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ADVOKATSKA KANCELARIJA

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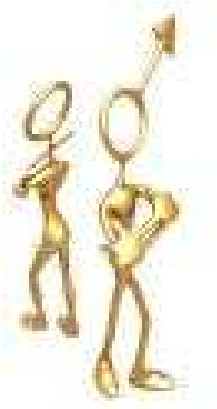

LAW ON GENDER EQUALITY

The Law on Gender Equality, to be implemented as of 25 December 2010, was published in the Official Gazette of the Republic of Serbia (No. 104/2009) on 24 December 2009.

In the context of EU rapprochement, the Republic of Serbia has undertaken to introduce a set of anti-discrimination laws, including the Law on Gender Equality. These laws are part of the legislation of all EU countries, as well as the countries in the region. The Law is in line with the general standards of international law, ratified international agreements and the RS Constitution, which guarantees the gender equality. The Law provides for: creation of preconditions for equal opportunities policy, exercise of rights, duties and undertaking special measures aimed at preventing and removing gender-based discrimination, as well as for the procedures of legal protection of persons exposed to discrimination. The implementation of this Law shall be monitored by the Gender Equality Directorate, Ministry of Labour and Social Policy, which submits no less than once a year a report on the status of protection and promotion of gender equality to the Government and the relevant Board of the National Assembly.

The adopted Law primarily aims to:

- Define more closely the principles of EQUAL OPPORTUNITIES POLICY and the vehicles of their protection. These principles imply equal representation of genders in all stages of planning, adopting and implementing decisions affecting the status of women and men in our society.
- SPECIAL MEASURES which are temporary in their character, and are undertaken to remove the factual gender-based inequality.

The Law provides for and governs the following areas:

- employment
- social insurance and health care
- family relations

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- education
- culture and sport
- political and public life
- court protection

➢ EMPLOYMENT, SOCIAL INSURANCE AND HEALTH CARE

The Law provides that employers must ensure that the employees, regardless of their gender, enjoy equal opportunities and treatment in respect of exercise of their rights derived from employment. Under the new Law, employers are under the obligation to keep records of the gender structure of employees and provide the information from such records to the labour inspectorate and the authority in charge of gender equality.

An employer having more than 50 employees with permanent contracts, is under the obligation to adopt a strategy for removing or alleviating the unequal representation of genders for each calendar year, and to prepare an annual report on implementation of the adopted strategy. If an employer should fail to adopt such strategy, such conduct will constitute an offence, punishable by a fine ranging between 10.000 and 100.000 RSD, and a fine ranging between 5.000 and 25.000 RSD in case of the responsible person at the employer. The strategy and the report are to be submitted to the Ministry of Labour and Social Policy.

When advertising a vacancy and job requirements, and selecting the candidates, it is not allowed to discriminate against any gender, and the gender may not be an obstacle to career advancement. The Law provides that maternity or parental leave may not be an obstacle to promotions, advancement and professional development, nor for assigning to inadequate jobs and dismissal. This Law guarantees the right of citizens to receive equal pay for equal work.

Within every cycle of professional development or training, employer must take care that the representation of genders reflects the structure of employees as much as possible.

The Law provides for the obligation on part of the employer to protect the employees from harassment, sexual harassment and sexual blackmail by other employees at the workplace. **These acts of harassment are deemed as violation of work duty constituting grounds for dismissal**, or pronouncing the termination of employment, as well as the grounds for removal of employee from work. An employee informs the employer in writing of the circumstances indicating the exposure to such harassment and requests adequate protection. Initiation of proceedings on part of the discriminated person does not constitute justified grounds for dismissal.

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Furthermore, the Law forbids gender-based discrimination relating to the exercise and enjoyment of rights in the area of social insurance and health care.

➢ FAMILY RELATIONS

Regardless of the family and marital status, the Law treats the married spouses and common-law partners equally when it comes to the exercise of rights to the respect of family life, and in case of family violence, court procedures are handled under an urgent procedure.
It is envisaged that a **court may, on request of the plaintiff, or *ex fficio*, pronounce a temporary measure,** whereby urgent protection is provided to the victim of violence.

➢ EDUCATION, CULTURE, SPORT AND POLITICAL LIFE

Gender-based discrimination is forbidden in the areas of education, culture, sport, political and public life, and equal opportunities and status of women and men are guaranteed.

