practice, which includes payment after the trial, is unacceptable and unfair, keeping in mind the possibility of duration of a court proceeding in Bosnia

and Herzegovina. The payments should be made several times during the court proceeding or on a monthly basis.

- ▶ **Complete responsibility of Bar associations regarding the obligatory education and keeping records on competencies of ex-officio lawyers**

Training and improvement of ex-officio lawyer's skills are an important part of the entire system reform. Lawyers who are not professional enough could cause serious damage to the suspect/accused and significantly endanger essential rights of the suspect/accused. The whole system of developing knowledge and competency of ex-officio lawyers should be the responsibility of Bar associations in Bosnia and Herzegovina. The associations should organize trainings and other forms of education which would be obligatory for all lawyers, but also keep records on all lawyers in that context. These records should have precise data on lawyers' specific knowledge and skills, their experience in special proceedings, as well as a clear assessment of results achieved during the education. Trainings should be specialised, and there should also be a minimum of knowledge and competency of a lawyer regulated by a policy of the respective Bar association. One of possible solutions is to establish a special sector within the associations, which would be responsible for designing and realising education of ex-officio lawyers.

3. Recommendations

In order to achieve all results from this document, it is necessary to perform the following practical steps:

- ▶ **Introduce the standard of limiting the number of ex-officio defences taken over by one single lawyer on the annual level;**
- ▶ **Introduce the so called "conflict of interests" in choosing an ex-officio defence attorney, i.e. a defence attorney with given mandate cannot be an ex-officio defence attorney in the same case, if during a proceeding the suspect/accused declares that he/she cannot pay further defence himself/herself. The exceptions should be possible only in cases when the court establishes that it is in the interest of justice;**

- ▶ **Update the lists of ex-officio lawyers in the Bar Associations, monitoring the occupancy of lawyers, their achieved results, skills and knowledge;**
- ▶ **Introduce the criteria for registration of lawyers on the list of ex-officio defences, which refer to their specific competencies and knowledge that will be documented;**
- ▶ **Identical fees for all ex-officio lawyers in the whole country;**
- ▶ **Establish complete responsibility of the Bar associations regarding the obligatory education and keeping records on knowledge and skills of ex-officio lawyers.**

Unapređenje odbrane po službenoj dužnosti u Bosni i Hercegovini

Policy dokument

1. Rezime

Ovaj Policy dokument ima za cilj da ponudi najbolje moguće rješenje za reformu sistema odbrane po službenoj dužnosti u Bosni i Hercegovini. Svi podaci preuzeti su iz dokumenta *Komparativna analiza krivične odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji*, koju je sačinila Balkanska regionalna mreža za vladavinu prava (BRRLN) u februaru 2016. godine.

Prijedlozi iz ovog dokumenta odnose se na nekoliko ključnih tema koje su identifikovane od strane aktera u svih pet zemalja, a koje su bile predmet istraživanja. Te teme su sljedeće: imenovanje advokata po službenoj dužnosti, plaćanje advokatima po službenoj dužnosti i stručnost advokata po službenoj dužnosti. Svaka od ovih tema važna je za reforme čitavog sistema, kao i za garancije ljudima koji su optuženi i kojima je potrebna pravna pomoć. Ovaj dokument pruža rješenja u skladu sa povratnim informacijama dobijenim tokom širokih konsultacija koje su sprovedene u Bosni i Hercegovini, a koje su organizovane od strane Helsinškog odbora za ljudska prava u Republici Srpskoj.

Predloženo rješenje iziskuje određene izmjene legislative, ali iziskuje daleko više promjena u postojećoj praksi i primjeni sistema odbrane po službenoj dužnosti u Bosni i Hercegovini. Ovaj dokument takođe predlaže sveobuhvatnije uključivanje advokatskih komora iz svih dijelova BiH, kao i veću odgovornost ovih institucija kako bi se decentralizovao čitav sistem i obezbijedila bolja stručnost i efikasnije procedure za zaštitu ljudskih prava lica u sudskim postupcima.

2. Uvod

Istraživanje efikasnosti sistema pravne zaštite optuženih u pet zemalja regiona sprovedeno je u okviru projekta “Unapređenje sistema zaštite odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji”. Ovaj projekat sproveden je od strane Helsinškog odbora za ljudska prava u Republici Srpskoj u saradnji sa partnerskim organizacijama u regionu sa ciljem da se doprinese jačanju sistema pravne zaštite optuženih u pet zemalja u regionu. Polazna tačka za realizaciju ovog istraživanja je dokument *Komparativna analiza o krivičnoj odvokaturi u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji*, koji je napravljen u februaru 2014. godine u okviru programa “Balkanska regionalna mreža za vladavinu prava” (BRRLN). Analiza je iskorištena kako bi se odredilo na koji način bi uspostavljanje regionalne mreže advokata odbrane moglo doprinijeti stvaranju jake, nezavisne i efikasne odbrane u krivičnim postupcima. Rezultati sprovedene komparativne analize o zastupanju osumnjičenih/optuženih (O/O) u krivičnim predmetima u svih pet zemalja u regionu, kao i rad članova ekspertskih grupa koji su raspravljali o problemima u funkcionisanju krivične odbrane, pokazali su da se svih pet zemalja regiona suočava sa ozbiljnim izazovima u osiguranju kvaliteta pristupa pravdi svim građanima. U skladu sa prijedlozima gore navedene analize, neophodno je identifikovati najvažnije stvari koje utiču na utvrđivanje i rad transparentnog sistema odbrane po službenoj dužnosti – posebno u slučajevima dodjeljivanja branioca po službenoj dužnosti O/O licima, kao i mogućnosti za uspostavljanje alternativnih modela u odbrani po službenoj dužnosti.

