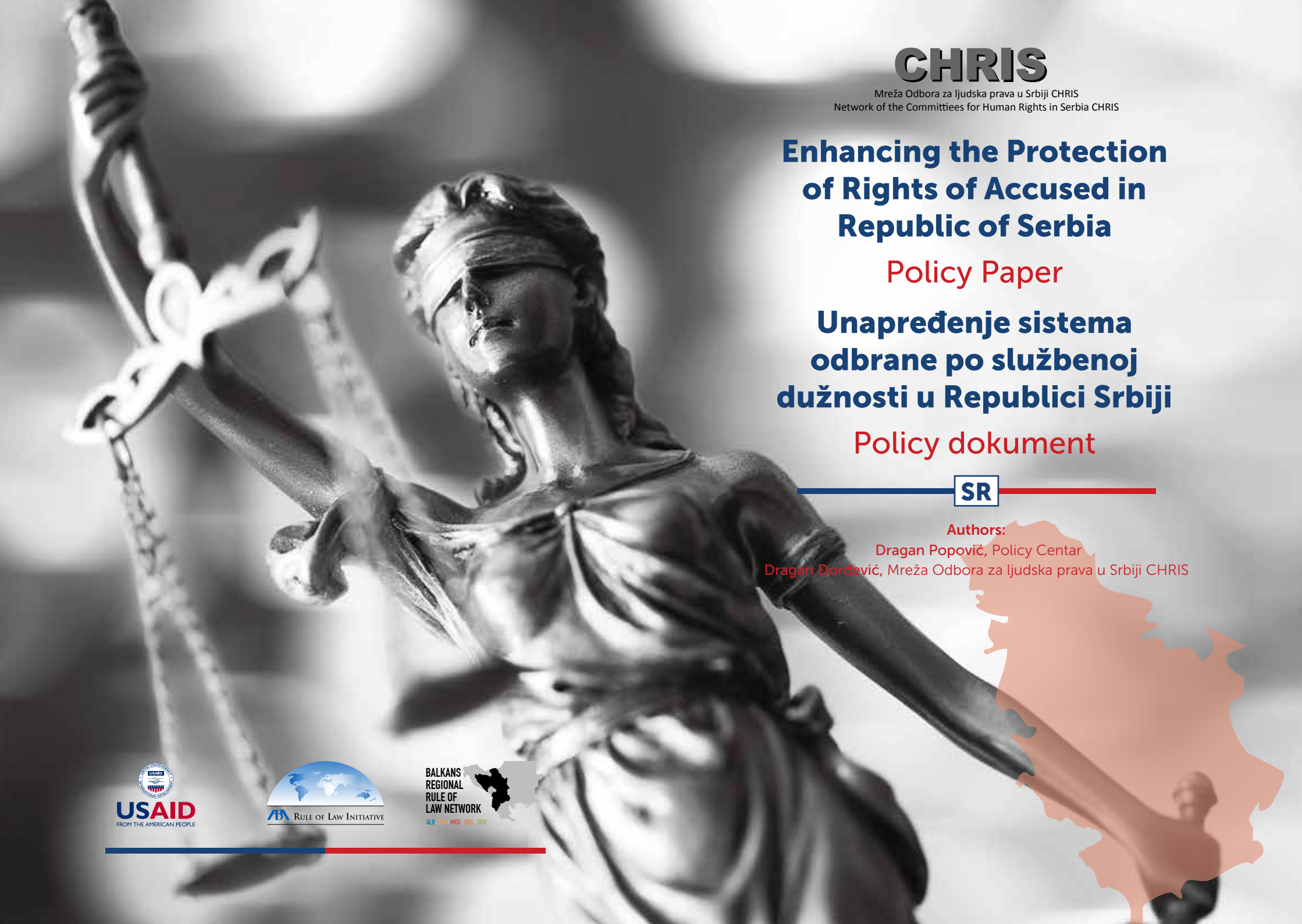

CHRIS

Mreža Odbora za ljudska prava u Srbiji CHRIS
Network of the Committees for Human Rights in Serbia CHRIS

Enhancing the Protection of Rights of Accused in Republic of Serbia

Policy Paper

Unapređenje sistema odbrane po službenoj dužnosti u Republici Srbiji

Policy dokument

SR

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BALKANS REGIONAL RULE OF LAW NETWORK
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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.

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Sadržaj

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).

THE OVERALL RESEARCH
IS AVAILABLE ON CD on page 31

Enhancing the protection of rights of accused in Republic of Serbia

Policy Paper

1. Executive Summary

The Policy Paper has the intention to offer the best possible solution for the reform of the ex-officio defense system in Bosnia and Herzegovina. All the facts and evidence base is taken from the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created by the Helsinki Committee for Human Rights in Republika Srpska in February 2014 under the program "Balkans regional rule of law network (BRRLN)".

The policy recommendations from the document are referring to several key topics identified by the stakeholders in all five countries which are subject of research. These topics are: appointment of ex-officio lawyers, payment to the ex-officio lawyers and competence of the ex-officio lawyers. Each of these topics is important for reform of the whole system and for securing guarantees for people who are accused and need legal support. The Paper proposes solution in accordance with the wide consultation process conducted in Serbia organized by CHRIS network.

The proposed solution requires some legislative changes but far more excessive changes in existing practice in ex-officio defense system in Serbia. Paper also proposes deeper involvement of Bar Chambers and secure better expertise and more efficient procedures for the protection of human rights of people which are in front of the court.

2. Introduction

Research on the effectiveness of the legal protection system of the accused in the 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 region with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)". Pursuance of analysis was used to determine how the establishing of a regional network of defense lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defense. The evidence base for this paper was this Comparative analysis.

The results of performed comparative analysis on the criminal defense advocacy in five countries in the region and the work of the members of the expert work groups, which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio determination and payment of fees to lawyers involved, competence assigned to the lawyers necessary to provide effective defenses by officio to accused persons and possibilities for setting up alternative models in ex officio defense.

