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PART TWO

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CURRENT LEGAL TREATMENT OF NGO's IN THE FEDERATION OF BaH AND THE REPUBLIKA SRPSKA (WITH PROPOSALS OF SOME POSSIBLE SOLUTIONS)

In making the Analysis of the valid laws governing NGOs in BaH, indisputably, we have to start from the fact that they are different in the territories of the Federation of BaH and the Republika Srpska. The difference must be pointed out this time as well if we want to find out the best possible way how to regulate this province.

Facts:

In the territory of the Federation of Bosnia and Herzegovina the non-governmental sector is governed by the two following laws:
- the Law on Citizens' Association (Federation of BaH Official Gazette No 6/95)
- the Law on Humanitarian Activities and Humanitarian Organizations (SR BaH Official Gazette No 12/95).

In the territory of the Repubika Srpska the non-governmental sector is governed by the Law on Citizens' Association (SR BaH Official Gazette No 5/90).

COMMENTS

The laws from the Federation territory are characterized by the fact that the both laws were enacted during the war. The Law on Citizens' Association is of the Federation level, different from the Law on Humanitarian Activities and Humanitarian Organizations that is of the republican level. The question whether there is any need for the existence of two laws is posed here if the fact that the Law on Citizens' Association permits citizens' association for the humanitarian purposes is taken into consideration. On the other hand,. the Law on Humanitarian Activities and Humanitarian Organizations prescribes that all issues that were not governed by this Law are to be solved in accordance with the provisions of the Law on Citizens' Association. A certain parallelism arises from the above stated that seems soluble if the current Law on Citizens' Association had

incorporated the provisions specific for humanitarian activities and humanitarian organizations. Posing of the question whether each organizing for a specific purpose (cultural, ecological) requires lex specialis enactment intrudes itself logically.

By its approach and method of governing the legal matter, the Law on Citizens' Association that is in force in the Republika Srpska can be described as controversial and interim nature of the time in which it was passed. It has all characteristics of the socialist conception of the law and the social function of regulations, but at the same time it comprises the visible signs of an effort to govern social relationships in somewhat different way from the usual one. The duality and provisional nature of the Law is expressed through its restrictive interpretation of the right to association and its liberal solutions set forth concurrently.
The title of the Law (the Law on Citizen's Association) tends to reveal the legislature's intention to govern the social process rather than to deal with its form and leave its content to the actors in the process.

I BASIC PROVISIONS

The main objectionable characteristic in this chapter of the laws in the Republika Srpska and the Federation of BaH is unpreciousness.
So, the Law on Citizen's Association in the Republika Srpska classifies associations into:
-political organizations further classified into: socio-political organizations and parties - though the essential difference between them is not discernible, neither the criteria nor a purpose of the classification are,
- social organizations,
- citizens' associations,
- movements and other forms of association and organization.

These concepts are defined but the text of the Law does not prove the effect of such a detailed elaboration.
The needs of the Law could have been met in full with a general definition of an association encompassing all the smaller classes.

On the other hand, there is a need, that intrudes itself during the analysis of the laws in the territory of the Federation, to define precisely kinds of associations and classification of NGOs (organizations) in the following manner:
- of common interest (trade unions, clubs, professional associations, etc.) and
- of public benefit.

This is considered very essential from the benefits angle which raises a new question as to who shall decide the kind of an association. There is a proposal that it should be a joint commission comprising representatives of NGOs and the government which will be a reputable and independent body.

II PREREQUISITES FOR AND THE METHOD OF REGISTERING AND ORGANISING ASSOCIATIONS

Concerning the provisions governing the registration and the method of organizing in the laws of the both Entities, certain issues are regulated in the same way and some issues are regulated quite differently.
The common characteristic in the both Entities is that, in order to make payments to associations for acquiring the status of artificial person, the Law adopted the so-called normative legal system that, in this case, reduces to the registration. At the first sight it seems fair enough but we can draw a conclusion from viewing the prerequisites stipulated by the Law that several obstacles have been set forth to associations on purpose, giving them a hard time in the registration.
The basis for the registration is a great number of founders - the Law stipulates that even 30 citizens should undersign the articles of association as founders. The background for requiring such a large number can be nothing else but an intention to create legal difficulties that will ward citizens' registering of associations off or the background is only the socialist conviction that only large numbers have the power.

Particularly, the issue of the possibility of minors' participating as members is still unsolved, though they are chargeable with crimes and competent to make employment contracts.