U skladu sa odredbama zakona o krivičnim postupcima u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji, besplatna pravna pomoć se pruža svim licima koja su optužena za određena krivična djela, a koja nisu u stanju da sebi plate advokata. Međutim, iskustvo je do sada pokazalo da se svih pet zemalja suočava sa problemima sprovođenja zakona u praksi, kao i sa obezbjeđenjem adekvatnog pristupa pravdi svim licima. Kao najvažniji problemi u pružanju adekvatne odbrane po službenoj dužnosti navode se sljedeći: nedostatak transparentnosti u pružanju adekvatne odbrane po službenoj dužnosti, neadekvatna i neblagovremena nadoknada odabranim advokatima, kao i njihova stručnost u pružanju odbrane O/O licu.

Predmet ovog istraživanja jeste da procijeni postojeće zakone i praksu po pitanju pružanja odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji, a u vezi sa postojećim međunarodnim standardima i praksom u ovoj oblasti. Stoga, fokus je na načinu imenovanja, plaćanju i stručnosti advokata koji pružaju odbranu po službenoj dužnosti O/O licima. S obzirom da pripadnici manjina/ugrožene grupe često imaju probleme u ostvarivanju svojih prava kod advokata i u adekvatnom zastupanju u krivičnim postupcima, poseban dio istraživanja se posvećuje ovim pitanjima.

Cilj ovog istraživanja jeste da se identifikuju najvažnije prepreke i izazovi u utvrđivanju transparentnog i efikasnog sistema odbrane po službenoj dužnosti u skladu sa domaćim i međunarodnim standardima u svih pet zemalja, kao i da se definišu preporuke za poboljšanje postojećeg sistema odbrane po službenoj dužnosti u regionu kako bi se poboljšao kvalitet zastupanja O/O osoba. Osnovna premisa je ta, da reforme sprovedene u oblasti krivičnog prava u svih pet zemalja regiona nisu ostvarile očekivane rezultate, kao i ta da postoje određeni problemi u funkcionisanju sistema odbrane po službenoj dužnosti koji značajno škode njegovoj efikasnosti, što utiče na pružanje efikasne odbrane O/O u krivičnim postupcima.

Bosna i Hercegovina je kao i druge zemlje, prihvatila obavezu da uskladi pravni sistem sa standardima Savjeta Evrope i EU u ovoj oblasti. Reforma sudstva u BiH počela je 2003. godine. Iako je određen broj značajnih reformi sproveden u oblasti krivičnog procesnog prava, izvještaji relevantnih institucija/organizacija ukazuju da sistem krivičnog procesnog prava još nije u potpunosti funkcionalan, kao i da ne obezbjeđuje adekvatnu zaštitu ni pomoć svim licima kojima je potrebna pravna zaštita tokom čitavog sudskog postupka.

Odnos između advokata i njihovih klijenata regulisan je između ostalog Etičkim kodeksom advokatskih komora i Zakonom o advokaturi. U skladu sa ovim dokumentima i međunarodnim standardima u ovoj oblasti, advokati koji su O/O dodijeljeni kao branioci po službenoj dužnosti su dužni da pruže efikasnu pravnu pomoć onim klijentima koji nisu u stanju da istu priušte. Kada je riječ o ispunjavanju ovih obaveza u praksi, advokati u BiH suočavaju se sa različitim problemima. Ne postoji transparentan mehanizam na snazi po kom se advokati po službenoj dužnosti određuju i isplaćuju. Štaviše, njihove nadoknade se obično ne isplaćuju na vrijeme. Advokati smatraju da pitanje imenovanja, plaćanja i stručnosti advokata

po službenoj dužnosti treba da bude osigurano, jer je opterećeno nedostatkom transparentnosti, mogućom korupcijom i nejednakosti, što šteti profesiji advokata, ali šteti pravu O/O da bude pravno valjano zastupan i zaštićen. Uprkos činjenici da postoje određene organizacije koje nude besplatnu pravnu pomoć, to je mnogo češće prisutno u građanskim nego u krivičnim slučajevima. Dodatno opterećenje se ogleda i u dalje prisutnom nerazumijevanju između advokata i nevladinih organizacija (OCD) koje pružaju besplatnu pravnu pomoć.