➢ COURT PROTECTION

Drawing on the Comparative Law, this Law creates new mechanisms which ought to provide efficient protection of subjective rights recognised and guaranteed by the anti-discrimination laws. The procedure in lawsuits for the exercise of civil law protection is particularly urgent. **The first hearing must take place within 15 days of the receipt of the complaint, and the plaintiff is released form the obligation of paying the costs of procedure in advance.** Any person whose right or freedom has been violated due to gender is entitled to initiate a lawsuit. The trade unions and the associations whose goals are related to the promotion of gender equality also have the capacity to sue, *with prior consent of the discriminated person*. In order to make the plaintiff's position easier in the evidentiary procedure, the rule of the presumption of *guilt* of the defendant has been introduced, provided, however, that the plaintiff has shown it *probable* or the court has established that the act of direct discrimination *has been committed*.

➢ PENAL PROVISIONS

Gender-based discrimination is punishable by a fine

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ranging between 5.000 and 100.000 RSD in case of an employer who is a legal entity and a fine ranging between 5.000 and 25.000 RSD in case of the responsible person at the employer.

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Administrative Litigation Law

The need to adopt a new law arose as a result of the tendency to bring this legislative matter in line with international standards, Constitution of the Republic of Serbia, and the new Law on Organisation of Courts (*Official Gazette of the Republic of Serbia, 116/2008)*, considering that the old Administrative Litigation Law had been applied in its original and unamended form ever since 1996.

The Parliament of the Republic of Serbia adopted a new Administrative Litigation Law (*Official Gazette of the Republic of Serbia, 111/2009)*, which came into force on 30 December 2009.

This Law, complying with the general applicable regulations and taking into account the international standards in this area, first and foremost the *Recommendation Rec(2004)20 of the Committee of Ministers of the Council of Europe on judicial review of administrative acts adopted on 15 December 2004*, introduces numerous new solutions, the most important of which are relating to:

1. Subject of administrative litigation

The previous Administrative Litigation Law recognised as the subject of administrative litigation the assessment of the legality of final individual administrative acts, with the exception of those for which other forms of legal protection were envisaged. The term final administrative act means any second-instance administrative act (rendered upon appeal against a first-instance act) as well as a first-instance act against which appeals in administrative procedure are not permitted under the law.

The new Law expands on this term, and in addition to the above assessment of the legality of final individual administrative acts, also recognises as subjects of administrative litigation:

a) assessment of the legality of other final individual acts which decide the issue of the rights, duties or legitimate interests of a person, with the exception of those for which other forms of legal protection are envisaged,

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b) assessment of the legality of other final individual acts, when provided by the law.

This means that the subjects of administrative litigation may now include the acts rendered about the matters which are decided directly by the Parliament or President of the Republic, based on their constitutional powers, where such acts decide the issue of rights, duties or legitimate interests of a person, because no other legal protection has been envisaged in respect of such acts. For years (until this Law was adopted), such acts had been considered as so-called political acts, which had been explicitly excluded from legal protection in administrative litigation. This constitutes an important new solution introduced by this Law, namely the deletion of the previous provision allowing for the possibility of individual administrative (or legal) acts in respect of which any legal protection is *a priori* excluded, whereby the Law has been brought into line with the Constitution *(Art 32 – "Right to fair trial")*, and with the European Convention on Protection of Human Rights and Basic Freedoms.

Naturally, there remains the legal possibility of conducting administrative litigation over "silence of administration", or failure to adopt an administrative or any other individual act which may be the subject of administrative litigation.

Considering all these important new solutions introduced by this Law, we conclude that they allow the legislator and court practice to "create" cases to be subjected to administrative judicial review.

2. Jurisdiction and judicial procedure

Administrative litigation is conducted in administrative judicial procedure before the Administrative Court as a special and independent court, the only one for the entire territory of the Republic of Serbia (with its seat in Belgrade, and the possibility to set up court divisions beyond its seat, which currently exist in Niš, Kragujevac and Novi Sad). This new solution is particularly important, considering that the old Law provided for the jurisdiction of the Supreme Court of Serbia and district courts which had their own administrative divisions.

A judgement rendered in administrative litigation is final and may not be challenged by an appeal, but only by the request to review the legality of the judicial ruling, which is an extraordinary legal remedy. Such procedure is conducted before the Supreme Court of Cassation, which is in line with the principle of single instance in deciding the issue in administrative litigation, provided under the Law on Organisation of Courts.

