



Public Interest  
Law Institute

# Making Legal Aid a Reality

A Resource Book for Policy Makers and Civil Society





Public Interest Law Institute

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A Resource Book for Policy Makers and Civil Society

Now known as



**PILnet**

The Global Network  
for Public Interest Law

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# Foreword

**T**he function of the law is to convert misfortune into injustice. I picked up this memorable proposition from Martha Minow, who got it from her father. It bears repeating. The function of the law is to convert misfortune into injustice. Such metamorphoses are not self-realizing. They need eager people who dedicate their skills to the betterment of human lives.

To demand that the dispossessed have access to the instruments of justice is like pushing water uphill. It can be done, but it goes against gravity. To succeed, or even to survive in this area, requires not only skill, persistence, and maneuverability, but a high degree of buoyancy and vitality.

Fill a room with legal aid activists from all over the world, give them the opportunity to exchange experiences, and what do you get? Sparkle. The kind of people attracted to legal aid work tend to be lively, verbally active, and expressive to a degree. They have to be. They are up against it. Legal systems historically have been created to regulate the affairs of the wealthy, and to keep the poor in their place.

What else do you get in that crowded room? You get passion. Passion can glow, and passion can burn. Promoters of legal aid are characterized by their passion; sometimes they glow, and sometimes they are burned. They are idealists. Their motivation is not to become rich or famous or powerful. It is to open wider the portals of justice. They give meaning to their own lives by enabling other people to enjoy greater meaning in their lives. If the law as it is practiced is unduly weighted towards one section of society and unacceptably exclusionary towards another, it is inherently biased. For proponents of legal aid, the idea that people have rights but are unable to enforce them is as bad as their not having the rights at all, in some ways worse because it relies on false pretences. Justice must exist within justice!

It is the commonality of their passion for justice that unifies argumentative and erudite legal aid practitioners throughout the world. The particular problems they face and the solutions they pioneer might well be quite different from place to place—what are regarded as scraps from the table in one situation, would be bountiful feasts in another. Yet in each country there is an eagerness to push beyond whatever barriers are denying access to justice. The basic problem is the same: to make the law more accessible to more people—and especially to ensure that those most desperately in need can most benefit from what the law has to offer.

It is the poor, not the rich, who most need rights. The rich cannot easily be ignored. They have money, power, and influence. They can usually settle their problems amongst themselves and without recourse to law. They do not need rights in the way the poor do. The poor are as frequently oppressed by law as they are freed by it. Even the growing international movement for seeing basic human rights as universal entitlements leaves them far behind. They are frequently unaware that they indeed do have rights, and even more in the dark as to how they can enforce them.

This is where legal aid activism comes in. To function meaningfully in this area you have to be clever, thoughtful, inventive, and open to new ideas. In addition you need to be eminently practical. Idealism without structure defeats itself. Structure without direction is dangerous.

This book responds directly to these needs. It contains an abundance of well-focused advice from people who have experienced both the glow and the burn of legal aid practice. There is guidance on questions of funding, on the different techniques available to secure legal representation, on the importance of paralegals, on the role of NGOs and other civil society organizations. Close attention is given to the rapidly growing number of public interest offices in private law firms (and may the competition among them be over who provides the greatest legal support to the greatest number in the most effective way—and who cooperates best with others!).

All the central aspects of legal aid work are dealt with, and in a lively way befitting the theme. The diet is rich, and makes me look forward to more debates, more sharing of experiences, and more books on wider themes of legal aid.

I believe that while pushing forward the frontiers of legal aid as it exists today, we have to get beyond regarding the legal system as a given. We cannot restrict ourselves to seeing the problem of access purely in terms of finding more funds and extra people to help those who cannot afford to hire lawyers. There are numerous other ways of achieving greater access.

We can remove barriers, which at present block access. Laws can be written in more accessible language (and in all the languages used by the people affected by them). Procedures can be simplified. Legal discourse could be made less impenetrable. Small claims courts, mediation, and arbitration can all help with accessibility.

Then, more needs to be done to provide information to the public. The public have a right to know what their rights are and how they can go about vindicating their rights. And people should be able to use the law to find out how those exercising public power have been functioning and on what basis they have arrived at their decisions. Access and accountability go hand in hand.

And, I believe, there is yet another way in which justice can be made more accessible. It is through enhancing the participatory and restorative aspects of the justice system. South Africa happens to be the country where the ancient African philosophy of *ubuntu* meets the evolving international notion of restorative justice. Offenders and victims are brought together. Families are involved. The emphasis shifts from almost exclusive focus on punishment to seeking ways and means of repairing damage and healing torn social fabric. Key decisions are taken by the people most affected, rather than solely by officials of the state. The gap between the state and those most directly affected by a violation of the law is narrowed. In this way people get access to the legal system by being direct participants in it. In both practical and emotional terms the barriers that separate ordinary people from the law are dissolved.

So I look forward to more books by more lively, troublesome, passionate, and articulate people on the enduring theme of access to justice. And may these follow-up books be as spirited, well informed, and helpful as this one!

Albie Sachs  
Constitutional Court of South Africa  
Johannesburg, January 2009

# Preface

Legal aid is at the core of what it means for a government to provide justice for the people it governs. A formal system of justice can be designed to utter perfection; yet, if individuals are not able to obtain justice for themselves through the legal system because of practical impediments, then the legal system is no longer a “justice system.” Throughout the world, large portions of the population that are in vulnerable circumstances because of poverty or other marginal status are effectively excluded from the formal system of justice.

Indeed, despite the special imperative to ensure justice when depriving individuals of their liberty, most people charged with crimes cannot afford to retain private counsel. Inefficient and underfunded government programs render hollow the promise of effective legal assistance for indigent criminal defendants—a right enshrined in international law and national constitutions. In some jurisdictions, legal aid provided at the government’s expense is mandatory only against accusations of the most serious crimes; many defendants are not covered at all. Even where legal aid is provided, many states operate an *ex officio* system involving assignment of private counsel at state expense—which typically yields underpaid lawyers, deficient representation, and substandard justice. All too often, the outcomes of criminal proceedings—guilt or innocence, freedom or detention—hinge arbitrarily on defendants’ finances.

Notwithstanding the acute problems in the field, legal aid is often overlooked. Legislatures and national policymakers preoccupied with other aspects of justice sector reform often fail to give comparable recognition to the urgency and complexity of ensuring adequate representation for those accused of crimes or meeting the basic legal needs of citizens. As a result, government policy in this area is often ad hoc, ill conceived, or poorly administered if enforced at all.

Although applicable national and international standards suggest an implied or express governmental responsibility to provide for free and effective legal assistance particularly to all indigent criminal defendants—and to some degree outside the realm of criminal law as well—there is little understanding among legislatures and policymakers that only an organized, systematic, and purposeful response will fulfill this responsibility. No international standards prescribe any particular system or structure to ensure the delivery of legal aid; while national governments devote significant attention to issues of efficiency of the judiciary, police, and investigation/prosecution, the majority of them fail to give comparable attention to the importance and efficiency of the system for delivery of free legal counsel.

PILI has been working for a number of years to help remedy that situation, and this publication represents our latest effort. It pulls together in one place some of the most useful information and ideas discussed at the Second European Forum on Access to Justice that we co-organized with the Open Society Justice Initiative in Budapest in 2005. The Forum brought together approximately 200 legal professionals, rights advocates, representatives of international institutions, and government officials from 40 countries to discuss strategies for improving access to justice.

This publication also provides some of the collective wisdom derived from our legal aid reform projects and those of Open Society Justice Initiative, and from experts with whom we have had the privilege to work over the years. The first part comprises a collection of papers from a variety of perspectives and country contexts. Collectively, the papers in this part elucidate reforms that have taken place in England and Wales, Israel, the Netherlands, South Africa, and the United States, and they highlight a broad array of issues for legal aid reformers to consider.

The first European Forum on Access to Justice, held in Budapest in December 2002, highlighted some of the key deficiencies in the provision of legal aid in ten European Union accession countries. The second part of this publication starts with an update, prepared for the second Forum in 2005, on reforms that had taken place between the two events. The amount of legal aid reform during that period is remarkable. The chapter continues with a series of more detailed case studies about some of the concrete legal aid reforms undertaken in some of those countries, specifically Lithuania, Bulgaria, Hungary, and Poland.

The third and fourth parts provide some practical tools. Part three starts with an analysis of how empirical research has been used in the United Kingdom to assess the quality of legal aid and continues with examples of research methodologies deployed in Bulgaria. The fourth part provides an overview of relevant international legal aid standards and is followed by a selected English-language bibliography on legal aid.

We hope that the materials provided in this publication will help answer some of the questions with which legal aid reformers grapple. But there are certainly many questions bearing further thought. Among them are the following:

- What is the most effective way to make the case that society as a whole benefits when legal aid is provided to the neediest and most vulnerable individuals in the society?
- How can governments best be persuaded that establishing legal aid management institutions is not about spending larger amounts of taxpayers' money on expanded bureaucracy, but rather is about spending taxpayers' money in a more cost-efficient, effective, and accountable manner?
- How can the quality and effectiveness of legal aid be improved along with the quantity of legal aid?
- Is there a need for improvement of international standards and obligations related to legal aid, and how can implementation of international standards be effectively monitored?

Answering these questions will require diligent and persistent efforts by dedicated individuals for many years to come. But it is our hope that learning from the experiences recounted in this volume can help with some of the next steps toward making legal aid more accessible, more effective, and more real.

Edwin Rekosh  
Executive Director  
Public Interest Law Institute

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**p a r t o n e**

# Issues in Legal Aid



# South African Legal Aid in Noncriminal Cases

*by David McQuoid-Mason*

The paper details the expansive and innovative system of civil legal aid delivery in South Africa and analyzes the potential for a broad and complex range of service provision arrangements as models for developing legal aid schemes in Central and Eastern Europe and elsewhere.<sup>1</sup>

## **1. Introduction: The General Background of Legal Aid in South Africa**

South Africa is a useful model for transitioning and developing countries, as it demonstrates what is achievable with a modest per capita annual expenditure on legal aid of approximately 1.36 USD.<sup>2</sup> The South African Constitution requires legal aid in criminal cases<sup>3</sup> and in 2006–7, 89 percent of the South African legal aid budget was spent on legal services for criminal defendants.<sup>4</sup> Consequently, the Legal Aid Board (Board),<sup>5</sup> the national legal aid body, has adopted a number of creative methods to maintain its provision of legal aid in both criminal and civil cases.<sup>6</sup> This paper addresses how South Africa provides legal aid in civil cases and to what extent the current approaches are effective.

In South Africa, as in England, lawyers fall in two categories: advocates (barristers), and attorneys (solicitors).<sup>7</sup> In 2003, an estimated 15,000 attorneys and 2,500 advocates served a South African population of about forty-five million people.<sup>8</sup> All law graduates in South Africa must undertake an internship as pupil advocates or candidate attorneys before admission to practice.<sup>9</sup> Of the 3,000 law students that annually graduate from the 21 law schools in South Africa, about 1,500 must complete internships in order to enter practice.<sup>10</sup> The comparatively large number of law schools with legal aid clinics, and the large pool of law graduates required to undertake internships with qualified lawyers, enables law students and law graduate interns to play a valuable role in assisting the Board with the delivery of legal aid services.<sup>11</sup>

Before addressing the delivery of legal aid in noncriminal cases, this article will briefly mention the influence of the new constitution, and special procedures that courts use to provide legal aid in noncriminal cases. Additionally, bear in mind contingency fees and prepaid legal services to extend the scope of legal aid in civil cases.

## 1.1 Legal Aid under the South African Constitution

The provisions of the South African Constitution requiring legal aid in criminal cases dramatically affect the ability of the Board to deliver legal aid in noncriminal cases.<sup>12</sup> The vast majority of the Board's budget is earmarked for criminal legal aid. Of the 314,084 new matters taken by the Board's justice centers during the period from April 2006 to March 2007, a total of 279,691 (89 percent) were criminal cases and only 34,393 (11 percent) were civil matters.<sup>13</sup>

With respect to civil legal aid cases, the Constitution imposes a special duty on the state to provide legal aid to children under the age of eighteen "where substantial injustice would otherwise result."<sup>14</sup> The Constitution contains no additional provision that specifically requires legal aid in noncriminal matters. However, it does provide that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum."<sup>15</sup> This raises the question of whether the state has a duty to provide legal aid to any person in a civil case who cannot afford representation. Unlike cases of arrested, detained, and accused individuals,<sup>16</sup> there are no specific constitutional duties imposed on the South African state to provide the services of a legal practitioner to litigants in civil cases. If, however, the "equality of arms" interpretation adopted by the European Court of Human Rights is applied,<sup>17</sup> such a duty would arguably lie with the state.

The Constitution also includes broad provisions for standing that enable people to act either on their own behalf or on behalf of others due to infringement or threat of their Constitutional rights. It provides that anyone may approach the court who is acting (a) in his or her own interests; (b) on behalf of another person who cannot act in his or her own name; (c) as a member of, or in the interest of, a group or a class of persons;<sup>18</sup> (d) in the public interest; or, (e) as an association acting in the interests of its members.<sup>19</sup> In addition, the Constitutional Court has held that it is a violation of the Constitution<sup>20</sup> for the state to try to limit claims against it by imposing very short notice and prescription periods on litigants seeking to enforce their rights, and any such provisions are in breach of the right of access to the courts.<sup>21</sup>

## 1.2 Special Procedures and Courts Assisting Indigent Litigants

For many years in South Africa, the rules of civil procedure have provided for *in forma pauperis* proceedings for people who cannot afford lawyers in civil cases.<sup>22</sup> In criminal cases, victims of crimes may ask for restitution during trial, which, if granted by a court order, have the same effect as a civil judgment.<sup>23</sup> In addition, special small claims courts introduced in 1985<sup>24</sup> and consumer affairs courts established in some of the provinces to address other cases.<sup>25</sup> In rural areas, there are traditional chief and headman courts that are now required to operate in accordance with the Constitution.<sup>26</sup>

## 1.3 Contingency Fees and Prepaid Legal Services

In 1997, South Africa instituted contingency fees.<sup>27</sup> Contingency fees provide funds to people who cannot afford a lawyer. Under this system, the lawyer's fees are a percentage of the money recovered if the case is successful.

Prepaid legal service insurance schemes introduced in South Africa aim to assist lower- and middle-income groups. Premiums between five and fifteen USD per month provide coverage of legal expenses for families (including children under twenty-one years of age) and individuals in criminal, civil, and labor matters, subject to certain limits.<sup>28</sup>

## **2. The Legal Aid Board**

### **2.1 Establishment of the Legal Aid Board**

The Board is the main vehicle for the delivery of legal aid services in South Africa. In 1966, the apartheid state outlawed the privately funded Defence and Aid Fund.<sup>29</sup> In order to deflect political pressure, the Board was established in 1969.<sup>30</sup> The Board has representatives from the bench, advocates, attorneys, government departments, and independent experts on legal aid, including the Association of University Legal Aid Institutions (AULAI) and a representative from the paralegal movement.<sup>31</sup> The Board was given complete discretion as to how it would offer legal assistance to indigent persons and, to this end, it established a set of working rules that are incorporated in the *Legal Aid Guide*.<sup>32</sup> The *Legal Aid Guide* provides for the implementation of Board resolutions under the supervision of the chief executive officer.<sup>33</sup>

### **2.2 Operation of the Legal Aid Board**

The Board used the judicare model of referrals to private lawyers as the main method of delivery until the end of the twentieth century.<sup>334</sup> After the introduction of the new South African Constitution in 1994, the Board became responsible<sup>35</sup> for providing legal aid in criminal cases where accused persons could not afford lawyers and “a substantial injustice would otherwise result” if they were not represented.<sup>36</sup> As a result, the Board was flooded with criminal cases and the judicare system started to break down; at the same time, expenditures on private lawyers began to escalate out of control. Consequently, the Board was compelled to consider other models of delivery.

Pilot projects were established to consider different ways of using salaried public defenders to provide legal aid.<sup>37</sup> In the end, a public defender model was implemented that included both qualified lawyers in public defenders’ offices and law interns attached to Board-funded law clinics. Justice centers incorporated the two public defender models as well as paralegals and legal aid officers. In addition, the Board entered into cooperation agreements with legal service providers such as public interest law firms and the independent university law clinics and established its own impact litigation division. When the justice centers or impact litigation division are unable to handle cases, they are referred to private lawyers.<sup>38</sup>

### **2.3 Budget of the Legal Aid Board**

During its early years, the Board was grossly underfunded. Gradually, however, funding increased, and by the 1990s, the Board’s budget began to increase dramatically.<sup>39</sup> There was another large increase after the turn of the century.<sup>40</sup>

There is a special line item allocated by Parliament in the Ministry of Justice budget for legal aid. For the year 2002–3, Parliament allocated to the Board 341.8 million rand

(about fifty-seven million USD), or approximately 1.27 USD for each of South Africa's forty-five million people.<sup>41</sup> The total justice budget for the year was 4,559.6 million rand, or 1.5 percent of the total budget for the country, which was 303,153.7 million rand. Thus, legal aid accounted for 7.9 percent of the justice budget, or 0.12 percent of the total budget, in 2002–3.<sup>42</sup> During the period 2003–4, the amount allocated to the Board was 367.9 million rand<sup>43</sup> (approximately 61.3 million USD), or approximately 1.36 USD per person. In 2007, this figure was increased to 502.8 million rand<sup>44</sup> (approximately 64 million USD), or about 1.42 USD per person. As previously noted, the vast majority of this expenditure is on criminal legal aid; however, the Board is presently trying to reverse this trend.<sup>45</sup> Nonetheless, while the delivery mechanisms used by the Board largely serve criminal legal aid clients, they have also been applied in noncriminal cases.

## 2.4 Exclusions from Noncriminal Legal Aid

As previously mentioned, the Board must provide legal assistance at state expense to children under the age of eighteen where “substantial injustice would otherwise result.” In all other cases, however, the chief executive officer (CEO) has the discretion to authorize that legal aid in civil matters be provided by Board employees, partners in cooperation agreements with the Board, and private lawyers.<sup>46</sup> However, there is a long list of exclusions in noncriminal cases with respect to legal aid provided through *judicare*. Although legal aid is available for civil matters, it is unavailable in cases involving:

- proceedings in terms of Sections 65, 72, and 74 of the Magistrates Courts Act,<sup>47</sup> involving the recovery of debts;<sup>48</sup>
- the administration, voluntary surrender, or sequestration of an estate or the liquidation of a legal person;<sup>49</sup>
- actions for damages on the grounds of defamation, breach of engagement contract, infringements of dignity or privacy, seduction, adultery, or inducing someone to desert or stay away from his or her spouse;<sup>50</sup>
- any action that may be instituted in the small claims court, including claims that exceed the small claims court's jurisdiction by not more than 25 percent, in which case the applicant can abandon part of the claim to bring it within the court's jurisdiction;<sup>51</sup>
- any civil appeal in which the CEO has not been satisfied that there are reasonable prospects for success and, where applicable, recovery;<sup>52</sup>
- arbitration, mediation, conciliation, and any other forms of alternative dispute resolution, unless authorized by the CEO or the Board;<sup>53</sup>
- matters where, in the opinion of the CEO, there is no substantial or identifiable material benefit to the client;<sup>54</sup>
- the prosecution, on a *judicare* basis, of a claim sounding in money or a continuation of such matter, where the legal aid officer must explain to the applicant that the matter can be dealt with by private practitioners on a contingency basis;<sup>55</sup>

- the institution, on a judicare basis, of a family law matter in the high court;<sup>56</sup>
- matters excluded by the Board from time to time;<sup>57</sup>
- matters in which the justice center executive is of the opinion that the chances of successful enforcement of an order in favor of the appellant are slim;<sup>58</sup>
- inquiries in the children's court, on a judicare basis, without the prior approval of the CEO;<sup>59</sup>
- domestic violence matters, on a judicare basis, in which a salaried lawyer from a justice center is available to attend to the matter;<sup>60</sup>
- any matter in which, in the opinion of the CEO, the benefit, or the potential benefit to the client does not justify the anticipated costs of the contemplated litigation;<sup>61</sup> and
- any inquest, on a judicare basis, except with the prior consent of the CEO.<sup>62</sup>

In addition, special conditions attach to the provision of legal aid involving labor matters,<sup>63</sup> land restitution,<sup>64</sup> labor tenants,<sup>65</sup> and asylum seekers.<sup>66</sup> Judicare legal aid will be not be rendered in divorce matters if:

- there is a reasonable possibility of reconciliation;<sup>67</sup>
- the CEO is of the view that proper and sufficient attention has not been given to settling the dispute;<sup>68</sup>
- considering all the circumstances, it does not appear to the CEO to be a deserving case;<sup>69</sup>
- a salaried practitioner at a justice center can take on the case;<sup>70</sup> or,
- in the opinion of the CEO, there is no substantial and identifiable material benefit to the client.<sup>71</sup>

Moreover, special provisions exist concerning customary law and polygamous marriages.<sup>72</sup>

## 2.5 The Means Test in Noncriminal Legal Aid

Except in the case of children under eighteen years of age where the test is whether “a substantial injustice would otherwise result” if the child does not receive legal aid,<sup>73</sup> a “means test” is applied to all noncriminal cases. In civil cases, the income of both the applicant and his or her spouse is considered and the joint income is determined to reach a calculated income as determined by the *Legal Aid Guide*.<sup>74</sup> In simple terms, the current means test cut off limit is 1,750 rand (approximately 292 USD) a month for single persons and 2,500 rand (approximately 417 USD) a month for married persons.<sup>75</sup>

### 3. Methods of Delivering Legal Aid in Noncriminal Cases

Methods of delivering legal aid in noncriminal matters at different stages in South Africa's history have included the following:

- pro bono work by lawyers;
- “judicare” referrals to private lawyers;
- law intern public defenders;
- justice centers;
- impact litigation;
- cooperation agreements;
- law interns in rural law firms;
- public interest law firms;
- independent university law clinics; and
- paralegal advice offices.

