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## FROM THE VIEWPOINT OF NGO

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- Your Rights, Sarajevo
- Legal Center, Podgorica
- Center for Peace, Legal Advice and Psychosocial Assistance, Vukovar
- Center for Peace, Non-Violence and Human Rights, Osijek
- Praxis, Beograd
- Humanitarian Center for Integration and Tolerance, Novi Sad
- Serbian Democratic Forum, Belgrade
- Initiative for Development and Cooperation, Belgrade

*Access to free legal aid for displaced persons in the Western Balkans countries;  
Overview of the situation in Bosnia and Herzegovina, Croatia, Serbia and Montenegro*

## I. INTRODUCTION

The wars, inter-ethnic conflicts, demolition of commercial buildings, housing facilities, monuments of culture, infrastructure facilities, forced migration of several million people<sup>1</sup> and their complete impoverishment, particularly in the post-war period, on the territory of the former Yugoslavia, have created increased need of the citizens, marginalized and vulnerable social groups, especially refugees, displaced persons and returnees for free legal aid in newly established countries such as Bosnia and Herzegovina, Montenegro, Croatia and Serbia (the Western Balkans countries).

In every democratic country, the exercising of basic human rights and freedoms mostly depends of the fact whether and how the rights to free legal aid are attained (*access to justice*). Exercising the right to free legal aid depends on the functioning of judicial institutions and state administration, their accessibility by the citizens, legal culture in a society, and legal literacy of the citizens. The free legal aid is a very important element of the access to judicial and public administration bodies for all the citizens, marginalized and vulnerable groups, and especially the displaced persons<sup>2</sup>. Work on the protection and promotion of human rights by smaller number of non-governmental organizations is directed towards providing of the free legal aid to displaced persons, and a great number of persons in this group are those who could not and / or did not know how to attain their rights.

Access to justice, public administration bodies and state institutions, as the right guaranteed by the Constitution, national and international laws, is not only limited to the possibility of appointing the legal representatives and being exempt from the obligation to pay the costs of the court proceedings, but also includes providing timely and professional general legal information to every party about their legal rights and obligations; by providing the legal advice on possibilities and conditions for exercising certain right; assistance in gathering required documents; preparation of written legal filings; representation based on the power of attorney before the courts, administrative and other state bodies; providing legal aid in the cases which are solved in the administrative procedure; assistance in the communication of the parties with the administrative and judicial bodies, etc. Lack of the comprehensive system solution of the free legal aid in the countries of this region is mostly covered by the non-governmental organizations.

Non-governmental organizations, their legal advisors, reports and analyses of the system of the free legal aid, point out to the increased number of persons with the need for free legal aid, and this type of aid is not available to them for different reasons. Judging by the number and the status of the persons addressing the non-governmental organizations, it has been concluded that the majority of these people are displaced persons, and within this category, most beneficiaries of legal aid are uneducated and /or

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<sup>1</sup> Please see the web presentation of the UNHCR on the refugees and displaced persons in the countries in the region. According to the official statistics of the UNHCR and the Commissariat for the Refugees of the Republic of Serbia for 1996, only in Serbia there were 537.937 refugees and 79.791 war affected persons. After June 1999, over 250.000 displaced persons from the territory of the AP Kosovo and Metohija found the refuge in Serbia. Currently, there are over 85.000 persons in Serbia with the official status of the refugees and over 210.000 internally displaced persons. Based on the data of the governmental Bureau for Care of Refugees, currently, in Montenegro there are 16.479 displaced persons out of which 10.979 persons are from Kosovo and Metohija, 4.063 persons from Bosnia and Herzegovina and 1.049 persons from Croatia.

<sup>2</sup> Term "displaced persons" refer to refugees, displaced persons and returnees, i.e. persons who, due to inter ethnic conflicts, left their property and place of residence and, pursuant to regulations of the countries in the region, obtained the status of the displaced persons in the Western Balkans Countries.

poor. Some of them could not communicate personally with the state institutions or address the judicial bodies due to a number of obstacles of objective and subjective nature (stay outside their home countries, non-recognition of the citizenship status, intolerant political environment in the local communities etc.). A small number of non-governmental organizations provide different types of legal aid to a great number of citizens, and according to their reports on provided free legal aid, it is obvious that the lawyers in non-governmental organizations have provided legal aid to the displaced persons in professional, conscientious and efficient way<sup>3</sup>.

The group of non-governmental organizations, providers of free legal aid, from the Western Balkans countries, states that, in the system of providing of the free legal aid, every type of legal uncertainty should be avoided, and the citizens in difficult financial situation, especially the displaced persons, should be provided with the complete access to justice. The purpose of this document is to present the real situation of the system of free legal aid in the Western Balkans countries, and demonstrate the need for this service to the policy and decision makers in the countries which still have not adopted the Law on free legal aid and/or the need to improve the system of free legal aid in the countries which have already adopted this legal solution.

### **1.1. Needs of displaced persons for free legal aid**

Without professional, timely, accessible and system organized free legal aid in the Western Balkans countries, it is not possible to secure the protection of basic human and civil rights for the displaced persons, nor is it possible for them to overcome numerous obstacles in the process of reintegration in the places where they return or complete integration in the new environments. For the purpose of accessing judicial and administrative bodies, protection and exercising of their specific rights, it is necessary to have certain legal skills, knowledge of the law and regulations, as well as court and administrative practice. Displaced persons are socially and financially the most vulnerable part of the population, they experience constant existential uncertainty and social exclusion. Most of the displaced persons do not have financial means to pay for the lawyers' fees and, also, majority of the lawyers are not familiar with the specific problems experienced by the displaced persons, as well as the legislations of the countries of their origin or relevant international treaties and standards. Above listed system insufficiencies and increased need of poor, vulnerable and excluded groups of citizens, especially displaced persons, for free legal aid are mostly covered by non-governmental organizations which work on promotion and protection of the human rights. Activities of non-governmental organizations in providing free legal aid to thousands of displaced persons and other citizens are enabled by the assets and financing of international donors. Although there is an obligation of the countries created after the dismantling of the former Yugoslavia to provide the system of free legal aid, and in accordance with accepted obligations, enable such and other types of support for the citizens and provide easier access and exercising of their different rights, only non-governmental organizations in the Western Balkans countries have managed to establish partnerships with the international organizations and institutions, developed their own capacities and efficiently provided free legal aid to displaced persons.

The specificity of the legal position, legal problems and the need of displaced persons for free legal aid is demonstrated in the fact that such type of assistance is needed by them both in the country of acceptance and the countries where they have been displaced.

The biggest obstacles and the most common reasons why free legal aid is not available to the displaced persons are the lack of will and /or indolence of the countries in the region to find the comprehensive

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<sup>3</sup> There is no record of complaints or objections of the citizens to relevant judicial bodies or public authorities related with the work of non-governmental organizations in providing free legal aid.

system solutions; lack of the institutional capacities, method of work and actions of the judicial and administrative bodies; lack of understanding of the needs of displaced persons; failure to provide information on possibility to use free legal aid and possibility to attain those rights, even in national /entity legal solutions, work and proceedings of the state authorities and institutions which obviously give advantage to national and/or ethnic belonging. The goal of such discriminative legal solutions, work and proceedings of the state authorities and institutions is cementing of the consequences of displacing of the population and legalization of the creation of ethnically homogenous countries after dismantling of the former Yugoslavia. This makes slower/more difficult/disables exercising of the right to personal choice and permanent solution for the displaced persons in the Western Balkans countries thus breaching the rights guaranteed by the UN Convention on the Status of the Refugees of 1951, Protocol with the Convention of 1967, as well as peace treaties for the former SFRY.

As stated in the joint statement of the ministries of foreign affairs of the Republic of Bosnia and Herzegovina, Republic of Montenegro, Republic of Croatia and Republic of Serbia at the international conference called "Permanent Solutions for Refugees and Displaced Persons – Cooperation between the Countries in the Region" held on March 25, 2010 in Belgrade, the problem of refugees and internally displaced persons has not been completely solved in any of the countries and it is necessary to improve regional cooperation in order to achieve fair, comprehensive and permanent solution, especially for the most vulnerable persons, in light of the fact that this would contribute to improved neighborhood relations and regional stability, as well as mutual support in the process of the European integrations.

Property rights, social and economic rights and acquired rights have been identified as legal fields where displaced persons experience the most problems.

**Return of the property, right to property and protection of property** of displaced persons. Countries in the region have different approach and practice in providing access to the rights related to the property and home.

Existing legal framework related with the housing in the Republic of Croatia, non-transparent procedure, unequal, difficult, and sometimes, disabled access to housing, lead to unequal treatment of the citizens before the law, legal safety of citizens is not satisfactory, and sustainable return of the displaced persons from Croatia is under a question mark.

In the Republic of Bosnia and Herzegovina, some of the owners and holders of housing rights were not provided with the right to have their property returned completely, either because the property was entirely destroyed or due to the change of purpose the state and the purpose of the property was changed. Therefore, it is necessary to establish the mechanism for authorizing the bodies in charge of the legal implementation of the regulations to enable so called : "return to previous state" by reparation of the devastated and/or destroyed property, allocation of substitute housing units or appropriate financial compensation in case it is impossible to return housing units due to destruction, expropriation, change of urbanistic and regulation plans, unauthorized construction by the third persons etc. Furthermore, the issue of housing right for military apartments in Bosnia and Herzegovina, once owned by the Ministry of Defense of the Federation of Bosnia and Herzegovina, has not been solved yet. Another challenge is lack of appropriate solutions for the displaced persons who did not own or have housing right in the houses or apartments by application of so called "social housing". These persons have been in collective centers for years, without the possibility of finding adequate and permanent housing solution.

**Recognizing the legal subjectivity** is the problem mostly encountered by Roma, Ashkali and Egyptians (RAE community) in the Republic of Serbia. Most members of this community have not been entered in

the registry of births, and cannot obtain documents about their identity and are completely disabled in accessing the right guaranteed by the Constitution. Subsequent registration is very complicated or, in most cases, impossible due to complicated and ambiguous legal solutions, different interpretation of provisions by administrative bodies, as well as inconsistent administrative and court practice. This community is the poorest part of the society and without professional legal assistance it is not possible to solve the problem of recognizing the legal subjectivity.

In case of reparation of destroyed or missing registry books of the citizens and registers of birth, the problem is caused by the repeated registration or subsequent registration of relevant facts for the Internally displaced persons (IDP). If a relevant fact has never been registered, subsequent registration of such fact is almost completely impossible. Furthermore, in case there is no objective method to prove the ownership of the object where they live and they do not have lease agreement with the owner of the real-estate, internally displaced persons will not be able to register their residence, which further prevents them from exercising other rights.

Different procedures of civil registries; incomplete and uneven interpretation of the legally prescribed procedure for presentation of evidence for the purpose of determining the disputed facts in administrative procedure; ambiguously prescribed competence and procedure of judicial bodies in the process of establishing the facts of birth; wide range of discretion rights of the courts and administrative bodies, and; complicated, long and expensive proceedings before administrative and judicial bodies limit the possibilities of Internally displaced persons to attain their rights.

