

COMMENTS ON THE DRAFT LAW ON THE AMENDMENTS OF THE LAW ON SOCIAL WELFARE

In Belgrade, 8 August 2018

A. Principal objections to the text of the Draft law on the amendments of the Law on Social Welfare

I Legalization of the measures prescribed by the Regulation on measures of social inclusion of beneficiaries of financial social assistance contrary to the international obligations of the Republic of Serbia contained in the ILO Convention No. 29 and Article 4 of the European Convention on Human Rights.

The most serious shortcomings of the Draft law include the introduction of measures that are contrary to the Constitution and the international obligations of the state in relation to the prevention of forced labor and discrimination, i.e. the introduction of provisions from the Regulation on measures of social inclusion of beneficiaries of financial social assistance. We remind that due to the introduction of these obligations that discriminate against the beneficiaries of financial social assistance and violate their dignity, the Constitutional Court has received several initiatives by the end of 2014 to assess the constitutionality of the disputed Regulation, and that the Ombudsman has submitted a motion for the assessment of the constitutionality of this act. The request sent to the Government of the Republic of Serbia for urgent suspension of the implementation of the Regulation was supported by 57 civil society organizations. By disregarding these initiatives and requests, as well as the warnings of the experts in this field, and by introducing the measures from the Regulation into the Law, the process of public discussion would completely be made senseless, due to the severe disregard of essentially important comments from the participants in the process. Ignoring of such an important warning from such a large number of representatives of civil society organizations would be a clear message to non-governmental organizations that their participation in public discussions in relation to the amendments to this regulation is purely formal, without taking into consideration the essential objections and proposals. It is also important to point out that the shortcomings of the Regulation could not be resolved by incorporating the obligations envisaged by the Regulation into the law since such obligations would continue to be contrary to the Constitution and international obligations of the state. In addition, the fact



that the measures proven to be inefficient are attempted to be incorporated into the law is a cause for concern, as was emphasized in the explanation of the Draft Law and in the preliminary results of the implementation of the Regulation implemented by the A 11 - Economic and Social Rights Initiative. Above all, these are the measures that are not suitable to improve the position of beneficiaries of financial social assistance in the labour market, because their involuntary participation in the performance of jobs for which no skills or qualifications are required (and this is mostly the case with the engagement of beneficiaries of financial social assistance under the Regulation) cannot result in greater chances of finding or retaining a job. On the contrary, these measures only contribute to the stigmatization of beneficiaries of financial social assistance, their further marginalization or the loss of funds to ensure basic existence.

II Regulation of the legal matter by bylaws that are contrary to the principles of legal certainty and guarantees of the prohibition of the reduction of the attained level of human rights

Also, we emphasize that the tendency for numerous bylaws to be adopted by the Minister without prior legal regulation of the basic terms and the more detailed conditions for the adoption of these bylaws can lead to the reduction of rights and to legal uncertainty. This is especially true if one bears in mind that numerous bylaws are not adopted within the prescribed deadline, that these acts are not subject to public discussion, nor can the content thereof be influenced by the experts from the given fields or by the general public. All these circumstances support the fact that in the proposed amendments to the Law on Social Welfare it is necessary to reduce the number of provisions that refer to the adoption of bylaws. Such legal solutions may, to a large extent, lead to the reduction of rights, which is contrary to the guarantees provided for by the Constitution under Article 20 that the attained level of human and minority rights cannot be reduced. This suggestion relates to the entire Draft since it has been observed that a large number of rights for the use of which the conditions were prescribed by the law are in fact deleted by the Draft Law and their regulation is left to the Minister in charge.

III Failure to observe the basic nomotechnical rules and methodology for drafting regulations

Finally, we note that laws and legal acts need to be written in accordance with the existing methodologies, so as to avoid ambiguities and disagreements, especially in terms of regulations that are the basic laws for a specific area.



B. Objections in detail

Proposal 1:

In Article 32 of the Draft, delete paragraph 2.

Proposal 2:

In Article 28 of the Draft, in paragraph 8, after the words “victims of human trafficking”, add words “and internally displaced persons”.

