

Initiative for the Improvement of the Mandatory Maintenance System

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Initiative for the Improvement of the Mandatory Maintenance System

The aim of the initiative is to establish a new model of collection of mandatory maintenance - alimony, which would contribute to the improvement of the mandatory maintenance system and financial situation of dependent children and their single parents.

Single parents, including more than 75% of mothers, have difficulties in realising the legal right to alimony payment by other parent, who is obliged to do so by the final court decision. Due to the lack of a system for monitoring the entire process, there are various ways of avoiding this legal obligation (ranging from the change of residence, unreported employment, reporting minimal income, concealing additional income, etc.). Bearing in mind that among the categories at risk of poverty, single-parent families and families with one employed member are faced with the highest risk of poverty¹, inability to exercise the right to alimony puts women and their children in a very unfavourable position.

On the other hand, the exercise of this right requires initiation of new legal proceedings, which further impoverish and exhaust women and do not guarantee any results. It is estimated that this right is not exercised by as much as 85% of children.² Statistics show that the number of criminal charges for a criminal offense of failure to make alimony payment is on the constant rise (from 2002, when 877 offenses were reported to 2010, with 1,442 reported offenses, of which 90% of the perpetrators were men)³, but the penalty policy is ineffective. The provisions of the Criminal Code which define the punishment of the alimony debtor are insufficient to meet the needs of the alimony recipient, given that the failure to make alimony payment is punished by fine or imprisonment of up to two years, which is realised in exceptional cases.

Consequently, it is necessary to introduce more effective measures that would encourage the persons, who are obliged to make alimony payment, to do that regularly. As a result, new measures would reduce the time and cost of alimony creditors necessary for exercising the right to alimony. The solutions we propose are based on an analysis of the current practice in exercising the right to alimony, analysis of regulations and good practices in some European Union countries that regulate the issue, and the framework *cost-benefit* analysis in relation to the situation in Serbia.⁴

This proposal for the improvement of alimony collection requires amendments to the *draft Civil Code* (Book III - Family Relations), the *Law on Enforcement and Security and the Criminal Code*, which, in their domains regulate the mandatory maintenance (alimony). The proposed model of collection of mandatory maintenance (alimony) involves several factors:

1. *Alimony Fund*, whose establishment is provided in the draft Civil Code (Articles 193-197). The draft Civil Code foresees that the resources of this fund would be used to cover the payment of outstanding child support when payment of alimony is late for three consecutive months or for six months cumulatively. The assumption is that the compensation paid by the Fund would not significantly increase allocations from the state budget, given that the alimony creditors have so far used other forms of government assistance (Social Welfare), since they are in the difficult financial situation as a result of the inability to realise alimony determined by court order. In addition, it is

¹ European Platform Against Poverty and Social Exclusion: European Framework for Social and Territorial Cohesion, SEC(2010) 1564 final.

² See: <http://www.pravniportal.rs/index.php?id=3451&cat=159>

³ Taken from the website of the Republic Statistical Office (July 2012), <http://webrzs.stat.gov.rs>.

⁴ The analysis on the situation in this field in Serbia and the European Union countries has been conducted by the Social Inclusion and Poverty Reduction Team of the Republic of Serbia.

assumed that after a while, funds of the Fund will decrease because with getting payment from debtors there will be less need for using public funds. Assets for the functioning of the Fund could be provided from debt enforcement, games of chance and the funds collected by applying the institute of postponement of criminal prosecution. The draft Civil Code provides that the more detailed requirements for the use of assets and the rules of the Fund's functioning will be prescribed by the minister responsible for family care.

Proposal relating to the amount of alimony paid by the Alimony Fund:

(a) The amount of alimony paid by the Fund is recognised and paid in the full amount determined by the final court decision or agreement between the creditor and debtor that has executive power.

Or

(b) The amount of alimony paid by the Fund is the sum periodically determined by the ministry responsible for family care as a compensation for foster children and persons in foster accommodation.