**Employment of displaced persons** is almost non-existent. According to the results of the research undertaken in Bosnia and Herzegovina<sup>4</sup>, it has been established that only 1% of all displaced persons have permanent employment. In the other Western Balkans countries the situation related with employment, inclusion and sustainability of the displaced persons is similar. In Montenegro, the unemployment rate of the displaced persons is significantly higher than the unemployment rate of the local population (over 30% compared to the unemployment rate of 17, 1% for the local population). 83, 7% of the displaced persons from Kosovo are not working, while the majority of displaced persons from Croatia and Bosnia and Herzegovina are supported (23, 9%) and unemployed persons (26, 2%).

Special problem in exercising the right to work, as guaranteed by many international treaties and national laws, is the fact that many displaced persons do not have the documents to prove their education or adequate professional skills. In the meanwhile, the Western Balkans countries have adopted completely new laws in the field of labor law and employment limiting the possibilities of the displaced persons and their right to return to their old jobs. This type of practice is discriminatory, disables displaced persons from exercising their basic right to work.

**Utility infrastructure and utility services.** There have been some problems related with the use of public utility infrastructure and utility services (undisturbed supply and use of electric energy, undisturbed supply and use of water, transportation and disposal of utility waste, lack of telecommunication infrastructure, poor or insufficient traffic connection with the administrative centers, etc.). This problem is particularly obvious in the field of the return of displaced persons due to none or slow and insufficient restoration of the infrastructure destroyed during the war.

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<sup>4</sup> National Strategy for Permanent Solution of the Problem of Refugees and Internally Displaced Persons in Montenegro

**Health and social insurance of the displaced persons** who are in the process of complete integration in the accepting countries is additionally made difficult by the fact that the right to health insurance is legally defined in completely different ways in the countries established after dismantling of the former Yugoslavia, and that the right to use primary health insurance is significantly more difficult for the displaced persons who were, for whatever reason, deleted from the registry of displaced persons, i.e. lost such a status.

**Rights related to pension and disability insurance** are among the most important acquired rights due to their scope and the fact that they are the only sources of income for many displaced persons and their families. Lack of international treaties and agreements in the field of pension and disability insurance and their inconsistent implementation are the additional financial burdens for already economically deprived displaced persons.<sup>5</sup> The amounts of pension payments received by the displaced persons are significantly lower than they should really be. This is mostly caused by the difficulties in proving work experience and pension insurance due to lack of appropriate documentation (work booklet and M-4 forms) and not accepting their evidence in the process of obtaining their right to pension.

**Privatization** of companies undertaken in the Western Balkans countries has completely excluded displaced persons, their work in those companies has not been acknowledged, they have not attained the right to coupons /shares/vouchers, thus, additionally making their social and economical position more difficult.

**Restoration of the property, apartments and houses destroyed during the war.** Possibility to have family houses, apartments and other property restored is legally regulated in the Republic of Croatia. The Republic of Bosnia and Herzegovina has not legally regulated this option. According to the available data, it can be concluded that the restoration of destroyed or damaged houses and apartments will not be complete within predicted timelines and before the announced deadlines. The proceedings initiated by the requests of the displaced persons to attain their right to the restoration of property sometimes last for years. There are some cases when relevant ministries do not render the decision on the requests of the displaced persons for 10 years, thus making the access to right and possibility of return of the displaced persons more difficult.

**Prolongation of administrative and judicial proceedings.** In the attempts to attain the rights, the displaced population faces the practice of long administrative and judicial proceedings which aggravate the access to justice. By excessively overstepping the legal deadlines, the courts and administrative bodies significantly decrease the essence of the right to access to justice which is also the integral part of the national constitutional right to a fair trial. The complaints or requests for exercising certain rights of the displaced persons are mostly not examined before the courts or administrative bodies. Due to such uncertainty, displaced persons are mostly forced to make additional effort and request the protection of the right to a trial within reasonable deadline by filing constitutional or administrative complaints, thus exercising the right they have unjustifiably waited for years.

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<sup>5</sup> Treaty between the Republic of Croatia and then Federal Republic of Yugoslavia on social insurance, signed on September 15, 1997. Assembly of the FRY ratified this Treaty in May 2001 (*Official Journal* – “International treaties”, no.1/01), and the Parliament of the Republic of Croatia ratified it in November 2001 (*People’s papers* – “International treaties”, no. 14/01). The Treaty came in force in April 2002, and the implementation started almost one year after. The Treaty between FRY and Bosnia and Herzegovina on social insurance (*Official Gazette of Serbia and Montenegro* – “International treaties”, no. 7/03) was signed on October 29, 2002. But, the Administrative agreement on its implementation was signed in April 2004.

**Integration or reintegration** of the displaced persons as a form of permanent solution of their status. In order to attain legally guaranteed rights, the displaced persons have to comply with prescribed procedures for exercising the same scope of rights as the citizens of the country where they found a new home or the citizens in the country of return. The rights include: right to the place of residence; right to freedom of movement; right and access to education; right and possibility of access to employment services; rights to all types of state assistance including the right to primary health assistance as well as financial assistance from the system of social insurance; right to citizenship status and ability to receive personal documents and passports; right to acquire and dispose of property. Legal frameworks for realization of integration or reintegration are complex, inconsistent, incomplete and unfinished, and lead to different interpretation of the regulations and legal uncertainty. Complex procedures, high administrative and other costs make the issuance of documents, used by the citizens to prove their citizenship status, more difficult. Professional legal aid is required for the initiation of the administrative process of naturalization and exercising the rights in the processes of integration or reintegration, and the confirmation about personal ID number of the citizens (MBG), excerpt from the registry of births, proof of citizenship, personal documents and passport from the countries of origin or the countries where the displaced persons found their refuge are needed for that purpose. Exercising the right to work and the right to health and social insurance is more difficult due to inconsistency of regulations which define the status of the displaced persons in above mentioned regions. National legislations of newly established countries, after the dismantling of the former Yugoslavia, do not acknowledge the circumstances that one part of displaced persons still have the **stats of foreigners or even persons without citizenship** despite the fact that they are essentially not foreigners and until the dismantling of the former Yugoslavia they had all constitutional and legal rights on the entire territory of that country.

## **II. ANALYSIS OF THE SITUATION RELATED WITH THE FREE LEGAL AID AND AN OVERVIEW OF CERTAIN COUNTRIES**

### **II.1. OVERVIEW OF THE SYSTEM OF FREE LEGAL AID IN THE WESTERN BALKANS COUNTRIES**

The way the system of free legal aid currently functions in the Western Balkans countries obviously cannot respond to the needs of displaced persons for legal aid. Even in the Republic of Bosnia and Herzegovina (several legal solutions are in force) or the Republic of Croatia, where a comprehensive Law on free legal aid and so called implementation regulations for establishing of the system of free legal aid were adopted, the citizens of lower financial status are not entirely in the situation to hire legal representatives, receive legal aid and have equal access to judicial and administrative bodies without discrimination.

#### **II.1.1. SYSTEM OF FREE LEGAL AID IN THE REPUBLIC OF BOSNIA AND HERZEGOVINA**

The characteristic of this system is lack of planned policy of free legal aid, deviation from the Strategy of Judicial Reform in Bosnia and Herzegovina, and different approaches is systematic solution of the issues of free legal aid. The role of non-governmental organizations and their contributions or possible contributions for the efficient functioning of the system of free legal aid are underestimated. Also, non-governmental organizations are marginalized in the attempt to entirely exclude them from the process of public consultations, thus neglecting their experience and expertise in providing free legal aid especially to the refugees, displaced persons and returnees. By excluding non-governmental

organizations from the process of public consultations and the system of free legal aid, the displaced persons are deprived of the independent and unbiased assistance and in many cases they are not enabled equal access to judicial and administrative bodies.

Legally defined system of free legal aid within Bosnia and Herzegovina exists in:

- Brcko District Bosnia and Herzegovina (Law on the Office for Legal Aid, 2007);
- Canton Zenica-Doboj (Institute for Legal Aid, established in 2005);
- Canton West Herzegovina (Law on Institute for Legal Aid which stipulates the establishing on the Institute. The Institute started working in 2009);
- Canton Tuzla (Law on Providing Legal Aid which stipulates the establishing on the Institute. The Institute started working at the end of 2009);
- Canton Posavina (Law on Providing Legal Aid which stipulates the establishing on the Institute. The Institute started working in October 2010);
- The Republic of Srpska (Law on Free Legal Aid of 2008. Pursuant to the Law, the Centers for Free Legal Aid with the offices have been established in the seats of the municipal courts.).

List of current regulations defining the system of free legal aid in the Republic of Bosnia and Herzegovina presents evidence that this issue have been solved in fragments and using different approaches, therefore, there is no uniform, comprehensive and efficient system solution for the free legal aid for the entire territory of Bosnia and Herzegovina. Constitutional jurisdiction of certain territorial units to solve the issue of free legal aid by adopting the laws on local or strictly territorial level is problematic and questionable. Since legal solutions are different, methods for their implementation are also different and the citizens cannot experience their positive effects.

The mutual characteristic of all existing models of legal aid in Bosnia and Herzegovina is that the following rights are attained:

- Right to general information on rights and obligations,
- Right to legal advice and assistance in filing out the forms,
- Right to legal assistance in preparation of all types of written documents,
- Right to representation before the administrative bodies and institutions (except in the Republic of Srpska),
- Right to representation before the courts,
- Right to assistance in preparation of the appeals and legal aid in the process of peaceful resolution of disputes (mediation).

Legal aid is provided to the beneficiaries in the exercising and protecting their rights and interests in the following:

- Litigation procedure,
- Criminal procedure in part where due to low financial status of the suspect or accused, their right to defense is attained by appointment of the attorney, and
- Representation of the injured party in the criminal proceedings, administrative proceedings (except in the Republic of Srpska , as well as by proposed draft Law on Free Legal Aid in Bosnia and Herzegovina), administrative disputes, infringement procedures, non-adversarial procedures and enforcement procedures.

The Law on Free Legal Aid in the Republic of Srpska has excluded the possibility of providing legal aid and representation before the administrative bodies and institutions in administrative proceedings despite the fact that the major portion of the breaches of rights occurs in those bodies and institutions with public jurisdiction. Administrative procedures are long, intentionally prolonged and the citizens are not able to pay expensive attorneys' fees. It is realistic to expect that, with such legal limitation, the citizens will be placed in unequal position in comparison with other citizens of the Republic of Bosnia and Herzegovina, their access to justice will be entirely prevented, and the number of administrative procedures will increase due to unreasonable deadlines, when they wait for their requests to be examined and the decisions to be rendered.

Most of the legal solutions in the Republic of Bosnia and Herzegovina do not stipulate the providing of free legal aid in the disputes for compensation of damages, thus leaving out the possibility to establish pecuniary and non-pecuniary damage caused by unprofessional and illegal actions by the administrative bodies and official authorities.