In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia free legal assistance is provided to all persons accused of certain crimes that are not able to pay for a lawyer. However, experience so far has shown that all five countries are facing problems of law enforcement in practice, and ensuring adequate access to justice for all citizens. As the most important problems in providing adequate defense ex officio for accused persons is mostly re-

ferred to: the lack of transparency in the appointment of lawyers by ex officio, inadequate compensation for appointed lawyers, as well as their competence in providing defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of research will be the manner of appointment, payment and competency of lawyers, who provide the defense for the accused by ex officio. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right to counsel and adequate 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 important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all five states, and define recommendations for improving the existing defense system of ex officio in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results, and that there are certain problems in the functioning of the defense system of ex officio that significantly impair its efficiency which affects the provision of effective defense to defendants in criminal proceedings.

3. Problem description

Courts in Serbia have been reformed twice in the recent past – the first time in 2010 and the second time in 2013 by amendments to the Law on Court Organization. Although the organization of the court system in Serbia is relatively new, numerous national and international organizations reported that the criteria for the for determining the number and location of the courts was not transparent as well as that files and data could be lost in the case management system during the transfer process.

There were several unsuccessful attempts in order to replace the 2001 Criminal Procedure Code. During the reforming process several different versions of this document were created, but never entered in the force. The new Criminal Procedure Code was implemented in the stages and

brought a number of changes–the largest being prosecutor-led instead of court-led investigation and adversarial instead of inquisitorial main hearings. The role of parties has also changed that now take a more active role during proceedings, conduct investigations, collect evidence, and cross-examine witnesses. In addition, the Criminal Procedure Code was also amending several times in the recent years.

According to the criminal law, the defendant is entitled to be informed in the shortest possible time, and always before the first interrogation, in detail and in a language he understands, about the charges against him, the nature and grounds of the accusation, as well as that everything he says may be used as evidence in proceedings. The defendant is obliged to have a defense counsel in the following situations: from the moment of first interrogation to the final conclusion of proceedings if the defendant is mute, deaf, blind, or otherwise incapable of conducting his own defense; from the moment of first interrogation to the final conclusion of proceedings; if the proceedings concern an offense punishable by a term of imprisonment of eight years or more; from the moment of deprivation of liberty if the suspect or defendant is deprived of liberty or prohibited from leaving his or her home; if the defendant is being tried in absentia or has been removed from the courtroom for disturbing the proceedings; if proceedings for ordering compulsory psychiatric treatment are being conducted; or from the beginning of plea negotiation proceedings. One or several defense counsel may be chosen and authorized with a power of attorney by the defendant or his legal representative.

In the case of mandatory defense, when defense counsel is not chosen, the defendant is left without a defense counsel during the criminal proceedings or defendant does not select another defense counsel, the public prosecutor or the president of the court before which the proceedings are being conducted shall issue a ruling appointing a court appointed defense counsel, according to the order on the list of attorneys provided by the competent Bar Association. The defense counsel who is appointed by the court may seek his recusal only on justifiable grounds. The president of the trial panel, the trial panel or an individual judge, upon a proposal of the public prosecutor or ex officio, decides on motions to relieve the defense counsel of duty when compiling the list of attorneys the Bar Association is required to take into account the fact that the practical or professional work of an attorney in the area of criminal law provides a

foundation for an assumption that the defense will be effective. The list of available defense counsels is posted on the web pages as well as the notice boards of the relevant Bar Association.

If the indigent cannot afford to pay the costs of the defense because of his/her financial status, a defense counsel must be appointed at the defendant's request if the criminal proceedings are being conducted in connection with an offense punishable by a term of imprisonment of three years or more, or if reasons of fairness so demand. As response to the defendant request, the preliminary proceedings judge, president of the trial panel, or individual judge the defense council is appointed by the president of the court before which the proceedings are being conducted according to the list of advocates provided by order on the roster of attorneys provided by the relevant Bar Association. The costs of defense in this case shall be borne from the budget of the court before which the proceedings are being conducted.

The Law on the Legal Aid in Serbia has not been adopted yet. There are no state-organized legal aid agencies currently operating in Serbia, which forces the indigent defendants to turn to lawyers appointed ex officio in cases where defense is mandatory and they cannot pay for it themselves. In order to ensure that indigent defendants are provided with defense counsel, the Bar Association cooperates with relevant institutional body by providing the courts with a list of defense counsels who are willing to be appointed for the ex officio defense. However, professional practice experience indicate that judges and prosecutors are hesitant to appoint counsel for indigent except in cases where it is required by law, primarily in cases where the defendant is facing a sentence of eight years or more and is deprived of liberty.

Lawyers appointed ex-officio by the courts are generally paid 50% of their usual tariff. Bearing in mind that ex officio defense requires large budget expenditure the courts have a significant backlog of debt owed to lawyers who had represented indigent defendants. This situation could affect quality of representation in terms that lawyer could not be in position to provide indigent defendants with the same quality of defense as the defendant who has financial resources to pay for defense.

There are no clearly defined rules of procedure that would regulate the assignment of ex officio defense attorneys, nor the criteria that lawyers must

meet in order to be considered capable of providing high-quality and efficient defense to their clients. Thus, the method of assignment of ex officio defense attorneys leads to a very serious problem in practice. Namely, the under-regulated procedure for assignment of ex officio attorneys makes room for different types of manipulation, as well as numerous opportunities for corrupt behavior, since the assignment of ex officio attorneys is not performed evenly and fairly. In practice, some lawyers benefit from the insufficiently defined rules and procedures for assignment of ex officio defense attorneys, because this allows them to keep "privileges" acquired in the process of assignment of the ex officio defense attorneys. On the other hand, in practice, complaints of detained/accused people as to the quality of the performance of ex officio defense attorneys, who try to convince them very often to confess the criminal act in order to complete the procedure as soon as possible, have become very frequent.