However, there is an urgent need for street-law-type education programs as none of these schemes will work effectively if members of the public are ignorant of their legal rights or where they can receive help in civil matters.<sup>76</sup> Each of the above methods of delivery will be considered in turn.

#### 3.1 Pro Bono Legal Aid Work

One of the first attempts to set up a nationwide state legal aid scheme in apartheid South Africa occurred in 1962 and was pro bono work by the legal profession. The legal profession provided free legal services to persons referred to them by local legal aid committees set up in every lower court by the Department of Justice.<sup>77</sup> This system subsequently failed because of the lack of publicity, lack of commitment by the profession, and too much unwieldy red tape.<sup>78</sup>

Until recently, pro bono work was not mandatory in South Africa. In 2004, however, the Cape Law Society made it mandatory for its attorney members to perform pro bono work on an annual basis. This was significant, as the ethical rules of the advocates' profession require advocates to accept legal aid work,<sup>79</sup> while those of the attorneys' profession only expect lawyers to take on cases “assigned by a competent body,”<sup>80</sup> which could include a court or the Board.<sup>81</sup>

Pro bono schemes are relatively inexpensive to operate and, if supported by the legal profession, can engender a spirit of public service. Pro bono clients, however, may not receive the same level of service as paying clients. Furthermore, many lawyers are so reluctant to take on pro bono cases that, even if they are mandatory, they may “buy out” of the time they would be required to devote to them.<sup>82</sup>

Pro bono legal aid work may be used as a supplement to state-funded legal aid services, but it should not be regarded as a substitute. It is evident that lawyers providing legal aid

expect to receive payment for their services, even if well below market value, and in democratic countries, the duty to pay for such services rests with the state.<sup>83</sup> The 1962 South African experience demonstrates that unless lawyers receive payment to deliver legal aid services, the chance of mounting a successful comprehensive legal aid scheme based on pro bono work is minimal.

### 3.2 “Judicare” Referrals to Private Lawyers

As already mentioned, until the last century the Board operated mainly by using the judicare system. Under the judicare system, private lawyers who render legal aid services in accordance with the *Legal Aid Guide* receive payment for their services with fixed tariffs.<sup>84</sup>

From 1971 to 1999, the Board referred 997,707 legal aid cases to private attorneys. Most of these cases involved criminal matters and, of these, 559,238 were referred only after 1994–5 and the advent of the new Constitution.<sup>85</sup> This means that the number of legal aid applications granted during that four-year period constituted 56 percent of all legal aid applications ever handled by the Board. A 709 percent increase in the criminal legal aid caseload during the period 1989–90 to 1998–9<sup>86</sup> eventually led to the abandonment by the Board of the judicare model as the main method of delivering legal aid.

By 2003–4, the Board’s shift from judicare to the justice center system was nearly complete. In 2002–3, judicare had accounted for 41 percent of all new matters while the justice centers accounted for 53 percent; by 2003–4, the percentage of judicare cases had fallen to 16 percent and that of the justice centers increased to 78 percent.<sup>87</sup> In 2006–7, the number of judicare cases constituted 11 percent of the total number of new legal aid cases, while those delivered by the justice centers amounted to over 87 percent.<sup>88</sup>

Of the 87,178 cases referred to private lawyers by the Board in 2002–3, only 588 (0.7 percent) were civil; meanwhile, the justice centers dealt with 177,587 cases, of which 17,946 (10 percent) were civil.<sup>89</sup> In 2006–7, 39,331 cases were referred to private lawyers, of which only 2,324 (6 percent) were civil, while the justice centers dealt with 314,084 cases, of which 34,393 (11 percent) were civil.<sup>90</sup> During 2003–4, it was calculated that the average cost of a judicare case was 2,152 rand (approximately 359 USD) and the average cost of a justice center case 1,090 rand (approximately 182 USD).<sup>91</sup> Thus, the judicare model is considerably more expensive than the salaried lawyer scheme.

In South Africa, the judicare system worked while there was an adequate administrative structure to support it, proper accounting systems were in place to deal with claims for fees and disbursements expeditiously, and budget constraints kept pace with demand. When the demand for criminal legal aid exceeded budgetary limits and the Board could no longer pay practitioners in a timely fashion, the judicare system broke down.<sup>92</sup> Attempts to solve the problem, by capping fees in criminal and civil cases, provided only a short-term solution<sup>93</sup> and eventually the Board opted for a model involving salaried lawyers in justice centers as the main means of delivery.<sup>94</sup>

### 3.3 Law Intern Public Defenders

The Attorneys Act<sup>95</sup> allows prospective attorneys with the necessary legal qualifications to engage in internship programs outside of an attorney’s office. This means that they may undertake a

period of community service<sup>96</sup> at law clinics accredited by provincial law societies, including clinics under the auspices of the Board. Such law clinics are required to employ a principal (an attorney with sufficient practical experience) to supervise law interns in the community service program. The candidate attorneys appear in the district courts and the principals appear in the regional and high courts. Interns serving for more than a year may also appear in the regional courts.

The Board took advantage of this provision to employ candidate attorney interns and supervising attorneys, with a maximum ratio of ten interns to one supervisor. The interns were employed primarily as public defenders in the district courts, but they also undertook civil cases in order to obtain well-rounded legal practice experience during their internships. The objectives of the Board scheme were (a) to render legal services to persons who satisfy the means test and (b) to alleviate the shortage of internship opportunities for candidate attorneys by providing “articles of clerkship” or “contracts of community service” to law graduates required to undertake internships.<sup>97</sup>

The Board began with a pilot project of five university law clinics in 1994 and eventually expanded the program to twenty university Board clinics. Each clinic received funds to employ a supervising attorney and up to ten community service interns as public defenders. Later, some of the Board clinics employed a ratio of eight interns to two qualified professional assistants, so that the professional assistants could appear in the regional (senior) magistrate’s courts. During the pilot project, the Board calculated that the average cost of 24,513 criminal cases and 12,997 civil cases handled by the state-funded law clinics during the period 1 July 1994, to 31 December 1996, was 433 rand (approximately seventy-two USD) per case.<sup>98</sup> This was less than half of the average cost of 976 rand (approximately 163 USD) per case charged under the judicare system during the same period.<sup>99</sup> During the period 1997–8, twenty law clinics completed 33,951 cases, of which 20,042 (59 percent) were criminal and 13,909 (41 percent) were civil.<sup>100</sup> At the time, the figure compared favorably with the 18,263 civil cases done under the judicare scheme<sup>101</sup> at as much as twice the cost. Due to its success, the law intern public defender program was incorporated into the justice centers and satellite offices operated by the Board.<sup>102</sup>

The law intern public defender program is a useful model for consideration by countries in Eastern and Central Europe with legal systems that require law graduates to serve an internship before admittance as practitioners. In countries that do not require law graduates to undergo an apprenticeship, the law intern public defender program could also serve to integrate newly qualified law graduates into the legal profession. Provided the interns receive proper training and supervision, the standard of service of the Board clinic candidate attorneys in the lower courts is at least equal to that of qualified attorneys or privately employed law interns.

### 3.4 Justice Centers<sup>103</sup>

The Board has set up a network of fifty-eight justice centers and forty-one satellite offices<sup>104</sup> that provide a “one-stop” service for legal aid clients. The satellite offices service the more rural areas using a circuit system, and justice centers in the larger cities have high court units—thirteen throughout the country.<sup>105</sup> The justice centers and satellite offices cover most of the regional and district courts and all the high courts in the country and areas not covered by a Board office are serviced using judicare<sup>106</sup> or pursuant to cooperative agreements.<sup>107</sup>

Depending on their location and the demands of the local legal environment, the justice centers employ a variety of legal and paralegal professional staff. These vary from larger justice centers where there are qualified attorneys and advocates employed as principals, public defenders, law intern public defenders, paralegals, and administrative staff<sup>108</sup> to satellite offices that have a much smaller core staff component. Candidate attorney interns are required to do both civil and criminal work in the district courts<sup>109</sup> while professional assistants (interns who have qualified to appear in court) appear in the regional courts and intern supervisors appear in the high courts (if the attorneys have an LLB or more than three years' experience) and the regional courts. Paralegals assist with the initial screening of clients, and administrative assistants and clerks provide the necessary administrative backup. *Judicare* is used only where the justice center cannot handle a case because of a conflict of interest or lack of capacity.<sup>110</sup>

The justice centers have become the main delivery system of both criminal and civil legal aid by the Board. As mentioned before, by 2002–3, the justice centers were addressing 53 percent of all new legal aid matters and by 2003–4, this had increased to 78 percent.<sup>111</sup> Notably, of the 236,282 new matters handled by the justice centers during 2003–4, only 27,280, or 12 percent, were noncriminal cases.<sup>112</sup> Likewise in 2006–7, as previously mentioned, of the 314,084 new cases handled by the justice centers, 34,394, or 11 percent, were civil.<sup>113</sup> The Board now estimates that it defends 60–75 percent of all criminal cases in the district courts, 70–80 percent of all criminal cases in the regional courts, and 90 percent of all criminal cases in the high courts.<sup>114</sup> The Board hopes to establish a benchmark ratio of 70 percent criminal and 30 percent civil cases in the justice centers.<sup>115</sup>

In the Board's 2005 report, the chairman described the value of the justice centers as follows:

The implementation of the justice center model was a monumental step in the right direction for the Legal Aid Board and the delivery of legal aid, in general, to those sections of our society who have been rendered vulnerable through the vagaries of poverty and unemployment. This in-house method has given the Board and executive management the requisite control over the finances of the organization. We are now able to plan and budget as well as to manage expenditure against budget on a proactive basis. We are also now able to respond to contingency situations appropriately. The days of *ad hoc* management and a growing contingent liability are safely behind us.<sup>116</sup>

### 3.5 Impact Litigation

In 2001, the Board set up a special impact litigation fund<sup>117</sup> designed "to uphold the rights entrenched in the Constitution of South Africa."<sup>118</sup> Certain conditions apply to the fund and include "a reasonable chance of success where a positive outcome will set a precedent that will benefit South Africa's indigent population."<sup>119</sup> For instance, during 2002–3, the Board dealt with cases involving deaths resulting from the collapse of a soccer stadium, the alleged poisoning of underground water, which affected the health and livelihood of neighboring communities, as well as the poisoning of residents by smoke originating in a fire that emitted very high levels of sulfur dioxide.<sup>120</sup>

Where the Board does not have the capacity to engage in impact litigation, it will refer the matter to a cooperation partner, to specialist lawyers on a *judicare* basis, or to law firms that have the necessary expertise.

### 3.6 Cooperation Agreements

The *Legal Aid Guide* defines a cooperation agreement as “[a]n agreement entered into between the Board and another party, not being an individual legal practitioner or a group/firm/company of legal practitioners. This is for the purposes of rendering legal services to indigent persons.”<sup>121</sup> The Board has entered into a number of cooperation agreements with public interest law firms, independently funded law clinics, and paralegal advice offices, most of which cover civil cases. Cooperation agreements provide stringent requirements—for example, the organization must have “a proven track record in public interest law and effective community services.”<sup>122</sup>

Cooperation agreements are entered into with legal service providers “who either have an established infrastructure in a region where the Board has no presence or who specialise in matters identified by the Board as priorities for service delivery.”<sup>123</sup> The service “must be provided to the poor at a cost less than *judicare* and, at no charge, to those who cannot afford the services in accordance with the means test which must always be conducted.”<sup>124</sup>

The majority of cases handled by the justice centers are done in-house, but when a center is unable to handle a case, it may be referred to a service provider that has a cooperation agreement with the Board or, in some situations, it may be referred on a *judicare* basis.<sup>125</sup> The cooperation agreement program has provided the Board with a cost-effective way of delivering legal aid services in areas where it does not have a presence. It has also given the Board greater exposure in those areas and has played an important role in expanding access to justice in previously disadvantaged communities.<sup>126</sup>

During 2006–7, the Board had cooperation agreements with six independent university law clinics and four with NGOs.<sup>127</sup> During the same period, the cooperation partners administered 5,468 new cases (most of them civil), or 1.4 percent of the total number of criminal and noncriminal cases handled by the Board.<sup>128</sup>

### 3.7 Law Interns in Rural Law Firms

In 1995, the Board, in a partnership with LHR, established a pilot project whereby the Board arranged for private attorneys in rural towns to employ law interns to do legal aid work. The Board then assisted financially by paying the interns’ salaries while LHR recruited appropriate attorneys and monitored the progress of the project. The project provided access to legal aid services in rural areas and provided employment in the legal profession to formerly disadvantaged individuals in the areas where they lived.<sup>129</sup>

The law interns were required, on behalf of the Board, to handle at least ten new legal aid instructions per month free of charge, as well as to perform community service one day each week. Eight candidate attorneys were involved in two pilot projects by the end of 1996–7.<sup>130</sup> The work done by the interns was mainly on criminal cases, but the interns also handled some civil cases, usually involving divorces. For instance, interns in four rural law firms during the period from March 1997 to February 1998 completed 400 criminal cases and 73 civil cases.<sup>131</sup> The project proved very economical, but the Board discontinued it once it began to focus on

the introduction of justice centers. Perhaps the scheme should be revisited in the future and introduced in those areas not covered by justice centers or cooperation agreements, since it is much less expensive to supplement the salaries of law interns in rural law firms than to establish Board satellite offices in areas where there is a limited demand for legal aid services.<sup>132</sup>

The rural law intern model was very cost-effective and could have undertaken more civil cases. It could be implemented in countries that require law graduates to complete an internship before being admitted to legal practice, particularly those countries with large rural populations and scattered law firms.

### 3.8 Public Interest Law Firms

Public interest law firms that take precedent-setting cases affecting large numbers of indigent people can play a valuable role in the delivery of civil legal aid services. For example, the Legal Resources Centre (LRC) in South Africa has a worldwide reputation for the quality and quantity of its public interest work of expanding access to justice in South Africa.

The LRC, with branches in Johannesburg, Cape Town, Grahamstown, Durban, and Pretoria,<sup>133</sup> gives practical help to individuals and communities that would not otherwise be able to obtain professional advice or enforce their legal rights, particularly in civil cases. In the twenty-five years of its existence, the LRC has assisted millions of disadvantaged South Africans whose human rights were being violated<sup>134</sup> and it has worked with a variety of paralegal advice offices.<sup>135</sup>

While the LRC used litigation and the threat of litigation to advance the civil and political rights of South Africans during the apartheid era, since the 1994 elections the LRC has focused on constitutional rights and land, housing, and development issues.<sup>136</sup> The LRC receives funding from the Legal Resources Trust, which receives money from overseas and local donors, and it does not charge for its services. Furthermore, the LRC was on the steering committee that set up the pilot public defender program for the Board and, together with the AULAI, was instrumental in encouraging the Board to enter into cooperative agreements with independently funded organizations in an effort to extend legal services to previously marginalized parts of the country.<sup>137</sup>

### 3.9 Independent University Law Clinics

Independently funded university law clinics provide training and practical skills for senior law students, as well as a valuable service for indigent members of the community. Moreover, some law clinic work is incorporated into optional or compulsory clinical law programs at universities. However, not all litigation is manageable by clinics—according to the rules of the law societies, some activities such as motor vehicle insurance claims are restricted to legal practitioners practicing on their own.<sup>138</sup>

In the past, the vast majority of cases involved: labor matters such as wrongful dismissals, unemployment insurance, and workers' compensation for injuries; consumer law problems such as defective products, loan sharks, and unscrupulous debt collection practices; housing problems such as fraudulent contracts, nondelivery, and poor workmanship; customary law matters such as emancipation of women and succession rights; and criminal matters.<sup>139</sup>

During the struggle against apartheid, many of the clinics at the progressive universities were engaged in human rights work involving segregationist pass laws, police brutality, forced removals, detention without trial, and other breaches of fundamental human rights.<sup>140</sup> In many instances, because they accepted clients “off the street,” law clinics tended to emphasize the service aspect rather than the teaching aspect of their function.

Legal aid clinics have continued to deal with poverty law problems, many of which are a result of lack of capacity or obstruction by the government. A few clinics have moved from general practice to more specialized constitutional issues, such as those affecting women and children, administrative justice, and land restitution. The majority of clinics, however, continue to engage in general practice in a climate where the law societies impose fewer restrictions.

The introduction of a democratic legal system and increased state expenditures on legal aid should have eased the service loads of the independent law clinics. The opposite has occurred, however, owing to reduced spending on civil cases by the Board and the increasing demands upon the state to deliver on the social and economic rights guaranteed by the Constitution. The law clinics, which apply a more flexible means test than the Board, are playing a useful role in this regard.

Within the law clinics, qualified staff members represent clients in criminal and civil matters in both the inferior and high courts. In 1985, “student practice rules” enabled final-year law students attached to law clinics to appear in criminal cases for indigent defendants accused in the district courts.<sup>141</sup> Although the 1994 post-apartheid government planned to introduce legislation to provide for such rules during its first term of office, the project never materialized. As stated previously, approximately 3,000 students graduate South African law schools annually. It has been pointed out that if each final-year law student were to handle only ten cases a year, mainly during the summer and winter vacations, criminal defense could be provided for 30,000 who were criminally accused.<sup>142</sup> The impact of this could ease the criminal caseload of the law intern public defenders in the Board’s justice centers, which could then spend more time on civil matters.<sup>143</sup>

As very few clinics receive funding exclusively by their universities, outside donors usually provide funding for law clinics. For example, the Attorney’s Fidelity Fund subsidizes accredited clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to supervise the clinic.<sup>144</sup> The AULAI has set up its own trust with an endowment from the Ford Foundation to strengthen the funding of the clinics. Financial support for the independent law clinics, however, is still precarious, as they rely primarily on annual grants. Until their contribution is recognized as an integral part of the national legal aid scheme, the future of the independent law clinics will remain uncertain. The move by the Board to enter into cooperation agreements with the independent university law clinics, in order to service clusters of paralegal advice offices, is a welcome acknowledgment of their important role in supplementing national legal aid services.

Independent university law clinics thus can play a useful role by assisting legal aid litigants in compelling the state to uphold its constitutional obligations, including the right to counsel. If a holistic approach is adopted with respect to legal aid services, cooperation and partnership agreements can be created between national legal aid structures and the university law clinics. Not only will this improve the spread of national legal aid services, but additional funding from the state will also help make the law clinics financially viable.