### **II.1.2. Beneficiaries of free legal aid in the Republic of Bosnia and Herzegovina**

The laws of different cantons and the law of the Brcko District limit the possibility of providing free legal aid to the citizens who have the residence on the territory of the specific canton or district. From the aspect of the protection of human rights and basic freedoms, it is absurd and unacceptable for the citizens of Bosnia and Herzegovina who have the legal interest on the territory of another canton and fulfill legal requirements, not to be able to attain the right to free legal aid. Certain cantonal laws and Institutions do not allow providing of free legal aid to the persons who are under international protection pursuant to the international standards. Law on Free Legal Aid of the Republic of Serbia, Law on the Office for Legal Aid of the Brcko District and proposed Law on Free Legal Aid of Bosnia and Herzegovina provide this opportunity. Current legislation does not recognize refugees, displaced persons and returnees as special categories.

### **II.1.3. Conditions and method for exercising the right to free legal aid**

Possibility to use free legal aid is attained based on the following criteria:

1. Financial criterion,
2. Criterion of obvious grounds and
3. Criterion of obligation pursuant to other laws and international conventions.

Current legal solutions are not consistent in relation with the jurisdiction for deciding whether the criteria are fulfilled. The right to decide on fulfillment of the criteria for exercising the right to free legal aid is given to the president of the Center for Free Legal Aid, and in most cantons that right belongs to the director of the Center or the Institute. Only the proposed Law on Free Legal Aid of Bosnia and Herzegovina envisages the possibility for the Board, as an independent body, to render the decision on use of the right to free legal aid.

Due to the fact that this service is provided to the poorest and most vulnerable groups of citizens and is considered to be the basis for providing of equal and efficient access to justice, this approach, with the exception of the Brcko Canton and proposed Law on Free Legal Aid of Bosnia and Herzegovina, can jeopardize the purpose and the goal of free legal aid. Procedures for determining the right to free legal aid are complicated both for the relevant authorities and beneficiaries of free legal aid. Also, the beneficiaries have a difficult task of gathering necessary documentation and submitting evidence of fulfillment of the criteria for each individual request for exercising the right to free legal aid.

**Financial criterion** is defined differently. Certain legal solutions give detailed description of the criteria and methods for determining the poor financial status of the beneficiaries of free legal aid. It is especially emphasized that there is a need to prove poor financial status of the individuals and the members of their family household. This approach is in compliance with the best practice of providing free legal aid in other countries. However, determining the financial status might be a significant burden for the possible beneficiaries and a great challenge for the providers of legal aid. The beneficiaries may encounter serious difficulties when proving poor financial status due to the fact that they are under obligation to provide evidence of total income and expenses of their household. It is definitely necessary to establish the system for determining the right to free legal aid based on the criteria which does not require the beneficiaries to complete many administrative and bureaucratic obstacles and procedures.

Furthermore, certain legal solutions envisage the possibility to pay one portion of the expenses of free legal aid in case the beneficiaries have certain income. This type of approach would realistically be feasible, it is considered that this income is sufficient and that partial payment of the expenses of the proceedings would not jeopardize the existence of the beneficiaries of legal aid and as well as the existence of the members of their family household, does not prevent persons who do not fulfill entirely the financial criteria from receiving free legal aid and enables saving of the state assets planned for the expenses of free legal aid. In order to avoid the interpretations that are too narrow, it is necessary to give precise directions in which cases, under which circumstance and with what guarantees are these people enabled to use free legal aid with partial payment of the expenses.

Offices for providing free legal aid are located in the cantonal seats, seat of the Brcko Canton and in five seats of district courts in the Republic of Srpska. There is no plan to have mobile offices and teams which would make site visits to the beneficiaries of the poor financial status because they do not have the means to come to the seats. It is necessary to establish mobile offices and teams or include justifiable travel expenses in the system of free legal aid. Many years of experience of non-governmental organizations show that the establishment of flexible and mobile system of legal aid fulfills some of the most important criteria of free legal aid:

- Cost-efficiency,
- Efficiency,
- Timeliness and availability of legal aid to the beneficiary, and
- Professionalism in providing this type of assistance.

None of the current laws prescribe the possibility of exemption from the payment of judicial and administrative taxes, which prevents beneficiaries of poor financial status from initiating judicial and administrative procedures and significantly limits them from accessing the justice. Although laws stipulate special conditions for exemption from the obligation to pay court and administrative fees, such provisions are not related to the beneficiaries of free legal aid. Positive social influence of the program of free legal aid is thus limited.

**The criterion of “obvious grounds “.** All legal solutions state that the persons submitting the requests for free legal aid must, besides financial criterion, fulfill the criterion of “obvious grounds “. Legal aid will not be granted when the basis for the complaint is in obvious discrepancy with the probability of success and when the beneficiary intends to initiate the procedure that is against bona fide and morality. Due to this ambiguity, it is not clear which specific reasons the provider of legal help will take into consideration. The evaluation of possible success of the procedure or morality of the intentions of the persons submitting the requests means that the decision on granting of the legal aid will be based on subjective evaluation and wide discretion right of the provider of the service of free legal aid.

**Criterion of obligation pursuant to the other laws and international conventions.** All legal solutions envisage providing of free legal aid to the persons who are entitled to such type of aid pursuant to special laws or international conventions, accepted and incorporated in the legislation by the Republic of Bosnia and Herzegovina. In practice, non-governmental organizations still play significant role in the protection of refugees, asylum seekers, displaced persons, victims of trafficking and victims of discrimination. The only provider of legal aid for the asylum seekers and refugees is the Association “Your Rights of Bosnia and Herzegovina”, as the signatory of the Memorandum of Understanding with the UNHCR, the Ministry of Security of Bosnia and Herzegovina and the Ministry for Human Rights and Refugees of Bosnia and Herzegovina on providing free legal aid to refugees, asylum seekers, displaced persons and returnees.

#### **II.1.4. Providers of free legal aid in Bosnia and Herzegovina**

All existing legal provisions, except for the Law on Legal Aid of the Republic of Srpska and proposed Law on Free Legal Aid of Bosnia and Herzegovina, define state authorities as service providers of free legal aid. For example, the legal aid providers in the Brcko District can only be the lawyers from the Legal Aid Office, appointed by the Judicial Commission of the Brcko district.

Law on County Legal Aid Institute of West Herzegovina County stipulates that the legal aid shall be provided by the director of the Institute appointed by the County Government and the defenders (legal representatives) appointed by the director. Laws on legal aid for Tuzla and Zenica-Doboj Canton have similar provisions, where legal aid is provided by directors and deputy directors of the Institute. In the Republic of Srpska, this issue is somewhat differently regulated with a wider circle of legal aid providers and representatives in various types of proceedings. The following have the right to representation in the litigation proceedings, criminal proceedings in part where the right to defense of a suspect or accused individual of lower financial status is executed by appointment of defense attorney,, administrative proceedings, the misdemeanor procedure, non-adversarial proceedings and enforcement proceedings:

- a. Employees in the Center, except for the defense in criminal proceedings,
- b. Lawyers who are the members of the Bar Association of the Republic of Srpska
- c. Employees in non-governmental organizations that provide legal aid for all the proceedings, except for the defense in criminal proceedings and under the same conditions as for the employees in the Center.

It is evident that most legal solutions do not stipulate the possibility for non-governmental organizations to provide free legal aid, although, during previous 15 years they have been the only ones providing this type of aid. The Government does not want to acknowledge the key role of NGOs in protecting the interests of disenfranchised, impoverished, excluded and the most vulnerable groups of citizens and individuals. In this regard, we would like to draw the attention to the fact that the provisions of the Civil Procedure Code define who may be authorized by the party for representation in the litigation proceedings to ensure the implementation of the basic principles of litigation proceedings (the principle of conscientious use and prohibition of abuse of procedural authorizations, the principle of acting within a reasonable time, the principle of cost-effective proceedings, etc.). Thus, Article 301 of the Civil Procedure Code provides that, the employees of the free legal aid service or, employees of all offices that provide free legal aid without compensation may be authorized to represent in the litigation proceedings, regardless of their internal organization, financing or belonging to wider associations.

Centers, Commissions and Institutes for legal aid must be independent in their work. However, their independence is questionable given the method of selection of the members, sources of financing and possibilities to decide about the allocation of the assets for free legal aid, and in the work they completely depend on the will of the government and it is difficult to simultaneously meet the requirements to fulfill two tasks: assess the eligibility of the beneficiaries based on the criteria which qualify them for receiving free legal aid, and provide free legal aid. Current legislation is not in accordance with the requirements of efficient and quality attaining of the right to free legal aid, it significantly increases the number of administrative staff and spending of budget funds for the maintenance of a large and slow administrative apparatus, rather than to fulfill the purpose of legal aid, which is contrary to the European standards, recommendations and directives.

The following problems have been identified in implementation of legal provisions on free legal aid in Bosnia and Herzegovina:

**Fragmented approach** to resolving the issue of free legal aid with a wide variety of legal solutions and the **limiting effect only in a certain territorial area; lack of information on free legal aid and lack of services for the citizens** (especially in remote, inaccessible areas and rural areas), and **rigorous criteria for granting legal aid** to the individuals in need of legal aid. **Marginalization of non-governmental organizations**, with the intention to completely exclude them from the legal aid system, at the same time favoring the newly created state agencies and administrative bodies.

In accordance with the identified problems we give the following recommendations:

It is necessary to completely remove **non-transparent, vague and undefined criteria for granting legal aid** to the citizens. Free legal aid is mostly related to the **criminal cases**. A small number of cases is related to providing of free legal aid in **administrative and civil proceedings**. It is necessary to establish a **special fund intended solely for the support of free legal aid** system and the formation of a single committee for legal aid, where all the participants would be evenly represented, and which would establish the rules of procedure and supervise the work of all providers of free legal aid.

Without a doubt, the concept of free legal aid is relatively new and under-developed in the legislation and practice in Bosnia and Herzegovina. It lacks a uniform criterion for assessing the need of all the individuals on the territory of Bosnia and Herzegovina for free legal aid. There is no single regulated procedure for submission of applications for free legal aid. The financial criterion is complicated and it limits the possibility for granting of the free legal aid. The independence of the work and decision making process of the bodies authorized to provide legal aid are questionable. All this indicates the need to adopt uniform law on free legal aid for the entire territory of the Republic of Bosnia and Herzegovina and /or harmonize the existing legal regulations with the international obligations of the direct application of the European Convention on Human Rights and Fundamental Freedoms and the harmonization of domestic legislation with the *acquis communitarie* of the European Union.

The Republic of Bosnia and Herzegovina must start working on a clear strategy for the development of free legal aid system, which will, in accordance with precisely defined terms, guarantee equal access to judicial and administrative instances to all its citizens and individuals who happen to be on its territory without any discrimination. Free legal aid system must be developed with the continuous cooperation and consultation with the NGOs and rely on the experience and knowledge of NGOs working with free legal aid beneficiaries.

## II.2.1. FREE LEGAL AID SYSTEM IN CROATIA

The early development of the free legal aid system in Croatia should be viewed in the context of the strengthening of the role of non-governmental organizations (hereinafter: NGOs) and their desire to be fully involved in the legislative process, in order to become part of the system. Challenges and obstacles still exist even after the adoption of the Law on Legal Aid and the comprehensive system of free legal aid in the Republic of Croatia was established.