2. *Measures for temporary restriction of rights*, which would include a temporary ban on the validity of a driver's license, a temporary ban on the validity of a passport, a temporary ban on registration of a vehicle could be ordered individually or collectively, depending on the circumstances of the case. After settling debts in full the debtor may file a request for the measure to be withdrawn along with the proof that the debt is settled. If after the measure(s) are lifted the debtor fails to pay alimony in the amount and in the manner determined by the court decision, the court will again impose the measures for temporary restriction of rights.
3. *The role of private enforcement officers*: The Law on Enforcement and Security should provide that minor alimony creditors or their legal representatives do not pay the costs of private enforcement officers, as well as that the creditor of legal maintenance and the creditor who has acquired the right to free legal aid is exempt from the advance costs of the enforcement procedure.

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Association for Autonomous Women's Initiatives, Belgrade
Vojvodina Centre for Human Rights, Novi Sad
Initiative for Development and Cooperation, Belgrade
Luneta, Belgrade
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**Proposals for amendments to the draft Civil Code
(Book III, Family Relations)**

V. DETERMINATION AND TERMINATION OF ALIMONY

1. Amend Article 187 by adding a new paragraph after Paragraph 1.

The amended Article 187 now reads as follows:

The alimony creditor may require that the amount of alimony is determined as a fixed monthly amount or a percentage of regular monthly income of the alimony debtor.

If the alimony amount is determined as a fixed monthly amount, the alimony amount is adjusted to the cost-of-living index twice a year.

If the alimony amount is determined as a percentage of regular monthly income of the alimony debtor (wages, salaries, pensions, fees, etc.), the alimony amount, as a rule, cannot be less than 15% nor more than 50% of regular monthly income of the alimony debtor reduced by taxes and contributions for mandatory social insurance.

If the alimony creditor is a child, the alimony amount should provide that the standard of living of the child is at least equal to the one enjoyed by the parent, alimony debtor.

EXPLANATION

Since the regulations do not provide for the percentage growth of alimony according to the annual increase in the cost of living, once determined alimony amount is very difficult to change. The parties are obliged to seek modification of the alimony amount over time (which requires initiation of new legal proceedings), which are again time and money consuming. For these reasons, the law needs to define an index of alimony increase on an annual basis, which will not affect the percentage of the determined alimony amount, but the change would relate to the fixed amount. At the same time this change allows automatic adjustment to the cost of living, and there is no need to initiate the procedure for the change of alimony amount.

2. Amend Article 194 by erasing Paragraphs 2 and 3, and adding a new paragraph.

The amended article 194 now reads as follows:

If the alimony debtor does not regularly meet his obligations for a period of 3 consecutive months or 6 months cumulatively, the child is entitled to receive support from the Alimony Fund.

The child-alimony creditor must submit a request to the Fund for the payment of alimony.

The request for the alimony payment from the Alimony Fund should contain information about the name of the alimony debtor, his birth, residence and employment. Other information about the alimony debtor necessary to decide on the right to alimony payment is obtained by the Fund ex-officio.

The child-alimony creditor without an established paternity necessary for the realisation of the right to alimony should submit to the Fund a birth certificate where the father's name is not registered.