Proposal 3:

In Article 33 of the Draft, add new paragraph 1 reading as follows: “In Article 81(4), after the word “spouse”, add words “and common-law partner”.

Proposal 4:

In Article 34 of the Draft, add new paragraph 2 reading as follows: “In Article 82(1)(3), after the words “at the moment of submission of the request for cash social assistance”, add a comma, followed by the following words: “other than a registered personal vehicle used for transport of an individual or a family member who is seriously ill or a person with disabilities or an elderly and hard-moving person or a vehicle that is necessary due to traffic isolation;”

Proposal 5:

Article 35 of the Draft should be amended as follows: “In Article 83(1) (1), the words “or registered as an unemployed person”, should be replaced with the words: “or a person who is not engaged in work”

In Article 35 of the Draft, add paragraph 2 reading as follows: “In item 2), after the word: “if”, add the following words: “over the past six months”. After the words “has not refused the offered”, add the word “adequate”.

Proposal 6:

Amend Article 36 as follows: “Article 84 is to be deleted”.



Proposal 7:

In Article 37 of the Draft, add new paragraph 1 reading as follows: "In Article 85, paragraph 3 is to be deleted". Delete paragraphs 3 and 4.

Proposal 8:

Article 41 of the Draft should be completely deleted.

Proposal 9:

In Article 44, paragraph 4, delete the following words "fact about missed earnings".

Proposal 10:

In Article 46 of the Draft, add new paragraph 1 reading as follows: "In Article 110, add new paragraph 2 reading as follows: One-off assistance is also granted to persons who do not have ID documents, or to stateless persons or to persons without a permanent or temporary place of residence, if they suddenly or currently find themselves in the state of social need. A new paragraph 3 is to be added, reading as follows: "The procedure of exercising the right for the beneficiaries referred to in paragraph 2 of this Article shall be carried out by the Centre for Social Work on which territory the beneficiary referred to in paragraph 2 of this Article is located".

C. Explanations for the proposed amendments

Explanation of proposal 1:

Regarding the imposition of participation in public works and the individual employment plan, we emphasize that forcing individuals (the effects of which, according to the practice of international contracting bodies and the European Court of Human Rights, can be compared to the conditioning of receipt of financial social assistance by performing work that the individual has not chosen and for which he/she does not have the required qualifications and psycho-physical abilities) to work on jobs that they themselves did not choose, is contrary to the prohibition of forced labour, which, according to Convention no. 29 of the International Labour Organization is defined as any work or service required from one person under threat of any punishment and for which such person did not offer himself/herself voluntarily. What is especially worrying is the fact that the Draft provides for a measure that was



previously applied on the basis of a bylaw (Regulation on measures of social inclusion of beneficiaries of financial social assistance) and which, according to the claims given in the explanation of the Draft, did not produce results.

Explanation of proposal 2:

We propose for the legislator to foresee the exemption from the payment of social protection services also for internally displaced persons, in the manner and for the reasons for which this was done for the victims of human trafficking. This is primarily due to the specific position of the IDPs, the fact that many analyses show that the biggest problems of displaced persons are habitation, access to information and employment, and due to these factors, they are largely in the constant need for social assistance¹. Therefore, all these circumstances point to the multiple vulnerabilities of this social group, and therefore to the need to facilitate access to social protection services in a way that they will be exempted from paying expenses.

Explanation of proposal 3:

We propose that the civil law partners, in addition to spouses, should be seen as family members, regardless of the place of living, having in mind that the Constitution sees these forms of the community as equal.

Explanation of proposal 4:

When determining the property that a beneficiary of financial social assistance may possess, it is necessary to introduce this exception in order to prevent individuals that find themselves in the state of social danger to be forced to sell their vehicle and in situations where this would result in great difficulties in achieving life's needs, serious reduction of the quality of life and inaccessibility of basic services and organizations.