At the beginning of the nineteen nineties in Croatia, the open doors days in the municipal courts, where the citizens could ask for legal assistance, were abolished, thus making access to justice more difficult. On the other hand, during the war and postwar period, when major breaches of basic human rights were registered, companies were transformed and privatized in a problematic way, which resulted in loss of thousands of jobs, causing significant social and economic stratification of the population where the majority of impoverished citizens lost the ability to pay expensive legal services. All this has created a tremendous need for free legal aid, which is used, today, by thousands of people (refugees, returnees, displaced persons, vulnerable and marginalized social groups). The created void has been filled by the NGOs and lawyers who provide free legal aid. Their work in providing legal aid was made possible by the funding from the international donors.

Due to many years of work on the monitoring of human rights, their protection and promotion, NGOs have acquired significant and generally useful legal knowledge and experience. The obstacles they have faced in providing legal aid are as follows:

1. Inadequate legal provisions,
2. Charges of illegal practice of law,
3. Problems in communication with a number of government agencies,
4. The absence of the Law on Free Legal Aid ,
5. Insecure and inadequate sourced of funding.

Free legal aid was not available to all citizens. The biggest problems occurred in small local communities and the areas of return of the refugees and displaced individuals.

In 2003, due to above mentioned problems, the Coalition for the Promotion and Protection of Human Rights (which is an alliance of nine NGOs from all over Croatia, providing free legal aid for many years) launched the campaign in order to define the status of NGOs for the protection and promotion of human rights, which provide free legal aid. The ultimate goal of the campaign was to encourage the development and adoption of the Law on Free Legal Aid based on which, inter alia, NGOs would have the legal ability to regulate and provide free legal aid.

While the need to develop a new and comprehensive legal aid system existed much earlier, legal regulation of the field of legal aid has been seriously approached only in the context of the negotiations between Croatia and the European Union. The National Program for Accession of the Republic of Croatia to the European Union included a formal assignment to provide legal regulation of the free legal aid system for the citizens of lower economic status. In the process of harmonization of the national legislation with the regulations of the European Union, in Chapter 23, Judiciary and fundamental human rights, on May 16, 2008, the Parliament of the Republic of Croatia adopted the Law on Free Legal Aid ("Official Gazette" No. 62/2008) which entered into force on June 8, 2008, and the application started on February 1, 2009. The purpose of the Law on Free Legal Aid was to provide professional legal assistance in realization of certain rights and ensure equal status in the proceedings for the individuals of lower economic status.

## II.2.2. Beneficiaries of free legal aid in Croatia

Beneficiaries of legal aid are Croatian nationals, foreigners with temporary residence, foreigners with permanent residence, asylum seekers, asylum-seekers in the proceedings for which legal aid to asylum seekers is not defined by a special law, foreigners under subsidiary protection and foreigners under temporary protection, who cannot bear the cost of legal assistance without the risk of existential threat. Beneficiaries of legal aid are foreign children who were found in Croatia without a parent or a legal guardian.

## II.2.3. The conditions and methods for attaining the right to free legal aid in the Republic of Croatia

Free legal aid is attained as primary or secondary legal assistance. **Primary legal aid** includes legal advice, preparation of the fillings in the administrative proceedings and representation in the administrative proceedings, legal assistance in peaceful resolution of disputes out of court, representing before the European Court of Human Rights and the international organizations. In addition to the lawyers, primary legal aid is also provided by the certified registered NGOs, trade unions and legal clinics.

**Secondary legal aid includes:** representation before the courts, legal assistance for peaceful resolution of disputes in court, and, preparation of documents in legal proceedings. Secondary legal aid is provided solely by the lawyers.

Granting of any form of legal aid includes exemption from payment of the fees and the costs of the proceedings. Free legal aid is granted based on the application submitted to the office of county administration. The request includes the information about the financial position of the applicant and the members of his household. Requested free legal aid may be granted to the applicant completely or partially. Once the application is approved, the applicant receives a referral which he takes to the provider of legal aid of his choice. If the request is not approved, the applicant may file an appeal to the Ministry of Justice, or initiate the administrative proceedings. In this case, the applicant is not provided with free legal assistance for this type of legal action.

The individuals who are eligible to receive free legal aid shall meet the property related requirements, in particular:

- Beneficiaries of some type of welfare,
- Compensation beneficiary (monetary compensation; the right to compensation have the beneficiaries of family disability benefits, the recipients of personal/ disability compensation and the Croatian Homeland War veterans who reside in Croatia, if they are unable to work and fulfill the conditions stipulated by the Law on the Rights of the Participants in the Croatian Homeland War),
- Individuals of lower economic status who cumulatively have to meet the stipulated requirements (and refer to the average income, the size of living area, savings, ownership of a valuable vehicle),
- Children in the proceedings for child support,
- Victims of the criminal acts.

Free legal aid should be granted in all the proceedings before courts, administrative bodies and other legal entities with public authorities, if they decide about the existential issues of the beneficiaries. Existential issues are: status issues, rights regarding the system of social protection and assistance, rights regarding the system of retirement/pension, health and disability insurance, labor issues, protection of

children and young adults, protection of victims of the offenses, property issues relating to the protection property up to the size of satisfactory housing, protection of the resources for the work required to support beneficiaries and household members, and other.

Foreigners on temporary stay and foreigners with permanent residence may attain the right to legal aid if they are eligible for granting of the rights to legal aid in proceedings, in their country of nationality, for which legal aid may be granted under the provisions of the Law on Free Legal Aid in the Republic of Croatia, same as for the Croatian citizens (the condition of reciprocity).

#### **II.2.4. Providers of free legal aid in Croatia**

In accordance with the Law on Free Legal Aid of the Republic of Croatia, providers of legal aid are lawyers, chartered associations and universities.

The associations gain authorization to provide legal aid by registering with the Ministry of Justice. The associations can be registered after providing the evidence that the legal aid will be provided by persons with law degree, completed state exam and bar exam and at least two years of work experience in the profession, or at the scientific position, as well as, after providing proof of payment of the insurance from the damage caused to the party by providing legal aid in the amount of 50% of insurance prescribed by the Law on Advocacy.

The funds for organizing and providing legal aid on the basis of referrals are provided by the state budget. Funding for the work of the legal aid societies and legal clinics at the universities is provided from the state budget in advance, based on granted projects. Within the funding granted as a part of the project to an authorized association or university for work of the and legal clinics, the authorized association or a legal clinic provide legal aid **based on the referral**, by which the beneficiary is granted legal aid, and the type and scope of legal aid are defined. Unspent funds approved for legal aid shall be returned to the state budget. Authorized associations shall submit quarterly and annual reports on extended legal aid, attaching all received referrals and the copies of relevant documents for each form of primary legal aid provided.

Compensation amounts for the provision of primary and secondary legal aid shall be determined for certain forms of legal aid and shall apply to all providers of legal aid.

During the first year of the application of the Law on Free Legal Aid, all parties who are directly involved in the implementation of the Law gained considerable experience in the application and noted the following problems:

**Insufficient awareness of the citizens about the existence, contents and opportunities provided by the Law.** Despite the fact that the Ministry of Justice posted the information about the free legal aid on its webpage, and that all the participants in the system are obliged to provide general information about the free legal aid system to the citizens, a large number of potential beneficiaries of free legal aid from the vulnerable groups, particularly refugees, displaced persons and returnees, economically and socially excluded citizen, have not been able to obtain information about the existence, contents and opportunities provided by this Law.

**Lack of precision in defining the right to free legal aid.** The right to free legal aid is defined in form of general principles in the Constitution of the Republic of Croatia, and in several completely different laws. The official information about the relationship between the declaration of the right to free legal aid in the Constitution and laws and their actual availability and use in practice is almost completely

absent. All these principles and legal documents regarding free legal aid should be integrated in one place – in the Law on Free Legal Aid.

**Difficulty and complexity of the form for granting of free legal aid.** Most beneficiaries are not able to independently complete the request. Despite the changes, which have reduced the number of pages, the application form is still complicated, complex and unintelligible to the beneficiaries. The above stated is in contradiction with the demand for fast, efficient and easily accessible legal protection for the poor. The assistance in completing the application forms cannot be obtained in the state administration offices, despite the fact that the offices are obliged to provide such assistance.

**Insufficient availability of the application forms for granting of free legal aid.** Although Article 18 of the Law on Free Legal Aid stipulates that the information on possibilities and conditions for use of legal aid, as well as application forms, should be provided to the parties by the first instance bodies, first instance administrative bodies, legal entities with public authorizations, providers of legal aid, and legal offices, this was not the case in practice. The unavailability of the application forms was recorded in many areas, especially to the beneficiaries who live in areas with insufficient coverage by the state bodies or associations authorized to provide free legal aid.

**Restrictive conditions required for granting of free legal aid** are not consistent with the severe economic and social situation in Croatia. Although the law provides the right to free legal aid for all the individuals who cannot pay for legal help without the risk of existential threat, it is clear that the criteria for granting legal aid are extremely restrictive. It is impossible to exercise the right to free legal aid by the citizen who owns a house, which is, in terms of the Law considered as a satisfactory residential area (35 square meters for the applicant and additional 10 square meters for each household member with a possible deviation of up to 10 square meters). With the consistent application of the above stated legal provisions, the applicant who lives in his own house but is not employed, did not qualify for the pension, does not use welfare, nor does he have any income or revenues, will be rejected. Such implementation leaves a lot of poverty-stricken citizens completely disqualified as the recipients of free legal aid services and disables access to the judicial bodies or public administration bodies. It is necessary to control the access to the right to free legal aid, by determining the conditions for accessing this right. However, conditions are set in the way to exclude, not to include the largest number of potential beneficiaries. One of the proposed changes to the conditions for granting legal aid, in accordance with the decisions of some Member States of the European Union, is that the property in which legal aid beneficiary lives or resides, would be completely excluded as a condition for accessing the right to free legal aid. In addition, it was proposed to raise monetary limits of the income of the citizens, which is justified, given the current attorneys' tariff, as well as general impoverishment of the citizens.

**The problem of interpreting the scope of the Law** is especially pronounced when exercising the right to legal aid in the proceedings that decide on the existential issues of the beneficiaries. The state administration offices have taken the right to interpret the Law on Free Legal Aid, although, pursuant to the Law, established criteria and given authority, they do not have sufficient qualifications and enough experience in the specific legal areas. Amendments to the Law on Free Legal Aid should explicitly list the cases in which the legal aid will not be approved, thus, avoiding discretionary assessment of the bodies which need to decide on the request of the beneficiary.

**Discrimination and/ or unequal treatment (lack of accountability for services beneficiaries).** The reports of all the associations registered to provide free legal aid emphasize the that the state administration offices are not sufficiently organized, the employees have excessive discretionary rights and are insufficiently informed about the needs of the beneficiaries of free legal aid. In relation with the

application of the Law and implementation rules, the professional staff of the state administration bodies must be aware of the full extent of the law and must be aware of their obligations towards the applicants who submitted the requests for free legal aid. This framework must be respected.

Although the Law stipulates that the lawyers cannot refuse to provide legal aid, except in exceptional cases, according to many beneficiaries, this is not the case in practice. **The problem of rejecting to see the citizens with referral by some lawyers**, is significant. It was indicated that there were many beneficiaries with valid referrals who addressed the lawyers and were rejected, and that none of them wanted to fulfill a legal obligation of providing legal aid, with the explanation that they had too many cases or that they were not experts in the legal area for which the same was approved, etc.

