

**REPUBLIC OF SERBIA
CONSTITUTIONAL COURT**

**11000 BELGRADE
Bulevar Kralja Aleksandra 15**

Proposer: **The Humanitarian Law Center, Belgrade, Dečanska 12, TIN;** [REDACTED]
reg. No.: [REDACTED] whose legal representative Budimir Ivanišević from
Belgrade, [REDACTED], who in the proceeding before
the Constitutional Court is represented by attorney Mihailo Pavlović from
Belgrade, address Jurija Gagarina 150/8, phone No. [REDACTED], agrees
that the identity of the proposer is publicly available.

**INITIATIVE FOR STARTING PROCEDURE OF
ASSESSMENT OF THE CONSTITUTIONALITY AND LEGALITY**

**of the Law on the Free Legal Aid
(„Official Gazette RS“, No. 87/2018 of 13 November 2018)**

The Proposer indicates that the provisions of Articles 4, 7, 9, 21 para. 4, 32 para. 4, 39, point 3, 43 para. 1 point 4 of the Law on Free Legal Aid (hereinafter ZBPP) are not in accordance with the Constitution of the RS, the generally accepted rules of international law and ratified international agreements.

Reasoning

The National Assembly of the Republic of Serbia passed the Law on Free Legal Aid (hereinafter ZBPP), and published in the „Official Gazette RS“, No. 87/2018 of 13 November 2018. On 21st November 2018, the Law entered into force, and will be applied starting 1st October 2019.

The Proposer indicates that the aforementioned provisions of the ZBPP are not in accordance with the Constitution of the RS, the generally accepted rules of international law and ratified international agreements, for the reasons that follow.

A) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF ARTICLE 4 OF THE ZBPP

Article 4 ZBPP reads as follows:

Conditions for providing free legal aid

Article 4.

Free legal aid can be provided to a citizen of the Republic of Serbia, a stateless person, a foreigner with permanent residence in the Republic of Serbia and any other person who has the right to free legal aid under another law or ratified international agreements, if:

1) s/he meets the conditions to be a beneficiary of the right to financial social assistance in accordance with the law governing social protection or a beneficiary of the right to child allowance in accordance with the law regulating financial support to a family with children, as well as to members of his/her family or common household, whose members are determined by these laws;

2) s/he does not fulfil the conditions to be a beneficiary of the right to financial social assistance or child allowance, but if after due payment for legal aid from own sources in the legal matter, he/she would fulfil the conditions of becoming a beneficiary of the right to financial social assistance or child allowance.

A person against whom the free legal aid applicant initiates a procedure for protection against domestic violence or other protection proceedings shall not be considered a member of the family or the common household of the person referred to in paragraph 1 of this Article. The revenues and assets of the person against whom the protection procedure is initiated do not affect the right of the applicant to exercise the right to free legal aid if s/he fulfils the conditions prescribed in paragraph 1 of this Article.

Free legal aid can be provided to a citizen of the Republic of Serbia, a stateless person, a foreigner with permanent residence in the Republic of Serbia and any other person who has the right to free legal aid under another law or a ratified international agreement, also if it is:

1) a child whose right, obligation or interest based on the law is decided in proceedings before a court, another state body or public authority;

2) a person against whom the measure of compulsory psychiatric treatment and care in a health institution or the protective measure of compulsory psychiatric treatment is executed;

3) a person undergoing the procedure of partial or complete deprivation, or restitution, of business capacity;

4) a person who exercises legal protection from domestic violence;

5) a person who exercises legal protection against torture, inhumane or degrading treatment or punishment, or trafficking in human beings;

6) a person seeking asylum in the Republic of Serbia;

7) a refugee, a person under subsidiary protection or an internally displaced person;

8) a person with disabilities;

9) a child in the accommodation service of the social protection system;

10) children and young people whose social services until 26 years of age have been stopped;

11) adults and elderly people who are placed in a social care institution without their consent;

12) a person who exercises the right to determine time and place of birth, in accordance with the law regulating extra-judicial proceedings;

13) a person affected by forced eviction and resettlement process in accordance with the law governing housing.