### 3.10 Paralegal Advice Offices

In South Africa, several organizations are involved in paralegal advice work.<sup>145</sup> Some of these educate the public concerning their legal rights, while others train paralegals to give advice. Paralegal NGOs, such as the Black Sash, concentrate in urban areas, while those like the Community Law and Rural Development Centre (CLRDC) focus on rural areas. The services provided vary from advice to full legal aid services such as those provided by the Legal Aid Bureau in Johannesburg.<sup>146</sup>

While paralegals in South Africa are usually paid, their remuneration is very low and, in some cases, paralegals work as unpaid volunteers. The training of paralegals varies and can consist of formal training leading to a diploma offered by LHR, Johannesburg University, and the CLRDC or mainly experiential learning obtained while working.<sup>147</sup> Furthermore, paralegal offices may have connections to organizations such as the Legal Resources Centre, LHR, and the CLRDC, or may simply rely on free services provided by private legal practitioners. Several paralegal advice offices have developed expertise in particular fields such as pensions, unemployment insurance, and unfair dismissals. Very often, paralegal advice offices are able to resolve the problems of their clients without having to resort to lawyers for assistance; however, when a paralegal advice office cannot solve the problem, the client receives a referral to the Board's offices, a legal aid clinic, or an appropriate law firm.<sup>148</sup>

Paralegals have also been included in the Board's justice centers and in certain cooperative agreements—in particular those in which independent university law clinics are required to service clusters of paralegal advice offices. A National Paralegal Institute (NPLI) was set up to assist the more than 350 paralegal advice offices in the country through training and fundraising, but it is no longer functional.<sup>149</sup> A new organization called the National Alliance for the Development of Community Advice Offices (NADCAO) has been formed. In addition to assisting with fundraising for paralegal advice offices, NADCAO is investigating paralegal accreditation certification procedures. The paralegal movement works closely with the AULAI and the Board, which has entered into a number of cooperation agreements, mainly with the independent university law clinics that undertake to service clusters of paralegal advice offices. Likewise, the AULAI has entered into an agreement with the International Commission of Jurists (Swedish Section) to administer funding for the university law clinics in order to provide legal backup and training for clusters of paralegal advice offices.

Paralegal advice offices play a complementary role to the legal profession in the delivery of legal aid services, operating at the grassroots level where communities first encounter legal issues. Paralegal advice offices therefore play an invaluable role in screening initial legal complaints and resolving legal disputes before referring potential litigants to the legal profession.<sup>150</sup> As a result, the Board has integrated paralegals into the justice centers and has tried to establish close links with community-based organizations.<sup>151</sup> Paralegals must receive payment for their services, as well as proper training. In addition, accredited paralegal advice offices need to receive adequate funding through integration into the national legal aid scheme.<sup>152</sup>

## 4. Conclusions

The following conclusions may be drawn from the South African experience with respect to state-funded legal aid in civil matters:

- 1) The Constitution guarantees civil legal aid for children under eighteen years of age “where a substantial injustice would otherwise result” and it provides a general right of access to the courts and wide grounds for standing, including public interest and class actions for breaches of fundamental rights.
- 2) The Board has moved away from judicare referrals to private lawyers to a justice center salaried lawyer approach for the delivery of legal aid services.
- 3) At present, only approximately 12 percent of the Board’s justice center budget covers civil legal aid because of the constitutional right to counsel requirements with respect to criminal matters. The Board hopes to shift this to achieve a ratio of 70 percent criminal to 30 percent civil cases in the justice centers.
- 4) The Board has saved a large amount of money by moving from a judicare system to salaried lawyers employed in justice centers.
- 5) The Board has experimented with a variety of creative cost-effective measures to deliver legal aid in civil and criminal matters. The most novel of these is the employment of law graduate apprentices as intern public defenders in the district courts—first in Board-funded university law clinics and then in the justice centers.
- 6) The Board has undertaken a civil legal aid program of public interest litigation by setting aside funds for impact litigation that may or be undertaken in-house or externally.
- 7) The Board has entered into cooperation agreements with independent university law clinics and community-based NGOs in order to extend its reach into areas where it does not have justice or satellite centers, and to expand its civil legal aid program.
- 8) The Board’s experiment with funding law interns in rural law firms deserves to be revisited to cover areas where there are no justice or satellite centers and there are no cooperation partners, and expanded to emphasize legal aid in civil matters.
- 9) Public interest law firms, such as the Legal Resources Centre and the independent university law clinics, play a valuable role in the delivery of legal services to the poor in civil matters and the Board should enter into more cooperation agreements with them.
- 10) Paralegals play an important role in the preliminary stages of assisting clients who require legal aid in civil matters.

## Notes

1. For an earlier version of the position in South Africa, see David J. McQuoid-Mason, "The Delivery of Civil Legal Aid Services in South Africa," *Fordham Intl. L.J.* (Symposium) 24 (2000), S111–42.
2. This is an average figure—in 2006 the expenditure was 1.28 USD per capita and in 2007 it was 1.42 USD. See subsection 2.3.
3. Constitution of the Republic of South Africa, Act 108 of 1996, Sec. 35. See note 12.
4. Legal Aid Board, *Annual Report 2006–2007* (2008), 24.
5. The Legal Aid Board was established in terms of the Legal Aid Act 22 of 1969, Sec. 2.
6. See subsection 2.1 and Sec. 3.
7. At the end of the apartheid era, 85 percent of the legal profession was white and 15 percent black, while 85 percent of the population was black; see McQuoid-Mason (2000), S111.
8. Trudie Jordaan, Legal Aid Board administration officer, presentation to the Lithuanian Legal Aid Parliamentary Working Group during a visit to the Legal Aid Board Head Office, Johannesburg, 1 April 2003. Of these, approximately 6,000 participated in the legal aid scheme (*ibid.*).
9. Candidate attorneys also must attend an approved practical training course: Attorneys Act of 1979, Sec. 2. Such courses vary from five-month, full-time practical training schools to five-week, part-time short courses; Law Society of South Africa, *Practical Legal Training: Courses 2002* (2002), 1 and 11.
10. See Nic Swart, "Entry into the Profession: What about Articles?" (1994), 1 (unpublished memorandum for the Law Society of South Africa).
11. See subsections 3.3, 3.7, and 3.9.
12. The sections in the South African Constitution referring to the provision of legal aid services to arrested, detained, and accused persons "if substantial injustice would otherwise result" provide that such persons have the right "to have a legal practitioner assigned to the accused by the State, and at State expense"; Sec. 35(2) and (3). The Constitutional Court has interpreted this to mean that an accused is not entitled to be represented by a legal representative of his or her choice at state expense (*S v. Vermaas, S v. Du Plessis* 1995 (3) SA 292 (CC)). It has been suggested, however, that where possible there is no reason the state should not attempt to accommodate the choice of the detainee; Etienne du Toit, "Criminal Procedure," in Mathew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, and Stewart Woolman (eds.), *Constitutional Law of South Africa* (1996), 27-5.
13. Legal Aid Board, *Annual Report 2003–2004* (2005), 20.
14. Constitution of the Republic of South Africa Sec. 28(1)(h).
15. Constitution of the Republic of South Africa Sec. 34.
16. See Constitution of the Republic of South Africa Sec. 35.
17. See *Airey v. Ireland*, ECtHR (1979) Series A, No. 32; 2 EHRR 305.
18. See *Beukes v. Krugersdorp Transitional Local Council*, 1996 (3) SA 476 (W). This case was decided under the provisions of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993, Sec. 7(4)(b)(iv)), but the wording of the final Constitution (Constitution of the Republic of South Africa, Act 108 of 1996, Sec. 38) is the same.
19. Sec. 38.
20. In this case, the Constitution of the Republic of South Africa 200 of 1993, Sec. 22, which is identical to the Constitution of the Republic of South Africa, Act 108 of 1996, Sec. 34.
21. *Mohlomi v. Minister of Defence*, 1997 (1) SA 124 (CC).
22. Several hundred cases have been dealt with annually in the high court under the *in forma pauperis* procedures in terms of the Rules of the High Court (Rule 40 of the Uniform Rules of Court). Under these rules, the registrar of the high court refers poor people (people with assets of less than 10,000 rand—approximately 1,667 USD) to private practitioners (attorneys who brief advocates) for help. The latter must take the cases without compensation (Rule 40 (5)), but they may recover their fees and disbursements at ordinary tariff rates if the litigant is awarded costs (Rule 40(7)). See generally D.J. McQuoid-Mason, *An Outline of Legal Aid in South Africa* (1982), 17–22. At one stage, it was thought that the *in forma pauperis* proceedings should be expunged from the statute book as they would be superseded by the activities of the Legal Aid Board.

- However, this has not happened, because of the Board's increased expenditures on criminal matters and concomitant reduced expenditures on civil cases. The procedure can be used to assist claimants in civil cases who would otherwise be excluded by the *Legal Aid Guide* (see McQuoid-Mason [1982], 62). For instance, 822 *in forma pauperis* cases were heard during 1996–7 (Department of Justice, *Annual Report for Period 1 July 1996 to 30 June 1997* (1998), Annexure on High Court Statistics 4).
23. Criminal Procedure Act 51 of 1977, Sec. 300–301. In terms of Sec. 300 (1) of the Criminal Procedure Act 51 of 1977, the victim of an offense involving damage to, or loss of, property (including money), or the prosecutor acting on the instructions of such a victim, may apply to court for a compensation order against the accused person if he or she is convicted. Provision is also made for payment to be made from any money taken from a convicted person on his or her arrest (Sec. 300 (4)). A compensation order has the same effect as a civil judgment in the magistrate's court (Sec. 300 (3)). Compensation orders are not issued very often, but when they are, they are usually linked to suspended sentences.
  24. Small Claims Courts Act 61 of 1984. See, generally, David J McQuoid-Mason, "Consumers and Access to the Courts," in D. McQuoid-Mason, T. Woker, L. Greenbaum, I. Konyon, C. Lakhani, and T. Cohen, *Consumer Law in South Africa* (1997), 308–10. During 1995–6, 27,890 trials were heard in the small claims courts (Department of Justice, *Annual Report 1995–96* (1997), 131). The current jurisdictional limit for the small claims court is 7,000 rand (approximately 1,186 USD).
  25. See McQuoid-Mason (1997), 310.
  26. David J. McQuoid-Mason, "Access to Justice in South Africa," *Windsor Yearbook of Access to Justice*, 17 230 (1999), 244.
  27. Contingency Fees Act 66 of 1997.
  28. See, generally, McQuoid-Mason (2000), S136.
  29. G. W. Cook, "A History of Legal Aid in South Africa" in Faculty of Law, University of Natal, *Legal Aid in South Africa* (1974), 32–33.
  30. Legal Aid Act 22 of 1969, Sec. 2.
  31. Legal Aid Act, Sec. 4.
  32. Legal Aid Board, *Legal Aid Guide* (2002). Amendments to the *Legal Aid Guide* must be put before Parliament (Legal Aid Act, Sec. 3A(2)).
  33. *Legal Aid Guide*, para. 4.2.
  34. *Legal Aid Guide*, chap. 1, para. 4.3.
  35. Legal Aid Amendment Act 20 of 1996, Sec. 1.
  36. Constitution of the Republic of South Africa, Act 108 of 1996, Sec. 35(2)(c) and (3)(g).
  37. *Legal Aid Guide*, chap. 1, para. 4.3.
  38. For details about these various methods of providing legal aid, see Sec. 3 of this article.
  39. The exponential increase from 66.3 million rand in 1994–5 to approximately four times that amount in subsequent years is almost solely due to the effect of the Board acting as the agent of the state with respect to its constitutional legal aid obligations. For instance, the budget for the period 1995–6, amounting to 182.4 million rand, reflected 66.4 million rand with respect to the conventional legal aid scheme, and 116 million rand for the provision of legal consultation services and legal representation by the Board under the Constitution (Legal Aid Board, *Report on Activities* [1996], A5). The Board estimated that it had been underfunded by approximately 425.8 million rand for 1998–9 and 428 million rand for 1999–2000 (Legal Aid Board, *Business Plan Covering the Period 2000 to 2003* [1999], 20).
  40. During 1999–2000, the Legal Aid Board received 224 million rand (Legal Aid Board, *Annual Report 2001–2002* (2003), 56); in 2000–1, 245.5 million rand; in 2001–2, 322 million rand; in 2002–3, 341.8 million rand (Legal Aid Board, *Annual Report 2002–3* [2004], 50); in 2003–4, 367.9 million rand (Legal Aid Board, *Annual Report 2003–2004* [2005], 98); in 2005 390.5 million rand (Legal Aid Board *Annual Report 2005* [2006], 65); in 2006 454 million rand; and in 2007 502.8 million rand (Legal Aid Board *Annual Report 2006–2007* [2008], 66).
  41. This compares with the expenditure on legal aid in other Commonwealth countries, such as the almost 60 USD per head spent by the United Kingdom, approximately 30 USD per head by Canada, and 0.02 USD per head spent by Nigeria on legal aid (calculations by the present writer based on expenditures on legal aid in the respective countries).

42. Calculations by the present writer based on statistics in Government Communication and Information System, *South Africa Year Book 2002/03* (2003), 242.
43. Legal Aid Board (2003), 56.
44. Legal Aid Board *Annual Report 2006–2007* (2008), 66.
45. Legal Aid Board (2005), 6.
46. *Legal Aid Guide*, chap. 3, para. 3.2.
47. Act 32 of 1944.
48. *Legal Aid Guide*, chap. 3, para. 3.1(a).
49. *Legal Aid Guide*, chap. 3, para. 3.1(b).
50. *Legal Aid Guide*, chap. 3, para. 3.1(c).
51. *Legal Aid Guide*, chap. 3, para. 3.1(d).
52. *Legal Aid Guide*, chap. 3, para. 3.1(e).
53. *Legal Aid Guide*, chap. 3, para. 3.1(f). However, such service may be performed by a justice center should it lead to an expeditious resolution of the matter or the saving of costs (*Legal Aid Guide*, chap. 3, para. 3.1(c) (iii)).
54. *Legal Aid Guide*, chap. 3, para. 3.1(g).
55. *Legal Aid Guide*, chap. 3, para. 3.1(h).
56. *Legal Aid Guide*, chap. 3, para. 3.1(i). In such matters, wherever possible, the justice centers will assist (*Legal Aid Guide*, chap. 3, para. 6.1(d)).
57. *Legal Aid Guide*, chap. 3, para. 3.1(j).
58. *Legal Aid Guide*, chap. 3, para. 3.1(k).
59. *Legal Aid Guide*, chap. 3, para. 3.1(l). Such matters may be dealt with in terms of cooperation agreements or by a justice center.
60. *Legal Aid Guide*, chap. 3, para. 3.1(m). If nobody is available from a justice center, “judicare” may then be used. See also *Legal Aid Guide* Chapter 3 para. 3.2(a).
61. *Legal Aid Guide*, chap. 3, para. 3.1(n).
62. *Legal Aid Guide*, chap. 3, para. 3.1(o).
63. *Legal Aid Guide*, chap. 3, paras. 4 and 5.
64. *Legal Aid Guide*, chap. 3, para. 10.
65. *Legal Aid Guide*, chap. 3, para. 11.
66. *Legal Aid Guide*, chap. 3, para. 12.
67. *Legal Aid Guide*, chap. 3, para. 6.1(a).
68. *Legal Aid Guide*, chap. 3, para. 6.1(b).
69. *Legal Aid Guide*, chap. 3, para. 6.1(c).
70. *Legal Aid Guide*, chap. 3, para. 6.1(d).
71. *Legal Aid Guide*, chap. 3, para. 6.1(e).
72. *Legal Aid Guide*, chap. 3, para. 6(7).
73. See Constitution of the Republic of South Africa Act 108 of 1996, Sec. 28(1)(h).
74. *Legal Aid Guide*, Annexure G.1.
75. Resolution of Legal Aid Board, 31 March 2004.
76. McQuoid-Mason (2000), S140–41.
77. Cook, 31–32; see also McQuoid-Mason (2000), S140–41.
78. P. H. Gross, *Legal Aid and Its Management* (1976), 176–77.
79. General Council of the Bar of South Africa, *Uniform Rules of Professional Ethics*, rule 6.3.1.
80. *International Code of Ethics*, rule 17.
81. Robin Palmer and David McQuoid-Mason, *Basic Trial Advocacy Skills* (2000), para. 2.5.2.
82. See Justice Earl Johnson Jr., “Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies,” *Fordham Intl. L.J.* (Symposium) 24 (2000), S83.
83. The American Convention on Human Rights seems to contemplate legal aid services being provided pro bono where it refers to “counsel provided by the State, paid or not,” in Art. 8.2(e).
84. For the tariff in civil cases, see *Legal Aid Guide*, Annexures F1–F5.

85. Legal Aid Board, “Legotla: Overview of the Board and Its Activities” (unpublished, November 1998), 8.
86. Legal Aid Board (November 1998), 8.
87. Legal Aid Board (2005), 19.
88. Legal Aid Board (2008), 24.
89. Legal Aid Board (2004), 14.
90. Legal Aid Board (2008), 24.
91. Legal Aid Board (2005), 20.
92. This can lead to accounting errors, fraudulent claims by lawyers, double payments, and corruption. In 1999, the Board managed to reduce its error rate from 60 percent to 1 percent by installing stricter controls and radically reducing the number of “judicare” cases, as well as by capping the fees that lawyers could claim for “judicare” (Legal Aid Board [1999], 10).
93. Legal Aid Board (1999), 11.
94. David McQuoid-Mason, “National Legal Aid Forum, Kempton Park, 15–17 January 1998: Working Commission Recommendations” 12 *South African L.J.* 48, 49 (1999).
95. Attorneys Act 53 of 1979.
96. The Attorneys Act 53 of 1979, Sec. 2(1A)(b), was amended by Sec. 2 of the Attorneys Amendment Act 115 of 1993 to allow aspiring attorneys to “perform community service approved by the society concerned”—provided that the person who engages them is practicing the profession of attorney, *inter alia*, “in the full-time employment of a law clinic, and if the council [of the law society] in the province in which that law clinic is operated, certifies that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic” (Sec. 3(1)(f)).
97. Legal Aid Board, *Annual Report 1993/1994* (1994), 35.
98. Legal Aid Report, *Monthly Report* (4 February 1997). This includes the costs for clinics that had only just been established. Ultimately, the cost per case was much less, as the more established clinics cost approximately 350 rand (approximately fifty-eight USD) per case (Legal Aid Report, [1997]).
99. The figure is the average for criminal and civil cases—approximately 75 percent of the work in the clinics was criminal and 25 percent civil.
100. Calculations by the present writer based on statistics in Legal Aid Board, “Legotla: Delivery of Legal Aid by Way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys as at 30 October 1998” (unpublished, November 1998), 1–5.
101. Legal Aid Board (November 1998), 8.
102. Legal Aid Board (2005), 9.
103. The Legal Aid Board defines a justice center as: “An office or set of offices at which the Board makes available the services of public defenders and/or principals and/or supervising attorneys and/or candidate attorneys and/or paralegals either as an office of the Board and/or in terms of a cooperation agreement and includes any office of the public defender or legal aid or legal aid clinic funded or partly funded by the Board and includes any satellite office of the above” (*Legal Aid Guide*, chapter 1, para. 1, definitions).
104. Legal Aid Board (2008), 21.
105. Legal Aid Board (2005), 2.
106. Legal Aid Board (2005), 2.
107. See subsection 3.6.
108. Legal Aid Board (1999), 20.
109. District courts can impose fines of up to 100,000 rand (less than 16,666 USD) and imprisonment for up to three years (Magistrates’ Courts Act 32 of 1944).
110. *Legal Aid Guide*, Annexure O, para. 1.2.
111. Legal Aid Board (2005), 19.
112. Legal Aid Board (2005), 20.
113. Legal Aid Board (2008), 24.
114. Legal Aid Board (2008), 11.
115. Vidhu Vedalkar, CEO, Legal Aid Board, “Legal Aid in South Africa” (unpublished paper, 13 October 2003), 8.