One of the many problems in the assignment of ex officio defense attorneys is the fact that the assignment of lawyers from a unique list is not centralized, but they are also assigned by the police, Prosecutor's office and the Court[1]. Earlier, there was a phone service in the premises of the Bar Association of Belgrade. This service would respond to the public authorities' requests for ex officio defense attorneys 24 hours a day. Although existence of this service provided the respect of the list order in assignment of ex officio defense attorneys, a certain number of prosecutors and Court Presidents refused this way of functioning of ex officio defense attorneys. As an explanation of the negative attitude towards this way of assignment of defense attorneys they specified that neither Criminal Procedure Act nor the by-laws obligate them to act this way.

In cases in which the ex officio defense attorneys are assigned ad-hoc in insufficiently transparent procedures, it can be expected that ex officio defense attorneys will be assigned "based on their friendship" with "influential people". This can be concluded from the experience and practice where only several names appear in cases of assigned ex officio defense attorneys, whilst on the other hand, there are many lawyers with

1 For example, there are 4 courts-of-law, 4 prosecutor's offices, 14 police stations and 6 deparments of the Criminal Police Administration, City Police Administration, in the territory of Belgrade; and each of these state institutions independently appoints lawyers following the unique list, with no possibility to see the appointments of other institutions, i.e. with no possibility to follow the order and witout any control.

significant practice experience in the field of the Criminal Law, who have never been invited to defend someone ex officio. Equally, the number of young lawyers whose profession is advocacy is increasing. They think that before they become lawyers, they have to spend some time in court or prosecutor's office in order to make some acquaintances and connections necessary for a successful practice of law. Consequently, young lawyers are deprived of possibility to participate equally in the assignment of ex officio defense lawyers. This often forces them to spend part of their career outside the advocacy, to acquire certain knowledge and experience in order to be competitive to other colleagues.

In all criminal proceedings, including those for the most serious crimes, ex officio defense attorneys are entitled to 50% of the amount fixed by the attorney tariff. Accordingly, it is disputable to what extent the lawyers are motivated to work, especially if one adds the irregular payment of financial resources to lawyers by the state. Afore-mentioned factors can indirectly affect the quality of defense, and therefore earning the rights to a fair trial and equality of all citizens before the law.

Due to the lack of funds for payments of defense services, a number of lawyers claim significant sums of money from the state, on the basis of provided ex officio defense. Also, these lawyers often face the problem of debt repayment to the state for taxes and contributions. As a solution to the existing problem, it is proposed to carry out mutual compensation claims. However, it was not possible to solve the problem in this way, because the settlement of claims with the state is allowed only in cases where the state claims the taxpayer the amount twice as high as the amount of the state's debt to the taxpayer.[2] Also, another circumstance which de-motivates lawyers to accept ex officio defense is the fact that their claims from the state, based on ex officio defense, are not interest-bearing, while the interests on the debts lawyers have towards the state, based on tax claims, are calculated and forcibly achieved.

As one of the possible solutions to the problem, representatives of the Ministry of Justice of Serbia proposed the introduction of "state lawyers" who would, instead of 50% reduced tariffs for the provision of official defense receive a fixed monthly compensation / salary. According to this proposal, the Ministry of Justice of Serbia would determine the criteria for

2 Rules of the Ministry of Finance of Serbia 2013

the selection and number of required lawyers, according to the number of persons who may be in need of ex officio defense. However, this concept of "nationalization of advocacy" did not meet with the approval of the majority of lawyers who believe that advocacy, as an independent profession, is incompatible by its nature with the civil service.

The Bar Association is, when drawing up a list, obliged to take into account the fact that practical and professional work of lawyers in criminal law provides grounds for assuming that the defense will be effective. On the basis of this provision, the legal obligation of the Bar Association is to take the necessary action to ensure that the list of ex officio attorneys is made of the attorneys on the basis of the entire practical or professional work in the field of criminal law and it can be assumed that the offered defense is professional and effective. Also, lawyers are obliged to improve their knowledge and skills on permanent basis.

Having in mind the prescribed regulations we wonder on the basis of which criteria and with which mechanisms is it possible to classify lawyers into those who can demonstrate effective defense and those who are not able to do so. If the only criterion for providing an effective defense is internship carried out in the legal profession, this does not mean that the length of the practice in the legal profession automatically means experience in a particular area of law. Practical experience suggests that on the list of defense attorneys ex officio there is a large number of lawyers with no experience in criminal proceedings, and their official defense mainly serves as a source for generating additional revenue. Also, the fact that the list includes people with significant experience in the field of criminal law cannot be the basis for the assumption that the defense will be effective.

Legal provisions prescribe that the Bar Association shall establish a system that will provide opportunities to all, if they want, to educate themselves for providing effective defense if they receive appropriate training in accordance with the obligations of the professional training and program which Bar Association provides. So, the Bar Association is obliged to undertake certain activities in order to check whether the list of assigned defense attorneys ex officio contains lawyers whose practical/professional work in the field of criminal law gives reason for the assumption that the given defense will be effective. The Bar Association is obliged to organize training in order to enable lawyers to provide effective defense. In accordance to that, it is necessary to provide continuous education of lawyers

in order for them to be able to provide effective defense, as well as opportunities to check their experience based on the determined criteria. In this way lawyers who in general do not deal with the criminal law could not be found on the lists with defense attorneys ex officio, while at the same time this would give all lawyers, if they want, the opportunity to educate themselves for providing effective defense.

Practical experience indicates that a large number of procedures end at the first hearing, as the defendants generally admit criminal offense charged against them advised by/with the consent of the assigned defense attorneys, even when there is no other evidence of the defendant committing the criminal offense. In accordance to that, there are a large number of judgments issued solely on the basis of the defendants admitting the offense, which can lead to the assumption that the defense attorneys are associates of the proceeding or that they participate in the "repair" of the Justice Statistics.