From the reasoning regarding the ZBPP in the Assembly, among other things, it also follows:

A fair trial implies that individuals are equal in access to justice and that they can effectively, under the same conditions and without discrimination, protect and exercise their rights before the courts and other public authorities. In order to do this, each individual must have available legal aid, which implies the duty of the state to provide legal aid of satisfactory quality, free of charge or at reduced costs, where the person who requires legal aid is unable to pay or when the provision of legal aid is imposed for reasons of justice.

The Constitution of the Republic of Serbia, on the basis of solutions found in contemporary comparative law, guarantees every individual the right to legal aid (Article 67), which, for the first time in our legal system, thereby accords this right the status of a constitutionally guaranteed human right. The constitutional guarantee of the right to legal aid imposes on the state the obligation to provide conditions for enjoying and protecting this right. Accordingly, it is necessary to regulate the provision of legal aid, which includes the obligation to provide free legal aid. In addition, the Constitution of the Republic of Serbia provides for the prohibition of any form of discrimination (Article 21, paragraph 3, of the Constitution), and a guarantee that the attained level of human rights cannot be reduced (Article 20, paragraph 2, Of the Constitution).

The Proposer points out that by the provision of Article 4 of the ZBPP, the circle of beneficiaries is primarily restricted to those who fulfil the conditions to be the beneficiaries of the right to financial social assistance, and not to all persons in need of legal assistance.

By introducing a legal provision whereby the circle of persons is limited only to the beneficiaries of social assistance, discrimination against all those persons who do not fall under the category of „the social population” has been exercised, therefore the conclusion is that free legal aid is not available to all citizens who at one point in time might need it.

It is an indisputable fact that there may be a need for free legal aid for citizens who have a case that is legally and factually complex and for which they need legal assistance, but for which for various reasons they are not able to afford lawyers. With such a legal solution, all citizens who find themselves in need of legal aid before a court, and who objectively do not have sufficient expertise to adequately present their case in court themselves, will not be able to exercise the right to free legal aid from a lawyer or other professional if they do not satisfy the so-called "social" conditions imposed by the ZBPP.

Besides, the European Court of Human Rights (ECtHR) has clearly stated in its decisions that there cannot be an acceptable approach by which certain individuals or groups of individuals (legal and physical) are excluded from the circle of beneficiaries of free legal aid; that this violates the principle of "equality of arms", that is, that it denies citizens the right to access to the court.

Thus, in **paragraph 45** of the judgment, *URBŠIENĖ AND URBŠYS v. LITHUANIA*, the ECtHR cited the following:

Nevertheless, the question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the specific facts and circumstances of each case, and will depend, inter alia, on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant's capacity to represent himself or herself effectively (see *Steel and Morris*, § 61). In this context, it must be ascertained whether the applicant's appearance before the courts without the assistance of a lawyer would be effective, in the sense of whether or not he or she would be able to present his or her case properly and satisfactorily (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32). The overall context must also be taken into account, and in particular to what extent the applicant had adequate access to the court and "equality of arms" during the proceedings (see *N.J.D. B. v. The United Kingdom*, § 74)

Argument: ECtHR Judgment - URBŠIENĖ AND URBŠYS v. LITHUANIA

Considering the content of the reasoning that followed the ZBPP in the Assembly, as well as the cited decision of the ECtHR, it is undisputed that the existing law excludes all persons

who do not fall under “the social category” or who, by engaging lawyers, would not be in this group of people.

There is no reasonable or justified reason for such a discriminatory exclusion, while the ECtHR clearly states in the cited judgment that the criteria that the State considers when granting legal aid cannot be justified on a social basis only.

Nevertheless, the Republic of Serbia has justified the condition for granting free legal aid solely on the social basis, and thus legally excluded all other persons in need of legal aid, but who do not fall under the mentioned categories.

B) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF ARTICLE 7 OF ZBPP

Article 7 ZBPP reads as follows:

Cases where free legal aid is not permitted Article 7.