Concerning the registration, it poses the issue of jurisdiction in the territory of the Federation of BaH. The opinion is that it would be more purposeful if the courts conducted it. This is justified with the fact that the judiciary is independent and unburdened by the elements that may be associated if the registration remains to fall within jurisdiction of the ministries.
Particularly, a need for transparency and easier access to information about NGOs poses the issue of a single national registry. On the other hand, in order to make the registration procedure simpler, regional jurisdiction over the registration may be set forth with an obligation to unite the data in the national registry within a specified time limit.

In the Republika Srpska, the courts retain jurisdiction over the registration of associations, but there is the question posed whether there is a need for a council of a high court to decide the registration given the fact that its role is only to very the prerequisites for the registration.

In the Federation, there is a great need to equalize essentially the provisions governing the issues of associations of foreigners and international organizations without favouring any organisation and to stipulate that the managing boards must comprise some locals.

Regarding the time limits, it is assessed that they are acceptable but it is necessary to make the stipulation of a possibility of "presumed registration ruling" in the event of the neglect of the time limits by the competent bodies.

The Law in the Federation of BaH does not provide for an appeal but only provides for instituting administrative proceedings which also should be changed in any case because deciding appeals is always swifter than carrying on administrative proceedings.

III TERMINATION OF AN ASSOCIATION

The laws of both entities are characterized by provisions governing banning of work of an association in very general terms which gives possibilities of arbitrariness. If the law provides that the competent body shall make ruling on banning an association if it ascertained that it operates affairs or business in contravention of goals and tasks provided for in the Statute, it is not difficult to conclude that it is easy to find some or other affair that, in the court's opinion, will not lead to the set goals, that is, that a reason to ban an association is easily found if wished. There is a motive for this in a provision reading that in the even of banning an association, property of the association shall become property of the municipality where it has the head offices. In our estimation, the property should be transferred to a similar association.

IV SPECIFIC REMARKS

The present laws do not regulate at all the significant issues of membership, liabilities, protection of members, especially managing bodies' members. We consider that it is not sufficient for associations to regulate these issues by statutes without definite common rules.

The following issues should be determined:
Who is liable for an association (personal liability should not be stipulated);
Employees and managing body members' obligation to loyal conduct, keeping of a secret not meant for the public, etc;
The penalties issue, whether the whole gamut of penalties should be determined especially those concerning the banning of associations and fines related to it;
The protection of NGOs, especially that related to activities in politics, along with reserved freedom of speech without any restriction.

According to the above mentioned, as the result of all analyses made so far, the following common measures should be taken:

01. Clearly defining differences in view of foundations, uniform definition of the term "non-governmental organization" that should include humanitarian organizations as well, but definite specific issues concerning them should be governed in specific provisions of the law on NOGs.
02. Clear classification of NGOs, particularly defining differences between political organizations and public organizations that would encompass conditionally unions, professional sport clubs, trade unions should be made.
03. Simpler organizational procedure through required smaller number of founders.
04. Courts should have jurisdiction over the registration, on regional principle, but a single national registry should be set up for the function of compiling data.
05. The possibility for an organization to make own choice about the area of activity regardless the territory in which it has been registered should be provided for.
06. A judge, individually, should decide the registration and the ruling should be subject to an appeal instead of institution of an administrative proceedings.
07. The issue of umbrella organizations and unions of associations should be dealt with separately.
08. Revision of the provision determining that an association may be banned should be made in terms of good grounds for its breadth, especially of the part about property in the way that property should be transferred to another similar association.
09. Revision of penal provisions.
10. The Law on NGOs should determine the procedure of getting approval for operating so called "public affairs" such as health care service, education, and the like.

PART THREE

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FINANCIAL TREATMENT OF NON-GOVERNMENTAL ORGANIZATIONS IN BaH - PROPOSAL OF MEASURES

INTRODACTURY REMARKS

Before proposing measures required for the improvement of financial treatment of NGOs in BaH, it is necessary to give answers regarding the technical approach to be taken in the legislation respecting financial and fiscal treatment of non-governmental and non-profitable sector. There are two options:

The first is: the above mentioned matter should be regulated in the domestic laws and other regulations respecting the matter, as it has been in the case of existent legislation.

The second is: all financial and fiscal relationships regarding NGOs should be determined in one main law on the non-governmental sector.
In principle this method would be more appropriate to the non-governmental sector though more inconsistent in terms of the legal system, and it would especially facilitate following of the legal framework for NGOs in future, for all relevant relationships would be focused in one (not in more than two laws) instead of being scattered in numerous regulations and, thus, difficult to follow.

In general, the comparative legislation adopts the first technical approach.

Considering the required measures that should be taken taking account of the analysis of financial treatment of non-governmental sector made so far in the both entities and using certain comparative knowledge, it is necessary to pay attention to every detail of the following:

- the provision of resources for the work of non-governmental sector,
- tax and customs duties benefits,
- financial treatment of employed people in NGOs.