Explanation of proposal 5:

By specifying that the beneficiary is not obliged to accept employment or work engagement that is not appropriate for him/her, it is prevented that the individual remains without the means to secure basic existence for not accepting employment or engagement that does not correspond to his or her psycho-

¹ UNHCR, JIPS, Commissariat for Refugees of the Republic of Serbia, Assessment of Needs of Internally Displaced Persons in Serbia, March 2011, available at: http://www.unhcr.rs/media/IRL_izvestaj_srpska_verzija.pdf



physical condition or qualifications. Here we also wish to recall the Conclusions of the Committee for Social Rights of the Council of Europe for Serbia for 2017, in which a question was addressed to the Republic of Serbia in order to determine whether “in the event of a refusal of employment, engagement in temporary, occasional or seasonal work or vocational training, the right to financial social assistance is completely abolished and whether this may result in the denial of all means of survival for the individual in question. The Committee believes that, if this information is not provided in the next State Report, there will be nothing to prevent the conclusion that the situation in this segment is not in accordance with the Charter (Revised European Social Charter).” In order to prevent the consequences that could endanger the livelihood of individuals and align the situation in Serbia with internationally accepted obligations, it is necessary, depending on the circumstances of each individual case, to consider the possibility of reduction, rather than the complete abolition of financial social assistance, as well as for the financial social assistance not to be abolished in situations where this would mean a complete loss of funds for subsistence.

Explanation of proposal 6:

Not knowing the procedures and fear of initiating proceedings in order to obtain support from relatives in practice constitutes a serious obstacle to the exercise of the right to financial social assistance for the most vulnerable beneficiaries of this assistance. Apart from the fact that the obligation to initiate proceedings under Article 84 of the Law on Social Welfare, i.e. Article 36 of the Draft, constitutes an excessive burden on socially vulnerable persons and the courts, the outcomes of the proceedings are such that they do not justify further implementation of this obligation, either because the relatives themselves have the obligation to support socially vulnerable persons or because of the inability to ensure participation of the parties in the proceedings.² The administrative settlement will not be applicable in a large number of cases where the relatives who have the obligation to support do not live in the country or their beneficiaries do not even know their address, and therefore will not lead to simplification of the procedure for exercising the right to financial social assistance. For the same reason, it is not possible to expect the reduction of the pressure on the courts. Due to the fear that the initiation of the proceeding would harm the family relationships, socially vulnerable persons are left without the right to financial social assistance, which is especially present among elderly people who do not dare to sue their children despite being incapable of working and having no income other than the financial social

² N. Bodiroga, *The right to financial social assistance of the beneficiary who is entitled to subsistence - Legal analysis of Article 84 of the Law on Social Welfare*, pg. 10, available at: http://praxis.org.rs/images/praxis_downloads/Pravo%20na%20novcanu%20socijalnu%20pomoc%20korisnika%20koji%20ima%20pravo%20na%20izdrzavanje.pdf.



assistance. Instead of savings, this obligation only increases the burden of the courts, makes it difficult to exercise the right to social assistance and exposes individuals to extreme poverty if, due to their ignorance, fear or ethical reasons, they do not initiate proceedings for support. It is necessary for Article 84 of the Law (i.e. Article 36 of the Draft) to be deleted to lower the burden of the courts and prevent the socially vulnerable persons to be left completely without the means of subsistence because they did not know or have permission to initiate support proceedings.

Explanation of proposal 7:

It is necessary to delete paragraph 3 of Article 85 of the current Law on Social Welfare, which stipulates that a person who is capable of work or a family in which the majority of members are able to work is entitled to financial social assistance for up to nine months during the calendar year, if they meet the requirements prescribed by the law. Individuals and families whose members cannot find employment are left without any means of living and without the ability to satisfy basic livelihood needs. Interruptions in the receipt of financial social assistance are pushing the beneficiaries even deeper into poverty and exposing them to the risk of drastic worsening of their living conditions, and often put them at risk of staying homeless due to the inability to pay for utility services and rent, which is particularly noticeable in relation to the users of social housing. In addition, stipulating that the beneficiary of financial social assistance who is able to work, or the family in which the majority of members are able to work, is entitled to financial social assistance for only nine months during the calendar year, the Republic of Serbia acts in direct contradiction with the concluding observations of the United Nations Committee on Economic, Social and Cultural Rights, which in the last review of the implementation of the International Covenant on Economic, Social and Cultural Rights in the Republic of Serbia, has highlighted this issue as one of the key issues that are in contradiction with the obligations from Article 9 of the Covenant.