116. Mr. Justice Dunstan Mlambo, chairman, Legal Aid Board (2005), 3.
117. Legal Aid Board, *Annual Report 2001* (2002), 4.
118. Legal Aid Board (2003), 17.
119. Legal Aid Board (2003), 17. Also see: "While individually expensive, these matters have the potential to establish precedents that will benefit many more persons than those who are parties to the initial litigation" (Legal Aid Board (2002), 6).
120. Legal Aid Board (2003), 17.
121. *Legal Aid Guide*, chapter 1, para. 1, definitions.
122. Legal Aid Board (2002), 11: "Full disclosure of all funding and activities is also required, as is submission of audited balance sheets each year and if necessary, a financial audit by the Board and the Auditor-General."
123. Legal Aid Board (2002), 11.
124. Legal Aid Board (2002), 11.
125. *Legal Aid Guide*, Annexure O, para. 1.2.
126. Legal Aid Board (2003), 17.
127. Legal Aid Board (2008), 26.
128. Legal Aid Board (2008), 26.
129. Legal Aid Board, *Annual Report 1995/96* (1996), 24.
130. Legal Aid Board, *Annual Report 1996/97* (1999), 21.
131. Calculations by the present writer based on statistics in Legal Aid Board "Legotla: Statistics on the Work Done by Way of Salaried Staff Models" (unpublished, November 1998), 6–7.
132. Legal Aid Board (1999), 21.
133. Legal Resources Centre, *Annual Report for the Period 1 April 2003 to 31 March 2004* (2004), 40.
134. See Stephen Golub, "Battling Apartheid: Building a New South Africa," in Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees around the World* (2000), 35–36.
135. Legal Resources Centre, *Annual Report* (1996), 9.
136. The constitutional rights program deals with access to justice, gender equality, children's rights, the enforcement of socioeconomic rights such as health care, education, housing, and water, and a constitutional reform program. The land, housing, and development program includes rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform, and urban and rural land development (Legal Resources Centre, *Annual Report* [1998], 4; see also McQuoid-Mason [2000], S128. An important part of the LRC program is the training of paralegals and lawyers from disadvantaged communities. It employs twelve to fifteen young law graduates each year and trains interns from elsewhere in Africa and the developing world (Legal Resources Centre [1998], 7).
137. See, generally, McQuoid-Mason (2000), S127–28.
138. See David J. McQuoid-Mason, "Legal Aid Clinics as a Social Service," in David J. McQuoid-Mason (ed.), *Legal Aid and Law Clinics in South Africa* (1985), 64.
139. For the types of cases handled by legal aid clinics, see McQuoid-Mason (1982), 139–61.
140. McQuoid-Mason (1982), 139–61.
141. The present writer drafted Student Practice Rules for South Africa based on the American Bar Association Model Rules for Student Practice (Council for Legal Education and Professional Responsibility, *State Rules Permitting the Student Practice of Law: Comparisons and Comments*, 2nd ed. (1973), 43) and submitted them to the Association of Law Societies of South Africa in April 1985 to pass along to the then Minister of Justice. Although the rules were approved by all branches of the practicing profession and law schools in the late 1980s, they appear to have been blocked by bureaucrats in the Department of Justice. The first Minister of Justice under a democratic government in South Africa, who took office in 1994, undertook to have the rules implemented, but this never happened (see McQuoid-Mason [2000], S129 n. 82).
142. Minister of Justice and Department of Justice, *Enhancing Access to Justice*, 25; see also McQuoid-Mason (2000), S130.
143. See McQuoid-Mason (2000), S130.
144. David J. McQuoid-Mason, "The Organisation, Administration and Funding of Legal Aid Clinics in South Africa," 1 *NULSR* 189 (1986), 193.

145. See, generally, Stephen Golub, “Non-Lawyers as Legal Resources for Their Communities,” in McClymont and Golub, 297, 301–6.
146. In 1996, the Legal Aid Bureau experienced financial difficulties and the Legal Board agreed to provide substantial funding for it.
147. See, generally, McQuoid-Mason (2000), S131.
148. See McQuoid-Mason (2000), S133.
149. McQuoid-Mason (2000), S133.
150. At the National Legal Aid Forum in 1998, it was suggested that paralegal advice offices should be incorporated into the legal aid system at two stages. The first stage should be to provide information and advice at the community level, and the second should be to refer clients to legal services for representation. For the first stage, the Legal Aid Board should: (a) build on the infrastructure of the existing paralegal community advice centers in the country; (b) empower advice offices by including paralegals and law-related education trainers to provide an educational component; (c) empower advice offices by including some professional lawyers and candidate attorneys in their staff; (d) encourage the use of alternative dispute resolution to resolve disputes; and (e) deal with preliminary issues where people require representation. If disputes cannot be resolved during the first stage, community advice offices should move to the second stage and refer clients to law clinics, public defenders, private lawyers, or community legal service centers or justice centers (McQuoid-Mason [1999], 48, 53).
151. Legal Aid Board (2005), 4.
152. McQuoid-Mason (1999), 53; see also McQuoid-Mason (2000), S135–36.

# Legal Aid in England and Wales: Current Issues and Lessons

*by Roger Smith*

This article describes the extensive and well-funded legal aid system in England and Wales, and presents proposals for improving the scope and quality of services currently available to legal aid clients.

## 1. Introduction

Legal aid in England and Wales is well established and comprehensive, extending to both civil and criminal cases. In 2003–4, its funding was just under three billion euros, with an annual per capita cost of almost sixty euros,<sup>1</sup> making the system the most highly funded governmental legal aid program in the world. There has been a series of reform initiatives relating to contracts with providers, the development of quality assurance mechanisms, experiments with different forms of delivery, and research regarding the need for civil legal aid. The government's desire to contain spending and to demonstrate "value for money" spent has been a major driving force behind these reforms. However, the reforms have resulted in tension and debate, leading many practitioners to perceive the system as in crisis despite its relative sophistication and resources as compared to systems in other countries.

Legislation passed in 1949 established the original national legal aid scheme in England and Wales, which was initially limited to providing assistance in divorce cases. However, periodic expansions in subsequent years (particularly during the 1970s and 1980s) dramatically increased the scope of legal aid coverage. Separate elements of the scheme now provide (1) representation in criminal and civil cases and during police interviews before a criminal charge is made, (2) advice and assistance in legal matters not necessarily related to litigation, and (3) dissemination of general public information relating to legal rights through the Internet and other media.

The evolution of the legal aid program occurred within the context, and often as a by-product, of larger changes in the legal profession and the justice system. For example, the establishment of a national scheme of state funding for lawyers to give advice to suspects detained in police stations was part of the 1984 reform of police station procedures, designed to normalize and improve the police interview process.

For many years after its establishment, the legal aid program did not have a fixed budget; as long as costs were modest, this absence of constraints had few political consequences. However, dramatic increases in the scope of the program resulted in corresponding increases in costs, particularly during the early 1990s, which led to a series of budgetary reforms. These reforms culminated in the Access to Justice Act 1999, which currently governs all aspects of the legal aid program for England and Wales. The Act transferred direct administration of the program to the Legal Services Commission (Commission), an independent body whose members are appointed by the Minister of Justice. The minister remains responsible for overall policy, while the Commission secures and pays participating practitioners and monitors the quality of their work. The program is divided into the Community Legal Service (CLS), governing civil matters, and the Criminal Defense Service (CDS), dealing with criminal matters.

## **2. Participation of the Legal Profession in Civil and Criminal Legal Aid Work**

The legal profession in England and Wales has two distinct but partially overlapping roles: solicitors and barristers. Generally, solicitors interact directly with clients regarding legal and business matters outside of court although they may appear in lower courts on behalf of clients, while barristers principally appear in court on behalf of clients referred to them by solicitors. Until the 1990s, almost all solicitors and barristers who were not engaged in large corporate work undertook some cases funded by the legal aid program during their career. Due to the legal profession's high level of participation in the program, attorneys traditionally have been staunch supporters of the rights of defendants whenever political debates on the matter arose. The practical effect of the reforms, however, has been to concentrate legal aid practice within a group of specialist providers; for example, solicitors are now less likely to perform legal aid work. Over time, this shift in participation levels may have the effect of reducing the base of political support for defendants' rights within the legal profession.

Despite the possible chilling effects of the recent reforms, a large number of solicitors still provide legal aid. In March 2004, there were 4,715 contracts for general civil work and 2,669 for criminal work.<sup>2</sup> Most, but not all, of the firms and solicitors have contracted for both criminal and civil work. The Commission creates the contracts, which its network of regional offices administers.

In relation to criminal work, besides private sector contracts, a pilot project has been established involving a set of public defender offices (PDOs) with staff attorneys. The program is being closely monitored, but initial results suggest that the PDOs may actually be no cheaper than providing legal services through private contracts. However, a number of other variables—the PDO office locations, office size, and high start-up costs and staff turnover—may have contributed to these results; therefore, the monitoring is resulting in an imprecise measure of the potential of the program's long-term success.

Participation in the legal aid program is not limited to solicitors and barristers; rather, the Commission has deliberately encouraged nongovernmental organizations (NGOs) to obtain contracts for civil work. As of March 2004, there were 414 contracts with such NGOs as legal aid providers. The largest practice areas of civil work by NGOs were welfare benefits, debt,

housing, and immigration. Lawyers, on the other hand, typically perform civil work involving family law and certain areas of non-family civil litigation, such as public law cases reviewing the decisions of public authorities.

Each contract for legal work imposes obligations designed to ensure performance and quality on the contracting firms and attorneys. Routine audits evaluate program participants on several criteria, including:

- documentation of procedures;
- the adequacy of business plans and soundness of financial controls;
- the quality of reference materials;
- employment policies (such as job descriptions, staff appraisals, equal opportunity policies, and personnel supervision);
- file management and review;
- the quality of cases as measured through “transaction criteria” (a checklist of inquiries and points designed to permit a trained observer to evaluate how a file was handled); and
- supervisor skills (measured by reference to participation in Law Society accreditation schemes, where appropriate).

### **3. The Community Legal Service and Civil Legal Aid Services**

The Commission has statutory duties to deliver community legal service, including “the provision of general information about the law and the legal system and the availability of legal services,”<sup>3</sup> as well as planning and “facilitating the planning by other authorities” of legal services,<sup>4</sup> with the power to set, monitor, and accredit standards.<sup>5</sup> The Commission also directs the day-to-day management of the legal services provided, including contracts with legal aid providers.

The secretary of state for the Department of Constitutional Affairs determines an annual budget for the CLS and provides directions and guidance as to funding priorities. The secretary also approves a Funding Code (establishing the criteria for funding individual cases), which is subject to approval by Parliament. Unlike the CDS, which has no fixed budget, aggregate expenditures for the CLS are generally capped at a set amount in any given year. Currently, the highest designated priorities for CLS funds are proceedings involving children and civil proceedings in which the client faces a real and immediate risk of loss of life or liberty. Secondary priorities include social welfare matters “that will enable people to avoid or climb out of social exclusion” (e.g., housing, debt, employment, and welfare benefits cases); domestic violence proceedings; and “proceedings against public authorities alleging serious wrongdoing, abuse of position or power, or significant breach of human rights.” The secretary of the CLS set these priorities at the commencement of the current scheme, but they are not statutory and the secretary may alter them at any time.

Civil contracts between providers and the CLS cover various categories of civil legal work, including crime and family, personal injury (of declining importance, given present funding

priorities), clinical negligence, housing, immigration, welfare benefits, employment, mental health, debt, consumer and general contracts, actions against the police, public law, education, and community care. Contracts are for varying levels of assistance, from merely providing legal information and advice to fully representing a client in litigation. The payment terms of contracts are either fixed or open, based on the type of assistance provided.

Providers receive payment of fixed fees for “controlled” work, which is generally limited to the provision of legal advice and excludes actual litigation. Under the contract, permission is given for a stated number of “matter starts”—cases or specific aspects of cases. Of these, a specified number must be within the approved categories of work, with a “tolerance” for unspecified types of other civil cases. The tolerance levels vary with local conditions, often being larger in rural areas where there is a scarcity of solicitors. However, on average the tolerance level tends to be 10 percent.

For cases that involve litigation, or “licensed” work, fees are not fixed; they receive an hourly payment instead. For licensed work, clients must pass a “means and merits” test to measure the likelihood of success for each case against its potential cost. A high-cost case scheme deals with cases involving 25,000 GBP or more in costs, and involves individual processing of the case, tendering for fees, and higher rates of payment.

A significant modification has been proposed to the existing system whereby legal aid would be made available even where the cost-benefit balance is unclear or on the borderline but the case is important for the general public interest. A separate Public Interest Advisory Panel, largely comprised of NGO representatives and chaired by a member of the Commission, advises on this matter and publishes its advice on the Commission’s website.<sup>6</sup>

#### **4. Special Civil Projects**

The use of private contractors in civil projects has allowed the Commission to earmark funds for a number of innovative, one-off projects. These account for a small portion of the overall budget but serve as a testing ground for novel approaches to the delivery of legal services. Significant examples include:

- The Commission recently took over the operation of the JustAsk! website from the Lord Chancellor’s Department.<sup>7</sup> The site has a directory of CLS providers, together with advice sections. Although the information on the website is presently only written (unlike some of the interactive video kiosks used for similar purposes in the United States), it is available from any personal computer. The Commission believes that it has enormous potential as access to the internet broadens.
- The Commission has a number of pilot programs exploring various methods of delivering legal services, including a contract to run a telephone advice project with Capita, a commercial company that runs a call center.
- The Commission maintained the direct funding of nine law centers, although these, along with others, are now being resourced through contracts. The Commission has supported the central costs of the Law Centers Federation and the Advice Services Alliance.

Even though certain organizations receiving funding might be inclined to criticize the Commission's activities for political reasons, such conflicts generally have not arisen. It is uncertain whether this will continue to be the case if funding is reduced.

- The Commission has allocated considerable funds to a pilot project evaluating Family Advice and Information Networks (FAINS). FAINS seeks to deliver family services through an alliance of different agencies—the successors to ill-fated attempts to introduce mandatory information meetings and coerce people into mediation under the Family Law Act 1996. FAINS attempts to put together a more subtle package of services (including mediation, counseling, and advice regarding money) for those considering divorce to choose from, with solicitors acting as gatekeepers to the services. The Commission does not fund most of the services. About 12,000 cases annually are now going to mediation through FAINS, of which two-thirds are reportedly successful, at a cost significantly lower than predicted.
- The Commission established a research department that has undertaken in-depth work on legal needs, the regional legal services committees that it inherited, and “community legal service partnerships” established more locally. The research department recently published a detailed study of need, titled *Causes of Action: Civil Law and Social Justice*.<sup>8</sup>

## 5. The Criminal Defense Service (CDS)

The CDS supervises legal aid provision for criminal cases in England and Wales. As with civil legal aid, the Commission generally provides legal aid in criminal cases through contracts with private providers, but a pilot program involving eight public defender offices staffed by Commission-employed lawyers was launched in 2001. The CDS has no overall fixed budget for crime because of the requirement to provide representation and assistance under the European Convention. Criminal cases account for a majority of the legal aid budget—amounting to 1.1 billion GBP, or 1.6 billion euros, for 2002 and 2003.

Legal aid in criminal cases is available from a solicitor on duty during interrogation in the police station and thereafter to varying degrees throughout the criminal process depending on the client's needs. At police stations, free legal aid is currently available in all serious cases without a means test, despite proposals to introduce one. In criminal courts, a merit test is employed to evaluate whether the case is in “the interests of justice.” The governing legislation states the principles on which the courts should apply the interests of justice test in each individual case.<sup>9</sup> The test is slightly broader in domestic law than the interests of justice test, as determined by the European Court of Human Rights. This is probably a result of the desire to accommodate and compensate for the adversarial nature of the justice system in England and Wales. In practice, almost all criminal cases in the higher courts involve legal aid. In 2000, for example, 94 percent of those tried and 83 percent of those sentenced in the higher courts received representation through legal aid. In order to cut costs, the government is introducing a measure to expand the means test to a larger number of cases.

## 6. The Quality of Legal Aid Services and the Community Legal Services Quality Mark

Beyond the cases it funds, the CLS influences the quality of legal representation through the development of its “Quality Mark” (QM), which has been available for providers of both criminal and civil legal aid services since April 2002. The CLS issues the QM designation to legal providers as an indication that the CLS has determined the provider meets CLS quality performance standards along one of five dimensions—self-help information, assisted information, general help, general help with casework, and “specialist”—which indicate increasing levels of assistance from pro se representation to representation by specialized counsel. The CLS initially developed the QM as a means of ensuring the quality of its providers, but the scope has since been expanded significantly beyond those specific providers of legal aid. Approximately ten thousand organizations throughout England and Wales have requested assignment of a QM at one of the five levels. Through the QM initiative, the CLS has also developed cooperative projects with discrete groups of providers, including a project designed for organizations “working for smaller minority groups and excluded communities who may experience difficulty in achieving the full quality mark.”

The CLS requires each provider of legal services through the criminal legal aid system to obtain and maintain a “Specialist” QM. Prior to granting a contract for criminal legal aid services, the CLS reconfirms compliance with the standards of the QM. The Specialist designation is an assessment of the overall quality of a firm, evaluating: its operation and management in a number of areas including staff experience, accreditations, performance, and evaluation procedures; the ability to provide “seamless” service (including referrals); financial stability and controls; file management and review systems; client satisfaction; and complaint procedures.

The process by which the CLS measures and assesses quality in monitoring QMs was initially designed to permit one trained observer to evaluate a firm’s performance within a single file, using a series of checkpoints and “transaction criteria.”<sup>10</sup> The intent was to permit the CLS to review a case after its conclusion, to assess “what was done and the standard to which it was done.”<sup>11</sup> The criteria were developed initially to evaluate legal advising services, rather than to assess the handling of cases.

In practice, the auditor evaluating a firm selects a small random sample of files and assigns them a score expressed as a percentage; the firm passes the audit only if every file scores above the pass mark. The firm may request a larger sample if some files pass and others fail. The standard for performance is not “perfection” but “fitness for purpose.”

The transaction-evaluation method has received criticism for relying on the content of attorney notes under the assumption that the attorneys under evaluation will keep good notes.<sup>12</sup> If the attorney’s notes are lacking in detail, recreating the case for evaluation becomes difficult.

The CLS is in the process of exploring alternative ways of assessing the quality of legal service providers. A “mystery shopper” strategy is among the methods under consideration; the CLS would send staff members posing as legal aid clients into firms to report on treatment.

The CLS is also developing a process of peer review, which will provide for review of case files by an independent and experienced fellow practitioner trained in this process. A panel will

be established for every major area of practice. Generally, participating attorneys have expressed enthusiasm for the proposal, because they believe other practitioners are more capable of conducting assessments than non-attorney auditors following a checklist of criteria.

## **7. The Law Society: Raising Standards by Encouragement and Accreditation**

The Law Society, the regulatory and representative body for solicitors in England and Wales, also has a significant role in ensuring the quality of effective representation. Its responsibilities and activities include establishing the criteria for basic qualification and practice standards for solicitors, as well as ongoing professional development requirements, establishing and monitoring a Criminal Litigation Accreditation Scheme, and establishing “best practices” for the profession by publishing practice guides and organizing conferences on the topic.

Widespread negative publicity about poor performance by solicitors and their representatives during police station interrogations led the Law Society to act. Specifically, it sought to elevate the standards of practice through the publication of practice guides, as well as to implement a more comprehensive Criminal Litigation Accreditation Scheme.

The first criminal practice guide that the Law Society published, *Active Defence*,<sup>13</sup> encourages defense attorneys to take initiative in developing a defense strategy, rather than merely reacting to the prosecution’s case. At significant milestones in a case, defense lawyers are encouraged to analyze and take stock of the information obtained so far, consider the implications for the cases made by both prosecution and defense, and make decisions about the actions that need to be taken, and particularly about undertaking investigations.<sup>14</sup>

In addition, the Law Society published *Criminal Defence*, a well-received practice guide tailored towards criminal courts.<sup>15</sup> The following excerpt on record keeping by solicitors during interrogations at the police station captures the essence of its approach to proactive defense lawyering:<sup>16</sup>

It is essential to keep proper records: if the suspect remains silent on your recommendation, the court may still infer guilt. Therefore, it may be necessary to make sure that the court understands the circumstances which led you to advise the suspect to remain silent. This means you have to keep full, clear contemporaneous notes of the prevailing circumstances and the advice which you gave so that you can:

- refer to them;
- produce them in court if necessary if privilege is waived.

Keep a careful note of

- the physical and mental state of the suspect...;
- the general conduct of the police and the “atmosphere” in which the investigation is being conducted;
- representations made by you at all stages and the reasons for them;

- what information is made available by the police to you;
- what requests for information are made of the police by you;
- what information is given to you by the suspect;
- the suspect's apparent understanding of the significance of the allegation, and the significance of his replies or failure to respond;
- the advice given by you to the suspect, and the reasons for that advice;
- as far as is practicable, what is said in the police interviews;
- what was said at the time of the charge/report for summons.

Besides its practice guides, the Law Society has expanded its Criminal Litigation Accreditation Scheme, which governs the accreditation of solicitors serving police station duty, to cover both solicitors and their representatives.<sup>17</sup> The scheme is highly detailed and comprehensive, focusing on the evaluation of skills integral to practicing law within the adversarial system of England and Wales—including knowledge of the relevant laws and understanding of how to intervene effectively in an interrogation.