So far the provision of resources has been made mostly from the following sources:

- resources from membership fees,
- resources from endowments and donations,
- resources from profits of the corporations owned by NGOs,
- other sources pursuant to the law.

The analysis made so far has shown that additional sources should be:
- resources from sponsorship,
- other fund raising activities such as: rounds of visits, campaigns, lottery, bingos and the like.

It means that the first measure would be the increasing in number of financial sources by the last two stated.

Clarification

Recources from membership fees

It is impossible to expect that this source of income is applicable in practice in the situation of BaH having just come out of war and of poor material conditions of citizens consequent upon that. Even if the membership fee is paid in very rare cases, it is usually a symbolic amount of money so that it may cover only basic costs of the organisation (overhead expenses or material costs) and there is no possibility for the programmed activities. The membership fee is usually paid in clubs and sport organisations but the resources are usually used for the payment of participation fees for competitions at different levels and different categories (municipal, cantonal, federal, state/ children, juniors, seniors etc.).It is not realistic to expect any improvement of the situation regarding this source of income.
Having regard to this source of income there is no need to take any measures.

Resources from endowments and donations

This source of income is the basis of financing NGOs in BaH at present, mostly relying upon foreign resources. In legal terms an endowment is nothing else but a donation. However, the NGOs' activities should be aimed at prospective domestic donors in order to get them interested for the non-governmental sector. The restrictive practice applied so far which, speaking truthfully, does not burden with taxation the donee, but burdens the donor if the donation exceeds 0.5 % of his gross income in the accounting period, is unsustainable.
The question whether the limit should be maintained or changed or removed is posed. Basically, very few prospective donors, if we refer to artificial persons, will appropriate significant resources for donations regardless the limit. They usually appropriate symbolic amounts of money not necessarily consequent upon the set limitation.
If the limit would be retained it should be increased from 0.5 % of gross income to a higher rate or the tax rate should be decreased from the present 36 % in the cases when a donation exceeds 0.5 % if subject to taxation.

Resources from profits of the corporations owned by NGOs

Pursuant to the valid laws the profit made by a corporation founded by an NGO is subject to taxation as that of any other corporation. We consider the model unsustainable because it does not stimulate the non-governmental sector to provide resources itself for its activities. On the other hand, we are aware that if the corporations were subject to tax exemption, they would have an economic advantage over their profitable competitors. In this way the following options are excluded:
- net income taxation
- exclusion of net income taxation.

The third option, that we propose to be a measure, is to tax all business activities if they yield income exceeding a definite amount or a definite rate of gross income.

Other sources pursuant to the law

In other sources, first of all, we have classified incomes from games of chance that may be gained only through the arrangement of games of chance that may be done only by the artificial persons registered for horse-racing and by sport organisations. This source is of quite restrictive nature, for it is meant only for sport organisations. On the other hand, it is also restrictive from the aspect of an option of gaining income itself.
Therefore, the conclusion, which intrudes itself, is that there is a great need to support the measure that will include the following sources:
- sponsorship
- other fund raising activities.

Sponsorship means the provision of resources from artificial persons that are interested to be promoted through an NGO's activities. However, the present law subsumes sponsorship, along with advertising and propaganda, in the same category where donation is so that, besides the introduction of sponsorship category, the next measure should be **the elimination of the limit placed for donations that consequently imposes taxation of the amount given by a sponsor.**

An NGO should be enabled to provide resources through the following activities: campaigns, lottery, bingos. These activities are occasional and can not be considered business activities. Certain limits must be placed here to avoid misuse. In the first place, fund raising through a campaign requires licences of which the procedure of getting has to be simplified. The organisations which raise funds in this manner have to present to the public how the funds have been spent laying special emphasis on the costs of the fund raising campaign itself.

At the end we propose the following measures for the improvement of financing the non-governmental sector in BaH concerning financial sources:

01. The increase in number of financial sources so as to include the following financial sources:

- sponsorship

- incomes from activities.

02. The elimination of the limit placed for donations which a donor can donate
or the increase in the amount of a donation that will not be taxable
or the decrease in the tax rate when a donation exceeds the limit.

This also applies to sponsorship that is subsumed under the category in which donation is classified.

03. The placement of limits, either absolute or proportional, for taxing the net income that an NGO earns by operating a business.

TAX AND CUSTOMS DUTIES BENEFITS

This is the second important matter related to the improvement of financial treatment of the non-governmental sector in BaH. Tax benefits are voluntary and are allowed only to those organisations that want and claim them.

Customs duties exemption

NGOs should be granted a privileged treatment or customs duties exemption on imported commodities and services used for the realisation of the programmed goals.