Providing free legal aid, even if the person meets the requirements for provision of free legal aid (Article 4), is not permitted in:

- 1) commercial disputes;
- 2) registration procedures for legal entities;
- 3) procedures regarding compensation for damage to honour and reputation;
- 4) proceedings before a misdemeanour court, if imprisonment is not imposed for a misdemeanour;
- 5) procedures in which the existence of the dispute is in obvious and significant disproportion to the costs of the proceedings;
- 6) procedures in which it is obvious that the applicant for free legal aid has no prospect of success, especially if his expectations are not based on the facts and evidence s/he has presented or are contrary to positive regulations, public order and good customs;
- 7) if there is an obvious attempt to abuse the right to free legal aid or any other right.

From this reasoning regarding the ZBPP in the Assembly, the Government’s explanation continues thus:

In Article 7 of the Law, cases are specified in which free legal aid is not permitted, even if the person meets the requirements for provision of free legal aid, which includes commercial disputes, registration procedures for legal entities, procedures regarding compensation for damage to honour and reputation, proceedings before a misdemeanour court, if imprisonment is not imposed for a misdemeanour, procedures in which it is obvious that the applicant for free legal aid has no prospect of success, especially if his expectations are not based on the facts and evidence s/he has presented or are contrary to positive regulations, public order and good customs, and if there is an obvious attempt to abuse the right to free legal aid or any other right.

The Proposer states that, as in the section under (A) that relates to the unconstitutionality of Article 4 of the ZBPP that, without any reasonable and justifiable reason, the *numerus clausus* has excluded a number of persons, thus discriminating against all those listed in Article 7 of the ZBPP.

Adding the fact that the ECtHR judgment cited has just considered the case of a legal person who was deprived of the right to free legal aid, since Lithuanian law also prevented the provision of free legal aid to legal persons, it is undisputed that the legislator has acted contrary to the practice of the ECtHR and excluded certain persons from the circle of beneficiaries of these services.

In addition, point 6 of the same Article states that the administrative body that decides to grant free legal aid "assesses" the prospects for success in the future proceedings. This idea of the legislator, according to which an "administrative body" takes over the court's powers, assesses the prospects for success, and, on the basis of personal assessment, refuses or grants free legal aid, openly raises the question of the further purpose of the courts, when it is possible to give authority to an administrative body to assess the prospects for the success or outcome of the court proceedings.

Pursuant to all of the above, the fact is that the provision of Article 7 of the ZBPP is unconstitutional and non-compliant with the international agreements ratified by the Republic of Serbia for identical reasons for which the provision of Article 4 of ZBPP is unconstitutional.

C) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF THE ARTICLE 9 OF ZBPP

Article 9 ZBPP reads as follows:

**Providers
Article 9.**

Free legal aid is provided by lawyers and legal aid services in local self-government units.

CSOs can provide free legal assistance in procedures for exercising the right to asylum and protection against discrimination.

For the CSOs, free legal aid is provided by lawyers.

Free legal aid in the legal aid service of a local self-government unit or on behalf of associations can be provided by law graduates, but only within the scope of the powers assigned to law graduates determined by the law governing the appropriate procedure. Legal Aid Providers - or CSOs within the goals set in their founding documents - may provide general legal information and fill out applications, as forms of free legal aid.

The local self-government unit may organise a joint free legal aid service with another provider, within the powers conferred on that provider by this Law, but cannot transfer the provision of free legal aid to it fully.

From the reasoning regarding the ZBPP in the Assembly, it also follows:

Article 9 of the Law lists free legal aid providers. Free legal aid can be provided by lawyers and the legal aid service of a local self-government unit, within the scope of the powers assigned to lawyers and other law graduates determined by the law governing the appropriate procedure (where free legal aid and support is provided). According to paragraph 2, CSOs can provide direct free legal assistance in the procedures for exercising the right to asylum and protection against discrimination.

Paragraph 3 states that free legal aid on behalf of associations is provided by lawyers, which refers to situations where procedural laws provide that the representative must be a lawyer. This means that paragraph 3 allows that, in cases not covered by paragraph 2, Civil Society Organisations (CSO) can provide free legal aid within the goals set in their founding documents, by engaging lawyers of their choice to provide free legal aid on behalf of the CSOs. If the laws governing the appropriate procedures do not require that the representative must be a lawyer, then paragraph 4 allows free legal aid to be provided by a law graduate engaged within the organisation. This provision ensures that the organisations dealing with the protection of human and minority rights and freedoms can directly provide free legal aid in the areas of legal protection in which they are engaged (women victims of domestic violence, partner and sexual violence, rights of LGBT persons, Roma, children, persons with disabilities and others). Also, in accordance with paragraph 4, free legal aid in local self-government units is provided by a law graduate.