To attain the accreditation, the candidate must first present a portfolio of work covering five cases “in which the candidate has personally advised and assisted a client at the police station when no other solicitor or representative was present.”<sup>18</sup> The portfolio is marked as “pass” or “fail” by an assessment agent approved by the Law Society. The candidate then must pass a “critical incidents test,” which includes a taped interview in which the candidate has to demonstrate how and why he or she would intervene during a client’s interrogation. These tests are followed by another interview and an advocacy assessment.

Applicants for accreditation also must take a course offered by approved providers and pass a test on the materials covered. In addition to a written section, the test includes a practical examination in which the candidate listens to a tape of an interrogation and has to indicate where and why he or she would intervene.

## **8. The Way Forward for Legal Aid in England and Wales**

Legal aid in England and Wales is currently perceived as being in a state of crisis. A parliamentary committee recently reported pessimistically on the state of the civil scheme:

Too much has been squeezed out of the CLS budget...Civil legal aid has become the Cinderella of the government's services to address social exclusion and poverty. The highly desirable extension of provision and services has only been possible at the expense of cutting back on eligibility, scope and remuneration. The process has gone too far.<sup>19</sup>

In response, organizations such as JUSTICE, a law reform and human rights NGO in the United Kingdom that works to improve the legal system and access to justice, actively seek to protect the budget and maintain current levels of legal aid provided. The recommendations made in a recent JUSTICE report<sup>20</sup> address many debated issues:

- Legal aid should be governed by legislation in which eligibility and scope is clear.
- The purpose of legal aid is to ensure that all members of society can exercise their rights—both human and civil or “citizenship”—to combat social exclusion, the meaning of which needs to be extended to incorporate the idea of “constitutional exclusion.”
- Legal aid must be integrated within a range of access to justice policies and, to assist in this, “vertical strategies” should be drawn up indicating, for example, national strategies for ending different types of exclusion.
- Legal aid must also be integrated within a range of policies on substantive law, particularly in relation to crime where the total expected cost must be related to Home Office initiatives.
- The civil legal aid budget, as least as far as it is for combating social exclusion, may be capped, as now, but it must be “ring fenced” and seen as entirely separate from legal aid spending to meet the requirements of Article 6 of the European Convention on Human Rights.
- Means tests for legal aid must be related to those for basic means-tested benefits, such as income support, to avoid “poverty traps” where a person with an increasing income from work may lose more in benefits and taxes than they earn in take-home pay. A claimant must have a right to independent appeal.
- Criminal and civil legal aid need to be seen as national legal services, providing services to national statutory standards.
- Legal aid practitioners must be of the highest quality and are entitled to reasonable remuneration. Some move toward security of employment might be traded for compensation for uncertainty. Remuneration levels should be transparent, public, and, in the future, set nationally. Legal aid practitioners must be independent (that is, employed neither by government nor by the Commission).
- Delivery of front-line legal aid will need to move to larger units operating to national standards of delivery.
- The CLS needs to recognize that it funds only a minority of the legal advice, so that a community legal and advice service can emerge in which the CLS may play a lead role but the contribution of other funders will be recognized.
- The Commission and the Department of Constitutional Affairs should work collaboratively with legal aid practitioners—both qualified and unqualified—in devising the “vertical strategies” for each area of law.
- Care should be taken to avoid the “dumbing down” of legal aid to advice rather than litigation. There should be explicit debate about the best way of using the law to combat social exclusion, which must include consideration of the potentially strategic role of litigation.

JUSTICE formulated these demands in part as a response to a “Fundamental Review” of legal aid announced in 2004, with a report due in 2005. Many feared that this report would recommend further cuts in funding. However, even with cutbacks, legal aid in England and Wales would remain a program that is, relative to that of other countries, extensive and well funded.

## 9. Lessons from the Legal Aid System of England and Wales

Although legal aid in England and Wales is undergoing a period of major change, it remains highly sophisticated and rooted in more than fifty years of experience with a state-funded scheme. The fact that the English legal system is based on adversarial principles and a common law tradition, combined with the post-war legacy of a commitment to the welfare state, probably partially explains why state-backed legal aid developed there at a faster rate than in many other countries in Europe. However, even though the continental experience has differed, the English example offers a number of general lessons.

First, dividing responsibilities between the government, which formulates policy, and a separate, semiautonomous body to administer the uniform scheme has contributed to success by shielding the government from making decisions in individual cases regarding who should receive legal aid, as well as permitting the development of management expertise independent from policymaking. In addition, separating service-providers from resource management and policy implementation has created checks and balances between the two interests.

Furthermore, the system should recognize that the type of legal aid provided might differ between civil and criminal cases, and should accommodate differences in client needs and provider expertise between offering legal advice and providing representation in court. In addition, legal aid policy must include, as one component, popular legal education, so that people understand their rights and can effectively exercise them using the resources made available to them. Moreover, the legal profession and the managers of the scheme must appreciate that the quality of the service provided is fundamental to the success of legal aid schemes in accomplishing their goals.

Finally, any program of legal aid requires government expenditure. It is not realistic to expect that a well-functioning and effective system can be maintained without some form of government financial assistance. Hence, it is important that interest and advocacy groups, as well as the representative bodies of the legal profession and legal aid providers, be actively involved in the political process to voice the need and desire for funding.

## Notes

1. Just over half of those expenditures were attributable to criminal matters.
2. Legal Services Commission *Annual Report 2004–5*, (2005).
3. Access to Justice Act 1999, Sec. 4(2)(a).
4. Access to Justice Act 1999, Sec. 4(6).
5. Access to Justice Act 1999, Sec. 4(7–8).
6. See [www.legalservices.gov.uk](http://www.legalservices.gov.uk).

7. See [www.justask.org.uk](http://www.justask.org.uk).
8. *Legal Services Commission* (2006).
9. Access to Justice Act 1999, Schedule 3, para.5.
10. A. Sherr, R. Moorhead, and A. Paterson, *Lawyers: The Quality Agenda*, vols. 1 and 2, Legal Aid Board (1994).
11. Legal Aid Board HC50, *Annual Report, 1991–92*, HMSO (1992), 24.
12. The Commission has a statutory right overriding the attorney-client privilege of confidentiality to inspect legal aid files in connection with its evaluations.
13. R. Ede and E. Shepherd, *Active Defence*, Law Society (2000).
14. *Id.*, 37.
15. R. Ede and A. Edwards, *Criminal Defence*, Law Society (2002).
16. *Id.*, 61.
17. The police station qualification scheme is linked to one for accrediting those who appear in the magistrates' (lower) criminal courts; together they form "Stage 1" of the Criminal Litigation Accreditation Scheme (Stage 2—advanced—does not exist yet).
18. Law Society, Criminal Litigation Accreditation Scheme, Assessment and Accreditation Procedures, para. 3.1.2, available at [www.lawsociety.org.uk](http://www.lawsociety.org.uk).
19. House of Commons Constitutional Affairs Committee, *Civil Legal Aid: Adequacy of Provision*, HC 391-1, para. 1348.
20. JUSTICE, Roger Smith, *Legal Aid: The Way Forward* (2004); "Legal Aid: A Way Forward," *JUSTICE Journal* (2004) 2, 44.



# Reforming Primary Legal Aid in the Netherlands

*by Frans Ohm*

The article outlines the legal aid system in place for civil and criminal cases in the Netherlands, analyzes reform of the Dutch primary legal aid scheme, and presents specific outcomes and preliminary conclusions based on quantitative analysis and client satisfaction surveys.

## 1. Introduction

One hallmark of the Dutch legal aid system is the network of publicly funded Legal Aid Centers (Centers) that provide easily accessible, low-cost legal services to hundreds of thousands of clients each year. Because the Centers provide a broad array of legal services, have liberal eligibility criteria, and are low cost or free for low-income clients, they have been widely regarded by policy observers as the greatest achievement of the Dutch legal aid system. Nevertheless, the Dutch are currently reorganizing their legal aid system and phasing out the Centers. This paper addresses the reasons for, and expected results of, this reform.

## 2. The Legal Aid System in the Netherlands

Pursuant to the European Convention on Human Rights and the Constitution of the Netherlands, each citizen of the Netherlands has the rights of access to the courts, to legal representation, and, if indigent, to receive publicly subsidized legal aid.<sup>1</sup> Since 1994, legal aid has been regulated pursuant to the Legal Aid Act (Act), which established five regional Legal Aid Boards (Boards) charged with organizing and administering legal aid. Supervised by the Ministry of Justice, the responsibilities of the Boards include matching legal experts with low-income individuals in need of legal services, as well as supervising and monitoring the quality of such legal services. The Boards also advise (upon request) the Ministry of Justice and Parliament on matters relating to the provision of legal aid.

The Dutch legal aid system is accurately characterized as a “mixed” model. The Centers, established in the 1970s, are fully subsidized by the Boards and employ salaried staff lawyers who provide legal services to clients. In addition, private lawyers are paid by the state to provide services directly to qualifying low-income clients.<sup>2</sup> Private lawyers acquire legal aid cases by referral from the Centers or through other channels. In each case, the lawyer must

submit a successful petition to a Board on the client's behalf in order for the client to receive legal aid.

The Centers aim to deliver primary legal aid, which includes providing general information regarding laws, regulations, and the operations of legal institutions, giving advice regarding simple legal problems, and referring clients with complicated or time-consuming matters to private lawyers.<sup>3</sup>

Prior to the reform, the Centers annually provided legal information in approximately 440,000 cases, as well as over 220,000 free, thirty-minute in-person consultations. These consultations generally included confirmation that the client's concern was a legal matter, assessment of the client's legal situation, determination of what actions were advisable and what actions the client could undertake on his or her own, and an assessment of time, costs, and likelihood of success. For a charge of 13.50 euros to a client, the Centers also conducted 34,000 three-hour consultations. These sessions allowed for in-depth consideration of a matter and, where appropriate, included the contacting of the opposing party in the matter in order to negotiate an out-of-court settlement.

By concentrating on primary legal aid, the Centers fulfill two important functions: (1) they provide readily available access to legal aid at no or very low cost and (2) they fulfill an important screening function by tackling disputes and other legal problems at an early stage, thereby diminishing the possibility of escalation and minimizing social and personal costs. If extensive legal assistance is required, the client understands his or her position and can therefore make an informed decision regarding how to proceed. Moreover, the Centers refer clients to private lawyers if a case requires extensive legal assistance or if the subject of the representation does not fall within the scope of the Centers, which, for example, do not practice criminal law or family law.

The main providers of legal aid in the Netherlands are private law firms and solo practitioners, who specialize in giving legal advice to private individuals and providing representation in areas such as criminal, family, labor, housing, social welfare, social security, consumer, and administrative law, as well as asylum and immigration matters. In order to take cases within the legal aid framework, private attorneys must be registered with the Boards and meet the Boards' quality requirements. To take on a particular case, a registered lawyer makes an application to a Board on behalf of the client, which evaluates each application through a means and merits test. Upon approval of the application, the Board issues a certificate that allows the lawyer to handle the case and specifies the amount the client has to pay.

The Ministry of Justice finances the Boards, which are accountable to the Ministry of Justice for their budgetary allocations; however, fees paid by clients contribute to a portion of the Boards' budget. A client's maximum contribution is based on his or her net income and varies from ninety to 769 euros per matter. Individuals with a net monthly income above 2,135 euros (which includes any income from a life partner) or 1,518 euros (for single people) are not eligible; thus, approximately forty-five percent of the Dutch population is eligible. In addition to generating revenue, the personal contribution is meant to encourage clients to carefully weigh the costs and benefits of proceedings, thereby discouraging frivolous cases and controlling the overall costs of the legal aid system. In all criminal cases in which the defendant faces possible imprisonment, legal aid is free of charge. The Boards pay fixed fees for different types of cases, rather than an hourly rate. The fee is approximately ninety-seven euros per

hour when converted to an hourly rate based on the average number of hours each type of matter typically requires of a lawyer. On average, a registered legal aid attorney manages fifty cases each year. More than 60 percent of all Dutch lawyers participate in the legal aid system, and collectively they manage over 344,000 cases yearly, in a population of sixteen million people.

### **3. Reasons for Reforming the Legal Aid System**

A study conducted in 2000–2001 on future trends and developments in Dutch society as they relate to the legal aid system generated a number of conclusions that gained widespread attention in the Netherlands. First, the study suggested a need to increase the visibility of the Centers, advertise the services offered, and promote their use among those who are vulnerable or unassertive in protecting their legal rights. The study also revealed that the demand for legal aid is likely to increase substantially in the future because of increased use of legal institutions in Dutch society and the fact that citizens are becoming more assertive and aware of their rights. However, with demand for legal services increasing, the relative number of lawyers willing to work within the legal aid framework was expected to decline because remuneration lags behind that received in private practice and because of the administrative burdens imposed on participating attorneys.

The study also concluded that some Centers were gradually shifting their attention from primary legal aid to extensive legal aid and representation, attributable in large part to the personal agendas of the Centers' staff lawyers. In fact, the study found that some Centers acted on behalf of paying clients not eligible for legal aid, thereby neglecting their primary role and ignoring the fact that providing private legal services was clearly contrary to the mission of the publicly subsidized Centers as set forth in the Act. This revelation led private law firms to object since performing such work represented unfair competition. Meanwhile, paralyzing discord among the Centers about their future strategy resulted in less emphasis on primary legal aid. Even more problematic was the fact that the manner in which Centers made referrals to private lawyers was not transparent and the tendency of Centers to keep the most interesting cases for themselves.

The study was released amid an ongoing debate in the Netherlands about the government's role in a market economy. The debate questioned whether the market should, and could, be the best provider of services such as transportation, electricity, and the delivery of postal and telephone services, or whether the government should have a role and, if so, what role. The study's conclusions introduced these concerns to the legal aid system leading many in the Dutch government to conclude that reform measures were necessary to preserve the emphasis on primary legal aid, keep the market transparent, and maintain a sufficient level of attorney participation. In exchange for the introduction of a quality scheme, the remuneration of registered legal aid attorneys increased in three phases over a period of three years (2003–5).<sup>4</sup> Moreover, the minister of justice obtained permission from Parliament to raise the amount clients must pay by 35 percent;<sup>5</sup> these additional funds are earmarked to cover the increased remuneration for legal aid lawyers. In addition, a new method for verifying client income—electronic access to records maintained by tax authorities—will be introduced, thereby

simplifying the administrative procedures for clients, lawyers, and Boards in determining the client contribution.

A consensus has gradually emerged among policymakers regarding which legal aid tasks belong to the public domain and which are more appropriately left within the private domain;<sup>6</sup> namely, the view is that the line is drawn when the client needs representation. Therefore, if the legal services provided are limited to informing the client about his or her position and giving advice as to actions that the client can take to achieve a satisfactory solution, he or she can receive help in the public domain. However, if the legal services require contact with the opposing party and the client cannot, or will not, pursue the case on his or her own based on the preliminary advice, the case is to be handled in the private sector by private lawyers. The rationale for this delineation is the view that extensive legal advice and representation are services that the market can and should provide. Conversely, giving information, explaining a judicial position to a client, and offering basic legal advice—essentially, a client's initial contact with the legal system—is considered the specific responsibility of the government and should therefore be provided by fully subsidized governmental agencies.

In November 2003, the minister of justice obtained permission from Parliament to dismantle the Centers. The primary function of the Centers is to be overhauled and strengthened by a new organization, the Legal Services Counter (Counter). Centers that want to enter the market will have the opportunity to transform into private law firms and employees of the Centers have the option to be employed either by a newly founded public Counter or by a former Center that is a newly privatized law firm. The reason for the bifurcated solution was to achieve the division between public and private functions advocated by the consensus view. The emphasis on primary legal aid would be restored and the supply side would be strengthened by the founding of new law firms whose members want to specialize in legal aid for those who fall within the legal aid scheme. Moreover, the operation is budget-neutral as far as the structural cost are concerned with the one-time transition costs of nineteen million euros financed through the Boards' reserves and the Ministry of Justice.

#### **4. The Nature of the Reforms**

Thirty Counters are anticipated, with the first Counter opened in June 2003 and eight Counters in operation as of this writing. Counters will be dispersed geographically so that every citizen will be able to reach a Counter within one hour using public transportation. Generally, at least six legal advisers (a mixture of lawyers and paralegals) and a receptionist;<sup>7</sup> will staff each Counter, with more staff employed in larger cities. The type of services delivered (all of which are free of charge) include general information, clarification of a legal problem and assessment of clients' legal options, provision of basic legal advice, including self-help steps that can be taken by the client such as writing letters, and referrals to lawyers who have a contract for that purpose with the Board. At the two Counters that have been functioning for at least six months, 63 percent of services, by client contact, are delivered by telephone, 25 percent of client contacts occur at a counter, 11 percent are provided in the consultation room in the Counter, and 1 percent are via email.

A specially designed electronic system will process and organize referrals so that a client is referred to a lawyer in his or her neighborhood who has the appropriate specialization. The

system also evenly distributes referrals among all available lawyers. When a client is referred, the lawyer receives an electronic message with information regarding the client and his or her problem and, if applicable, the preliminary advice given to the client at the Counter while the client obtains information regarding the operations of the legal aid system. As was the case with the Centers, the Boards will subsidize the Counters, which also supervise the provision, quality, and parameters of legal aid. Furthermore, the Boards have authority over the Counters.

## **5. Outcomes of the Reforms**

The introduction of the Counters is closely monitored, with each Counter delivering a monthly report that states how many clients were assisted and through which channels—telephone, e-mail, or in person at the counter—as well as how much time is spent on each consultation and how many clients were referred to private lawyers. The satisfaction of the clients is also measured, albeit less frequently. The private lawyers are also surveyed; for example, they are asked whether the client who was referred arrived, whether the client was well informed about how the legal aid system works and the costs he or she can expect, and whether the Counter assessed the case properly for referral.

The first survey conducted at two Counters that had been open for six months revealed that the expectations of the clients matched the services offered: 64 percent of clients polled described the services provided as good, 32 percent as very good, and 4 percent as sufficient. The expertise of the employees of the counters was rated good (84 percent) up to very good (10 percent). However, concerns have risen with respect to privacy at the counters, and these concerns are currently being addressed.

The average client telephone call takes eight minutes, which clients stated was long enough in 64 percent of the cases, while 34 percent had no opinion and 2 percent found this to be insufficient. Ninety-four percent obtained a direct answer regarding their question and/or a referral to a lawyer while the other 6 percent had an appointment made for a consultation at the Counter. Among other survey results: the new telephone number of the Counters is still not well known; more publicity must be generated; the average time spent at the counter is eleven minutes; and a consultation in the consulting room lasts ten minutes to one hour, depending on the type of case and client.

The percentage of referrals differs greatly between the Counters surveyed, from as low as 10 percent to as high as 32 percent. Currently, the reasons for the divergence are unknown and will be investigated. About a quarter of the referrals are made to a social public organization while the remaining three-quarters go to lawyers.

Of the clients referred, 37 percent did not visit the lawyer for whom they received referrals. Reasons cited include fear of high costs (the client contribution and court charge), the client's failure to complete the necessary paperwork for the application for aid to the Board, the client's lack of time, energy, or motivation to initiate a legal process, diminishment of the matter's urgency, or actual resolution of the matter in the interim. The follow-up rate is a topic for further investigation and debate. Is the percentage of clients choosing not to pursue a referral acceptable? Is this the desired manner for people to weigh their interests? Are there serious problems not being dealt with? Clients who did make contact the lawyer were generally satisfied and said they were well informed about the costs.

## 6. Preliminary Conclusions

The reorganization of the Dutch legal aid system is too recent for a comprehensive assessment of its results and potential problems. One possible risk is a negative effect on the demand for legal services, and thus access to justice, caused by the fact that the client contribution has become larger under the reforms. Another is that the supply of lawyers to work within the network will decrease. In addition, some are concerned that the expertise of paralegals to handle many client requests will be inadequate and that the Counters will simply become referral mills. Clients failing to pursue referrals to lawyers may consequently also emerge as a problem.

The question initially posed by this article was if the Dutch are eliminating a successful legal aid system by dismantling the Centers, transforming them into Counters, and giving former staff lawyers the opportunity to establish private law firms. Partway into the transition and with the first results at hand, there are many reasons to believe that the reorganization will achieve its goals and surpass its predecessor.