After the adoption of the bylaw which prescribes the application form for the approval of funds for the providing of primary legal aid, which is atypical compared to conventional design which has been familiar to the associations for a number of years, it became clear that the Ministry of Justice on one hand, and authorized associations on the other hand, had completely different understanding of the term "project financing of the associations". The referral model, as expected, unnecessarily slows down the approval process, use and collection of free legal aid and it is in complete contradiction with the model of project finance of the associations. This situation caused the authorized associations to return the funds approved for funding legal aid to the state budget<sup>6</sup>. The system of referrals, as used in Croatia, is absolutely inappropriate for financing of primary legal aid. It is necessary to promote project financing for primary legal aid, through the application of the usual system of contracting and performance evaluation of the projects (projects that are co-financing relevant categories of actual costs for providing free legal aid, and project reports showing that the money is really spent meaningfully).

**The problem of inconsistent practices of the state administration offices.** The procedure of collecting the necessary documentation prior to approving funds for legal aid takes time, and creates additional costs for the applicant. We cannot ignore the fact that, in most cases, the beneficiaries generally do not have any knowledge of where to obtain required documents (birth certificates, tax certificates, land registry certificates etc.). There have been records of inconsistent practices in the work of the state administration offices. Some offices require additional documents from the applicant, various confirmations and certificates, regardless of the fact that such obligations are prescribed only in exceptional, specifically defined cases, which further discourages beneficiaries from applying for free legal aid.

The request for approval of free legal aid shall initiate administrative proceedings, and the decision upon request is an administrative act. Primary legal aid includes legal aid in the preparation of the documents for the administrative bodies and legal entities with public authority. Due to the fact that in many cases, the accusations help beneficiaries in filling out the application forms, such engagement should be recognized as legal aid in preparation of the filings before the administrative bodies. This also applies to the composition of the appeals against the decision rejecting the application for approval of free legal

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<sup>6</sup> According to the report of the Ministry of Justice of the Republic of Croatia regarding the rights to legal aid and spending of the funds, in 2009, 2.01 million kn was granted for 21 associations and one legal clinic. From February 01, 2009 until March 01, 2010, a total of 78,076. 00 EUR was spent on free legal aid. In 2009, 21 associations and one legal clinic received 145 referrals in the total value of 15, 379. 00 kn, or an average of 106. 00 EUR per legal action. Associations, with the exception of two, returned the amount of 1,519, 300. 00 EUR to the state budget. In 2010, The Ministry of Justice has awarded the amount of 330,000. 00 kn for 23 projects, associations and two legal clinics, or six times less than in 2009.

aid. Without professional assistance, the parties are unable to write appeals based on legal provisions. In case of a negative decision related to the request for approval of free legal aid, the filing of the appeal or administrative action for approval of the legal aid should be considered as primary legal aid.

**The problem of narrowing the type and scope of activities of the authorized associations.** Licensed associations and NGOs, in particular, are unjustly denied the opportunity to provide some form of legal aid for which the law provides only a secondary legal aid.

The limitations for non-governmental organizations are particularly imposed regarding the possibility of preparation of administrative and constitutional complaints. Registered and authorized associations have the necessary capacity, and their legal advisers need education, knowledge, skills and experience in providing that type of legal aid.

**Insufficient and inappropriate associations and consultations with non-governmental organizations.**

For years, the non-governmental organizations have been the most accessible for the beneficiaries of free legal aid in the Republic of Croatia, they are the most vital resource and in the best position to assist the citizens in exercising their rights. However, in the process of nomination, as well as during the adoption and implementation of the law, it has been concluded that the work of the NGOs is not sufficiently appreciated. By means of using wrong national policies and strategies, their contribution is minimized, and these cannot be considered as the policies that are open to civil society in general. It is necessary to fully recognize and appreciate the role of civil society and partnership in the integration of policy-making process from the very beginning. The participation of the NGOs in the system of free legal aid and their critical view of the functioning of the Free Legal Aid is not desirable for the official authorities. The lack of associations and cooperation with the NGOs and other experts in the process of consultations and decision-making is one of the causes of bad legal decisions and lack of full realization of the aims and objectives of the Law on Free Legal Aid.

**Free Legal Aid Commission.** For the purpose of monitoring of the consistent implementation and execution of the legal aid system, the Law on Free Legal Aid stipulates the establishment of the Free Legal Aid Commission, as an advisory body of the Ministry of Justice. The Commission has 7 members, including a representative of the authorized associations. The Minister is obliged to call on the bodies and legal entities from which the members of the Commission are nominated, to nominate their representatives. Unfortunately, instead of sending the invitation to the associations, the representative of the only association registered at the time was appointed to the Commission. Since the associations' representative to the Commission was appointed in the above mentioned way and not at the suggestion of other associations, the process of consultations between the appointed representative of the association and the authorized associations providing free legal aid was completely omitted. Although the associations formally had their representative, there was no real contribution of the associations to the work of the Commission. The election, the composition and the operation method of the Free Legal Aid Commission should be changed in order to ensure operational work and wider jurisdictions of that body (for example, in monitoring and directing of the system). The appointment process should enable the participation of the representatives of both the beneficiaries and providers of free legal aid. Thus, it is necessary to redefine the role of the Free Legal Aid Commission and send an invitation to the associations and legal clinics to nominate their representatives to the Commission through the transparent procedure.

**Conclusion.** Establishment of the free legal aid system in the Republic of Croatia has not fully enabled the citizens in bad financial situation to appoint a legal representative, obtain legal aid and equal access to judicial and administrative bodies without discrimination. The referral model has proven to be unnecessarily bureaucratic and it additionally complicates the procedure of approval and use of free

legal aid. It is necessary to initiate a wide public discussion on the essential changes of the Law on Free Legal Aid in order to achieve full sense and purpose of the free legal aid system, accomplish prerequisites for the implementation of the *acquis communautaire*, fulfill the taken obligation of ensuring full equality of the citizens before the law and ensure the right to fair and public discussion before independent court. Otherwise, the concept and functioning of the free legal aid system will be seriously doubted.

Formal recognition of the right to free legal aid does not necessarily mean its implementation in practice – it is not an indisputable fact in itself. Not only is this right complicated in its implementation, but it also eventually hinders and disables the very ones who are supposed to use it.

Due to the above mentioned problems in the functioning of the Law, in 2009, the procedure was initiated to evaluate the compliance of the Law on Free Legal Aid with the Constitution, resulting in the abolition of several articles of that Law.<sup>7</sup>

Along with the procedure for the constitutional evaluation, the international expertise of the Law and its implementation in practice was undertaken, and the conclusion was that there were many deficiencies in the free legal aid system. Problems in the functioning of that system were also highlighted by many other participants: civil society organizations, lawyers and the Croatian Bar Association, Croatian legal experts and beneficiaries themselves.

The European Union also warned of the problems in implementation of the free legal aid system in its reports on the progress of Croatia in the accession process.

The latest proposed amendments to the Law<sup>8</sup> contain the most essential changes that should be introduced into the free legal aid system in the shortest possible period, not excluding other changes that should be initiated after systematic collection of data and their scientific processing.

The suggested legal changes should include the following subjects imposed by the decision of the Constitutional Court and legal practice experiences:

1. The definition of the existential issues (Art.5 It.2 of the Law on Free Legal Aid) should be precise and definite, but, at the same time, it should be open and sufficiently broadly regulated in order to include all cases in line with the standards of human rights protection and the best practices in Europe. Free legal aid should be generally provided for all types of legal issues. Primary legal aid (legal counseling) should be provided related with all the issues of achieving the rights secured by the legal order in the situations when the beneficiaries cannot act adequately. In regards to the secondary legal aid, it should also be provided for all cases, except when they are

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<sup>7</sup> By the Decision of the Constitutional Court of the Republic of Croatia No. U-I-722/2009 dated April 6, 2011, the following articles were abolished: Art.5 It.2, Art.8, Art.10 It.2, Art.37 and Art.53 It.2 of the Law on Free Legal Aid, coming into effect by July 15, 2011. The Constitutional Court made a Decision not to accept the proposal for constitutional evaluation of the Law on Free Legal Aid as a whole, that is, of the following articles: Art. 1, Art. 9, Art.11It.4, Art. 29, Art.40, Art.41, Art.53, Art.54, Art.55, Art.56, Art.57, Art.58, Art.59, Art.60 and Art.64 of the Law on Free Legal Aid.

<sup>8</sup> The Centre for Peace, Non-Violence and Human Rights from Osijek and the Centre for Peace, Legal Advice and Psychosocial Assistance from Vukovar initiated and contributed with concrete proposals to the amendments of the Law on Free Legal Aid, in line with former objections to the functioning of the Law. Their suggestions have been taken into consideration and incorporated into the Draft Law on Amendments to the Law on Free Legal Aid.

obviously not justified, in cases when the protection of beneficiary's rights cannot be achieved or when it is possible to achieve the protection outside the framework of free legal aid in some other, more appropriate way. The state institutions should not have a discretion right to evaluate whether a case should be considered as "an existential" issue, so that possible, strictly limited exceptions (cases which are *not* existentially important) should be clearly defined.

2. Property criteria relating to the property of potential beneficiaries of free legal aid from Art. 8 of the Law are defined too restrictively, thus covering only smaller part of the population, leaving unprotected the part of socially vulnerable strata which often needs legal aid in order to attain the right to social or other state assistance or assistance of the local and district (regional) self-government. Therefore those criteria should be adapted especially with regard to the real estate owned by the beneficiary, and with regard to the persons who are also requested to provide the statements on property and incomes (household members).
3. The system of referrals system should be reexamined. In any case, the "referrals" have proven to be inappropriate mechanism for distribution of state assistance for providing primary legal aid, bringing about the fact that the referral could be obtained in only minor percentage (0.5%) of all cases where civil society organizations offered legal counseling services. As the result, there are unused means assets allocated for this purpose, only marginal financing of legal counseling from the state budget for free legal aid and, eventually, drastic drop in the budget planned for free legal aid which certainly does not reflect the actual needs. That is why it is necessary for the extension of primary legal aid to fully ensure the affirmation of the project financing system, which was originally planned by the Law on Free Legal Aid, just to be annulled by the obligation to cover the approved assets by collected referrals. Supervision of the spending of approved assets should be implemented without referrals, on the basis of provider's report which could in turn be monitored during the process. The assets for free legal aid should significantly cover the actual expenses of providing that assistance (labor expenses, missed salary, expenses for use of facilities and equipment, actual expenses, etc.).
4. Criteria for refusing to provide free legal aid should be regulated by the Law. They should be clearly defined, without referring to other acts (Law on the Bar, Code of Lawyers' Ethics, etc.) considered by the Constitutional Court to contain reasons which are broad, vague and subjective to such an extent that conscientious and reasonable persons can only speculate as to their meaning and contents. If the lawyers are engaged by use of the referral, then the referral should also include the name of the lawyer engaged in providing free legal aid.
5. The system of state financing and distribution of assets intended for primary and secondary legal aid should abandon its discretion right and go back to the initial agreement on reserving half of the budget for primary and half for the secondary legal aid.
6. The position of the Free Legal Aid Commission should be strengthened and secured in a way that both the representatives of the providers of the free legal aid and adequate representatives of the beneficiaries would participate.
7. Other changes originating from the decision of the Constitutional Court and international expertise should also be implemented, within the limits imposed by short deadlines.