4. Policy Proposal

The most obvious issue in the matter of protection of the rights of accused is appointment of ex-officio lawyers. The existing practice allows significant level of corruption and seriously jeopardizes the rights of accused. The issue requires public debate and full awareness of all stakeholders. There is no simple solution for the complex issue of ex-officio defense system in Serbia. The issue requires whole set of measures and changes of practice which will be conduct by all relevant stakeholders in the system. Official procedures are not clear and allow significant space for misuses and corruption. Even though Lawyers' chamber plays important role in Serbian legal system and showed the strength in several occasions its position in this matter is still not on adequate level. Without strong and independent Lawyers' chamber it is hard to set up the whole system and provide necessary protection of human rights of defendants.

The most important part of the solution should be strengthening the role of Lawyers' chamber. On the first place, they need to update the list of ex-officio lawyers on more frequent base (several times per year). Chambers should be integral part of the process and their role is very important in securing the just system of appointment. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country.

The list of the Lawyers' chamber should be for the whole city or region covered by the chamber. The existing solution allows courts, police and prosecutors to use the list without any criteria and without track records. That provides situation that some of the lawyers have more than 100 cases per month while others have none. The police and prosecutors are fully aware that some of the lawyers are more willing to cooperate with them and they are often chosen to be ex-officio defenders.

The chambers should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. The Lawyers' chamber in Serbia has already started with the implementation of call center which will receive all the requests from the police, prosecutors and courts. On this way, the Chamber could control at least frequency of the ex-officio lawyers and establish if some of the institutions choose more often specific names from the lawyers' list.

In order to improve this area, it is also necessary to change the implementation of lawyers' fees policy. There are a lot of issues and misconducts in existing practice. The majority of these issues could be solved with stricter implementation of the law. The tariff should be very carefully considered. The existing practice which includes payment after the whole process is unacceptable and unfair, bearing in mind the length of the court proceedings in Serbia. Payments could be provided several times during the proceedings. It is unacceptable that state postponed the payments to the lawyers without any kind of interest or other way of compensation.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly

jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chambers in Serbia. Chambers should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the Chambers.

5. Policy Recommendations

In order to achieve all the results from the paper, following practical steps should be done:

- Update of the ex-officio lawyers' lists in Chambers;
- To initiate signing of a Memorandum on Cooperation with the High Judicial Council and State Prosecutorial Council on the new manner of appointment of ex-officio lawyers;
- To create conditions for legally binding agreements with the High Judicial Council, Prosecutor's Office and the police;
- To install a software which could track the engagement of all ex-officio lawyers;
- Installing the call center in the Chamber which could track all the calls from the state institutions;
- Review of the tariff for all legal procedures;
- To change the practices of paying ex-officio lawyers so to consider involvement of interest or any other form of compensation to lawyers where the payment is delayed by the state;
- Full responsibility of lawyers' chambers for permanent education and monitoring of the work of ex-officio lawyers;
- Once the conditions have been created, to initiate the amendments of the Criminal Procedure Code on the basis of the monitoring and the analysis of performance of the new system of appointment of ex-officio lawyers.

Unapređenje sistema odbrane po službenoj dužnosti u Republici Srbiji

Policy dokument

1. Rezime

Cilj *Policy dokumenta* je da ponudi najbolje moguće rešenje za reformu sistema odbrane po službenoj dužnosti u Republici Srbiji. Sve činjenice i baza dokaza uzete su iz dokumenta: „Unapređenje sistema odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji" koju je sačinila Balkanska regionalna mreža za vladavinu prava (BRRLN).

Preporuke iz dokumenta se odnose na nekoliko ključnih tema koje su prepoznale zainteresovane strane u svih pet zemalja koje su predmet istraživanja. Ove teme su: imenovanje advokata po službenoj dužnosti, plaćanje advokata po službenoj dužnosti i kompetencije advokata po službenoj dužnosti. Svaka od ovih tema je važna za reformu celokupnog sistema i za obezbeđivanje garancija ljudima koji su optuženi i trebaju pravnu pomoć. Dokument predlaže rešenje u skladu sa širokim konsultativnim procesom koji je sproveden u Srbiji u organizaciji Mreže CHRIS.

Predloženo rešenje zahteva neke zakonodavne promene ali daleko obimnije promene u postojećoj praksi sistema odbrane po službenoj dužnosti u Srbiji. Dokument takođe predlaže dublje angažovanje advokatskih komora i obezbeđivanje veće stručnosti i efikasnijih procedura u zaštiti ljudskih prava ljudi pred sudom.

2. Uvod

Istraživanje o delotvornosti sistema pravne zaštite optuženih u pet zemalja u regionu sprovedeno je u okviru projekta: "Unapređenje sistema odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji". Ovaj projekat je sproveo Helsinški odbor za ljudska prava u Republici Srpskoj u saradnji sa partnerskim organizacijama u regionu sa ciljem da doprinese jačanju sistema pravne zaštite optuženih u pet zemalja u regionu. Polazna osnova za realizaciju ovog istraživanja je dokument: „Uporedna analiza krivične odbrane u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji" koji je sačinjen februara 2014. godine pod programom: Balkanska regionalna mreža za vladavinu prava (BRRLN). Analiza je bila izvedena da bi se utvrdilo kako bi formiranje regionalne mreže krivičnih advokata moglo da doprinese uspostavljanju snažne, nezavisne i delotvorne advokature u krivičnoj odbrani. Baza dokaza za ovaj dokument je *Uporedna analiza*.

Rezultati sprovedene uporedne analize o krivičnoj odbrani u pet zemalja u regionu i radu članova stručnih radnih grupa, koje su razmatrale problem u funkcionisanju krivične odbrane, pokazali su da se svih pet zemalja u regionu suočavaju sa ozbiljnim izazovima u obezbeđivanju kvalitetnog pristupa pravdi za sve građane. U skladu sa preporukama gore pomenute analize, nužno je prepoznati najvažnija pitanja koja utiču na uspostavljanje i rad transparentnog sistema odbrane po službenoj dužnosti - naročito u oblastima utvrđivanja dodele advokata po službenoj dužnosti i plaćanja honorara angažovanim advokatima, kompetencija koje se pripisuju advokatima koje su nužne u pružanju delotvorne odbrane po službenoj dužnosti optuženim licima i mogućnostima za uspostavljanje alternativnih modela u odbrani po službenoj dužnosti.