### Notes

1. Constitution of the Netherlands, Art. 17: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law." Art. 18: "(1) Everyone may be legally represented in legal and administrative proceedings. (2) Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament."
2. To some extent, trade unions and consumer organizations also deliver legal aid. More and more people take legal aid insurance. In 2000, 14 percent of the households had such insurance, while the number rose to 19 percent in 2003.
3. The staff lawyers at the Centers are not necessarily lawyers registered at the Bar (advocates). They have a university degree in law, but they did not follow with an apprenticeship at a law firm to become what we call an advocate. Advocates can represent clients in all courts, but staff lawyers only at certain lower courts and only in certain types of cases. In recent years, more and more staff lawyers have become advocates.
4. The Ministry of Justice, the Boards, and the Law Society signed an agreement introducing a quality audit system. Since January 2004, a law firm must have a positive audit to be able to be registered at the Boards. The audit covers office organization, the treatment of clients (such as giving them written information about the cost and chances, keeping them informed, and providing a client with satisfactory research) and will be extended with peer review in the future. Every three years, an audit must be renewed.
5. Implemented at the end of January 2004. Research regarding the effects is being carried out; results were not yet available at the time of this writing.
6. Events were somewhat more difficult than this statement implies. In fact, there was a sharp debate within the legal community regarding legal aid. This debate was fueled by a committee of wise men appointed by the minister of justice to consider the matter. The details of that debate are beyond the scope of this paper. The debate has come to an end (at least for the time being) with the decision to create the Counters, but it will probably resume at some point in the future.
7. Now that extensive legal aid and representation are not part of the services delivered, paralegals are used. The higher education system has a judicial stream that qualifies students for this purpose, among other functions.

# Striving to Square the Circle: Quality Legal Aid in an Age of Shrinking Budgets

*by Moshe Hacoheh*

The article outlines the Israeli legal aid system and discusses some of the cost-cutting solutions developed to address the system's financial crisis, as well as some of the challenges relating to ensuring quality legal representation while streamlining the system as a whole.

## **1. General Structure of the Israeli Legal Aid System**

Over the past decade, the Israeli legal aid system has struggled with a challenge that is common to many legal aid systems: accurately projecting the level of demand for services and estimating future operating costs. While it is relatively easy to identify the number of defendants without representation in the criminal justice system by using records kept by the police and the courts, it is very difficult to obtain reliable information regarding defendants' incomes or their desire for representation. Predicting future demand in the civil system is even harder. In fact, it is practically impossible to estimate from available data the number of people who, given the opportunity for free or reduced-fee legal aid, will initiate legal proceedings or defend themselves when such proceedings are instigated against them. Discerning the income levels of members of such a group is even more difficult.

The Israeli legal aid system was established in two stages—the civil system in the early 1970s and the criminal system in the 1990s.<sup>1</sup> Given the very limited financial resources allocated for legal aid in Israel and in order to deal with the unknown number of applicants, both the civil and the criminal systems have introduced strict eligibility tests which potential clients must meet in order to receive legal aid,<sup>2</sup> thus reducing the number of potential applicants from the outset.

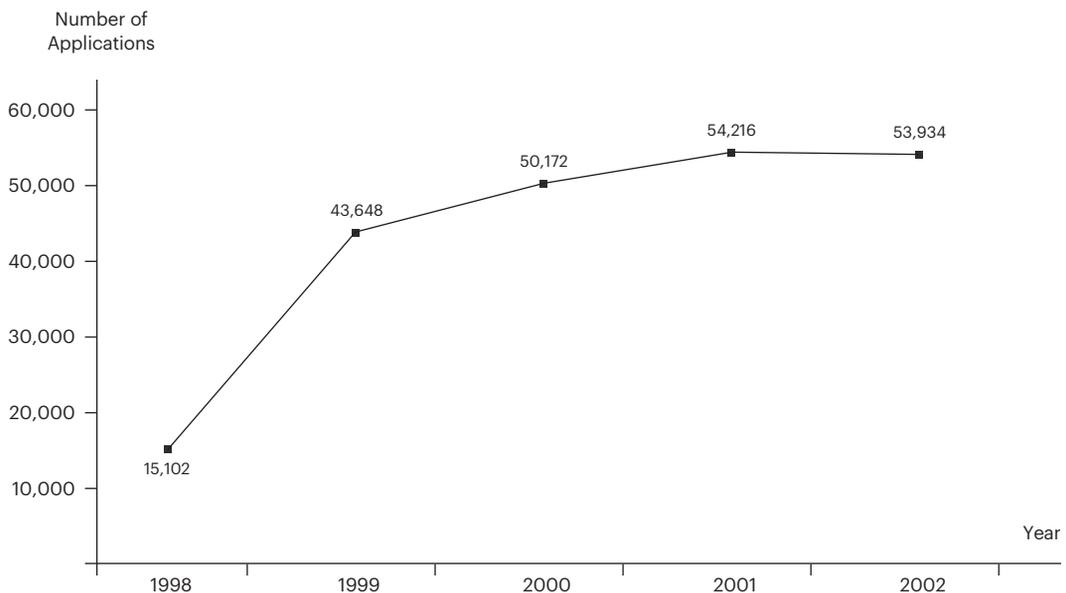
In both the civil and the criminal systems, eligibility is generally limited to individuals with very low incomes and capital. In order to receive civil legal aid, a potential client must meet income requirements and pass a test of legal merit by demonstrating that the suit is not

frivolous. Generally, applicants for legal aid in criminal cases must be accused of an offense carrying at least five years' imprisonment in order to qualify for aid, unless the appointment is mandatory.<sup>3</sup> However, in criminal cases, in order to comply with the requirements of the Israeli Constitution, as well as with international human rights conventions to which Israel is a party, courts have the authority to use discretion in granting representation to defendants and detainees who otherwise would not be eligible.<sup>4</sup> A court may invoke this power, regardless of a defendant's financial ability or desire for representation, when it determines that the defendant's legal rights will not be protected without representation. No similar authority exists in the civil legal aid system, although courts have often voiced the need for such an alternative.

## 2. Financial Difficulties

Israel has suffered a continuous financial crisis since at least 2000—the gross national product (GNP) has shrunk approximately one percent, unemployment has grown sharply, and the state budget has been cut repeatedly.<sup>5</sup> Since the establishment of the Public Defender Organization (PDO) in 1996, the number of applicants for criminal legal representation has grown steadily, as indicated in Chart 1;<sup>6</sup> this growth is mostly a result of the severe economic situation in Israel, a growing crime rate, and new legislation expanding eligibility for legal aid in different types of pre- and post-conviction proceedings.<sup>7</sup>

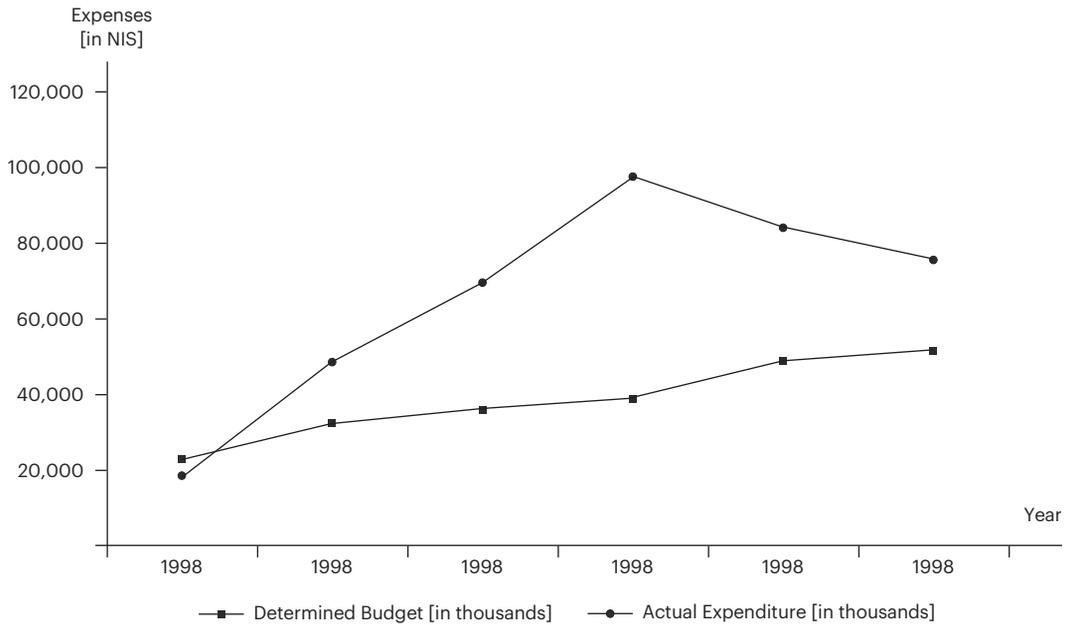
*Chart 1*  
Applications for public defenders during 1998–2002



The increasing number of applicants for legal aid led to continuous and corresponding growth in the PDO's yearly expenditures; however, as indicated in Chart 2,<sup>8</sup> PDO-allocated funding was never increased to meet the growing demand for public legal assistance.

Chart 2

Discrepancies between determined budget of PDO and actual expenditure



Another explanation for the gap between the PDO’s annual budget and its actual expenditure is the frequent use by the courts of their broad discretionary power to appoint counsel in criminal cases. This method of appointment intended to cover only a small number of exceptional cases, but courts commonly appoint a public defender to provide legal services for almost fifty percent of all suspects and defendants.<sup>9</sup> The higher than anticipated rate of appointment is generally attributed to the judge’s desire to mediate between the extremely narrow statutory eligibility criteria,<sup>10</sup> liberal interpretation by many judges of their appointment power, and the fact that remuneration for such appointments does not come from the judiciary’s budget but from the PDO budget. Whatever the cause of the gap, it is clear that having judges determine the eligibility of many defendants while the PDO covers actual expenses of such representation makes it difficult for the latter to accurately estimate its yearly expenditures in advance and to control those expenditures during the year.<sup>11</sup>

The discrepancy between the PDO’s budget and its actual expenses led to a heated dispute between the PDO and the ministries of Finance and Justice. The ministries refused to cover the PDO’s budget shortfalls unless it agreed to implement substantial steps to control costs. As a result, the PDO was unable to pay external public defenders it had hired to represent clients, triggering a general strike by these lawyers.

### 3. Responses to the Budget Crisis

The PDO responded to its budget crisis by reducing expenditures and developing new eligibility criteria.

### 3.1 Reducing Expenditures

In order to reduce its expenditures, the PDO decreased remuneration of public defenders, instituted the use of contract arrangements with legal aid providers, developed concentrated arraignment days, and developed a computerized cost-assessment system.

Public defenders' fees, which had previously represented approximately 90 percent of the PDO's expenses, were reduced by 30 percent from 2001 to the present.<sup>12</sup> However, by reducing fees, the PDO inadvertently reduced the motivation of many public defenders, thereby negatively affecting the quality of representation. To counteract this effect, the PDO decided to limit the number of lawyers with whom it contracted and give each of them more cases to ensure that the participating attorneys have a sufficient income level.<sup>13</sup>

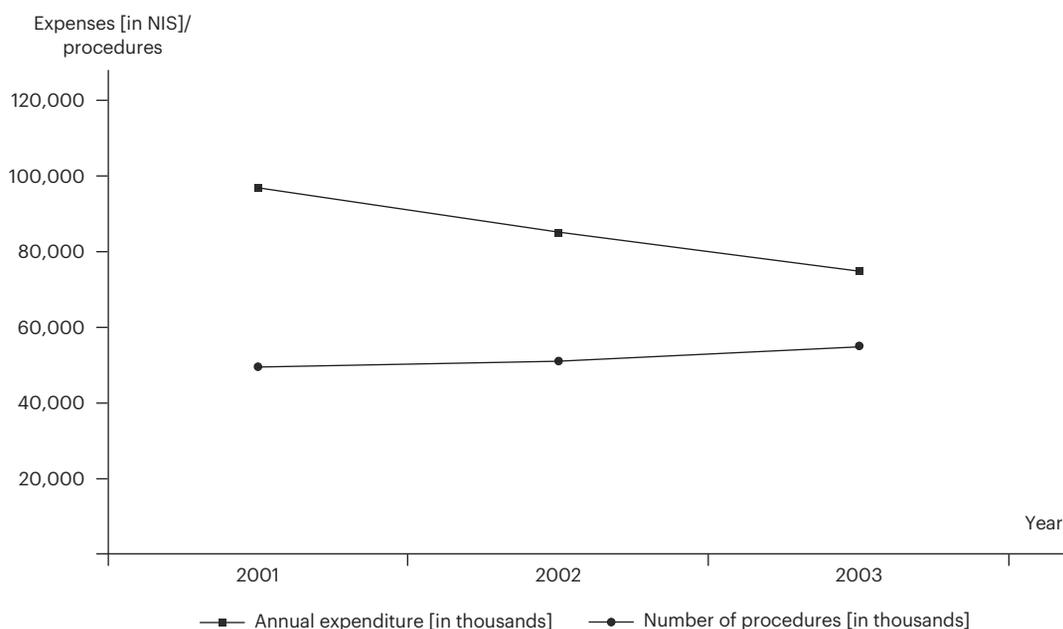
The institution of concentrated arraignment days represents an additional effort to manage time and resources more effectively. Under the program, several relatively simple cases are scheduled for arraignment before a particular judge on a particular day with the intention of speedily concluding most of them. An attorney on duty for the day meets with the defendants scheduled for arraignment, reviews the evidence in each case, and attempts to reach a plea bargain or other favorable disposition quickly.<sup>14</sup> Arraignment days rotate among public defenders with each attorney receiving a fixed payment for each day, regardless of how many cases he or she manages. Concentrated arraignment days reduce representation costs and enable the PDO to increase the number of clients eligible for representation because all defendants participating in concentrated arraignment days are eligible for public aid regardless of their economic status or the severity of the accusation against them. However, concentrated arraignment days can encourage an assembly-line approach to client representation, making it difficult for the designated attorney to engage in extensive individual client contact and fully weigh the evidence and possible defense theories in each case. As a result, many clients opt out of participating in the program and elect to appear in court with a private attorney at their own expense.

Another cost-cutting measure involves contract arrangements, used by many legal aid providers in the United States, in which a private attorney consents to represent clients in all proceedings and actions of a pre-agreed number of cases for a fixed sum.<sup>15</sup> The obvious advantage of this arrangement is that it enhances the certainty of the annual budget by enabling the PDO to know in advance the cost of representation in the transferred cases. However, the fee schedule is problematic because remuneration is often not proportional to the size and difficulty of the cases involved, which may lead to dispositions that are not necessarily in the best interests of the clients. Attorneys may not have the incentive to pursue each case zealously, but instead may be encouraged to conclude cases quickly through plea bargains. In order to moderate the negative effects of this approach, the PDO has generally limited its use to relatively simple cases involving misdemeanors and minor felonies, cases tried before Juvenile Courts, cases involving people with mental disabilities, and concentrated arraignment days.

In an additional cost-cutting move, the PDO developed a unique computerized assessment system that estimates, based on accumulated data and experience, the average cost of each case. The program enables the PDO to assess its annual expenses on any given day of the year and to plan its expenditure accordingly. This system had been in use for two and a half years at the time of this writing and has been unexpectedly accurate in its predictions. Unfortunately, no comparable system has been developed for the civil legal aid system.

As seen in Chart 3,<sup>16</sup> implementation of these solutions over the past several years has succeeded in reducing the PDO's annual expenses significantly, despite the increase in the number of clients represented by public defenders.

*Chart 3*  
PDO's annual expenditure vs. number of procedures dealt with



### 3.2 Eligibility Criteria for Legal Aid

The financial difficulties facing the PDO have also forced it to reassess eligibility criteria for legal aid. The current eligibility criteria combined with broad judicial discretion in appointing counsel has had the unintended effect of creating a system in which only five percent of all applicants qualify to receive representation based on the financial and substantive criteria, but the courts appoint representation for nearly 50 percent of suspects. Since 2000, clients have been required to pay a fixed contribution (equivalent to about 10 percent of the fees in a regular misdemeanor case). However, courts have the authority to exempt defendants from this requirement, which they generally exercise in order to prevent delays in the proceedings.

As a result, the PDO is developing new eligibility standards based on the notion of “partial legal aid” and a sliding scale of contributions. This reform should expand participation in the system while offsetting costs by requiring greater contributions from those participants who can afford to pay. The scheme’s pilot version was implemented in 2006, with plans for amendments to existing legislation to be introduced after a careful study of its effects.

Under the new scheme, financial and substantive eligibility tests would be more flexible in order to include more applicants, but client contribution fees would rise significantly for higher-

income participants. The proposed reform also calls for the creation of a minimum threshold for income and assets. Clients whose earnings and assets are below the threshold would receive free representation while those who earn above the threshold or have assets whose value exceeds a specified amount would be eligible for reduced-fee representation. The extent of each client's contribution would be determined according to his or her level of income, assets, and financial obligations. The new criteria, unlike the existing system, would prohibit courts from exempting defendants from such a payment or deferring it. With respect to substantive eligibility criteria, proposed legislation envisions eliminating the minimum five-year incarceration condition and replacing it with a rule requiring the appointment of counsel for any defendant exposed to a potential period of actual incarceration.<sup>17</sup> The existing discretion of the courts to appoint representation would remain in effect. However, because the suggested new criteria is designed to cover almost the entire range of potential applicants, the courts' discretion would be relevant in only a small number of cases, as originally intended.

The concept of providing partial legal aid to defendants not classified as poor but unable to purchase high-quality legal services at market prices is common to many modern European legal aid systems,<sup>18</sup> but the Israeli legal system has yet to establish such a practice. The PDO is seeking to implement its proposals in the near future, in order to increase the number of people eligible for representation and ensure high-quality representation while eliminating the gap between actual expenditure and allocated funds.

#### **4. Challenges**

Dealing with budget limitations is a problem common to all legal aid systems, and it compels creative solutions necessary to overcome these challenges. One of the principal conceptual difficulties facing legal aid systems is defining indigence. Israeli policymakers have determined that rather than establishing rigid criteria based on earnings close to the poverty line, a successful definition must be flexible enough to consider all of the factors that may contribute to a person's inability to afford legal representation.

An additional challenge in dealing with the financial aspects of legal aid is to ensure the quality of representation granted by the system. Given that it is not politically feasible in the current financial climate in Israel to address this problem by providing high remuneration to attorneys, the public aid system relies principally on oversight—by defining standards of representation, conducting inspections, providing professional support and continuous training, and maintaining the status of public defenders—to achieve this goal. The PDO has already upgraded its level of supervision over external public defenders by conducting more inspection visits to the courts, requiring attorneys to submit real-time reports on each case they manage, and requiring that every attorney's agreement to a guilty plea or a plea bargain that involves actual imprisonment receive prior approval from the PDO. The PDO also holds frequent mandatory training sessions for external public defenders. In addition, teams of experts are creating information kits dealing with representation—including legislation, court decisions, and model pleadings for typical cases—to distribute to public defenders.