It is necessary to delete paragraphs 3 and 4 of the Draft that define regular education. First of all, we note that the concept of education is defined by the law that is the basic law for the given domain, that is, the Law on the Fundamentals of the Education System, and the obligation of regular education is stipulated by the Law on Primary Education and Upbringing. The aforementioned laws already prescribe the obligations and responsibilities arising from the circumstances of irregular attendance. Therefore, we are of the opinion that a provision that in this way represents a kind of a sanction in the form of loss of financial social assistance in a situation where the child is not attending school regularly, is contrary to the sense of providing social benefits. In addition, this is not done in the interests of the child, because if the child does not attend school, the goal is for the child to continue to attend classes rather than to



deprive the family of social assistance. Continuation of attending classes is established by educational social work with the family and involvement of the centre for social work, with the aim of providing support to the family. Therefore, the circumstance that in this situation the family will lose social assistance has the purpose to punish, not support, and in addition, the family that has a social need is left without financial social assistance or the amount thereof is reduced. All of the above may in numerous cases result in the withdrawal of the child from further education because when faced with the lack of funds and other means, the family will be forced to find other solutions that often involve children.

The way in which the Draft in Article 37 defines regular education and regulates the way of exercising the rights of children in full-time education is in contradiction with the principle of the best interest of the child referred to in Article 3(1) of the Convention on the Rights of the Child. This type of material support should aim to protect children from poverty and to provide them with a chance to live in dignity and achieve appropriate development, rather than reward particularly successful children and sanction those facing difficulties in accessing education. These difficulties are often related to the life in poverty, and the abolition or reduction of material support in such cases would be fundamentally contrary to the best interest of the child. We especially emphasize that this provision may have a disproportionately negative effect on children belonging to the Roma national minority who often face additional problems in the field of education or to whom quality education is not available due to lower expectations from teaching staff, discrimination, untimely inclusion in pre-school education, insufficient knowledge of the language and poverty. In this respect, one should bear in mind that the Committee on the Elimination of Racial Discrimination, in determining whether a particular act is contrary to the prohibition of racial discrimination, examines whether such act has an unjustifiably different impact on a group that is different in race, colour or national or ethnic origin,³ and the acts may be discriminatory if their purpose or effects result in a more difficult exercise of rights and freedoms,⁴ and therefore even without any discriminatory intent.

Explanation of proposal 8:

Article 97 of the current Law on Social Welfare already stipulates the obligation of the beneficiaries in relation to the reporting of all changes that are relevant for the recognized right, and Articles 105 and 106 provide for the obligation to compensate and recover the amount received without justification, and

³ Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), paragraph 3.

⁴ *Ibid*, paragraph 2.



therefore Article 41 of the Draft is completely redundant. Furthermore, Article 41 of the Draft opens up multiple risks of disproportionate interference with the rights of beneficiaries of financial social assistance. Even though achieving savings and preventing abuse in exercising the right to financial social assistance constitute a general interest, the measures taken to achieve this aim must be legal, proportionate and necessary. However, the measures referred to in Article 41 of the Draft law introduce the risk of numerous violations of the rights of beneficiaries of financial social assistance, including the protection of personal data, the risk of non-transparency in the processing and exchange of data between different authorities, as well as the risk of abuse and relying on unreliable data and unreliable sources.