3. Opis problema

Imenovanje advokata po službenoj dužnosti: Iako su posljednjih godina velike sume novca dodjeljivane za finansiranje odbrane po službenoj dužnosti u BiH, podaci koji su dostupni u praksi pokazuju da samo nekoliko privilegovanih advokata, za koje se često tvrdi da dobijaju slučajeve zahvaljujući ličnim poznanstvima, ima najveću finansijsku korist od pružanja odbrane po službenoj dužnosti. Postojeći zakonski okvir BiH ne garantuje pravičnu raspodjelu odbrane po službenoj dužnosti, a često je slučaj u praksi da se samo nekoliko advokata pojavljuje kao advokati koji se dodjeljuju po službenoj dužnosti. U isto vrijeme, postoje istaknuti advokati sa dugogodišnjim stručnim iskustvom u oblasti krivičnog prava koji nikada nisu dobili nijedan slučaj gdje su bili dodjeljeni kao branioci po službenoj dužnosti. Takođe, često je slučaj u praksi da iako su ti advokati pozvani od strane zvaničnog organa da rade kao branioci po službenoj dužnosti, obično se naglašava da oni moraju doći u sud istog trena, što u većini slučajeva nije izvodljivo (na primjer, zbog geografske udaljenosti, činjenice da su trenutno van zemlje ili već imaju zakazano suđenje).

Zakoni o krivičnim postupcima u Bosni i Hercegovini predviđaju da pod određenim zakonom određenim okolnostima osumnjičenima, prilikom prvog ispitivanja, odnosno O/O prilikom izjašnjenja o prijedlogu za određivanje pritvora, odnosno okrivljenom u vrijeme dostavljanja optužnice mora biti predočen spisak advokata po službenoj dužnosti ukoliko nisu u stanju da se sami brane ili da angažuju advokata. Osumnjičenima/optuženima se mora omogućiti da sami nezavisno odaberu advokata koji će ih braniti. Iako je licima u pravosuđu zabranjeno da predlažu ili utiču na O/O osobe prilikom izbora advokata po službenoj dužnosti, u praksi je bilo slučajeva kada O/O nisu imali priliku da sami odaberu svog advokata

ili im je isti dodjeljen bez njihovog znanja ili sud nije prihvatio njihov izbor advokata po službenoj dužnosti.

Takođe, dešavalo se da određeni službenici “predlože” ili “promovišu” O/O licima određene advokate, a zatim se O/O pojedinac pojavi pred sudom i kaže ime svog advokata po službenoj dužnosti i prije nego što mu/joj se ponudi spisak advokatâ po službenoj dužnosti. U ovakvim slučajevima očigledno da je odabir advokata bio sugerisan osumnjičenima, ali je ove tvrdnje je jako teško dokazati. Sudski zapisi sa saslušanja, koji često ne sadrže dovoljno informacija o izboru advokata, uglavnom konstatuju da je O/O licu prezentovan spisak advokata po službenoj dužnosti, a zatim slijedi informacija o odabranom advokatu. S obzirom da O/O ne potvrđi tačnost ovih navoda sopstvenim potpisom, ne može se sa sigurnošću tvrditi da je pravo O/O lica da nezavisno odabere advokata po službenoj dužnosti ispoštovano.

Iskustvo iz dosadašnje prakse pokazalo je primjere različitih nepravilnosti pri dodjeljivanju advokata po službenoj dužnosti od strane raznih zvaničnih organa. Često se kaže da je upravo zakonska odredba koja omogućuje O/O licu odabir advokata po službenoj dužnosti zapravo jedan od problema. Međutim, praksa je pokazala da u stvari ne postoji realna mogućnost da O/O odabere advokata. Situacije gdje iskusni advokati imaju malo ili uopšte nemaju slučajeve u kojima su učestvovali kao advokati po službenoj dužnosti ukazuju da takve situacije nisu posljedica nezavisne volje O/O lica, već predstavljaju mješavinu različitih uticaja – uticaj policije, tužioca, direktni uticaj suda ili uticaj sudske policije.

Svi ovi navodi ukazuju da postoji opravdanost sumnje u korupciju pri određivanju advokata po službenoj dužnosti, što uzrokuje štetu svim onim licima koja svoj posao obavljaju profesionalno, savjesno i valjano. Međutim, u ovom slučaju sud ne može da utiče na situaciju kada se O/O pojavi na saslušanju na kom se određuje o izboru advokata po službenoj dužnosti kada je O/O već odabrao advokata kog želi da angažuje. Sud mora da poštuje odredbe Zakona o krivičnom postupku, koji nalaže da je O/O licu dato pravo da odabere advokata iako u određenim slučajevima postoje indicije da je to pravo zloupotrebjeno. Takođe, u praksi je bilo slučajeva kada je O/O angažovao advokata a zatim, nakon dvije ili trije radnje preduzete od strane tog advokata, O/O bi izjavio da nema novca da istog plati. Tako bi sud dodijelio advokata po službenoj dužnosti, i to onog advokata koji je na početku angažovan od strane O/O.