## Notes

1. See the Civil Legal Aid Statute of 1972 and the Public Defender Statute of 1995. The provision of legal aid in both civil and criminal cases is based on a “mixed” model. A small nucleus of state-employed attorneys are mainly in charge of administration and professional supervision, while the bulk of the actual services is provided by private attorneys who are contracted on a case-by-case basis.
2. Moshe Hacohen, “Building a Rights-Based Framework for Legal Aid in Israel,” Open Society Justice Initiative (2004), 51–56.
3. Appointments are mandatory in (1) capital cases, (2) cases carrying an incarceration period of ten years or more, and (3) cases in which the defendant is mentally or physically unable to defend herself.
4. Israeli Public Defender Statute of 1995, Sec. 18(b).
5. Professor Jack Habib, Myers-JDC-Brookdale Institute, *An Overview of Social and Economic Trends and Issues*, brookdale.jdc.org.il/files/UJC-marketing-update-2-2-06.ppt.
6. See [www.justice.gov.il/NR/rdonlyres/1F5DA50C-00EA-428A-AF66-8E18BC808AE1/0/report2002.pdf](http://www.justice.gov.il/NR/rdonlyres/1F5DA50C-00EA-428A-AF66-8E18BC808AE1/0/report2002.pdf), 19.
7. See Hacohen, 55.
8. See [www.justice.gov.il/NR/rdonlyres/CDA9A2EE-EF5A-4F9B-AC26-2F36EC340553/0/report2003.pdf](http://www.justice.gov.il/NR/rdonlyres/CDA9A2EE-EF5A-4F9B-AC26-2F36EC340553/0/report2003.pdf), 46.
9. Other channels of referral to the PDO include referrals by counsel on court duty (26 percent), the police station where the suspect was arrested (13 percent), or Probation Services (4 percent), independent application (4 percent), and other application procedures (2 percent). According to the PDO’s internal data, a large number of applicants who did not qualify for representation under these substantive criteria did qualify under the financial indigence test and were subsequently appointed counsel.
10. See chapter 6 of the 2003 Annual Report and chapter 5 of the 2004 Annual Report. The 2003 Annual Report on page 7 attributes the high number of unrepresented defendants at the time in Magistrate’s Courts in the North and South (54 percent) to the unrealistic substantive and income criteria because judges there are reluctant to use their discretionary power. With regard to income criteria the report notes that a defendant who belongs to a family unit of three whose aggregate gross monthly income is above 4,666 Israeli new shekels (then the equivalent of 1000 USD) or has assets worth above 21,000 Israeli new shekels (then the equivalent of 4,700 US) is not eligible for representation. Furthermore, the substantive criteria require that the defendant be charged with at least one offense carrying potentially over *five years* of incarceration in order to become eligible. The report cites, for example, a situation where the defendant is charged with three separate offenses, each carrying a potential of four years in prison but because of the rigid criteria will not be eligible even if in practice he may be sent to several years in prison. Additionally, the criteria require that applicant meets *both* the income and merits tests in order to be eligible. (In 2007, the merit test was changed. The new legislation states that if the defendant is likely to be *actually incarcerated* for any length of time regardless of the severity of the offence he is charged with, the court must appoint the defendant a public defender if he or she is not represented by a lawyer, regardless of income or assets.)
11. Another serious drawback of this structure is the fluid nature of the judicial discretion as applied and the very different approaches taken by individual judges in utilizing that discretion. Statistics reveal that there are often significant differences in levels of representation between different jurisdictions in Israel, or even in the same jurisdiction, due to different judicial interpretations of the fallback power. Thus, in Israel’s larger cities where judges tend to apply their discretion more liberally, as many as 80 percent of suspects and defendants are represented in criminal procedures, with two-thirds of them represented by public defenders. In peripheral areas, where judges tend to be more reluctant to exercise the fallback power, less than 50 percent of suspects and defendants receive representation in criminal procedures and only 40 percent of them (i.e., less than 20 percent of all defendants) are represented by public defenders. This information is based on the results of a comparative field research conducted in 2003 by the OPD in conjunction with the Israel Bar Association in several jurisdictions and highlighted discrepancies in appointment policies between courts in different cities and rural areas, as well as between judges in the same courthouse. The results are detailed in pages 6–11 of the 2003 Annual Report. A complimentary study with similar results was conducted in January 2005, the results of which are detailed on page 6 of the 2004 Annual Report.
12. See section 3.4 of the 2004 Annual Report at 23.

13. With regard to limiting the number of lawyers contracted by the OPD in order to counteract potential poor quality, the 2003 annual report states: The fact that remuneration to public defenders was cut by the treasury by 30 percent between 2000 and 2003 served as a disincentive to quality representation. Furthermore, it was mostly the more qualified PDs who suffered a major decrease in their income who tended to decline appointments. The idea was therefore to concentrate more cases in the hands of the better PDs who as a result would earn more and retain quality service and at the same time weed out the less qualified lawyers from the list. This was subject to a caseload limitation since even the most qualified PDs cannot provide quality service beyond a certain caseload.
14. If such an attempt is unsuccessful, the case enters the regular track, where the defendant is not necessarily eligible for public representation.
15. A similar method, with necessary alterations, was adopted for public defenders functioning as part of the internal PDO staff employed according to a contract system.
16. See [www.justice.gov.il/NR/rdonlyres/CDA9A2EE-EF5A-4F9B-AC26-2F36EC340553/0/report2003.pdf](http://www.justice.gov.il/NR/rdonlyres/CDA9A2EE-EF5A-4F9B-AC26-2F36EC340553/0/report2003.pdf), 44.
17. Since the publication of a previous version of this article in 2005, legislation has changed. Currently any defendant facing a risk of actual incarceration is eligible for public defender representation. Procedurally, at the initial stages of the trial the prosecutor must inform the court of the possibility that the sentence requested by the prosecution might result in incarceration upon conviction. Such a statement automatically renders the defendant eligible for a public defender if he or she does not have a private attorney. In addition to this legislative development, the substantive and income tests still exist, but they currently apply only to defendants who are not at risk of incarceration.
18. Examples include Finland, the Netherlands, France, and Sweden. See PILI et al., *Access to Justice in Central and Eastern Europe: Source Book* (2003), 476–89.

# Development of a Civil Legal Aid System: Issues for Consideration

*by Daniel S. Manning*

This article argues in favor of developing a civil legal aid system that takes an expansive approach to legal representation in order to ensure equal access to justice and equality of outcomes for indigent individuals. It argues that civil legal aid promotes systemic improvements by fostering economic development and supporting social inclusion. It presents the essential elements for designing an effective civil legal aid program, including developing eligibility criteria, identifying priorities and overall goals, choosing services and types of providers, and developing a funding base.

## **1. Introduction: The Need for Civil Legal Aid**

Countries worldwide are recognizing the need to ensure that their justice systems treat all members of society fairly and that some level of access to legal advice and representation is necessary in order to achieve “equal justice for all.” There is increasing recognition that enabling the poor and disenfranchised to gain access to the justice system actually improves the system. Consideration of access to justice often starts with the criminal justice system, as it involves the coercive power of the state and the European Convention on Human Rights (Convention) requires signatory states to provide criminal legal aid. Conversely, civil legal aid is harder to define and the state’s obligation to fund civil legal assistance is less established.

The core elements of the argument for criminal legal aid are straightforward: the state cannot deprive someone of liberty without a fair trial and since there cannot be a fair trial without legal representation, fundamental principles of justice require that the state provide a lawyer if the accused cannot afford one. It is simply not possible to make a similarly succinct argument for the provision of civil legal aid. While the concept of equal access to justice provides a starting point for the discussion, many questions remain unanswered. For example, is state-funded civil legal aid required to ensure adequate access to the court system? If not, what should each person have access to in the justice system? The criminal justice system is intended to ensure that no one is deprived of liberty without due process of law, but what rights are worthy of protection through state-funded legal representation in the civil justice system? Political and civil rights? Economic, social, and cultural rights? Gender equity? Freedom

from discrimination? Good governance? How should such rights be protected? Is legal advice sufficient or must a lawyer provide representation?

Although there are many complex issues that need to be addressed and barriers to overcome in the establishment of an effective criminal legal aid system, this paper takes the position that an even wider array of issues need to be addressed in order to create an effective civil legal aid system. There is no “right” way of providing civil legal aid; rather, the appropriate civil legal aid system depends on what problems society is addressing, what resources are available, how the legal system in place operates, and many other factors that vary widely from place to place. However, some common issues must be addressed in any adequate consideration of development of a civil legal aid system.

## **2. Defining Civil Legal Aid**

There is no generally accepted definition of civil legal aid. For the purposes of this paper, civil legal aid refers to the provision of legal assistance in anything other than criminal matters for people who are poor, disenfranchised, or otherwise excluded from society. Such an expansive definition potentially includes every form of public interest legal advocacy while a system consisting only of private groups focusing on environmental justice or gender equity cannot be considered a civil legal aid system. The provision of direct assistance to individuals with standard civil law problems such as evictions and divorces is central to civil legal aid. However, legal aid also entails advocacy to change laws or bring the benefits of existing laws to larger groups of people and public education campaigns to inform people of their rights.

There are many choices to be made regarding what is within the scope of any particular legal aid system, such as determining who is eligible, what legal problems should be addressed, and what services should be provided. These choices should not be based on preconceived ideas about what civil legal aid is as this may quickly narrow the scope of any system that is developed. While civil legal aid can be, and often is, provided through private charitable efforts, the focus of this paper is publicly supported legal aid programs, possibly supplemented by substantial private contributions.

## **3. Reasons for Providing Civil Legal Aid**

There are many possible reasons for providing civil legal aid, the most important being the promotion of human and civil rights. The European Court for Human Rights (Court) held in *Airey v. Ireland* that the Convention “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory...or by reason of the complexity of the procedure or of the case.”<sup>1</sup>

For states bound by the Convention, the *Airey* decision must be the starting point of the analysis, but not the end as *Airey* itself is of limited scope. The Court made clear that, while the particular circumstances in the case before it were of sufficient complexity to require that legal assistance be provided, the conclusion should not be drawn that “the State must provide

free legal aid for every dispute relating to a ‘civil right.’” Assuming that *Airey* establishes a broad right to legal assistance where it does apply, the decision is nevertheless limited to complex legal matters or those cases where legal representation is compulsory under domestic law. Thus, many litigants are on their own in court. Moreover, *Airey* does not assist individuals appearing before administrative tribunals or for a multitude of matters that never reach the point of formal dispute resolution.

Even states that are not compelled as a matter of human rights covenants or other law to provide free lawyers may take a human rights approach to legal aid. For example, the Charter of Fundamental Human Rights of the European Union includes several provisions that could be the proper subject of a civil legal aid program, such as basic freedoms,<sup>2</sup> equality,<sup>3</sup> solidarity,<sup>4</sup> and citizens’ rights.<sup>5</sup>

Likewise, civil rights offer a framework for building a legal aid program, even if the state is not obliged to provide a free lawyer for every dispute related to a civil right. Roger Smith, director of JUSTICE, an organization in the UK that strives for legal reform and promotes human rights, discusses the concept of “social exclusion.” Smith defines this as “what happens when people or areas suffer from a combination of linked problems such as lack of access to services, unemployment, poor skills, low incomes, poor housing, crime, poor health and family breakdown,” and argues that it gives important guidance for the provision of legal aid. “The point of funding civil legal aid becomes to use the law to provide access to services, higher income, better housing, etc.” Smith goes on to argue that:

Social exclusion needs to also include concepts of civil or citizenship rights.... It needs to incorporate notions of empowering citizens to obtain rights and, thus, being included within society. In the context of legal aid, social inclusion has to be seen as having a hard core—the successful assertion of rights of those excluded from benefits, services and opportunities to which they are entitled.<sup>6</sup>

Although a human and civil rights framework provides the most expansive approach to designing civil legal aid, there are several other possible guiding principles. One such principle is the goal of providing equal access to courts. In democratic societies, courts are essential institutions that should be open to all members of society. Moreover, poor people are often more dependent on courts than people of greater means. Courts are commonly involved in matters of basic human needs such as evictions, child support, and child custody and frequently provide the only means of redress for victims of accidents or unscrupulous merchants or lenders.

Another reason for state provision of civil legal aid is to promote effective resolution of disputes. Government agencies at all levels have a profound impact on people’s lives by providing essential social welfare benefits, granting licenses and permits, imposing penalties, collecting fees and taxes, and ruling on the status of immigrants. In most instances, an administrative body must hear all disputes before it is brought to court, and matters are frequently decided by reference to complicated regulations. Therefore, most disputes never reach court. While administrative tribunals ideally should function without the need for lawyers, this is rarely the case.

Although most private disputes are also resolved out of court, poor people are often at a considerable disadvantage if they do not have legal assistance. Frequently, they either fail

to pursue legitimate claims or settle for far less than they are due because they do not know how to, or cannot, assert their rights. Civil legal aid is therefore important because it provides people with the information they need to make informed decisions. Often people can handle matters on their own if they simply know their rights and a brief session with a lawyer can help a person decide what action to take or enable them to submit a successful application or make a proper claim.

Furthermore, with an expansive approach legal aid can help achieve social policy goals through the enforcement of existing laws, which are often adequate but are simply not enforced. Some laws prohibit certain behavior, such as discrimination based on race, gender, age, language, or membership in a national minority while others require government agencies to provide social welfare benefits to people meeting certain criteria or to act on applications within a specified time. When public entities are unable or unwilling to enforce such laws, private individuals can do so with proper legal representation. In many cases, in fact, private enforcement is the only way laws can be properly implemented, with legal aid lawyers playing a major role.

Civil legal aid lawyers can also help advance social policy goals through the creation of new laws. While legal solutions are created only after problems emerge, if the victims are poor or disadvantaged or if their problems are not taken seriously by those in power it is often difficult to create new legal remedies. Legal aid lawyers can thus help the poor, disadvantaged, or excluded have their voices heard.

#### **4. Benefits of Providing Civil Legal Aid**

The primary benefit of civil legal aid is that it enables the individuals receiving legal assistance to secure rights that would not have been protected otherwise. Although the benefits take many forms, for the most impoverished members of society, this typically involves addressing basic human needs for shelter, income, health care, education, employment, and freedom from harm. There is also reason to believe that people who receive proper legal representation are better suited to dealing with future problems. Moreover, to the extent that legal aid helps overcome social exclusion, particularly in the more expansive sense expressed by Roger Smith, people are able to become more active and effective participants in society.

Beyond individual benefits, legal aid promotes systemic improvements. Courts function more efficiently when people receive representation. There is ample evidence from divorce courts, for example, that significantly more time is taken to resolve child custody, maintenance, and property division issues when one or both parties are unrepresented. In other cases, lawyers are able to negotiate settlements and thereby avoid bringing cases in court.

Furthermore, legal aid can help make government itself more effective. People who are the victims of discrimination or the intended beneficiaries of government programs that are not achieving their goals have very useful information about what is wrong and how to fix it. Legal aid lawyers can use this information to create solutions, whether through litigation, lobbying, or other means.

Legal aid can also help in the construction of democratic institutions. Government is complex and people often lack the information they need in order to play a constructive role in

civic affairs. Giving legal advice to community groups, tenant associations, women's groups, and groups representing racial or national minorities can enable people to advance their interests and make the institutions that govern their lives more responsive to their needs.

Moreover, legal aid can help promote economic development. At a very basic level, people who are able to find help dealing with poor housing, lack of health care, domestic violence, and a host of other problems addressed by legal aid are in a better position to be economically productive. Indeed, many examples exist of legal aid organizations working with poor communities to form cooperatives, develop housing, or even establish new businesses.

## **5. Who Should Get Legal Aid and What Help Should Be Offered**

Eligibility is a function of (1) the purpose for which legal aid is provided, (2) the specific issues to be addressed, and (3) available funding. While income is the standard measure, other factors can determine the need for assistance. For example, assistance is often provided to people with disabilities, refugees, older people, young people, immigrants, or victims of a particular problem.

The goals and eligibility requirements of the legal aid program largely determine the issues that a legal system will address. One central question is: who decides the priorities for a civil legal aid program? Should legal aid providers be given a wide mandate to address priorities that are set at a local level or should there be strict national guidelines? While local flexibility may be the best way to respond to local needs, it could leave some people without representation by virtue of where they happen to live. Furthermore, although national standards ensure uniformity, they may reduce the ability to solve emerging problems.

Though a legal aid program is typically envisioned as a group of lawyers providing representation to individuals in court proceedings, this picture represents only the middle of the spectrum of possible services. For example, Ain O Salish Kendra, a highly skilled and respected legal aid organization in Bangladesh, includes a street theater group because that is the most effective way to provide legal information to some rural communities. While theater productions may not be typical, various forms of legal education are often part of a legal aid program. The continuum of services also includes limited advice, provision of basic services such as making phone calls or writing a letters, individual representation in matters outside court, court representation, appellate litigation, representation of groups and organizations, public interest or class action litigation, and lobbying.

The mix of services depends on the goals of the legal aid program. For example, a broader human rights agenda requires a wider range of services than one that focuses primarily on improving access to the courts while proper representation of disadvantaged groups may require the capacity to lobby the relevant legislative bodies. Furthermore, when effectively representing clients depends on obtaining a favorable ruling from a constitutional court, legal aid organizations must have an appellate practice. As with many aspects of legal aid, there is no correct answer regarding the proper mix of services. In addition, the needs of clients require constant reassessments.

Decisions about what services to offer often determine what staff is necessary to provide the service. For example, there is clearly no need for a street theater troupe if legal education is

not part of the mandate. Similarly, there is no need for lawyers skilled in economic development if the organization does not do such work. Conversely, the availability of people with certain skills may determine the type of services offered. In some rural areas, for instance, lawyers are simply not available but there are people who can be trained to do paralegal work. The result may be that only legal advice and education are available in some communities.

## **6. How Civil Legal Aid Should Be Provided**

While there are many variations, civil legal aid in the US is generally provided by private attorneys who are reimbursed by the state (a system sometimes referred to as *judicare*) and through legal aid nongovernmental organizations that employ staff attorneys. Many law school clinical programs, bar association volunteer programs, and public interest groups also provide legal aid. For purposes of decisions about public funding, however, the most informative choice is whether to use the private attorney model or the staff attorney model, or some combination of the two.

The issues to be considered in making this decision include the goals of the program, the comprehensiveness of services to be provided, the desired cost, efficiency considerations, responsiveness to local needs, the availability of lawyers, and the interests of the legal community. For example, if the goal of the legal aid program is to combat social exclusion, the staff attorney model is better. On the other hand, if the goal is to provide a high volume of routine court representation, the private attorney model is better. The decision about what model to adopt boils down to a question of expertise versus efficiency. Dealing with social exclusion requires time to become acquainted with the community, a working familiarity with government agencies, and a thorough knowledge of the laws that have the most impact on poor people and full-time staff attorneys are better situated to gain the necessary knowledge and skills. Moreover, private attorneys are better able to handle a high volume of cases.

Although quality is not inherently better with either system, staff attorney programs have some methods for monitoring and improving quality that may not be as readily available to private lawyers, particularly those who practice independently. Specifically, because staff attorney programs mostly involve groups of lawyers in practice doing very similar work, there is more of an opportunity for training, supervision, and evaluation. While this is not always done adequately, legal aid staff attorney programs tend to be designed with the expectation that such quality control mechanisms will be a part of routine operations. Moreover, it may also be easier for funding agencies to audit the quality of work done by staff attorney programs, both because the agency can look at whether the internal quality control mechanisms are being used and because there may be fewer service providers when compared to individual private attorneys.

Costs of legal programs are more a function of whether there is an entitlement to legal aid and what control mechanisms are in place than whether the staff attorney or the private attorney model is utilized. The more staff attorney programs incorporate the type of quality control mechanisms mentioned above, the more costs increase. Similarly, staff attorney programs may engage in more community outreach activities that are more expensive on a per case basis. On the other hand, private attorneys may have higher earnings expectations. Nonetheless, the difference in cost between staff attorney programs and private attorneys probably has more to do with the type of services available than any factor unique to either model.

As previously mentioned, efficiency may favor private lawyers. However, efficiency is only one of many values to consider in structuring a legal aid program. Even assuming that private lawyers are more efficient, if there is discretion in which cases lawyers accept people with easier cases may be more likely to find representation. For example, divorce cases with complicated custody disputes may be passed over by private attorneys in favor of cases without such problems. In addition, people with mental health issues that require more time and attention from a lawyer may be passed over for those cases without such nettlesome issues.

Effectiveness also depends on the type of case. Legal issues affecting poor people are often highly specialized, particularly when they involve social welfare programs. Staff attorneys have more expertise because they only do legal aid work while private attorneys generally do not have the time to concentrate on issues of most relevance to the poor or disenfranchised clients of legal aid.

Thus, to the extent that the system sets its priorities locally, a staff attorney program is better suited to identifying and responding to local needs. Since staff attorneys spend all their time serving poor people, they are more likely to work with community groups and local agencies, as well as to have the administrative capacity to set clear priorities. On the other hand, if priorities are set on a system-wide or national basis, there is less opportunity to become aware of local concerns.

The availability of attorneys and the interests of the legal community are two facets of the same issue. Is the organized bar willing to support legal aid in any form and, if so, which model is favored? Drawing general conclusions on this point is difficult, since experiences vary widely from country to country and even within countries. In some instances, local bar associations believe that staff programs take business from private attorneys while in other situations, legal aid is seen as a means for younger attorneys to start their practices. In any case, a legal aid program can rarely function without strong support from the private bar.

## **7. Funding Civil Legal Aid**

Domestic funding for civil legal aid is unavailable in many countries. However, international funding may be obtained to provide legal aid to address very specific problems such as the return of refugees, property disputes, or claims for benefits under rebuilding programs, depending on the circumstances in the country. In many cases, international funding has made it possible to create effective legal aid organizations that quickly develop the capacity to do work beyond their original mission. The challenge, however, is to make the transition to domestic funding, which often takes a great deal of time. This in turn requires putting the issue on the agenda long before the international funding declines.