U skladu sa odredbama krivičnog zakona Albanije, Bosne i Hercegovine, Kosova, Makedonije i Srbije, obezbeđuje se besplatna pravna pomoć svim licima koja su optužena za određeno krivično delo koja ne mogu da plate advokata. Ipak, dosadašnja iskustva su pokazala da se svih pet zemalja suočava sa problemima sprovođenja zakona u praksi, i obezbeđivanja odgovorajućeg pristupa pravdi svim građanima. Najvažniji problemi u obezbeđivanju odgovarajuće odbrane po službenoj dužnosti optuženima većinom se odnose na: nedostatak transparentnosti kod imenovanja advokata po službenoj dužnosti, kao i njihove kompetencije u pružanju odbrane optuženom.

Predmet istraživanja je vrednovanje postojećeg zakonodavstva i prakse u pružanju odbrane po službenoj dužnosti u Albaniji, Bosni i Hercegovini, Kosovu, Makedoniji i Srbiji, pozivajući se na postojeće međunarodne standarde i prakse u ovoj oblasti. Stoga će fokus istraživanja biti način imenovanja, plaćanja i kompetencija advokata, koji pružaju odbranu optuženima po službenoj dužnosti. Imajući u vidu da se članovi manjinskih/ugroženih grupa često susreću sa problemima u ostvarivanju svojih prava na advokata i odgovarajuće zastupanje u krivičnim slučajevima, ovim pitanjima će biti posvećen poseban deo istraživanja.

Cilj istraživanja je utvrditi koje su najvažnije prepreke i izazovi u uspostavljanju transparentnog i efikasnog sistema odbrane po službenoj dužnosti u skladu sa domaćim i međunarodnim standardima u svih pet zemalja, i definisati preporuke za poboljšanje postojećeg sistema odbrane po službenoj dužnosti u regionu, da bi se poboljšao kvalitet predstavljanja optuženih. Osnovna premisa je da sprovedene reforme u oblasti krivičnog prava u svih pet zemalja u regionu nisu postigle očekivane rezultate i da postoje određeni problemi u funkcionisanju sistema odbrane po službenoj dužnosti koji u značajnoj meri pogoršavaju njegovu efikasnost što utiče na obezbeđivanje delotvorne odbrane okrivljenih u krivičnim postupcima.

3. Opis problema

Sudovi u Srbiji su bili dva puta reformisani u skorijoj prošlosti, prvi put 2010. godine a drugi put 2013. godine dopunama i izmenama Zakona o uređenju sudova. Iako je uređenje sudskog sistema u Srbiji relativno novo, brojne domaće i međunarodne organizacije su izveštavale da kriterijumi za određivanje broja i mesta sudova nisu transparentni kao i da se dosijei i podaci mogu izgubiti u sistemu upravljanja predmetima u toku procesa prenosa.

Bilo je nekoliko neuspešnih pokušaja zamene Zakonika o krivičnom postupku iz 2001. Za vreme procesa reforme bilo je sastavljeno nekoliko različitih verzija tog dokumenta, ali nikad nisu stupile na snagu. Novi Zakonik o krivičnom postupku je bio sprovođen u fazama i doneo je više promena, najveća je da istragu vodi tužilaštvo a ne sud a glavna rasprava je akuzatorna a ne inkvizitorna. Uloga strana se takođe promenila te sada imaju aktivniju ulogu u toku postupka, sprovode istrage, sakupljaju doka-

ze, i unakrsno ispituju svedoke. Pored toga, Zakonik o krivičnom postupku je takođe bio menjan i dopunjavan nekoliko puta poslednjih godina.

Prema krivičnom zakonu, okrivljeni ima pravo da bude obavešten u najkraćem mogućem roku, i uvek pre prvog saslušanja, detaljno i na jeziku koga razume, o optužbama kojima se tereti, prirodi i osnovi optužbe, kao i da sve što kaže može da se koristi kao dokaz u postupku. Okrivljeni je dužan da ima branioca u sledećim situacijama: od trenutka prvog saslušanja do pravosnažnog okončanja postupka ako je okrivljeni nem, gluv, slep, ili na drugi način nesposoban da se sam uspešno brani; od trenutka prvog saslušanja do pravosnažnog okončanja postupka; ako se postupak vodi zbog krivičnog dela za koje je propisana kazna zatvora od osam godina ili teža kazna; od trenutka lišenja slobode ako je okrivljeni lišen slobode ili mu je zabranjeno da napušta svoj stan; ako se okrivljenom sudi u odsustvu ili je zbog narušavanja reda udaljen iz sudnice; ako se protiv njega vodi postupak za izricanje mere bezbednosti obaveznog psihijatrijskog lečenja; ili od početka pregovora sa javnim tužiocem. Jednog ili više branilaca može izabrati i punomoćjem ovlastiti okrivljeni sam, ili njegov zakonski zastupnik.

U slučaju obavezne odbrane, kada nije izabran branilac, okrivljeni je ostao bez branioca u toku krivičnog postupka ili okrivljeni nije izabrao drugog branioca, državni tužilac ili predsednik suda pred kojim se vodi postupak mu za dalji tok postupka rešenjem postavlja branioca po službenoj dužnosti, po redosledu sa spiska advokata koji dostavlja nadležna advokatska komora. Branilac postavljen po službenoj dužnosti može tražiti da bude razrešen samo iz opravdanih razloga. Predsednik sudskog veća, sudsko veće ili sudija pojedinac, po predlogu državnog tužioca ili po službenoj dužnosti, odlučuje o razrešenju branioca od dužnosti kada se od advokatske komore traži da prilikom sastavljanja spiska vodi računa o tome da praktični ili stručni rad advokata u oblasti krivičnog prava daje osnov za pretpostavku da će odbrana biti delotvorna. Spisak branilaca koji su na raspolaganju objavljuje se na internet stranici i oglasnoj tabli nadležne advokatske komore.