Do 2009. godine Zakon o krivičnom postupku Bosne i Hercegovine omogućavao je sudskom vijeću da odabere advokata po službenoj dužnosti u ime O/O kada O/O odbije da to učini. Nakon izmjena i dopuna zakona, u slučajevima kada O/O odbije da odabere advokata, isti mu je dodjeljivan onim redoslijedom koji je određen spiskom advokata. Iako je ova izmjena i dopuna zakona trebalo da omogući jednak izbor svih advokata, u praksi se i dalje javlja situacija da se slučajevi dodjeljuju samo nekoliko advokata. U skladu sa postojećim zakonskim odredbama, jedan od problema jeste i mogućnost da O/O ima više angažovanih advokata, dok postoji ograničenje kada su u pitanju advokati po službenoj dužnosti – jedan O/O, jedan advokat. Tako se dolazi do situacije u praksi da postoje slučajevi u kojima ima do deset O/O, gdje se advokatima odbrane plaća za svakog O/O, što nepotrebno stvara ogromne troškove.

Iako se na listi mogućih advokata nalazi veliki broj pravnih zastupnika, generalno samo je manja grupa advokata poznata po zastupanju po službenoj dužnosti O/O lica i oni su najčešće odabrani od strane O/O koji su lošeg imovinskog stanja. Advokati koji su često odabrani od strane O/O imaju toliki broj slučajeva da imaju zaradu koja je značajno iznad prosječne zarade advokata u BiH. Zastupanje u više stotina predmeta od strane jednog advokata izaziva sumnju u kvalitet odbrane koji mogu omogućiti svojim branjenicima.

Plaćanje advokatima po službenoj dužnosti. Advokat ima pravo da primi novčanu naknadu za svoj rad u skladu sa tarifom koju je odredila advokatska komora u saradnji sa ministarstvom pravde. Iznos naknade za rad advokata zasnovan je na vrsti postupka, preduzetim radnjama, vrijednosti spora ili izrečene kazne, kao i drugim parametrima određenim tarifom. Odluke o sudskim troškovima donesene od strane suda i drugih organa određuju iznos naknade za pravnu pomoć koju izvrši advokat, a u skladu sa tarifom koja je bila na snazi u vrijeme pružanja pravne pomoći. Nakon završetka sudskog postupka, advokat obračunava iznos troškova za svoj rad, što poslije verificira nadležni sud i vrši se isplata troškova. Međutim, u praksi je slučaj da pojedini advokati čekaju i nekoliko godina da im se uplati zarađeni novac, a uslijed nedovoljnih finansijskih resursa u budžetima.

Slijedeći praksu pojedinih zemalja u regionu, Zakon o advokaturi Republike Srpske predviđa da iznos naknade za advokate u Republici Srpskoj određuje Vlada RS u skladu sa prijedlogom Ministra pravde. Dalje, pred-

viđeno je da će Vlada odobriti izmjene i dopune Zakona o iznosu naknade i plaćanja advokata po službenoj dužnosti tako što će se poštovati rok od 60 dana nakon stupanja zakona na snagu. Međutim, ove izmjene i dopune još uvijek nisu poznate javnosti. Kao jedan od razloga zbog kojih se odugovlači sa objavljivanjem ovih odluka navodi se činjenica da se troškovi advokata po službenoj dužnosti isplaćuju iz entitetskog budžeta, zbog čega Vlada RS nastoji zadržati određeni uticaj na određivanje iznosa, kao što ima u svim drugim slučajevima gdje se sredstva isplaćuju iz budžeta. Dalje, navedeno je da advokati po službenoj dužnosti imaju određene beneficije u poređenju sa advokatima koji nisu izabrani na ovaj način.

Naknade za advokate po službenoj dužnosti u Bosni i Hercegovini isplaćuju se u skladu sa Odlukom Suda BiH, kao i tarifama koje odrede advokatske komore. Stoga, advokati odbrane po službenoj dužnosti naplaćuju svoje usluge u iznosu usklađenim sa postojećim tarifama advokata u krivičnim postupcima (100%), što predstavlja značajne troškove za budžet na svim nivoima Bosne i Hercegovine. Po ovom pitanju, BiH predstavlja izuzetak u poređenju sa drugim zemljama regiona, gdje je iznos koji se isplaćuje advokatima odbrane uglavnom jednak iznosu od 50% od tarifa utvrđenih od strane advokatske komore. Većina advokata koje smo kontaktirali slažu se da su postojeće tarife za advokate po službenoj dužnosti visoke, kao i da predstavljaju značajan teret za budžete. Slažu se da bi naknade trebalo prilagoditi ekonomskoj situaciji u zemlji. Dalje, čini se da je odbrana po službenoj dužnosti atraktivna pojedinim advokatima s obzirom da im nudi mogućnost zarade, koja je daleko iznad prosječne zarade u zemlji. Uprkos određenim inicijativama za smanjenje postojećih tarifa, koje su čak pokrenuli advokati, značajni koraci po ovom pitanju još uvijek nisu učinjeni.