Judicial procedure is initiated by a suit, to be brought before the court within 30 days of the receipt of the act being challenged, *i.e.* within the period provided by the law in case of silence of administration. The suit does not stay the enforcement of the challenged act, however exceptionally, if the requirements prescribed by the law have been met, the plaintiff may request a delay of enforcement until such time as the judicial decision is rendered. Under the new Law, it is the Administrative

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Court which decides directly on such requests, instead of the authority whose act is being enforced, or the authority in charge of the enforcement, which was the case under the old Law and proved to be very inefficient in practice.

3. Electronic documents

A party may submit any and all motions to the Administrative Court as electronic documents, and subject to the party's prior express consent, the Court will provide its decisions in the same manner, in accordance with the Law on Electronic Documents *("Official Gazette of the Republic of Serbia", 51/2009)*.

4. Oral public session

Unlike the old Administrative Litigation Law, the new Law provides that oral public sessions in administrative judicial procedure shall be mandatory.

The rule of oral public sessions is absolutely mandatory in cases of:

a) complex subject matter of litigation,
b) need to better clarify the state of facts,
c) dispute resolution without documents,
d) participation of two or more parties with conflicting interests in the administrative procedure,
e) establishment of facts so that the matter may be decided in full jurisdiction.

Exceptionally, provided that the subject matter of litigation is such that it does not require direct examination of the parties and independent establishment of facts, or if the parties should expressly consent to this, the court may render its decision in a closed session.

5. Judgement

The Administrative Litigation Law provides for three types of judgements, as follows:

a) Judgements rendered in limited jurisdiction proceedings

Under this type of judgement, the Administrative Court fully or in part annuls the challenged act and remands the case for a new decision to the competent authority, unless there is no need for a new act in such matter.

The new Law introduced the adjudicative judgements, as follows:

- judgements on establishing the illegality of an act without legal force and effect,
- judgements on establishing that the defendant has repeated its earlier act that had been already annulled before the court,
- judgements on declaring a decision null

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and void.

b) Judgements rendered in full jurisdiction proceedings

Under this type of judgement, the Administrative Court fully or in part annuls the challenged act and replaces such act by this judgement in full, provided that the nature of the matter and the facts of the case offer sufficient grounds for doing so.

The Court renders this type of judgement on request of the plaintiff, and if such request is dismissed, it shall state the reasons for dismissal of the request.

The Law, however, provides for the obligation to render this type of judgement when deciding in limited jurisdiction litigation may cause hardly reparable damage to the plaintiff, providing that in such case the court itself established the facts.

As earlier, the Law provides for one exception when this manner of deciding the case is excluded, which occurs when the subject matter of administrative litigation is an act issued by exercising free discretionary powers.

c) Judgements rendered in proceedings because of "silence of administration"

Under this type of judgement, the Administrative Court may order the authority whose act is being challenged to render a decision it has failed to render.

However, if it is in possession of the necessary facts and if the nature of the matter should so allow, the Court may render judgement directly deciding the administrative matter itself.

6. Legal remedies

As stated earlier, a judgement rendered by the Administrative Court is final and may not be challenged by ordinary legal remedies. The parties in such case may have recourse to two extraordinary legal remedies, as follows:

a) Request to review judicial ruling

This request is decided by the Supreme Court of Cassation, and it may be submitted by the parties and the competent public prosecutor, considering that the new Administrative Litigation Law no longer provides for the request for protection of legality as an extraordinary legal remedy used by the public prosecutor.

b) Motion to reopen procedure

This motion is decided by the court which

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rendered the decision to which the reason for reopening procedure apply, and it is submitted by a party within 30 days of learning about the reason for reopening the procedure.

The Law introduces a new reason for reopening the procedure, namely a situation where a stand from a subsequently rendered decision of the European Court of Human Rights in the same matter may affect the legality of a finally decided case.

7. Costs of procedure

An important new solution introduced by the new Law relates to the costs of procedure, as unlike the old Law which provided that each party should bear its own costs, the new Law provides that the Administrative Court should decide about the costs of procedure by applying the appropriate provisions of the Civil Procedure Law.

8. Compensation of damage for failure to enforce judgement

Under the new Law the plaintiff is entitled to compensation of damage arising out of non-enforcement or untimely enforcement of the judgement rendered in administrative litigation. This right is exercised before the competent court in the civil procedure.

9. Ongoing cases

All cases which had commenced before this Law came into force shall be completed under the rules of procedure valid prior to its coming into force.

The procedures upon suits, requests for extraordinary review of judicial rulings and motions to reopen procedure will be decided before the Administrative Court, and the procedures upon appeals of the judgements rendered in administrative litigation and the requests for protection of legality will be decided before the Sup

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