Ako siromašni ne može da plati troškove branioca zbog svog imovinskog stanja, postaviće se na njegov zahtev branilac ako se krivični postupak vodi za krivično delo za koje se može izreći kazna zatvora preko tri godine ili ako to nalažu razlozi pravičnosti. O zahtevu okrivljenog odlučuje sudija za prethodni postupak, predsednik veća ili sudija pojedinac, a branioca

rešenjem postavlja predsednik suda pred kojim se vodi postupak po redosledu sa spiska advokata koji dostavlja nadležna advokatska komora. U tom slučaju, troškovi odbrane padaju na teret budžetskih sredstava suda pred kojim se vodi postupak.

Zakon o pravnoj pomoći u Srbiji još uvek nije usvojen. Ne postoje agencije za pravnu pomoć u organizaciji države koje trenutno rade u Srbiji, čime su siromašni okrivljeni primorani da se okrenu advokatima koji su imenovani po službenoj dužnosti kada je odbrana obavezna i ne mogu sami da je plate. Da bi osigurali da je siromašnim okrivljenima obezbeđen branilac, advokatska komora sarađuje sa relevantnim institucionalnim organom time što dostavlja sudovima spisak branilaca koji su voljni da budu imenovani za odbranu po službenoj dužnosti. Ipak, iskustvo profesionalne prakse ukazuje da sudije i tužioci oklevaju da imenuju branioca siromašnim okrivljenima osim u slučajevima kada to zakon zahteva, prvenstveno u slučajevima kada je okrivljeni suočen sa kaznom od osam ili više godina i lišen je slobode.

Advokati koje imenuju sudovi po službenoj dužnosti generalno su plaćeni 50% svoje uobičajene tarife. Imajući u vidu da odbrana po službenoj dužnosti zahteva velike budžetske rashode, sudovi imaju značajna zaostala dugovanja advokatima koji su zastupali siromašne okrivljene. Ova situacija bi mogla da utiče na kvalitet predstavljanja u smislu da advokat ne bi mogao da bude u poziciji da pruže isti kvalitet odbrane siromašnim okrivljenim, kao onima koji su ih izabrali putem punomoći.

Prilikom imenovanja branilaca po službenoj dužnosti ne postoje jasno definisana pravila procedure koje bi uređivale ovu oblast, niti kriterijumi koje advokati moraju ispuniti kako bi se smatrali sposobnim da pruže kvalitetnu i efikasnu odbranu svojim klijentima. Dakle, način imenovanja branilaca po službenoj dužnosti dovodi do veoma ozbiljnih problema u praksi. Naime, nedovoljno uređena procedura imenovanja branilaca po službenoj dužnosti otvara prostor za različite vrste manipulacija, kao i brojne mogućnosti koruptivnog ponašanja, jer se dodjeljivanje branilaca ne vrši na ravnomjeran i pravičan način. U praksi, pojedinim advokatima ide u prilog nedovoljna definisanost pravila i procedura za imenovanje branilaca po službenoj dužnosti, jer im to omogućava zadržavanje "stečenih privilegija" prilikom dodjeljivanja odbrane po službenoj dužnosti. Sa druge strane, u praksi su postale sve češće pritužbe pritvorenih/optuženih osoba na kvalitet rada dodjeljenih branilaca, koji veoma često pokušavaju

da ih ubjede da priznaju krivično djelo za koje se terete, kako bi se procedura okončala što ranije.

Jedan od brojnih problema u dodjeljivanju odbrane po službenoj dužnosti jeste i to što određivanje advokata sa jedinstvene liste nije centralizovano, već ih paralelno određuju i policija i tužilastvo i sud.[3] Svojevremeno je u prostorijama advokatske komore Beograda postojala služba koja je 24 sata odgovarala na telefonske zahtjeve državnih organa za advokatima po službenoj dužnosti. Iako je postojanje ovog servisa obezbjeđivalo poštovanje redoslijeda protokola postavljanja branilaca po službenoj dužnosti, određeni broj tužilaca i predsjednika sudova odbio je ovakav način funkcionisanja odbrane po službenoj dužnosti. Kao obrazloženje negativnog stava prema ovakvom načinu dodjeljivanja branilaca uglavnom su navodili da ih Zakon o krivičnom postupku niti podzakonski akti ne obavezuju na ovakav način postupanja.

U slučajevima kada se odbrane po službenoj dužnosti dodjelju ad-hoc po nedovoljno transparentnoj proceduri, može se očekivati da se odbrane po službenoj dužnosti dojeljuju po "prijateljskoj osnovi", odnosno principu "ko koga poznaje". Na ovakvu vrstu zaključaka upućuju iskustva iz prakse, prema kojima se svega nekoliko imena advokata pojavljuje u slučajevima dodjeljenih odbrana po službenoj dužnosti, dok s druge strane postoje brojni advokati sa značajnim praktičnim iskustvom u oblasti krivičnog prava, koji niti jednom nisu bili pozvani da zastupaju okrivljenu osobu po službenoj dužnosti. Isto tako, sve je veći broj mlađih advokata kojima je advokatura osnovni životni poziv, jer smatraju da, prije nego postanu advokati, moraju provesti izvjesno vrijeme u sudu ili tužilastvu kako bi stekli određena poznanstva i veze, neophodne za uspješno bavljenje advokaturom. Shodno tome, mladi advokati su uskraćeni za mogućnost ravnopravnog učešća u dodjeljivanju službenih odbrana , što ih često primorava da određeni dio karijere provedu izvan advokature, steknu određena znanja i iskustva, kako bi bili konkurentni ostalim kolegama.