### **II 3.1 FREE LEGAL AID SYSTEM IN THE REPUBLIC OF SERBIA**

Providing of the free legal aid is guaranteed by Article 67 of the Constitution of the Republic of Serbia, which for the first time has raised the right to legal aid in Serbia to the level of basic and constitutionally guaranteed human right. Constitutional guarantee of the right to free legal aid implies concrete obligations of the state regarding creation of the conditions for the implementation and protection of this right.

However, specific legal framework for developing of the free legal aid system has still not been established in the Republic of Serbia.

Some elements of the free legal aid system already exist in the legislation and in practice. Decrees on legal aid are included in several laws which regulate only certain aspects of the legal aid. The Law on Local Self-Government, Article 20 Item 31, stipulates that municipality organizes the legal aid service for the citizens. Article 25 of the Law on Advocacy stipulates that the bar association can provide free legal aid to the citizens on the territory of the basic court. In the sphere of criminal legal protection, providing of the legal aid, including free legal aid, is partially regulated by the Criminal Procedure Code and the Law on Juvenile Perpetrators of Criminal Acts and legal protection of minors. Free representation of the parties in the civil court proceedings is regulated by the Law on Civil Proceedings and the Family Law. Providing of the legal aid is also stipulated by the Law on Asylum, in the sense that persons seeking asylum have the recognized right to free legal aid. The persons whose right to asylum has been recognized have the same right to legal aid and free court to justice as the citizens of the Republic of Serbia. A foreigner whose temporary protection has been approved has the right to legal aid under the conditions defined for the asylum seekers.<sup>9</sup>

During the criminal proceedings, the accused has the right to free representation if unable to provide an attorney. The institute of “poverty right” enables the party to request from the court or administrative body exemption from payment of taxes and court fees because of the bad financial situation. During the civil proceedings, the party can ask for free representation if that is necessary for the protection of his rights.

The Ministry of Justice of the Republic of Serbia has begun the process of creation of a thorough and effective free legal aid system available to all those who need it. The basic concept is that free legal aid is primarily intended for socially deprived citizens, but it can be provided to all those who need legal advice. In October 2010, the Government of the Republic of Serbia adopted the Strategy for Free Legal Aid System Development which will serve as a foundation for the adoption of the Law on Free Legal Aid. Through the free legal aid system, the citizens would have the possibility to inquire about their rights, get an advice on which institution they should address and what kind of procedure they could initiate, as well as get help in writing petitions or ensure representation in various procedures before the state bodies.

### **II 3.2 The Reasons for Establishing Free Legal Aid System in the Republic of Serbia**

There is a significant for provision of free legal aid in the Republic of Serbia. This conclusion is supported by the data on the number of clients asking for some kind of free legal aid from the existing legal aid providers, data on social-economic status of the population at the edge or below the poverty line and data on structure of the socially vulnerable groups the most numerous of which being refugees and internally displaced persons. Due to the proportion and difficulty of the problems faced by these socially vulnerable groups, Serbia has been proclaimed one of the five countries in the world with the extended refugee crisis. There has been an obvious increase of need for efficient assistance in achieving the citizens’ rights in increasingly more complex legal system.

The Strategy for Free Legal Aid System Development of the Republic of Serbia has been prepared in line with the constitutional guarantee of the right to legal aid which obliges the state to provide the conditions for the enforcement and protection of this right, and the country’s efforts to establish the full rule of law in accordance with the highest international standards. Adoption of this Strategy represents

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<sup>9</sup> Strategy for Free Legal Aid System Development of the Republic of Serbia

the first step towards establishment of the effective, efficient and financially sustainable system of free legal aid. The National Strategy of Judiciary Reform has determined the access to justice as one of the priorities in the establishment of the efficient judiciary system, thus proposing short-term, mid-term and long-term reforms in the legal aid system. The Strategy for Free Legal Aid System Development in the Republic of Serbia was created as a result of harmonization with the strategic goals and commitments of the National Strategy of Judiciary Reform established by the National Assembly of the Republic of Serbia, and with the Action Plan for Implementation of the Strategy adopted by the Government of the Republic of Serbia in July 2006.

The Strategy for Free Legal Aid System Development in the Republic of Serbia has been prepared within the project “Creating Effective and Sustainable System of Providing Free Legal Aid in the Republic of Serbia” implemented by the Ministry of Justice. Strategic commitments and the framework of the future free legal aid system in the Republic of Serbia are based on the results of the two-year work of the Legal Aid Fund, formed within this Project, which allocated assets for providing assistance to poor and marginalized groups in the Republic of Serbia through the processes of public bidding. The work of the Fund enabled the testing of various models for providing legal aid, highlighting their advantages and disadvantages, reexamining criteria for obtaining legal aid, as well as the ways for efficient managing and financing of the free legal aid system, in order to get valid data on the basis of which optimal solutions would be formulated – in other words, realistic and feasible suggestions and recommendations. Non-governmental organizations providing legal aid to internally displaced persons, as well as many others offering assistance to other socially vulnerable groups have been included in this project from the very beginning. The joint NGO database recorded close to 10000 beneficiaries in the periods August 2007 – January 2008 and May – December 2008. The majority (97%) referred to legal counseling, writing of petitions and other forms of legal aid not including representation.

Models and experiences of other European countries in providing free legal aid have been discussed at various experts’ meetings, workshops and conferences held during that process, on the topic of developing the legal framework for free legal aid in Serbia. NGOs providing free legal aid to the refugees and IDPs had a significant role in that consulting process and contributed to better understanding and recognizing of the specific needs and requests of the refugees and IDPs regarding the free legal aid. At the moment, the consulting process is halted, and, for the time being, there are no new public initiatives for continuation of the work on adoption of the legal framework for providing free legal aid.

### **II.3.3. Providers and Beneficiaries of Free Legal Aid in the Republic of Serbia**

So far, the free legal aid practice in Serbia varied. Free legal aid was provided by municipal legal aid services, non-governmental organizations, bar associations, various professional and expert associations, union organizations, political parties and legal clinics at law faculties. Where operational, the municipal legal aid services provided legal aid to the beneficiaries who addressed them, but there is no precise statistical data regarding the number of beneficiaries, the characteristics of the beneficiaries or the type of the provided legal aid.

Providing of free legal aid by the professional associations and the political parties is limited and directed towards protection of the rights of their members. Legal clinics are relatively new free legal aid providers and they are dealing with civil law-related problems.

In line with its constitutional and legal obligations and authorities, the bar association is involved in provision of free legal aid. Several projects promoted institutionalization of free legal aid and they were implemented or are still being implemented in some cities/regions of Serbia since 2002, financed by the

Agency for International Cooperation and Development of the Kingdom of Spain, the Catalanian Agency for Cooperation and Development and the Catalanian Ombudsman. These projects were based on so-called Spanish model with the bar association as the main provider. Currently, there is a similar project being implemented on the territory of the Autonomous Province of Vojvodina sponsored by the Government of Vojvodina.

Since the nineties, the non-governmental organizations have been engaged in the protection of human rights, especially with regard to the specific groups of beneficiaries: refugees and internally displaced persons, persons with disabilities, minorities, etc. Through that work, they have acquired vast knowledge and experience and thus qualified for taking an important position in future free legal aid system. Regardless of a very difficult work and survival conditions, civil sector used its knowledge, dedication and persistence significant to achieve the results in the area of human rights protection. The best results and contributions to the human rights respecting have been achieved through cross-border cooperation of the civil sector in Serbia and the civil sectors of the neighboring countries. The reason for that is their joint goal, that is, respect of the human rights of all citizens regardless of their nationality, race, religion, or social status. Civil sector was and still is a strong factor in the development of democracy and affirmation of the rule of law in this area. In the past twenty years, civil sector has been the leading element, that is, free legal aid provider in Serbia, despite instable and uncertain sources of financing, mostly coming from international donations (private and state donations), and, to a lesser extent, from the state budget, or local self-government budget (municipality, town, province).

The situation regarding the providing of legal aid to the refugees and internally displaced persons is becoming more difficult. International donors have withdrawn or significantly reduced their activities. The state does not fulfill its constitutional obligation regarding the provision of free legal aid to this category of population and it does not fill the vacuum created by the withdrawal of the international donors. Many organizations have stopped providing concrete legal aid or they have significantly reduced their activities. Therefore, large portion of the refugees and internally displaced persons do not have legal aid in Serbia today. This seriously compromises already compromised human rights of the refugees and internally displaced persons. That is why it is necessary for Serbia to build the free legal aid system as soon as possible, and to define its responsibility regarding support of the specialized non-governmental organizations which have been providing legal aid to the refugees and internally displaced persons for years; that system would, among other things, have significant financial effects that could be beneficial for Serbia.

#### **II.3.4. Problems and recommendations for establishment of free legal aid system in the Republic of Serbia**

Regardless of the described situation and constitutional guarantees, free legal aid system is still not legally regulated. Therefore, it is necessary to intensify activities regarding adoption of the Law on Free Legal Aid, which should ensure efficient fulfillment of the constitutional right to legal aid. The reasons for intensifying of these activities are manifold.

In 2002, 10.6% of the population in the Republic of Serbia was under the poverty line, that is, approximately every tenth citizen was poor. In addition, the concentration of the population around the poverty line was extremely high, meaning that 20% of the population had insufficient financial means.

The poverty of the working age population is mostly the result of the effects of unemployment<sup>10</sup>. The trend of increasing of unemployment rate has not been stopped, so it is expected that the number of poor persons in Serbia would continue to increase in the next few years, which, in turn, means that the needs for free legal aid would also keep increasing.

The members of vulnerable and marginalized social groups are in especially difficult position. The persons from displaced populations belong to marginalized groups, which are mostly in bad financial situation and whose needs for free and, from professional point of view, specific legal aid are increasing.

In line with one of the basic principles of the Law on General Administrative Procedure, the chair of the administrative procedure is obliged to explain to the lay party about his rights, which is different compared to the procedures regulated by the laws that regulate court procedures without such obligation. Very often, the administrative bodies do not follow the basic principle of the procedure and do not fulfill their legally clearly defined obligation. With the current systemically unregulated situation in Serbia, this type of legal aid is provided to the vulnerable groups by the NGOs, with their employees being engaged as legal representatives of the parties in question, or by the NGOs which have the possibility to engage a lawyer through donated projects, mostly in the court procedures.

Having in mind the described situation in Serbia, it is necessary to do the following:

- a. adopt the Law on Free Legal Aid as soon as possible,
- b. ensure its comprehensiveness and quality,
- c. ensure that legal aid is timely, economical, easily accessible and with minimal administration,
- d. ensure that free legal aid is provided by various providers, including also non-governmental organizations and various professional associations specialized for providing aid to certain groups of beneficiaries, that is, to socially vulnerable groups,
- e. ensure that legal aid is provided by competent persons, and
- f. establish measures for accountability of the legal aid provider for the consequences that might ensue.