Article 41 establishes the powers of the centres for social work very broadly when it comes to the processing of personal data of the beneficiaries of financial assistance, prescribing that the centre for social work may re-examine the conditions for exercising the attained rights of the beneficiary if, *in any way*, it becomes aware of facts that significantly influence the conditions for exercising such right (our italics). In Article 3, paragraph 1, item 3 of the Law on Personal Data Protection (hereinafter: the LPDP), it is specified that the processing of data is "any action taken in relation to data such as collecting, recording, transcribing, multiplying, copying, transferring, searching, sorting, separating, crossing, unifying, adjusting, editing, ensuring, using, making available, disclosing, publishing, disseminating, recording, organizing, storing, adapting, detecting by transmission or otherwise making available, concealing, and otherwise making unavailable, as well as carrying out other actions in relation to the said data, regardless of whether it is done automatically, semi-automatically or otherwise. " It is without doubt that the use and "obtaining in any way" of data on beneficiaries of financial social assistance constitutes processing of data in the sense of the LPDP and that it must meet certain conditions in order to be considered permitted, and the individual has the right to know who, why and what information is being processed about him/her, from where the data was collected, i.e. the source of the data, in which collections the data about him/her may be found, in what time procedure the data are being transmitted, and alike. Article 41 of the Draft does not answer these questions and does not provide any guarantees regarding the permissibility of data processing and the prevention of abuse.

When submitting a request, beneficiaries of financial social assistance may give written consent to the centres for social work to process their personal data on which the official records are kept, which are necessary for the decision-making process. Accordingly, the consent for the collection of data in accordance with Articles 9 and 103 of the APA refers to the processing of data on which official records are kept, and Article 41 of the Draft also provides for the processing of data for which official records are not kept. This is particularly noticeable when collecting data on the residence of individuals or their family



members abroad for a period longer than 15 days. According to domestic regulations, no official records are kept on the temporary residence of domestic citizens longer than 15 days (and shorter than 90 days).⁵ Only if the citizens stay abroad for more than 90 days, they are obliged to report to the Ministry of Internal Affairs and official records are kept of such persons.

Since staying abroad for more than 15 and less than 90 days is not subject to keeping official records, the collection of such data by the centres for social work opens up multiple risks of non-transparent data exchange or their unauthorized processing and abuse. The collection of such information is contrary to the Law on Permanent and Temporary Residence of the Citizens, which prescribes the manner of keeping records on the permanent and temporary residence of the citizens and on staying abroad, and the Ministry of Internal Affairs is entrusted with the collection of data on these circumstances and with keeping records. However, the Draft Law on Amendments to the Law on Social Welfare introduces the possibility of keeping parallel records on citizens' movements, in particular by the centres for social work.

The collection and processing of such data by the centres for social work create serious dangers of disproportionate interference with citizens' rights and violations of the right to privacy under Article 8 of the European Convention on Human Rights.⁶ The processing of such data is not completely regulated by the Draft, without specifying the purpose and method of collecting, storing and processing of such data. In addition, there is also a question of who collects data on staying abroad for more than 15 days and about whom. If such data were collected only for the beneficiaries of financial social assistance, such treatment would be contrary to the prohibition of discrimination, since records on staying abroad for less than 90 days are kept only for one category (the beneficiaries of financial social assistance). This would be contrary to the special protection of the legality of the processing of particularly sensitive data, which, under Article 16 of the LPDP, also includes the receipt of social assistance. If the centres for social work do not collect data from the Ministry of the Interior at all, then the manner of data processing is in contradiction with the principle of promptness and accuracy of data, which means that the processing of personal data is not permitted if the data are not based on credible sources (Article 8 of the LPDP).

Explanation of proposal 9:

⁵ Central Registry - A catalogue of personal data collections managed by the Ministry of Internal Affairs, available at: <https://registar.poverenik.rs/r/bdb4d40c-70b6-4641-a26c-7f65fe850d23>.

⁶ Here it is necessary to make a very clear distinction between, on the one side, Article 38, paragraph 2 of the current Law on Social Welfare that refers to the collection of data that the applicant himself provides or the body collects on the basis of his/her consent or the law and, on the other hand, the collection of data that is not regulated, for which there is no legal basis or protection against abuse.