Besides these conditions, an additional requirement for free legal aid is that the provider is registered in the Free Legal Aid and Free Legal Assistance Registry. It is also stipulated that

free legal aid providers can also provide free legal assistance, within the powers conferred on that provider by this Law, or within the objectives for which they were founded. Also, the local self-government unit may organise a joint free legal aid service with another provider, within the powers conferred on that provider by this Law, but cannot transfer the provision of free legal aid to it fully.

By comparing the content of the legal norm with the explanation following the law, there is the question whether Paragraph 3 of Article 9 of the ZBPP allows, in cases that are not covered by paragraph 2, that Civil Society Organisations (CSO) can provide free legal aid within the goals set in their founding documents, by engaging lawyers of their choice to provide free legal aid on behalf of CSOs.

This question was the subject of a debate between the Bar Association and representatives of citizens' associations who clearly stated that they had been providing legal aid to final beneficiaries for decades, precisely by engaging lawyers for them as expert and qualified persons in judicial or administrative proceedings.

The provision of Article 9 of the ZBPP is questionable not only bearing in mind Article 67 of the RS Constitution, but also bearing in mind Article 21 of the RS Constitution, for several reasons:

(1) Whether the provision of Article 67 of the RS Constitution should be interpreted narrowly, in the sense that only lawyers and legal aid services can provide free legal aid, or should receive a broader interpretation – namely, that it is the minimum that needs to be secured, but that others must be able to provide legal aid (such as legal clinics at faculties, associations of citizens, etc.);

(2) Whether the legislator has authentically interpreted paragraph 3 of Article 9 of the ZBPP, and allowed space for associations to provide legal aid in other proceedings (other than asylum and non-discrimination), provided that they have previously hired a lawyer as an expert to provide free legal aid in judicial or administrative disputes;

(3) Whether the provisions of this law apply only to funds received from budget funds or to any funds that citizens' associations possess - i.e. do citizens' associations reserve the right to choose lawyers who will represent legal aid beneficiaries if financed from their own funds received by projects from other donors who are not in a manner related to budget funds, or from other means (such as projects approved by international donors to provide free legal aid in specific areas).

Answers to these questions are crucial for the further functioning of free legal aid that has not been financed from budgetary funds so far, but exclusively from projects and donations by international donors.

In a situation where there are obvious problems in the interpretation of the legal provisions of the ZBPP, as well as in the vague explanation of the Law in the Assembly, it seems that the Constitutional Court would need to take a position with regard to the provision of Article 9 of the ZBPP, first of all in an assessment of the constitutionality of Article 9 ZBPP pursuant to Articles 21 and 67 of the Constitution of the RS, and then to give an answer to the question of who should constitute the service providers, as well as the means by which the regulations of the ZBPP are to be applied (whether exclusively through public funds, or also through own funds, as received by projects and donations).

D) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF THE ARTICLE 21 PARA. 4 OF ZBPP

Article 21 ZBPP reads as follows:

Absence of obligation to provide free legal aid Article 21.

The provider is not obliged to provide free legal aid to a beneficiary:

- 1) who conditions the provision of free legal aid with demands as to the ultimate outcome or success of the procedure;
- 2) who does not behave towards the provider in accordance with the law;
- 3) if there is a conflict of interest between the beneficiary and the provider or the person working to provide free legal aid and engaged by the provider, in accordance with the law regulating the prevention of conflicts of interest;
- 4) if free legal aid is granted contrary to this law.**

A provider who refuses to provide free legal aid shall immediately notify the beneficiary and the authority granting legal aid (Article 27).