Finansiranje odbrane po službenoj dužnosti se često smatra jednim od vodećih problema sa kojim se advokati susreću u praksi uslijed niskih iznosa koji se plaćaju odbrani po službenoj dužnosti, kao i zbog neredovnih isplata troškova za ovu vrstu odbrane. Nedostatak sredstava u budžetu predstavlja jedan od glavnih razloga zašto se kasni sa isplatom advokatima po službenoj dužnosti. Pored toga, pojedini advokati pominju mogućnost da se određeni troškovi nikada i ne isplate uslijed zastare finansijskih potraživanja. Međutim, advokati su dužni da plaćaju poreze bez obzira na kašnjenje isplata za odbranu po službenoj dužnosti.

Kašnjenje u isplatama advokatima odbrane po službenoj dužnosti od strane suda može da utiče na kvalitet odbrane pa tako i na pravo osumnjičenog ili optuženog na pravično suđenje. Iskustva iz prakse pokazala su da su advokati odbrane po službenoj dužnosti koji su zastupali optužene pred kantonalnim i okružnim sudovima čekali na isplatu svojih zarada i po nekoliko godina, kao i da su koristili sopstvena sredstva kako bi platili odbranu. Tarife u Sudu BiH su značajno manje u poređenju sa drugim sudovima, iako se ova institucija bavi najtežim zločinima, poput ratnih zločina. Međutim, naknade za rad advokata pred ovim sudom su redovne i to je jedan od glavnih razloga zašto pojedini advokati češće prihvataju slučajeve pred ovim sudom. Informacije koje su prikupljene od strane advokata ukazuju da je ova tarifa u najvećem broju slučajeva prihvatljiva za kolege koje žive i rade u Sarajevu ili u okolini Sarajeva, gdje je sjedište Suda BiH. Suđenja traju kratko, tarifa je značajno niža u poređenju sa drugim sudovima, plaća se samo prisustvo na ročištu, što sve utiče na mogućnost advokata koji dolaze iz drugih gradova BiH da učestvuju na suđenjima.

Stručnost advokata po službenoj dužnosti: U skladu sa postojećim zakonima, advokati imaju obavezu da neprekidno učestvuju u profesionalnim obukama i da stiču nova znanja i vještine, koje su neophodne za profesionalno, nezavisno, efikasno i etičko obavljanje advokatskog posla, i koja su u skladu sa programima profesionalnih obuka advokatske komore. Advokatske komore RS i Federacije BiH imaju primarnu odgovornost za profesionalnu obuku i stručni razvoj advokata. U vezi sa tim, Advokatska komora Federacije BiH organizuje obuke za advokate, ali prevashodno ohrabruje advokate da prisustvuju seminarima koje organizuje relevantne institucije po pitanju izmjena u zakonima, što podrazumijeva i seminare o krivičnom pravu koje organizuje Sud BiH. Advokatska komora RS organizuje rasprave o pravnim pitanjima na svojoj godišnjoj konferenciji.

Spisak advokata koji su ovlašteni da zastupaju O/O lica pred Sudom BiH utvrđuje se i ažurira preko Odsjeka krivične odbrane (OKO) na mjesečnom nivou. Kako bi se osigurali najviši standardi zastupanja O/O, Sud BiH traži od advokata da pokažu svoje znanje o relevantnom pravu prije nego što se nađu na listi ili im se dozvoli da se pojave pred Sudom. Podnosilac prijave za gore navedeni spisak mora da bude validan član Advokatske komore RS ili Federacije BiH, i mora da ima najmanje sedam godina radnog iskustva u praksi kao advokat, sudija ili tužilac u pravnim

pitanjima kako bi bio imenovan kao jedini advokat ili primarni advokat. Kad je u pitanju kriterijum znanja, advokati moraju da posjeduju znanje i stručnost u relevantnim oblastima prava u skladu sa kriterijumima utvrđenim od strane OKO. Odjeljenje za ratne zločine Suda BiH zahtijeva da svi advokati koji bi branili lica optužena za ratne zločine, a koja nikada nisu branila lice optuženo za ratni zločin, završe specijalnu jednodnevnu obuku. Ovaj kriterijum znanja se ispunjava ili već postojećim relevantnim iskustvom ili učešćem na alternativnoj obuci koju organizuje OKO, a ista je potrebna samo za advokate koji se bave ratnim zločinima.

Ovaj sistem funkcioniše prethodnih 10 godina i smatra se jednim od najboljih opcija u pogledu kriterijuma za imenovanje advokata u krivičnim predmetima u BiH. Do sada je otprilike 250 advokata odobreno od strane OKO da učestvuju u predmetima ratnih zločina pred Sudom BiH. Pored toga, jedan broj nevladinih organizacija saraduje sa advokatskim komorama RS i Federacije BiH, kao i sa organima vlasti kako bi se obezbijedili obrazovni treninzi za advokate i druge profesionalce u sudstvu. U slučajevima kada advokati ne ispunjavaju standardne kriterijume da bi se pojavili pred Sudom BiH, Zakon o Sudu BiH ima odredbu po kojoj se takvi advokati *“specijalno primaju”*. Sudije će takođe imati mogućnost da posebno odaberu advokate iz BiH koji nisu na spisku ovlaštenih advokata, kada je u interesu pravde da se to učini. Sudije će takođe imati pravo da odrede strane advokate, tamo gdje njihova stručnost i pravo na pravično suđenje to zahtijevaju. Sve prijave za specijalni prijem moraju biti predate Sudu.