U svim krivičnim postupcima, pa i onim za najteža krivična djela, braniocima po službenoj dužnosti pripada 50% iznosa utvrđenog advokatskom

3 Na primjer, na teritoriji Beograda postoji 4 suda, 4 tužilaštva, 14 policijskih stanica i 6 odeljenja Uprave kriminalističke policije GSUP-a i svaki od ovih državnih organa samostalno postavlja advokate po redosledu sa jedinstvene liste, bez mogućnosti uvida u postavljanje od strane drugog državnog organa, što znači-bez mogućnosti poštovanja redosleda i bez kontrole.

tarifom. Shodno tome, postavlja se pitanje u kojoj mjeri su advokati motivisani za rad, naročito ako se tome doda neredovnost isplate finasijskim sredstava advokatima od strane države. Navedeni faktori posredno mogu uticati na kvalitet pružene odbrane po službenoj dužnosti, a samim tim i na ostvarivanje prava na pravično suđenje i jednakost svih građana pred zakonom.

Usled nedostatka finansijskih sredstava za isplate za pružene odbrane, veliki broj advokata potražuje od države značajne sume novca po osnovu pruženih odbrana po službenodj dužnosti. Isto tako, ovi advokati često se suočavaju sa problemom isplate dugovanja prema državi po osnovu poreza i doprinosa. Kao jedno od mogućih rješenje postojećeg problema, predlagano je da se izvrši kompenzacija uzajamnih potraživanja. Međutim, nije bilo moguće riješiti problem na ovakav način, jer je prebijanje potraživanja sa državom dozvoljeno samo u slučaju kada država potražuje od poreskog obveznika dvostruko veći iznos od iznosa njenog duga prema poreskom obvezniku.[4] Isto tako, još jedna od okolnosti koja demotiviše advokate da prihvate odbrane po službenoj dužnosti jeste činjenica da se na potraživanje advokata od države po osnovu službenih odbrana ne obračunavaju kamate, a na dugovanja advokata prema državi po osnovu poreza – kamate se obračunavaju i prinudno izvršavaju.

Kao jedno od mogućih rješenja za postojeći problem, predstavnici Ministarstva pravde Srbije predlagali su uvođenje „državnih advokata", koji bi umjesto umanjene tarife za 50% za pružanje službene odbrane primali fiksnu mjesečnu naknadu/platu. Prema ovom prijedlogu, kriterijume za odabir i broj potrebnih advokata bi određivalo Ministarstvo pravde Srbije, prema procjeni broja osoba koje bi mogle imati potrebu za odbranom po službenoj dužnosti. Međutim, ovaj koncept „podržavanja advokature" nije naišao na odobravanje većine advokata, koji smatraju da je advokatura, kao samostalna i nezavisna profesija, po svojoj prirodi nespojiva sa državnom službom.

Advokatska komora je obavezna, kada sastavlja spisak, da uzme u obzir činjenicu da praktični i profesionalni rad advokata u krivičnom pravu čini osnovu pretpostavke da će odbrana biti delotvorna. Na osnovu ove odredbe, pravna obaveza advokatske komore je da preduzme neophodne radnje da osigura da je spisak advokata po službenoj dužnosti sastavljen

4 Pravilnik Ministrasva finansija Srbije iz 2013. godine.

od advokata na osnovu celokupnog praktičnog i profesionalnog rada u oblasti krivičnog prava i da se može pretpostaviti da je ponuđena odbrana profesionalna i delotvorna. Takođe su advokati dužni da stalno unapređuju svoja znanja i veštine.

Imajući u vidu propisane propise, pitamo se na osnovu kojih kriterijuma i sa kojim mehanizmima je moguće razvrstati advokate u one koji mogu da prikažu delotvornu odbranu i one koji to ne mogu. Ako je jedini kriterijum za pružanje delotvorne odbrane staž proveden u pravnoj struci, to ne znači da dužina prakse u pravnoj struci automatski znači iskustvo u određenoj oblasti prava. Praktično iskustvo sugeriše da na spisku branilaca po službenoj dužnosti postoji veliki broj advokata bez iskustva u krivičnim postupcima, a njihova službena odbrana uglavnom služi kao izvor generisanja dodatnih prihoda. Takođe, činjenica da su spiskom obuhvaćeni ljudi sa značajnim iskustvom u oblasti krivičnog prava ne može da bude osnova pretpostavke da će odbrana biti delotvorna.

Pravne odredbe propisuju da će advokatska komora uspostaviti sistem koji će svima dati priliku, ako žele, da se obrazuju za pružanje delotvorne odbrane ako prime odgovarajuće obuke u skladu sa obavezama stručne obuke i programa koje obezbeđuje advokatska komora. Tako je advokatska komora dužna da preduzme određene aktivnosti da bi proverila da li spisak dodeljenih branilaca po službenoj dužnosti sadrži advokate čiji praktični/profesionalni rad u oblasti krivičnog prava obezbeđuje osnovu za pretpostavku da će data odbrana biti delotvorna. Advokatska komora je dužna da organizuje obuku da bi omogućila advokatima pružanje delotvorne odbrane. U skladu sa tim, neophodno je advokatima obezbeđivati stalnu obuku da bi se osposobili za pružanje delotvorne odbrane, kao i prilike da provere svoje iskustvo zasnovano na određenim kriterijumima. Na taj način advokati koji se generalno ne bave krivičnim pravom ne bi se mogli naći na spiskovima branilaca po službenoj dužnosti, dok bi istovremeno ovo svim advokatima, ako žele, dalo priliku da se obrazuju za pružanje delotvorne odbrane.

Praktično iskustvo ukazuje da se veliki broj procedura okončava na prvom ročištu, pošto okrivljeni uglavnom priznaju krivično delo za koje su optuženi po savetu/uz saglasnost dodeljenih branilaca, čak kada ne postoji drugi dokaz da je okrivljeni počinio krivično delo. U skladu sa tim, postoji veliki broj presuda koje su donete isključivo na osnovu okrivljenih

koji su priznali delo, što može da navede na pretpostavku da su branioci saradnici postupka ili da učestvuju u „popravci“ pravosudne statistike.