The centres for social work have been given too much authority in attributing the income that an individual could have achieved even though he/she actually did not realize it. It is necessary to omit the possibility of determining the missed earnings in order to harmonize with the practice of international institutions and bodies overseeing the implementation of the contracts in which the Republic of Serbia is a contracting party, in particular, the case *ERRC against Bulgaria*⁷, in which Bulgaria has imposed a limit on the maximum number of benefits that can be received by an unemployed person that is able to work. In this case, the Council of Europe's Social Rights Committee has established that the Revised European Social Charter has been violated. The intention of the legislator that the beneficiary of special-purpose financial assistance will not a priori be prevented from earning an income throughout the year, and primarily relying on seasonal work, has limited the receipt of this compensation to a period of nine months, is an assumption that cannot generally refer to all beneficiaries of financial social assistance. Namely, the possibility of earning additional income and generating revenues incorporates many factors and it must be primarily considered in each case individually and with respect to the specifics of each individual beneficiary. In this way, under this regulation, all persons in need of social support are placed in a position where they cannot exercise their right at full capacity. Therefore, A 11 - The Economic and Social Rights Initiative proposes to prevent the implementation of this article by deleting it, thus preventing further violation of rights in the field of social protection and disturbing the material position of beneficiaries of financial social assistance.

Missed earnings is an instrument to deny the right to remuneration, and thus the assessment to determine whether the missed earnings have occurred must be clearly and precisely defined, in order to avoid different application of the law in practice. Specifically, in this legal formulation, the criteria cannot be determined, and therefore this issue is left to the person processing the case, which often leads to biased attitudes and groundless assertions of social workers on which the assessment of the amount of the missed earnings is based.

Here we remind that, examining the fulfilment of the obligations that the Republic of Serbia took over on the basis of the Revised European Social Charter, the Committee of Social Rights of the Council of Europe in its conclusions for 2017 and 2016 has determined that the situation in Serbia is not in accordance with Article 13 of the Charter, since the amount of social assistance to which the socially vulnerable individuals

⁷ The European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint no. 48/2008, decision of 18 February 2009, available at: http://www.errc.org/uploads/upload_en/file/decision-on-the-merits-by-the-european-committee-of-social-rights-18-february-2009.pdf.



are entitled is clearly inadequate and does not exceed the poverty line.⁸ The amount of financial social assistance in the Republic of Serbia is often insufficient to cover basic expenses, such as rent in social housing and utility bills, and this amount is further reduced by the unrealistic and arbitrary determination of the missed earnings. The abolition of the category of missed earnings is necessary in order to more effectively combat poverty and fulfil the obligations that the Republic of Serbia has taken in that regard, inter alia, on the basis of the Revised European Social Charter.

Explanation of proposal 10:

The minimum that the states should provide to each individual means the availability of resources necessary to meet the basic needs of living, and stateless persons and persons without documents are often unable to provide the resources necessary to meet basic existential needs. In this respect, we draw the attention to the Conclusions of the Council of Europe's Committee on Social Rights for Serbia for 2017 and 2016 in which the Committee reminds the state that even the persons who are illegally staying in the country, but who are in a state of danger, must have the right recognized by the law to meet the basic needs such as food, clothing, and shelter.⁹ We also point to the practice of the European Court of Human Rights and an increasing number of cases in which the violation of Article 3 was found and to the prohibition of torture, inhuman and degrading treatment (from which the states are obliged to protect *everyone* under their jurisdiction) because the states have failed to ensure the conditions of life appropriate to ensure that every human being has the right to a dignified treatment in relation to their basic needs, including the right to shelter.

⁸ European Committee of Social Rights, *Conclusions 2017 – Serbia – Article 13 Paragraph 1 – Adequate assistance for every person in need*, available at: <http://hudoc.esc.coe.int/eng?i=2017/def/SRB/13/1/EN>.

⁹ European Committee of Social Rights, *Conclusions 2017 – Serbia – Article 13 Paragraph 1 – Adequate assistance for every person in need*, available at: <http://hudoc.esc.coe.int/eng?i=2017/def/SRB/13/1/EN>.