EXPLANATION

In order to realise the right to alimony, the child-alimony creditor must file a proof that the collection enforcement has been unsuccessful, which would significantly prolong the payment of funds from the Alimony Fund due to the fact that the enforcement procedure takes at least three months. In this case, the period in which the debtor does not meet his alimony obligation, that is the period in which the child does not receive alimony determined by court order, would be expanded to more than three or more than six months. Furthermore, the request for alimony payment from the Alimony Fund contains a large amount of data about the alimony debtor (information on his address of residence, property status, occupation, employer address, etc.), most of which are usually unavailable to alimony creditor and represent an unrealistic request for alimony creditors. In situations where alimony debtors conceal the required information (do not report their income, conceal extra income), change residence or employer, alimony creditors generally have no way of obtaining the information. On the other hand, the Fund could obtain the information ex-officio from the competent institutions, without special procedures and compensations. The extension of the right to receive support from the Fund to the category of children without a recognised paternity would lead to equalisation of their rights with those of the children from the category of the children with recognised paternity and would consequently end discrimination against these categories of children and their single parents. This would also express the equal orientation of the state towards the children from all categories of single parents and willingness to support the dignity of life of marginalised groups. Given that the draft Civil Code (Art. 193, para. 3) provides that the detailed requirements for the use of the funds and rules of the Fund will be prescribed by the minister in charge of family care, all the details related to the exercise of the right to alimony payment need to be defined by a separate by-law.

Proposals for amendments to the Law on Enforcement and Security (*Official Gazette of RS, No. 31/2011 and 99/2011*); now Draft Law on Enforcement and Security on the website of the Ministry of Justice

- 3. Amend Article 34** with Paragraph 3 which reads: [The legal maintenance creditor and the creditor who has acquired the right to free legal aid are exempt from the advance costs of the enforcement procedure.](#)

The amended Article 34 now reads:

The costs of the procedure in connection with the determination and implementation of the enforcement are paid by the enforcement debtor.

The enforcement creditor is required to advance the costs of the procedures, in accordance with the law and regulations governing the costs. The Court, i.e. enforcement officer shall suspend

enforcement if the enforcement creditor fails to provide proof of the paid advance WITHIN THE GIVEN DEADLINE, unless exempt by law or by a court decision.

The legal maintenance creditor and the creditor who has acquired the right to free legal aid are exempt from the advance costs of the enforcement procedure.

The costs of the procedure initiated ex officio are advanced from funds of the court in charge of enforcement.

The enforcement debtor is obliged to reimburse the necessary procedure costs to the enforcement creditor.

The enforcement creditor is obliged, upon the enforcement debtor's request, to cover the costs of the procedures that are unreasonably caused.

The cost of the procedure incurred before the enforcement officer is decided by the enforcement officer with a reasoned conclusion and enforcement is determined for the collection of the costs.

The reimbursement request may be submitted within eight days of the completion of the procedure.

The regulation under Paragraph 2 of this Article is passed by the minister in charge of justice (hereinafter: the Minister).

EXPLANATION

The fact is that the legal maintenance creditors often cannot exercise their right to alimony due to obligation to pay advance costs of the enforcement procedure. The advance payment of costs by the minor creditors, which largely represent a socially vulnerable group of the population, is an unjust request and violates the principle of the best interest of the child by which all state bodies, including the courts should be guided. The court and private enforcement officers would not be damaged by paying enforcement costs, but these costs would be collected from the debtor along with the enforcement of monetary claims. Moreover, in light of the adoption of the Law on Free Legal Aid, we believe that the enforcement creditors, which will be recognised this right in accordance with the Law on Free Legal Aid, should be exempt from the advance costs. We suggest that the final and transitional provisions foresee that this provision will fully come into force after the adoption of the Law on Free Legal Aid.

4. **Amend Chapter III** by adding part 2a Measures for temporary restriction of rights, and new articles 53a-53r.

Chapter III **MONETARY FINE, JUDICIAL PENALTIES, MEASURES FOR TEMPORARY RESTRICTION OF RIGHTS AND THE PROCEDURE FOR OBTAINING A STATEMENT ON PROPERTY BY ENFORCEMENT DEBTOR**

2a Measures for temporary restriction of rights **Types of measures for temporary restriction of rights**

Article 53a

The debtor of legal maintenance can be imposed the following measures for temporary restriction of rights: temporary ban on the validity of a driver's license, temporary ban on the validity of a passport, temporary ban on vehicle registration. Measures may be imposed individually or collectively, depending on the circumstances.

Measures for temporary restriction of rights would last until the settlement of the amount of the principal debt specified in the enforcement request, but not for the instalments that are due in the future.