Kvalitetna odbrana O/O lica se može obezbijediti jedino od strane advokata koji imaju relevantno profesionalno znanje i iskustvo. Kako bi se povećala i stručnost advokata i kvalitet odbrane, neophodno je organizovati obuku za advokate pri nižim sudovima i neophodno je stvoriti obaveznu neprekidnu pravnu edukaciju. Kada je u pitanju kvalitet odbrane po službenoj dužnosti, često je slučaj da advokati imaju više ročišta u jednom danu tako da je praktično nemoguće spremati adekvatnu odbranu za svaki slučaj. U takvim okolnostima, O/O ne može imati kvalitetnu odbranu.

Informacije ili činjenice koje bi mogle poslužiti kao dokaz odbrani u suđenju moraju biti dostupne braniocu. Advokat odbrane, osumnjičeni ili optuženi ima pravo na kopije dokumenta nakon izricanja presude. Međutim, u praksi su advokati koji su uključeni u odbranu osumnjičenog ili optuženog često isticali da im tužilac ne dozvoljava da pristupe spisima ili dokazima prije donošenja presude. Na primjer, advokati koji učestvuju u

slučajevima ratnih zločina pred Sudom BiH isticali su sljedeće - dokazi i relevantna dokumentacija im je data na CD-u za vrijeme ročišta, ali advokatima nije dozvoljeno da donose laptopove u sud. Pored toga, dokazi su kategorisani kao tajni u skladu sa Zakonom o zaštiti tajnih podataka. Na osnovu ovoga, samo je tužiocu i sudu dozvoljeno da imaju uvid u ove dokaze koji bi mogli biti ozbiljan problem za O/O jer je nemoguće da advokat prezentuje odbranu bez uvida u dokaze protiv O/O. Svi ovi faktori bi mogli da utiču na kvalitet odbrane.

4. Prijedlozi za poboljšanje

► Uvođenje standarda u ograničenju broja preuzetih odbrana po službenoj dužnosti na godišnjem nivou

U okviru već postojećeg sistema odbrane po službenoj dužnosti, a da bi se riješili navedeni problemi kada je u pitanju imenovanje, potrebno je ograničiti broj preuzetih odbrana po službenoj dužnosti po advokatu na godišnjem nivou. Ograničenje broja preuzetih odbrana po službenoj dužnosti na godišnjem nivou bi uticalo:

- na transparentnije korišćenje liste advokata za odbranu po službenoj dužnosti u smislu da bi advokati bili birani po tome da li su i u kojoj mjeri ostvarili godišnji dozvoljeni broj predmeta koji su preuzeli kao branioci po službenoj dužnosti i na taj način bi se smanjio broj izbora samo nekoliko „odabranih advokata“;
- advokati nisu u mogućnosti da ostvare kvalitet u pojedinačnim sudskim postupcima ukoliko su preopterećeni velikim brojem preuzetih predmeta. Ograničavanjem broja dozvoljenih predmeta na godišnjem nivou bi dalo dovoljno vremena da se branioci kvalitetno upoznaju i pripreme za predmete u kojima su izabrani da budu branioci po službenoj dužnosti.

Uspostaviti jedan od dva načina kontrole evidencije o ograničenom broju predmeta na godišnjem nivou koji preuzima advokat po službenoj dužnosti:

- I. Samu evidenciju o broju preuzetih odbrana po službenoj dužnosti vodi sud, shodno tome, potrebno je unaprijediti CMS na način da uključuje podatke:
 - o trenutnoj zauzetosti/dostupnosti advokata na listi;

- broju predmeta preuzetih po službenoj dužnosti jednog advokata (uzimajući u obzir dozvoljeni broj predmeta na godišnjem nivou);
- dužini trajanja predmeta preuzetih po službenoj dužnosti pred sudovima.

Odabir/imenovanje branioca po službenoj dužnosti bi trebalo da vrši sud na taj način da bi iz CMS-a preuzimao listu raspoloživih advokata nasumično poredanih (na ovaj način bi se izbjegao raspored advokata na listi po imenu/prezimenju). U ovom slučaju, sudija koji je nadležan u predmetu predočio O/O licu listu advokata izvučenu iz CMS-a na, te O/O omogućio izbor branioca po službenoj dužnosti sa ponuđene liste.