From the reasoning regarding the ZBPP in the Assembly, it also follows:

Article 21 of the Law foresees that the provider may refuse to provide free legal aid in the cases referred to above, which are at the same time the reasons for refusing applications for free legal aid when filing a request. Provision of free legal aid may be refused: a) if the beneficiary conditions the provision of free legal aid with demands as to the ultimate outcome or success of the procedure, 2) if the beneficiary does not behave towards the provider in accordance with the law, 3) if there is a conflict of interest between the beneficiary and the provider or the person working to provide free legal aid and engaged by the provider, in accordance with the law, 4) if free legal aid is granted contrary to this law. In the case that a provider refuses to provide free legal aid, the provider shall immediately notify the beneficiary and the authority granting legal aid (the administrative body within the local self-government unit).

The Proposer considers that the provision of Article 21 para. 4 of the ZBPP is entirely incompatible with the provisions of the RS Constitution, as the free legal aid provider is expected in effect to review the final decision of the administrative body that has considered all the circumstances of the case and granted free legal aid to the beneficiary.

In the light of the fact that the intending beneficiary of the free legal aid was obliged to submit the entire documentation to the competent administrative body before exercising the right to free legal aid, that the administrative body then considered all the documents and brought a decision granting the beneficiary free legal aid, and that such a solution had become final and that the beneficiary had acquired the right to a legal aid service, there would be no legal basis for the service provider to reconsider the fulfilment of the conditions for granting free legal aid.

The Proposer points out that decisions of administrative bodies can only be reviewed by a second instance administrative body or in court proceedings, and that the service provider is in no instance authorised to reconsider the final individual administrative act granting free legal aid.

In accordance with the above stated, the provision of point 4, paragraph 1 of Article 21 of the ZBPP cannot in any way be compatible with the Law on General Administrative Procedure and the Law on Administrative Disputes, above all, as well as with the RS Constitution and the generally accepted rules of international law and ratified international conventions.

E) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF THE ARTICLE 32, PARA. 4 OF THE ZBPP



Article 32 ZBPP reads as follows:

**The conduct of the administrative body
Article 32.**

The procedure for requesting the granting of free legal aid is urgent.

The administrative body shall make a decision on the request within eight days of the date of receipt of the request and, if additional documentation has been requested from the applicant, within eight days of the date on which the documentation was received.

If there is a risk of the applicant incurring irreparable damage, or if the time limit within which s/he can take action in the proceedings is about to expire, the administrative body shall make a decision on the claim within three days of its receipt.

If the administrative body does not reach a decision within the eight or three days from the date of the receipt of the request or the submission of the supplementary documentation, the request shall be deemed to be rejected.

The administrative body requesting from the applicant supplementary documentation shall be obliged to set a deadline for its submission, which may not be shorter than eight days, the expiry date of which shall be deemed to have been waived by the applicant in the case in which he has not provided the requested supplementary documentation.

From the reasoning regarding the ZBPP in the Assembly, it also follows:

Article 32 of the Law prescribes the conduct of the administrative body. It is stipulated that the procedure for requesting the granting of free legal aid be urgent and the deadlines for the conduct of administrative bodies be set. Bearing in mind the precisely defined conditions for the use of free legal aid, the Law provides for a short deadline for decision-making upon the request of the applicant. The administrative body shall make a decision on the request within eight days from the date of receipt of the request, and if it has requested additional documentation from the applicant, within eight days from the date on which it was received. If supplementary documentation is required on the fulfilment of the conditions, the deadline shall be counted from the day of submission of the supplementary documentation. If there is a risk of the applicant incurring irreparable damage or if the time limit within which s/he can take action in the proceedings is about to expire, the administrative body shall make a decision on the claim within three days of its receipt. If the administrative body does not reach a decision within the eight or three days from the

date of receipt of the request or the submission of the supplementary documentation, the request shall be deemed to have been rejected.

The Proposer points out that paragraph 4 of Article 34 of the ZBPP is directly contrary to the provisions of the Law on General Administrative Procedure, the RS Constitution and the generally accepted rules of international laws and ratified international conventions, as it introduces a presumption of a negative decision in the administrative proceedings.

If the administrative body fails to respond within the time limit, thereby presenting a situation leading to the legal presumption that the request for free legal aid has been refused, the intended beneficiary of the service still remains unclear as to why his application was rejected, what the decision was based on and what the grounds would be to appeal in a situation when the solution to the beneficiary's request was not brought.