If the legal maintenance debtor fails to pay the principal debt within 3 months, the court shall, after the expiry of the deadline, pass a decision on increasing the amount of the principal debt. The court is obliged to take this fact into account ex officio.

Procedure of passing decision

Article 53b

The request of the legal maintenance creditor to the court to oblige the legal maintenance debtor for the adoption of measures for temporary restriction of rights is decided by the court in the enforcement procedure.

The request for the adoption of measures for temporary restriction of rights is filed at the court responsible for the execution of the court decision, which establishes obligation of legal maintenance prior to submitting the request for enforcement.

The rules of urgency of the enforcement procedure are applied on the procedure for the request to adopt the measures for temporary restriction of rights.

If the court finds that the request for the adoption of measures for temporary restriction of rights is grounded, it shall pass a decision to impose one or more measures for temporary restriction of rights.

The legal maintenance debtor is entitled to file a complaint to the Decision, which does not prevent the decision execution. The reason for the complaint cannot be the fact that the imposed measure prevents the legal maintenance debtor from carrying out his work or job.

Compulsory enforcement

Article 53c

With the Decision that imposes one or more measures for temporary restriction of rights the court shall order the Ministry of Interior to enter the temporary ban into the records on the issued and valid driver's license, travel documents and registered vehicles.

Termination of the measures for temporary restriction of rights

Article 53g

After the principal debt related to legal maintenance has been paid, the court shall pass a decision on the termination of measures for temporary restriction of rights and submit it to the parties.

The decision shall then be submitted to the Ministry of Interior in order to delete the measures from the records.

EXPLANATION

Bearing in mind that the existing legal measures from the Criminal Code related to the punishment of the alimony debtor are not sufficient to meet the needs of alimony creditors, it is necessary to introduce new, more effective measures. Practices of some countries have shown that measures such as the confiscation of a driver's license, temporary ban to a passport validation, prohibiting registration of a vehicle are very effective and that under the threat of these measures the debtors pay alimony regularly. For example, in England and Wales, the Agency for Child Care takes action against the debtor such as money transfer directly from the earnings of the debtor, a driver's license revocation, as well as imprisonment.

Proposals for the amendment to the Criminal Code (*Official Gazette of RS*, No. 85/05, 88/05 – correction, 107/05 – correction, 72/09 and 111/09)

- 5. Amend Article 195** so that in Paragraph 1, after the words “shall be punished”, the words “monetary fine or” are deleted, and in Paragraph 4, after the word “court”, the words “is obliged to determine the obligation of community service for the offender and order him” are added.

The amended Article 195 now reads as follows:

Failure to provide alimony Article 195

- (1) Those who do not provide alimony for a person they are legally obliged to support, with the court decision or executive settlement before the court or other competent authority, in the amount and manner determined by the decision or the settlement, shall be punished with imprisonment up to two years.
- (2) The offender specified in Paragraph 1 of this article shall not be punished if has not provided alimony out of justifiable reasons.
- (3) If the offense specified in Paragraph 1 of this article has resulted in serious consequences for the dependent person, the offender shall be punished with imprisonment of three months to three years.
- (4) If it imposes a suspended sentence, the court [is obliged to determine the obligation of community service for the offender](#), and order him to fulfil his payment obligations and make regular alimony payments.

EXPLANATION

The provisions of the Criminal Code which define punishment of the alimony debtor are not sufficiently effective, especially since the debtors are most often imposed suspended sentences,

while monetary fines or imprisonment are exercised in rare cases. Since the alimony debtors already have (most often large) financial debts to alimony creditors, fines are ineffective because it is an additional burden for the debtor which complicates the payment of already substantial amount of debt. In order to improve the collection of alimony and meet the needs of alimony creditors, in cases where suspended sentences are imposed, in addition to the order to settle payment obligations and continue with regular alimony payments, it is important that the court determines the obligation of community service for the offender.