#### **II.4.1. FREE LEGAL AID SYSTEM IN THE REPUBLIC OF MONTENEGRO**

Montenegro does not have a separate law which would regulate the providing of the free legal aid. The Judicial Reform Strategy and the Action Plan for Implementation of Strategy for the period 2007-2012 stipulate the creation of normative framework for the establishment of free legal aid system and ensuring of the sustainability of that system, as an international standard of the right to equal access to justice. The right to legal aid is defined by the Constitution of Montenegro, Article 21, as follows: "in line with this provision, legal aid shall be provided by the lawyers, as an independent and autonomous profession, and by other services", while Paragraph 2 of the same article stipulates that "legal aid may be provided free of charge, in accordance with the law". Draft version of the Law on Free Legal Aid stipulates that legal aid may be provided only by lawyers registered in the registry of lawyers providing free legal aid, while there is no mention of non-governmental organizations as free legal aid providers.

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<sup>10</sup> In April 2010, unemployment rate in the Republic of Serbia was 20.1%, while out of the remaining 79.9% of the population registered as employed, up to 19.8% of them are unofficially employed (illegal employment). Source: Statistical Office of the Republic of Serbia.

Some segments of free legal aid exist in Montenegro, but they are not regulated in a precise and adequate manner. According to Article 168 of the Law on Civil Procedure, the court shall, at the party's request order that he/she be represented by a qualified representative, if that is necessary for the protection of the party's justified interest, or if the party is of such general financial state that does not allow him/her to bear expenses of a qualified representative. Legal provision of "poverty right" in civil proceedings is rarely used by the parties, either due to lack of knowledge resulting in not using that provision, or due to court failing to inform the parties, even though it is obliged to explain to lay parties about options and ways for protection of their interest. At the same time, according to the Law on Advocacy, the bar association makes decision whether someone will be provided *pro bono* legal aid.

Provision of legal aid in the administrative procedure has been established based on the general provisions of the principle of providing aid to lay parties, where the body which is managing the procedure ensures that lack of knowledge of the party and other participants do not result in violation of the rights they are entitled.

According to the Law on Civil Procedure, the right to legal aid has been defined through provisions on mandatory defense and the right to defense counsel due to poor financial state. The situation is different when it comes to criminal matters where the "poverty right" is very much present, and mandatory defense by lawyer is used to a large extent even though it is burdened with certain weaknesses (primarily regarding quality of defense which is jeopardized by lack of budget funds, irregular and belated payments to lawyers, etc.). In civil proceedings, free legal aid is very rare.

Non-governmental organizations in Montenegro which, in the past 20 years, have born the main burden of the provision of free legal aid to the most vulnerable categories of the population have not been included in the legal aid system. Non-governmental organizations, consumer protection associations, unions, political parties, legal clinics working at the law faculties, are all out of the scope of regulated legal aid. The conclusion is that the current legal aid system in Montenegro, through valid regulations and practice, is based on an out-of-date and incomplete concept, which enables potential discrimination.

#### **II.4.2. Reasons for establishment of free legal aid system in the Republic of Montenegro**

The right to legal aid is the right guaranteed by the Constitution of Montenegro, as well as Article 6 of the European Convention on Human Rights and Fundamental Freedoms, and the Republic of Montenegro needs to comply with it. However, so far, the state has not succeeded in creating normative framework for fulfillment of these rights. In Montenegro, there are no clear mechanisms and criteria for provision of legal aid. Partial provisions of the law are unclear and imprecise. Free legal aid is rarely provided and, in practice, it does not guarantee effective access to justice for the poor and other persons who should receive such aid. In addition, there is no special budget or special budget lines in the public administration bodies referring to free legal aid.

Besides the awareness raising activities initiated by civil sector, the Ministry of Justice of the Government of Montenegro has recognized the importance of this issue and taken steps towards adoption of the law on legal aid. Adoption of this law would be the adequate legal response to obligations described in the Constitution and in European Convention on Human Rights and Fundamental Freedoms, as well as to future obligations regarding implementation of legal standards developed as part of European Union legislation in its right to legal aid segment.

### **II.4.3. Providers and beneficiaries of free legal aid in the Republic of Montenegro**

In past years, in Montenegro, many organizations, from municipal legal aid services, to non-governmental organizations, professional associations, organizations working with persons with disabilities, and union organizations, have shaped themselves as free legal aid providers.

For years, all of them have been providing legal aid services to certain groups of population. Municipal legal aid services have been providing aid to persons of poor financial state living in the municipality area; in criminal issues, lawyers have been representing persons of poor financial state; disability organizations and unions have been providing assistance in legal matters to their members. Non-governmental organizations also provide free legal aid. Ever since the nineteen-nineties, the non-governmental organizations have been successfully providing legal aid in relation with the human rights matters. They are especially active in protection of marginalized and vulnerable social groups, internally displaced persons and members of minority nationalities.

Currently, in practice, there are two ways to obtain legal aid: legal aid financed by the state (municipal secretariats and services) with sources of financing being budget funds and fees from the beneficiaries. The other way is free legal aid not financed by the state and provided by non-governmental organizations. These non-governmental organizations have limited resources available and they provide legal aid only to certain number of beneficiaries. Non-governmental organizations providing free legal aid receive the funds from the international donors, but that is what makes this legal aid system imperfect. There is no state financing, which raises the issue of sustainability of those non-governmental organizations without the assistance of the international donors.

According to the provisions of the draft Law on Free Legal Aid, free legal aid shall be provided by lawyers registered in the registry of free legal aid lawyers, which will be managed by the Ministry in charge of judiciary, while non-governmental organizations are not mentioned at all. On the other hand, internally displaced persons have not been recognized as a separate group with specific needs and specific legal aid required. According to the draft Law on Free Legal Aid, the right to free legal aid can be obtained by: citizens of Montenegro; persons without citizenship legally residing in Montenegro and persons seeking asylum in Montenegro; foreigners with permanent residence or with approved temporary residence; and, other persons in line with the rules of the international law which is binding for Montenegro.

### **II.3.4. Problems and recommendations for establishment of free legal aid system in the Republic of Montenegro**

Without the engagement of non-governmental organizations, thousands of internally displaced persons in Montenegro would be left without legal aid. The NGOs providing free legal aid make major contribution to more efficient and more complete fulfillment of the needs of internally displaced persons and refugees. By engaging in social life through providing free legal aid to internally displaced persons, NGOs have become socially beneficial factors, and the arrival of the organizations that are providing free legal aid has resulted in major benefits particularly for the category of internally displaced persons who were in need of free legal aid. Through the work of non-governmental organizations on providing free legal aid, internally displaced persons are being brought into equal position with the other citizens. The needs of internally displaced persons, as a specific group, for free legal aid are extremely high, because of their very vulnerable social-economic status, massive violation of their rights, their large number and the need to permanently resolve their status.

Based on many years of experience in providing free legal aid, it is necessary to point out to some of the recommendations that should be considered during the development of the legal framework for

establishing of the free legal aid system in Montenegro. It is necessary to enable full enjoyment of constitutionally guaranteed right to free legal aid, which also implies defining conditions for exercising of the right, especially when it comes to the most vulnerable social groups (internally displaced persons, the poor, women, children, persons with disabilities, Roma population and the members of other minority groups). It is necessary to intensify activities that lead to adoption of the Law on Free Legal Aid that should comprehensively define organization and modes of work of free legal aid providers which must include non-governmental organizations that have proven, through their current work without assistance or support of the State, they can meet beneficiary groups' various needs for free legal aid. Future model of the Law should provide conditions for efficient free legal aid by professionals, through establishing of efficient monitoring of provision of free legal aid and establishment of clear and transparent form of financing of all free legal aid providers.

## **I. OBLIGATIONS OF WESTERN BALKAN COUNTRIES ACCORDING TO INTERNATIONAL AGREEMENTS**

According to the provision of Article 6 of the European Convention on Human Rights and Fundamental Freedoms:

“...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by law.”

Providing the service of free legal aid to the citizens that have no financial means is considered the basis for ensuring equal and efficient access of citizens to judicial and administrative bodies. When citizens' rights and obligations are determined, the member states of the European Council are requested to provide free legal aid when such kind of aid is necessary for efficient access to judicial and administrative bodies, whether due to legal representation being mandatory or due to complexity of the content of the case and judicial/administrative proceeding.

Board of Ministers of the European Council recommends to the member states to apply the legal aid system as follows:

1. In a way that includes all individuals under jurisdiction of the member state which, besides citizens of the state in question, also includes all other persons present on its territory on different bases (foreigners, persons without citizenship, persons without any means, that is, all individuals who are unable to pay for professional legal aid);
2. In a way that includes all appropriate judicial or administrative cases in accordance with the prescribed procedure;
3. In a way that legal service is provided by independent lawyers who should be encouraged to provide legal aid to the individuals of poorer financial status and with full support of the state and community; and
4. Especially in a way that includes non-governmental organizations and bar associations in the free legal aid system.

The Western Balkans countries (the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Serbia and the Republic of Montenegro) have joined the European Convention on Protection of Human Rights and Fundamental Freedoms which obligates them to establish comprehensive systems of free legal aid as a precondition for implementation of European Union's *acquis communautaire*. With such preconditions, clearly specified criteria, comprehensive and clear procedural provisions and

defined jurisdictions, the legislations of the Western Balkans countries would harmonize the national legislations with:

1. Resolution (76) 5 on legal aid in civil, administrative and commercial matters;
2. Resolution of the Committee of Ministers of the Council of Europe (78 ) 8 on legal aid and advice;
3. Directive of the European Commission 2003/8 of January 27, 2002; and
4. Charter of Fundamental Rights of the European Union (2000/C; 364/1; Nice 7/12/2000).

One of the interpretations from the judicial practice of the European Court of Human Rights from Strasbourg states that a country has the following obligations regarding the provision of legal aid:

1. To insure practical and efficient access to judiciary either by provision of free legal aid or by simplification of procedures, so that citizens would have the possibility to represent themselves in certain “easier and simpler” proceedings;
2. Not to make citizens’ access to justice more difficult, but to make it easier, and to simplify the procedures for obtaining legal advice and legal aid (avoiding the so-called unnecessary complexity of the procedures); and
3. To remove all financial obstacles, for the citizens with limited social and economic status, for attaining and defending their rights.

## **II. SIGNIFICANCE AND ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN PROVIDING OF FREE LEGAL AID TO INTERNALLY DISPLACED PERSONS**

Through analysis of the existing legal framework for provision of free legal aid in Bosnia and Herzegovina, Montenegro, Croatia and Serbia, we have determined that there is a whole range of uncertainties and “gray areas” which allow various interpretations of legal provisions. Non-governmental organizations, however, are doing very well in practice and are regularly providing various forms of free legal aid to internally displaced persons. Such aid does not have any lucrative significance, because beneficiaries receive legal aid services completely free of charge. This activity of non-governmental organizations is mostly funded by international or local donations, while the state budget financing is insufficient or non-existing.