II. Drugi način evidencije o broju preuzetih odbrana po službenoj dužnosti vodi Advokatska komora (FBiH i RS) putem softvera i to na način:

- Da se softverom povežu sudovi u BiH i advokatske komore u BiH, na način da evidencija o imenovanju advokata po službenoj dužnosti bude unesena u pomenuti softver. Pristup softveru bi imali sudovi i advokatske komore. Rezultati o evidenciji i broju preuzetih predmeta bi bili ažurirani i postavljeni na web stranice advokatske komore. Tako da tu postoji transparentniji uvid u spisak preuzetih predmeta po službenoj dužnosti
- ▶ **Uvođenje tzv. „sukoba interesa“ u odabiru branioca po službenoj dužnosti i veća kontrola od strane Suda za provjeru imovinske karte osumnjičenog/optuženog**

U praksi, a postojeći zakoni u BiH to ne onemogućavaju, dešava se da O/O odabere advokata po svom izboru i to putem punomoći, gdje sam O/O vrši plaćanje usluga advokata/branioca. Nakon prvenstvenog odabira advokata, a tokom postupka pred sudom, O/O otkaže punomoć koju je dao advokatu za zastupanje, i zatraži od suda da mu se dodijeli advokat po službenoj dužnosti. Birajući sa liste ponuđenih advokata, bira istog onog advokata kojeg je prvenstveno izabrao po punomoći. U ovom slučaju, potrebno je izvršiti detaljnu analizu imovine O/O lica, kako bi se istinski utvrdilo imovinske stanje a ne da je došlo do prevare od strane O/O i advokata. Kada se vrši izbor advokata po službenoj dužnosti, plaćanje tako izabranog advokata pada na teret države/entiteta.

Upravo na osnovu navedenih problema koje se dešavaju u praksi, potrebno je uvesti da jednom izabran advokat putem punomoći ne može biti, kasnije u istom predmetu u postupku pred sudom i izabrani advokat po službenoj dužnosti („sukob interesa“). Kontrolni mehanizam u sprovođenju ovog standarda bi bio sud. Uvođenjem ovog standarda, uticalo bi se na to:

- da se izdvajanje sredstava za plaćanje advokata po službenoj dužnosti koja padaju na teret države, znatno smanjuje;
- pravilno korišćenje liste advokata po službenoj dužnosti u pravcu smanjivanja broja izbora samo nekoliko “odabranih advokata”
- kontrola koja dolazi od strane suda, bi bila dosljednija u oblasti provjere imovinske karte koju dostavlja osumnjičeni/optuženi.

▶ **Veća odgovornost sudova u Bosni i Hercegovini**

Najočiglednije pitanje po pitanju zaštite prava optuženog jeste imenovanje advokata po službenoj dužnosti. Postojeća praksa omogućuje pojavu korupcije i ozbiljno ugrožava prava optuženog. Ova tema zahtijeva javnu raspravu, kao i potpunu uključenost svih aktera. Kako bi se spriječila korupcija i nejednaki tretman advokata, jedno od mogućih rješenja bi bila stroga prevencija koruptivne prakse, kao i veća uključenost sudova. Ovo podrazumijeva rigoroznu borbu protiv korupcije, česte kontakte između suda i advokatske komore, kao i administrativne i krivične postupke protiv službenika suda i advokata koji su učestvovali u nezakonitim radnjama. Ovo rješenje je brzo i jednostavno i ne zahtijeva promjene postojećeg zakona niti dodatne troškove za budžet. S druge strane, ovo rješenje zahtijeva visok nivo integriteta i svjesnosti po pitanju značaja vladavine prava među svim relevantnim licima koja donose odluke u sudovima i komorama. Ovo je teško očekivati u zemljama koje nemaju dovoljno razvijen stepen demokratije i pravne tradicije. Nažalost, sve zemlje Balkana spadaju u ovu grupu, uključujući među njima, i Bosnu i Hercegovinu.

▶ **Ažuriranje spiskova advokata po službenoj dužnosti u advokatskim komorama**

Drugo moguće rješenje zahtijeva određene pravne promjene i nove mehanizme za poboljšanje prakse imenovanja advokata po službenoj dužnosti. Najvažniji dio ovog rješenja jeste jačanje uloge advokatskih komora. Na prvom mjestu, mora se ažurirati spisak advokata po službenoj dužnosti na

nešto redovnijoj osnovi (nekoliko puta tokom godine). Komore treba da budu sastavni dio postupka i njihova uloga je veoma važna u obezbjeđenju pravičnog sistema imenovanja. Sistem koji pruža pravičan tretman advokata nije važan samo za advokate, nego i za prava optuženog. Optuženi mora da ima mogućnost da bude zastupan pred sudom od strane advokata koji su odabrani u pravičnom i transparentnom postupku, a ne na osnovu korupcije. Korumpirani sistem proizvodi niži nivo kvaliteta i ozbiljno ugrožava prava lica koja su dio sudskog postupka. On takođe urušava cjelokupan sistem vladavine prava i zaštite ljudskih prava u zemlji.