4. Predlog za poboljšanje

Najočigledniji problem po pitanju zaštite prava optuženog je imenovanje advokata po službenoj dužnosti. Postojeća praksa dozvoljava značajan nivo korupcije i ozbiljno ugrožava prava optuženog. Ovaj problem zahteva javnu raspravu i da sve zainteresovane strane imaju punu svest o tome. Ne postoji jednostavno rešenje za složeni problem sistema odbrane po službenoj dužnosti u Srbiji. Ovo pitanje zahteva celokupni skup mera i izmena u praksi koju će izvoditi sve bitne zainteresovane strane u sistemu. Službene procedure nisu jasne i dozvoljavaju postojanje značajnog prostora za zloupotrebe i korupciju. Čak i da advokatska komora igra značajnu ulogu u srpskom pravnom sistemu i da je pokazala snagu u nekoliko prilika, njena pozicija u ovoj stvari nije još uvek na odgovarajućem nivou. Bez snažne i nezavisne advokatske komore teško je postaviti celokupni sistem i pružiti nužnu zaštitu ljudskih prava okrivljenih.

Najvažniji deo rešenja bi bilo jačanje uloge advokatske komore. Na prvom mestu, treba da češće ažuriraju spisak advokata po službenoj dužnosti (više puta godišnje). Komore bi trebalo da budu sastavni deo ovog procesa i njihova je uloga veoma važna u obezbeđivanju pravednog sistema imenovanja. Sistem koji obezbeđuje pravično postupanje advokata nije važno samo za same advokate već i za prava optuženog. Optuženi treba da ima mogućnost da ga pred sudom zastupaju advokati koji su izabrani u pravičnom procesu a ne na osnovu korupcije. Korumpirani sistem proizvodi niži nivo kvaliteta i ozbiljno ugrožava prava lica koja su deo sudskog postupka. Takođe uništava ceo sistem vladavine prava i zaštite ljudskih prava u zemlji.

Spisak advokatske komore treba da bude za ceo grad ili region koji komora pokriva. Postojeće rešenje dozvoljava da sudovi, policija i tužilaštva koriste spisak bez ikakvih kriterijuma i bez evidencije. To dovodi do situacije u kojoj neki advokati imaju preko 100 slučajeva mesečno dok drugi nijedan. Policija i tužilaštva su u potpunosti svesni da su neki advokati voljniji da sarađuju sa njima i često ih biraju da budu branioci po službenoj dužnosti.

Komore treba da instaliraju softver koji bi evidentirao sve advokate po službenoj dužnosti, uključujući brojeve slučajeva, dotadašnji učinak, uspešnost i sve ostale bitne podatke. Softver bi mogao da obezbeđuje nasumičnost u imenovanju advokata. Precizni podaci u softveru pružaju priliku da svi okrivljeni imaju puni pregled mogućih advokata po službenoj dužnosti i da slobodno izaberu na osnovu jasnih dokaza rezultata. Advokatska komora u Srbiji je već počela sa uvođenjem pozivnih centara koji će primati sve zahteve od policije, tužilaštava i sudova. Na taj način, komora bi mogla da makar kontroliše učestalnost advokata po službenoj dužnosti i da ustanovi ako neke ustanove češće biraju određena imena sa spiska advokata.

Da bi se ova oblast unapredila, nužno je i promeniti sprovođenje politike advokatskih honorara. Postoji mnogo problema i protivpravnog ponašanja u postojećoj praksi. Većina ovih problema bi se mogla rešavati strožim sprovođenjem zakona. Tarifu treba uzimati u obzir vrlo pažljivo. Postojeća praksa koja uključuje plaćanje posle celokupnog procesa nije prihvatljiva i nepraktična je, imajući u vidu dužinu sudskih procesa u Srbiji. Plaćanje bi moglo da se vrši nekoliko puta u toku postupka. Neprihvatljivo je da država odlaže plaćanja advokatima bez ikakve vrste kamate ili drugog načina naknade.

Obuka i unapređenje veština za advokate po službenoj dužnosti jesu važan deo reforme celog sistema. Advokati sa nedostatkom kapaciteta bi mogli da nanesu ozbiljne štete optuženom i značajno ugroze suštinu prava optuženog. Celi sistem izgradnje kapaciteta za advokate po službenoj dužnosti treba da bude odgovornost advokatskih komora u Srbiji. Komore treba da organizuju obuke i druge oblike obrazovanja, ali i da vode evidenciju o svim advokatima. Ova evidencija zahteva precizne podatke o određenim znanjima i veštinama advokata, iskustvu u posebnim postupcima, kao i jasne rezultate vrednovanja za sve učesnike u procesu obrazovanja. Obuke treba da budu specijalizovanije i pravilnicima komora treba da se propiše minimum kapaciteta advokata.

5. Preporuke

Da bi se postigli svi rezultati iz ovog dokumenta treba učiniti sledeće praktične korake:

- ažurirati spisak advokata po službenoj dužnosti u komorama;
- inicirati potpisivanje Memoranduma o saradnji sa Visokom savetom sudstva i Visokim savetom tužilaštva o novom načinu izbora advokata po službenoj dužnosti;
- stvoriti pretpostavke za zakonski obavezujuće ugovore sa Visokim savetom sudstva, tužilaštvom i policijom;
- instalirati softver koji bi mogao da prati angažovanje svih advokata po službenoj dužnosti;
- instalirati call centar u komori koji bi mogao da prati sve pozive iz državnih ustanova;
- obezbediti permanentni proces monitoringa i analize rada call centra;
- prikaz tarifa za sve zakonske postupke;
- promeniti prakse plaćanja advokatima po službenoj dužnosti koja bi mogla da sagleda i uključivanje kamate ili drugog oblika naknade advokatima u slučajevima kašnjenja isplate od strane države;
- puna odgovornost Advokatskih komora za obavezujuću i konitiuniranu obuku i monitoring rada advokata po službenoj dužnosti kada se stvore pretpostavke inicirati izmene Zakonika o krivičnom postupku na osnovu monitoringa i analize funkcionisanja novog sistema izbora advokata po službenoj dužnosti.

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