In order to remove various discriminatory obstacles for implementation, promotion and protection of basic human rights of internally displaced persons, and in order to create preconditions for establishment of legal state and rule of law, non-governmental organizations have directed their activities mainly towards advocacy before national political and legal institutions, as well as international, primarily European institutions. Especially significant are regional initiatives and establishment of regional cooperation between non-governmental organizations with the goal of supporting the protection of rights of internally displaced persons, establishment of legal state and rule of law, processes of reconciliation and development of democracy in the region, which gives to non-governmental organizations a specific, authentic and unique role in these processes.

The significance and magnitude of non-governmental organizations' role in provision of free legal aid to internally displaced persons become apparent when looking at the statistics on the provided free legal aid and the number of beneficiaries<sup>11</sup>.

According to the data received from the **Association "Your Rights B&H"**<sup>12</sup> in Bosnia and Herzegovina, 8.197 beneficiaries in Bosnia and Herzegovina obtained free legal aid during the year 2009. Out of that number, 152 beneficiaries belong to particularly vulnerable groups (asylum seekers, refugees, persons with temporary admission, persons with approved residence for humanitarian purposes, persons without citizenship, victims of human trafficking, etc.); 1.100 of them are members of Roma community, and; 6.945 beneficiaries from the category of refugees, internally displaced persons and returnees from Croatia, and particularly vulnerable local population. During the year 2009, 3.246 beneficiaries applied for legal aid for the first time, while the other 4.951 were previously assisted beneficiaries. Provision of free legal aid to the beneficiaries in this organization includes a range of legal services starting from verbal legal advice and replies to urgent requests, to legal representation before the authorized administrative and judicial bodies. The highest number of requests during 2009 was related with the housing, return of property, employment, pensions, status rights of civilian victims of war, disability payments for demobilized armed forces, communal infrastructure, and issues related with the possible discrimination. Besides working on actual cases, this organization is operating in the areas of politics, monitoring of implementation of strategic documents, lobbying and advocacy in the area of adoption of new or amendments to the existing regulations.

According to the data from NGO "**Legal Center**", **Podgorica, Montenegro**, in the period 2007 – 2010, free legal aid was requested by the total of 10.350 beneficiaries who were provided with 26.529 services. In Montenegro, this organization's key activities are focused on the local integration of persons with status of the displaced, the right to citizenship, permanent settlement and residence. Especially significant is the problem of RAE (Roma, Ashkali and Egyptian) population which includes 1.376 persons according to the **Legal Center's** research. In most cases, these persons have not been registered in the register of births, and the procedure for registering them later is extremely complicated.

In Croatia, during the period from 1998 till mid-2010, **Center for Peace, Non-Violence and Human Rights from Osijek** recorded over 55.500 beneficiaries of free legal aid. According to data from the pilot activity research within the campaign of the Coalition for Promotion and Protection of Human Rights, conducted in May and June 2004, by one of the members of the Coalition, Organization for Civic Initiatives from Osijek, during 2002, 38 NGOs operating on the entire territory of Croatia and providing free legal aid, recorded 76.845 beneficiaries of free legal aid, and during 2003, 87.236 beneficiaries of

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<sup>11</sup> Statistical data used from NGOs providing free legal aid to refugees and internally displaced persons in the countries of this region.

<sup>12</sup> This Association implements its activities through 9 offices and provides free legal aid to the following categories of beneficiaries: persons seeking international protection; persons with recognized international protection; refugees from Bosnia and Herzegovina; former holders of temporary admission status with the prospect of integration in Bosnia and Herzegovina; persons that have the right to temporary residence for humanitarian purposes; persons without citizenship; victims of human trafficking and victims of other sexual or gender-related violence; internally displaced persons and returnees; refugees from Croatia, and; targeted categories of endangered local population in accordance with the Criteria for defining priority categories of beneficiaries and service providing of the Association "Your Rights B&H".

free legal aid. According to the report of the Ministry of Justice of the Republic of Croatia, from the beginning of the enforcement of the law on February 1, 2009 till March 1, 2010, state offices received 4.545 requests for approval of free legal aid, and 3.182 requests were approved. By comparison, in the period from February 1, 2009 to December 31, 2009, six registered and authorized member associations of the Coalition for Promotion and Protection of Human Rights recorded 13.978 beneficiaries belonging to the category of citizens of poorer financial status.

By mid-2010, **Center for Peace, Legal Advice and Psycho-Social Assistance from Vukovar** recorded around 40.000 free legal aid beneficiaries. The largest number of cases referred to housing, property rights, restoration of damaged property, status rights (citizenship and residence permits, permanent residence of foreigners, obtaining various status documents), rights to pension and disability insurance, social and labor rights, access to communal rights, as well as issues referring to suppression of discrimination.

Through the activities of non-governmental organization **Praxis from Serbia**, legal aid, information and counseling were provided for 86.184 beneficiaries (internally displaced persons, refugees, readmission returnees, members of minority communities (mostly RAE population)) regarding access to status, property, social, economic and other rights. This organization registered 115.492 requests for free legal aid and legal advice; of those, 3.369 were court proceedings and 59.912 were administrative proceedings. Besides working on actual cases, this organization is active in advocating amendments to inadequate legislation and adoption of new ones, as well as in highlighting administrative and systemic obstacles that prevent beneficiaries from fulfilling their basic human rights, and public advocating of systematic solution for the problem of “legally invisible persons”, that is, individuals not recognized by the law.

**Humanitarian Center for Integration and Tolerance (HCIT)** from Novi Sad, from its founding in 1997 to mid- September 2010, provided free legal aid to over 130.000 beneficiaries, of which over 100.000 were refugees and internally displaced persons, while approximately 30.000 were local citizens with legal requirements in other states of the former SFRY (Yugoslavia). Electronic database kept by HCIT as an implementing partner of UNHCR, registered from May 2004 to September 17, 2010, 50.801 refugees and 6.239 internally displaced persons<sup>13</sup>. HCIT obtained over 26.000 documents from Croatia for the displaced persons, over 6.500 documents from Bosnia and Herzegovina, about 6.000 documents for internally displaced persons from Kosovo and Metohija; it conducted through lawyers in Croatia around 230 court proceedings, out of which few dozens of which have been positively resolved by now; it helped thousands of refugees to achieve the right to pension and repayment of pension, to file claims for reconstruction and housing in Croatia, restitution of possession of apartments or purchase of those in B&H, etc. Within the activities on advocating elimination of legal and other obstacles for fulfillment of their basic human rights, two legislative initiatives of HCIT have been accepted by the federal, that is, Serbian Parliament, that enable refugees to hold dual citizenship, and reduce administrative fees for registration and birth certificates for displaced persons and refugees by 70%.

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<sup>13</sup> As the UNHCR’s implementing partner, through implementation of the free legal aid project kept in electronic form from May 2004 till September 17, 2009, the HCIT provided 97.607 instances of legal aid, as follows: 1.787 various forms were completed; 13.610 powers of attorney were made for personal obtaining of documentation; 2.178 powers of attorney were made for other purposes; 12.804 powers of attorney were made for obtaining documentation through HCIT; 3.809 statements were made, as well as 717 appeals, 1.873 proceeding expedites, 228 objections, 305 proposals, 1.589 suites, 681 contracts, 7.489 requests, 2.471 complains, and 1.948 other petitions. 10.888 pieces of verbal information were provided, as well as 34.838 pieces of verbal legal advice.

According to the data from NGO **Serbian Democratic Forum (SDF)**, in the last three years, this organization has provided legal aid to 11.000 refugees from Croatia currently residing in Serbia. Database of NGO **Initiative for Development and Cooperation Serbia (IRS)** contains data on 1.500 beneficiaries (refugees and displaced persons) to whom free legal aid was provided in the period from April 1, 2008 to September 1, 2010. These beneficiaries were refugees and displaced persons from Croatia, Kosovo and Bosnia and Herzegovina. With these two organizations as well, the largest number of requests for free legal aid referred to issues of obtaining documents, protection of property rights, achieving social-economic rights (pension, health care, social welfare, etc.), access to state and other bodies/offices (judicial and administrative bodies).

### **III. CONSIDERATIONS, CONCLUSIONS AND RECOMMENDATIONS FOR ESTABLISHMENT OF EFFICIENT FREE LEGAL AID SYSTEM: View of the non-governmental organizations which provide free legal aid**

#### **V.1.1 General Considerations and Recommendations**

Free legal aid systems in the Western Balkans countries should include the following criteria:

##### **Criteria for free legal aid providers:**

- Graduate lawyers; provision of free legal aid and general legal information should not be limited to graduate lawyers with completed bar exam,
- Constant education, development of capacities and increase of quality of provided free legal aid,
- Establishment and strengthening of cooperation with law faculties, legal clinics, judicial bodies, public administration bodies, authorized state bodies and institutions, partner to non-governmental organizations (domestic and foreign), international organizations, etc.

##### **Forms of legal aid that can be provided by non-governmental organizations:**

- Providing verbal and written legal advice and general legal information from various legal areas,
- Providing expert and technical assistance for obtaining different documentation,
- Expert and technical assistance to parties in communication with administrative bodies, bodies with public authorization and judicial bodies,
- Submitting written legal petitions to courts, administrative and legal services, state and other bodies,
- Issuing of documents,
- Representation in cases of violation of basic human rights and freedoms, and in cases of discrimination before the local and international courts and institutions,
- Possibilities should be considered for representation in certain civil and extra-judicial proceedings; certain criminal and misdemeanor proceedings, and; customs and tax proceedings.

##### **Beneficiaries of the right to free or sponsored legal aid**

- Refugees, displaced persons and returnees,
- Persons who were granted asylum and asylum seekers,
- Migrants,
- Persons without citizenship,
- Foreigners,

- All marginalized, discriminated and vulnerable groups of citizens and individuals,
- All persons that cannot obtain legal aid without endangering their ability to provide for themselves or to provide for their families themselves or restraining the members of their families, and persons of poor financial state.

#### **The method for determining the right to free legal aid**

- prescribe the way and procedure for determining the right to free legal aid,
- procedure should be prescribed in a manner as to enable efficient access to judiciary and administration,
- abolish or mitigate existing restrictions, especially for refugees/returnees/displaced persons,
- give to non-governmental organizations possibility of independent assessment, decision and scope regarding provision of free legal aid in emergency cases.

#### **Modes for financing of free legal aid**

- Through budget funds,
- Through donations from natural or legal persons,
- Through establishment of foundations for free legal aid financing,
- Through donations from abroad,
- Through project and program financing.

The advantages of non-governmental organizations providing free legal aid to displaced persons are that they, in certain way, represent that specific group of citizens; they have the possibility of monitoring their specific problems during longer period of time; they act in large areas and on behalf of large number of beneficiaries; they can influence the public and the media; they have the possibility of advocating before competent state authorities and institutions; they have the capacities and possibility to report to international organizations.

Non-governmental organizations have built their own capacities, expertise, commitment, ethics and flexibility in providing free legal aid services; they started doing it in the moment when states did not even think of systematically regulating the area of free legal aid, and, therefore, they should be allowed to continue doing this and survive. It is the minimum of the commitments that Western Balkans countries are expected to fulfill towards non-governmental organizations and beneficiaries of the free legal aid system.