It is here necessary to build in a mechanism of protection against possible misuses so that only commodities and services used by an NGO for its activities will be exempted from customs duties. If the things are sold within a short period of time -holding period- (e.g. 3 years) by the NGO, it would be liable to pay the duties.

On the other hand, these provisions have to be very clear and precise in order to prevent free interpreting and, thus, different applications by customs officers in each definite case.

Tax deductions

Having regard to the different legislation in the Republika Srpska and the Federation of BaH respecting tax deductions and taking account of the fact that, in practice on the territory of the Federation, tax deductions are interpreted in different ways, it is essential to determine by the law tax deductions concerning commodities and services used by an NGO for its activities.

The alternative that concerns customs duties deductions:

The allowing of tax and duty benefits for the organisations whose activities are of prime significance, e.g. health care, education, culture, human rights. This method is not applicable for the whole non-governmental sector and that is why we state it as an alternative. The main objection is that it is not a method generally applicable but it is based upon the principle of lists.

Real estate sales tax

NGOs that carry on real estate purchase in order to use it for the operation of their activities should be exempted from the taxation. According to the existent law, the seller is the taxpayer, because he gains income but it results in building in of the tax in the price in practice. Therefore, we propose that NGOs that purchase real estate should be exempted from the taxation with a limiting element that would have the function of misuse - on the next selling the NGOs have to pay the tax.

The measures for the improvement of financial treatment of NGOs concerning tax and customs duties benefits:

01. To prescribe tax and customs duties benefits on commodities and services used by NGOs for performing their activities along with, in order to avoid misuse, the limiting element in the event of selling them by NGOs.

02. To simplify the procedure of utilisation of the benefits.

3. To exempt real estate sale from the taxation.

FINANCIAL TREATMENT OF PEOPLE EMPLOYED IN NGOs

Besides the opinion that the non-governmental sector is voluntary and that valuable assistance is rendered by volunteers, it is quite acceptable that those employed in the sector are paid so as to have reasonable salaries and all rights arising from employment (e.g. health care and pension plan). What is an appropriate remuneration for the work performed in an NGO is the issue to be solved within the organisation determinable on facts and circumstances related to the organisation itself.

Having regard to the need for the people employed in the non-governmental sector to be protected and to exercise the rights arising from employment, it arises from the above stated that their employment and the payment of contributions, including tax, should be regulated by the law. The explanation of this is the fact that NGOs are usually financed by donations and the funds for salaries are limited covering gross salaries. The tax payment would jeopardise even bare subsistence salaries. On the other hand, an employee cannot influence significantly the increase in income and, thus, the increase in his salary.

This is pointed out in order to lay stress on the impossibility to regard employment in the non-governmental sector as identical with employment in the industry or non-industrial branches. Considering the option of leaving the decision on whether he wants to have the contributions for health care and pension plan paid or to draw the gross salary for an employee to make it of his own free will, we take account of the fact that each employee must have the options but must be aware of consequences of non-payment of the contributions.

Another important issue for the engagement in NGOs is the issue of the letter of appointment (temporary service contract). We think that the relationship between an employee and an NGO cannot be considered an ordinary temporary service contract, for the labour cost is not identical with the market labour cost owing to the fact that the employee does one part of his work as voluntary contribution. Therefore, we think that gross income taxation, that will encompass the income earned in the NGO, is sufficient. Practically, the contract is to be stamped in the Revenue Service in order to be recorded there and later, at the end of the year, to be included in the returns of income. If done otherwise, there will be an instance of double taxing on the basis of the letter of appointment and on the basis of gross income.

The measures to be taken in the legislation respecting financial treatment of people engaged in NGOs:

01. To enable people engaged in NGOs to be engaged on the basis of employment liable to contributions but not to salary tax.

02. The engagement in NGOs on the basis of the letter of appointment (temporary service contract) cannot be regarded as an ordinary temporary service contract but as an employment in NGOs giving effect to salary tax only when gross income is taxed.

ADDITIONAL DETAILS

While regulating financial and fiscal matters of NGOs the following facts should be taken into account:

- To enact a specific provision that will avert the local authorities (in RS it means municipal authorities in the first place) from making additional imposts to the NGOs that work in their territory.
- To specify the procedure of allowing tax, duty and other deductions or benefits.
- To stipulate the tax exemption in all cases when private property is placed at public use as by endowment or the like.
- To revise the registration or additional registration fees regardless the body within whose competence they fall.
- To consider specific ways of gaining income, such as the lottery or other gambling games and various kinds of occasional charitable activities of non-profitable nature.

Sarajevo, 20 January 1998