The applicant points out that the ECtHR in one of its judgments dealing with the violation of the principle of "equality of arms" stated the following:

"The reasons that the administrative bodies gave in the administrative procedure were too general, which is why, in the appeal proceedings, the Appellant was hampered from taking the opportunity to adequately state the first instance decision; the body before which the facts were presented refused to allow the applicant to submit arguments supporting his position" (see *Hentrich v. France*, § 56).

Taking into account the cited statement that the violation of this right exists even in situations where the competent authorities give reasons which are too general, there would be a violation of the law if the grounds for refusing the request for free legal aid would not be available at all. The legislator has foreseen precisely this kind of solution and hence, with the law itself, violates the rights of potential service beneficiaries.

Therefore, the legal presumption of the existence of a negative decision on the request for granting free legal aid, in the event that the decision is not issued within eight or three days of receipt of the documentation, would constitute a gross violation of the right to "equality of arms" as a constituent element of the right to a fair trial.

F) UNCONSTITUTIONALITY AND NON-COMPLIANCE OF THE ARTICLE 39, PARA. 3 OF THE ZBPP

Article 39 ZBPP reads as follows:

Fee for provision of free legal aid

Article 39.

The free legal aid provided by the legal aid service in the local self-government unit is funded from the local self-government unit budget.

When free legal aid is provided by lawyers or when a notary draws up a document or mediates in solving a dispute, local self-government units pay 50% of the fees for providing free legal aid or the document drawn up by notary or its mediation in solving a dispute, while the other 50% of the fee is borne by the Republic of Serbia, through the Ministry.

Representation in the first instance administrative procedure is not financed from the budget of the Republic of Serbia or the budget of the local self-government unit.

Free legal aid and free legal support can be funded from donations and project financing.

In relation to this provision of the Article, the explanatory preamble to the ZBPP includes, inter alia, the following:

Free legal aid and free legal support can be funded from donations and project financing. Providing legal aid can be funded from own sources, or by providing pro bono services, in accordance with the existing practice.

The Proposer points out that the legislator has, before everything else, excluded the complete administrative procedure in the first instance, and by doing so deprived the entire group of beneficiaries of this right.

To avoid further repetition regarding these matters, the Proposer points to the reasons set out in Section (A) and (B) of this Initiative concerning Articles 4 and 7 of the ZBPP, the unjustified exclusion of all those who exercise rights before the administrative bodies in the first instance, and the discrimination introduced by Article 39 ZBPP.

The other issue raised during the examination of this Article is the question that has also been raised earlier: whether the associations of citizens, after the adoption of this law, can continue to provide free legal aid from their own resources (which they receive from donations or projects to provide free legal aid).

This issue is one of the key problems the resolution of which will profoundly effect the work and provision of free legal aid in the future, thus the Constitutional Court's response to the perplexity created by this law would be very helpful.

G) REQUIREMENT OF THE PROPOSER

Bearing in mind all the above, the Proposer of the Initiative suggests that the Constitutional Court should consider the provisions of the ZBPP, not only those to which the Proposer refers, but also those that may also present a source of danger and harm to the beneficiaries of the free legal aid services, and find that they are not in agreement with the Constitution of the Republic of Serbia, generally accepted international law or ratified international conventions.

In addition, the Proposer considers that there is a strong need for the Constitutional Court to eliminate the doubts created by the provisions of the ZBPP and by the legislator when writing the text of the Law, with explanations which contain extremely contradictory reasonings that can only entail further legal uncertainty as regards the legal system of this country, with a risk of a collapse of the principle of the rule of law and a gross violation of the basic human rights of the citizens.

The Constitutional Court's statement is therefore necessary to prevent the potential adverse consequences which would ultimately be borne by the citizens, especially those who would be direct beneficiaries of free legal aid.

The Proposer also suggests for the Constitutional Court to hold a public debate, in accordance with Articles 37 to 41 of the Law on Constitutional Court, to invite all relevant stakeholders to present their views in relation to the provisions of this Law and, after the public debate, to bring the decision suggested.

In Belgrade, 25th December 2018

L A W Y E R

Mihailo Pavlović

Annexes:

1. Law on the Free Legal Aid with reasoning
2. ECtHR Judgment - **URBŠIENĖ AND URBŠYS v. LITHUANIA**