▶ **Uvođenje kriterijuma za upis advokata na listu odbrana po službenoj dužnosti**

Druga važna stvar jeste stvaranje specijalnog spiska advokata u krivičnim postupcima. Ovaj spisak bi omogućio da O/O odaberu najkvalifikovanije advokate i da im se tako omogući da ostvare svoja prava na najprofesionalniju odbranu. Nesumnjivo pravo svake osobe jeste da odabere najkvalitetnijeg advokata koji će ga zastupati pred sudom. Činjenica da određeno lice nije u stanju (iz bilo kakvih razloga) da plati advokata ne treba da znači da kvalitet usluge treba da bude niži ili da ne bude isti kao kod lica koje može da priušti advokata. U okviru stvaranja što bolje liste, potrebno je uspostaviti kriterijume na osnovu kojih bi samo oni advokati koji ih ispunjavaju, bili uključeni u listu advokata za odabir po službenoj dužnosti. Ovi kriterijumi bi trebali da sadrže:

- Iskustvo u radu kao advokat;
- Prisustvo obavezanim edukacijama koje realizuju advokatske komore u BiH, kao i druge institucije za edukaciju advokata (npr. Odsjek krivične odbrane).

Uspostavljanje kriterijuma bi trebalo da je propisano ZKP-om ili drugim zakonskim odredbama, kao i odgovarajućim entiteskim zakonima o advokaturi.

▶ **Uniformne naknade za sve advokate po službenoj dužnosti u cijeloj državi**

Kako bi se poboljšala ova oblasti, takođe je neophodno promijeniti načine plaćanja naknada advokatima. Većina problema u dosadašnjoj praksi bi mogla biti riješena dosljednom primjenom zakona. Pojedini problemi ipak zahtijevaju nove zakonske odredbe. Takođe, tarifa treba da budu uni-

formna u cijeloj državi i svi sudovi bi trebalo da imaju istu tarifu za iste pravne poslove. Tarifu treba detaljno razmatrati s obzirom na činjenicu da trenutno postoje određena neusklađena rješenja (pojedini poslovi advokata uopšte nisu plaćeni, a opet, neki drugi su previše skupi). Postojeća praksa koja podrazumijeva plaćanje nakon čitavog postupka je neprihvatljiva i nepravična, imajući u vidu dužinu trajanja sudskog postupka u BiH. Isplate treba da budu vršene nekoliko puta tokom trajanja sudskog postupka ili na mjesečnoj osnovi.

▶ **Potpuna odgovornost komora po pitanju obavezne edukacije i vođenja evidencije o kompetencijama advokata po službenoj dužnosti**

Obuka i poboljšanje vještina advokata po službenoj dužnosti predstavljaju važan dio reformi cjelokupnog sistema. Advokati koji ne posjeduju dovoljnu stručnost bi mogli da prouzrokuju ozbiljnu štetu O/O licu i značajno ugroze suštinu prava O/O. Cjelokupan sistem izgradnje znanja i kompetencija advokata po službenoj dužnosti bi trebalo da bude odgovornost advokatskih komora u BiH. Komore bi trebalo da organizuju treninge i druge oblike edukacije, koje bi bile obavezne za sve advokate, ali i da vode evidenciju o svim advokatima u tom kontekstu. Ovi spisi treba da imaju precizne podatke o specifičnom znanju i vještinama advokata, iskustvu u posebnim postupcima, kao i jasnu procjenu rezultata ostvarenih tokom edukacija. Obuke bi trebalo da budu specijalizovane, a takođe treba da bude propisan minimum znanja i kompetencija advokata pravilnikom komora. Jedno od mogućih rješenja se ogleda u formiranju posebnog odjeljenja unutar komora, koja bi se bavila osmišljavanjem i realizacijom edukacija advokata po službenoj dužnosti.

3. Preporuke

Kako bi se postigli svi rezultati iz ovog dokumenta, potrebno je sprovesti sljedeće praktične korake:

- ▶ **Uvođenje standarda u ograničenju broja preuzetih odbrana po službenoj dužnosti na godišnjem nivou po advokatu;**
- ▶ **Uvođenje tzv. „sukoba interesa“ u odabiru branioca po službenoj dužnosti, tj. da branilac po punomoći ne može biti i branilac**

po službenoj dužnosti u istom slučaju ukoliko se okrivljeni u toku procesa izjasni da ne može sam plaćati dalju odbranu. Izuzeća bi trebala biti moguća samo u slučajevima kada sud utvrdi da je to u jasnom interesu pravde;

- ▶ **Ažuriranje spiskova advokata po službenoj dužnosti u advokatskim komorama, prateći zauzetost advokata, postignute rezultate, te vještine i znanja;**
- ▶ **Uvođenje kriterijuma za upis advokata na listu odbrana po službenoj dužnosti koji se odnose na njihove specifične kompetencije i znanja, a koji su dokumentovani;**
- ▶ **Uniformne naknade za sve advokate po službenoj dužnosti u cijeloj državi;**
- ▶ **Potpuna odgovornost komora po pitanju obavezne edukacije i vođenja evidencije o advokatima po službenoj dužnosti.**

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