## **8. Governing and Administering Civil Legal Aid**

Wide ranges of systems have been developed for overseeing civil legal aid. In the US, for example, civil legal aid is usually provided by local legal aid groups, which receive grants from the national Legal Services Corporation (LSC). The US Congress appropriates a fixed amount

of money that the LSC distributes to the local nongovernmental groups under a formula based on the number of poor people in the area served by the nongovernmental organization. While Congress and the LSC impose certain limitations on the use of the funds, governing boards and administrators of the local group control operations, which set priorities, determine eligibility, and select cases, subject to periodic audits by the LSC.

Since 2000, civil legal aid in England and Wales has been provided under a contracting system through the CLS, with government caps on the overall budget. The CLS, through its administrative arm, the Legal Services Commission, enters into contracts with providers for services in specified categories such as family, personal injury, and housing, which specify the types of services available, including advice, mediation, or full legal representation. Private law firms or nongovernmental organizations can provide these services, as long as they meet certain quality standards.<sup>7</sup>

The legal aid systems in both the US and England and Wales place limitations on the type of cases legal aid lawyers may take, which is both a way to set priorities and control costs. In the US, some of the limitations intend to ensure that legal aid organizations do not take cases that private lawyers can manage.

While these are only two of many models for providing legal aid, the issues are the same under any system: how best to control costs and ensure quality and how to set priorities, determine eligibility, and assess the merits of cases.

## **9. The Relationship between Civil Legal Aid and Criminal Legal Aid**

Some countries have completely separate systems for criminal and civil legal aid while others have merged systems; even the merged systems, however, have some degree of separation. There is no inherent reason why the same system cannot provide criminal and civil services. Although many private lawyers practice both criminal and civil law, relatively few legal aid groups provide both criminal and civil legal aid and the few that do tend to have separate criminal and civil divisions. While arguments can be made for specialization, there are also risks to overspecialization.

Administrative arguments exist for maintaining separate criminal and civil legal aid systems, but the major challenge is budgetary. Specifically, civil work is secondary in systems in which there is one budget for criminal and civil legal aid and in which each indigent person charged with a crime with possible penalties of imprisonment is entitled to a lawyer paid by the state. In the US, where the programs and budgets are completely separate, both the civil and criminal programs face financial problems, although neither affects the other. This is partially due to a substantial amount of funding for civil legal aid is national, while criminal legal aid mostly receives state or local level funding. However, many state legislatures fund both types of programs while viewing them as completely independent. The challenge is to show the need for both criminal and civil legal aid.

## Notes

1. *Airey v. Ireland*, ECtHR (Judgment of 9 October 1979), No. 6289/73 [1979], 3, para. 26. *Airey* is cited as an example. Of course, it applies only to contracting states. Other international instruments, to varying degrees, could provide a basis for obligations similar in scope to the *Airey* judgment.
2. See Article 14, guaranteeing education, and Article 18, regarding asylum.
3. See Article 21, regarding nondiscrimination, and Article 25, regarding the elderly.
4. See Article 30, regarding unjust dismissal, and Article 34, regarding social assistance.
5. See Article 41, the right to good administration.
6. JUSTICE, *Legal Aid: The Way Forward* (2004), 16.
7. See Roger Smith, “Promoting Access to Justice in Central and Eastern Europe,” appendix in *Access to Justice in Central and Eastern Europe: Source Book*, PILI et al. (2003).



# Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients

*by Robin G. Steinberg*

This article describes a holistic, client-oriented approach taken by some public defender offices in the United States, proposing a model of legal aid advocacy that moves beyond the traditional role of courtroom representation in specific cases. Holistic representation involves a multidisciplinary approach that responds more effectively to the broader needs of indigent clients, empowers client communities in the long term, improves efficiency in the justice system, and reduces the workload of service providers.

## **1. Introduction: The Trouble with Lisa**

Lisa looked older than she was. Her face and body had aged prematurely from a childhood marked by abandonment, sexual abuse, and betrayal. Her teenage years were spent as a prostitute; her adulthood was ruled by an uncontrollable heroin addiction.

I met Lisa when I was a young public defender in New York City in the mid-1980s. I liked her instantly. Her sharp tongue, quick wit, and confrontational style with any authority figure won me over. Lisa was charged with robbing her “john” in a midtown hotel room by hitting him over the head with a champagne bottle, tying his legs and feet behind his back, and leaving him naked, bleeding, and helpless as she unloaded his wallet into her purse. As it turns out, her immobilized customer had tried to get her “services” for free and refused to pay her; Lisa was having none of that. Unfortunately for her, as she left the hotel room she walked directly into hotel security guards, who arrested her.

She was charged with robbery and unlawful possession of a weapon. Over the thirteen months that I represented Lisa, we shared lunch, talked about her case, and stayed in regular contact as we prepared for her trial. However, it was not until two days before her trial that I began to understand this young woman's life. Concerned that she would show up for her trial "high" on heroin, or simply fail to show up on time, I questioned her about where she would be staying during the trial and how I could contact her. At that moment, it became clear that I did not really know Lisa at all. She had no "home," her heroin habit was raging, and she had no idea how to present herself to the jury that would decide her fate. So I did what only a young public defender would do: I brought her home to my fifteen-by-eighteen-foot studio apartment in Greenwich Village, where I could keep a watchful eye over her during the weeklong trial that was about to begin.

I litigated the case as if it were my only one. I tried to block out my other eighty clients who were waiting for my attention. Even though the jurors took several days to make their decision, they did convict Lisa of robbery in the end, and she was sentenced to one and a half to four years in prison. I cried as they led Lisa away in handcuffs.

I saw Lisa once again, during her release from prison after serving almost a year of her sentence. Eventually the appellate court reversed her conviction and freed her. She walked through the prison gates, threw her arms around me, and thanked me for not forgetting her. As she walked down the steps into the New York City subway—a free woman—she turned, smiled, and gave a little wave good-bye. And with that, she was gone.

By the traditional standards of public defense, I did a good job. Lisa received a high-quality legal defense in her criminal case. I raised all appropriate objections about police conduct, challenged the prosecution to prove its case beyond a reasonable doubt, and litigated her case effectively, zealously, and without compromise. I appealed her conviction and eventually won her freedom.

So why does Lisa still haunt me almost two decades later? The reason is that while I addressed the needs of her criminal case effectively, I did nothing to change her life—in other words, to address her human needs. Those needs left unaddressed would eventually drive her back into the criminal justice system and into that same prison cell from which she had escaped. Looking back, what Lisa needed was an advocate who could look beyond her criminal case to her drug addiction, her homelessness, and her psychological needs stemming from years of trauma and abuse. Lisa needed an advocate working with her as a "whole client," not just as a case.

## **2. Holistic Advocacy: A Better Way**

The specter of Lisa and the thousands of clients like her whom I have seen in more than twenty years of being a public defender got me thinking differently about what clients need, and what a public defender should do for clients. What has become clear is that the traditional model of indigent defense representation has become complicit in the broken machinery that is the American criminal justice system. Even when we zealously fight the government and argue passionately and persuasively for our clients, at the end of the day, we do nothing to alleviate the crushing circumstances from which they have come and to which they return. There is, I now believe, a better way.

Working compassionately with indigent clients often means seeing firsthand that the problems and challenges confronting them are more wide-ranging than the criminal charges they face. It means knowing that clients come with a host of unaddressed social problems, including poverty, mental illness, alcoholism, substance abuse, post-traumatic stress disorder, and family dysfunction.

Quite simply, the criminal justice system is the last stop for many clients, and there is no greater moment of need, desperation, or opportunity than in the hours and days after an arrest. Being arrested after committing a crime is a galvanizing event in the lives of most clients: the moment when their drug addiction spills into the open, when the desperation becomes unbearable or the fury becomes unmanageable. Although it is a time of terrible fear and vulnerability, it is also a time when clients are most likely to seek change and respond to offers of help. Criminal cases are the ideal place for lawyers, expert in criminal and civil law, to deal preemptively and swiftly not only with the case at hand but also with matters ancillary to the arrest, such as eviction from public housing, deportation proceedings, and the imminent removal of children from the home. It is an ideal time for social workers, psychologists, mental health professionals, and other advocates to work with clients in a number of ways. For example, by maintaining health treatment that may have been interrupted by the arrest or by securing counseling to deal with trauma and abuse that may have indirectly led to the arrest. Another option would be charting out a service plan that involves securing employment and fulfilling court-mandated programs that will lead to a better disposition of the criminal case and a better life. Precisely at this time, when clients are at their lowest and when the potential legal and social service pitfalls are the greatest, is when clients need a highly skilled legal defense, civil legal aid, and a compassionate social service presence in their lives.

It is unsurprising, then, that housing a broad array of services in a public defender's office makes sense. What I have found in my experience, and what is echoed by my colleagues day in and day out, is that the criminal case is often not the most challenging or the most complex or the most pressing issue in the lives of our clients. How do I make sure that my family and I have enough to eat? How can I find and keep a job? How do I regain custody of my child, who was removed from my home? My clients must answer these questions, and if "taking a plea" is part of the solution, they are happy to oblige. Pleading guilty is only a small part of their much larger life equation.

Responding to the broader needs of criminal defendants is what I call "holistic advocacy." I believe that this model—social service intensive, collaborative, and long-term—has begun to create a radical transformation in the way that public defenders see their function in the criminal justice system. This paper demonstrates that moving away from a traditional model of representation toward a more holistic model is good policy, enhances advocacy, and satisfies clients.

### **3. Traditional Public Defender Work and Holistic Advocacy**

In the traditional public defender model, the lawyer is defending a case rather than a client. The goal is to remove the immediate threat of legal jeopardy, not to ameliorate any larger issue. Unfortunately, within these clearly defined limits, lawyers seldom develop the skills to delve

more deeply into the lives of their clients or to work collaboratively with them on addressing the issues that drove them into the criminal justice system. Part of the problem is a lack of resources and time. There is also an institutional bias against forming long-lasting relationships or otherwise investing emotionally in the life of a client. Holistic representation addresses both of these shortcomings by allocating the proper resources and simultaneously requiring the collaboration of service providers, community members, and family. Although time is always a problem, the resources and expectations of a holistic office strive to create and integrate significant compassionate relationships into the representation provided by the lawyer.

The goal of every defense lawyer in any setting is to win the best disposition of a case that is possible for the client. Holistic representation does not change this fundamental and compelling goal. Winning an acquittal or less jail time, or avoiding prison altogether, for a client will always be a core goal of any criminal defense lawyer. In a holistic defense model, though, the goal is also to make a long-term difference in the life of a client.

As any lawyer knows, the better we know a client, the better we are able to advocate for that person. Pulling on one thread in the complicated tapestry of a client's life often yields surprising insights. Indeed, addressing one problem can help a client open up to a lawyer in another, completely unexpected context. This deeper connection and greater understanding result in better case results for the client and greater success and satisfaction for the lawyer.

What often makes lawyers and other advocates "burn out" is the feeling that they are doing too much work yet not securing any positive results for their clients. Seeing the same faces return with another criminal charge, as well as with the same issues at home, at work, and in their communities, is depressing and depletes motivation. Creating a place where a poor person can get help with his or her criminal case, find an affordable living situation, seek counseling, receive assistance with a résumé, and ask any question with the assurance that someone will work hard for him or her is obviously exciting and rewarding for that client. The extraordinary rewards for the advocate are even more impressive.

This is not to lose sight of the immediate criminal case, and holistic advocacy does yield better criminal case dispositions. With more information about clients' lives and circumstances and with more engagement on the part of clients in addressing the challenges they face, defense lawyers are better able to advocate for their clients and persuade judges and prosecutors to offer more desirable case results and sentencing options. Clients in holistic offices have a far greater chance of receiving referrals to an alternative to incarceration that focuses on drug treatment or vocational training. Less jail time and more time in rehabilitative services means less harm to clients, their families, and their communities, and better results for society. What is good for clients can certainly be good for lawyers, advocates, the criminal justice system, and society.

#### **4. The Critical Divide: What Causes Criminality?**

Lawyers and advocates for the poor continue vigorous debates about what clients with criminal cases need. At the core of the debate is a disagreement about what leads to criminality. Is criminality an issue of moral character, or is it the result of other forces, some specific to the person and others generalized to social circumstance? Did Lisa break the law because she was a bad person? Or did she break the law because she was responding in large part to poverty, to a lifetime of abuse, and to her struggle with addiction?

For those who believe crime to be a derivative of poor character, there may be little reason to look at the “whole client” in a case. However, for those who believe that the cause of criminal behavior is far more complex and far more tied to the social condition of poverty, then holistic defense makes a great deal more sense. For them, there is a new and effective model of representation pioneered in “holistic defender” organizations such as The Bronx Defenders. My argument in this paper is for those willing to see criminality as not involving only a simple character failure, as well as for those who are unsure of their opinion. If you are willing to consider the notion that criminality is not just an issue of character, then I hope that you will also accept the need for public defenders to adopt this new model and usher in an era of more compassionate and effective representation of indigent criminal defendants.

## **5. Legal Aid in the Criminal Justice System in the United States: Background**

The movement toward holistic models of indigent defense in the United States is grounded in the diverse and pressing needs of indigent clients. With the prevalence of drug addiction, poverty, and homelessness among poor criminal defendants, and with the continuing high rate of recidivism, it became clear rather quickly that penal sanction alone was an insufficient answer to our criminal justice problems. Despite this realization, both the criminal justice system and public defenders’ offices were slow to find an answer. As our prison population doubled and then doubled again, growing toward the almost unthinkable number of two million, the traditional notion that defense work should address only the criminal case persisted. Across the country, regardless of whether there are institutional public defenders or private lawyers providing representation, the scope of services offered to indigent clients was exclusively limited to defending and advising clients with respect to the criminal charges presented against them. Traditional representation, then, is case specific and court-based, with little attention paid to the social service, psychological, or civil legal needs of each client. The result is a system that processes cases and the people attached to them, creating a “revolving door” of clients coming through the system repeatedly. The system changes nothing—after a period of incarceration, clients are just as poor, just as addicted to drugs, just as mentally ill, just as homeless, and even more hopeless.

The good news is that advocates for the poor are waking up to the reality of their clients’ lives. Across the United States, we are seeing a slow but advancing movement toward holistic, client-oriented practice, which responds to the limitations of case-specific representation and challenges the traditional US system.<sup>1</sup> Lawyers for the poor, along with clients, academics, and social service providers, are beginning to recognize that poor clients need more than just criminal defense. They need crisis counseling, therapy, alcoholism and drug treatment, housing assistance, immigration advocacy, child welfare representation, and a host of other services.

## **6. How Does Holistic Advocacy Work?**

At the core of holistic advocacy is a commitment to a “client-centered” practice. Client-centered means empowering clients to identify the challenges they face and to work with advocates to

overcome those obstacles. It begins where the criminal clients are—arrested, traumatized, and desperate. By providing zealous criminal defense representation and by offering comprehensive and effective solutions to the social service, psychological, and human needs that they have, clients can chart their own paths toward a future free from criminal justice involvement and incarceration. How an organization decides what services to provide and how to deliver them is determined by what clients in a given community know they need and want. Unified and guided by a broad vision of criminal defense representation, holistic practice can change lives and strengthen families and communities.

Supporting the core principle of client-centered practice, holistic models of advocacy have two critical components:

- advocacy through interdisciplinary work groups, and
- a presence in the client community.

The Bronx Defenders, for example, houses social workers, criminal defense lawyers, civil lawyers specializing in child welfare, housing, and immigration, and youth and community outreach staff—all in a single building. The office itself is located in the South Bronx, where most of its clients live; beyond the panoply of social services, the office also provides youth programs to local elementary and high schools. Cementing its place in the community, the social work staff at The Bronx Defenders serves as a clearinghouse for a wide variety of social services, having developed relationships with more than 300 local social service organizations, schools, and community groups.

## 6.1 Interdisciplinary Work Groups

The centerpiece of a holistic office, and the primary way to reinforce the interconnectedness of the issues that clients face, is through interdisciplinary work groups. Whole client representation is most achievable when an office utilizes interdisciplinary teams of lawyers (with different specialties), social workers, investigators, and support staff. Depending on the needs of clients, there may also be psychologists, job developers, youth program personnel, and community organizers. The Bronx Defenders, for example, includes lawyers who specialize in housing and immigration law, a team of child welfare advocates, several youth service personnel, and a number of community organizers.

Providing a team of advocates for clients is rewarding and challenging. The ability to work collaboratively with experts from different disciplines on behalf of clients is rewarding because it means a unique ability to address both a client's criminal case and his or her human needs. It is challenging, though, because many lawyers resist multidisciplinary practices for fear of losing control and power over the case and client. Nothing in their law school training or prior experience fosters a collaborative work style—whether with other lawyers or with other professionals. This resistance hardens in a case-focused, traditional defender model. By focusing on client needs rather than case needs, however, advocates soon learn that they must rely on others to help them address the wide array of complex social, economic, legal, and psychological needs that almost every client presents. Lawyers may know what is best in the courtroom, but they do not always grasp what is best for the client. Through integration and

indoctrination, even the most resistant lawyer will begin to understand the value of social work and collaboration.

Since social workers' training differs significantly from that of lawyers, they ask different questions and focus on things lawyers often miss or undervalue. Consequently, they are regularly able to unearth helpful information that even a diligent lawyer would be unable to learn. Social workers give voice to client's experiences and life goals in a way that can help lawyers (often unexpectedly) resolve the client's legal predicament. By working collaboratively with social workers or other mental health experts, lawyers begin to understand clients. This understanding quickly yields recognition of the value of social work. With a social worker as a partner, a lawyer can offer the best legal representation for a client, while the social workers can focus on the other problems confronting that client. The client's needs are served well because he or she is having all questions answered, and the lawyer and social worker are encouraged because they are better able to do their work as advocates.

## 6.2 Presence in the Client Community

A presence in the communities where clients live is critical to the success of a holistic model, whether the defenders' office is physically located in the community or the defenders have a frequent presence in the community in other ways. From a political perspective, outreach affords the office an opportunity to raise its profile in the community. Clients are more likely to seek the help of defenders and to trust their advice and assistance if they have a positive reputation among family, friends, and neighbors. Moreover, a regular presence in the client community sensitizes the lawyers and staff to the conditions in which their clients live. Finally, the experience of being in the client community strengthens advocacy skills—adding to the attorney's palette the power to paint a picture of a client's life, family, and community from firsthand experience. The effect of that immediacy is hard to overestimate, and it makes for a powerfully persuasive tool whether arguing to a judge, prosecutor, police official, or jury.

Being aware of client communities is not enough—to become full participants in the holistic model of advocacy, public defenders should actually become involved in their clients' communities. For example, the Dade County Public Defender Office runs an antiviolence project. The public defender for Albemarle County and the City of Charlottesville has established a citizens' advisory committee, and The Bronx Defenders runs a youth organizing project for local high school students and an art and literacy program for elementary school students down the street from its office.

The effects of such involvement are amazing. Send an otherwise trial-focused lawyer to sit at a card table at a local middle school's career day, and you will find that a day of talking to eighth graders, some of whom have never seen a lawyer before, can make a tremendous impact on both the lawyer and the students. Of course, the lawyer's presence is great for the children and wonderful for the school, but it is also significant that the community knows that professional and compassionate advocates are available to them. Even an attorney steeped in the traditional model will return from this sort of visit deeply aware of the myriad hurdles that everyday life presents for those he or she represents. That knowledge, for the vast majority of lawyers, compels them to be more sensitive to client needs and more effective in communicating the essential humanity of their client to both a prosecutor and a court. Ultimately, exposure

to the community makes lawyers both more effective and more sensitive—two things that are traditionally viewed as incompatible.

## **7. Holistic Advocacy Makes Good Social Policy**

The costs of incarceration are frequently understated. Beyond the capital expenditures of building and staffing prisons, incarceration wreaks havoc on communities and families left impoverished by the loss of a provider or parent. In the simplest of terms, holistic defense is a criminal justice issue and, despite its connectedness to the defender function, a crime prevention tool. By leveraging information about clients, their circumstances, and their families, holistic advocates can actually provide opportunities for clients to solve the complex problems that drive them into the criminal justice system in the first place, thereby lowering recidivism, strengthening families, enhancing public safety, and reducing the costs of a system that can swallow even the most generous budget.

Since government bears the cost of higher crime as well as chronic family violence, alcoholism and substance abuse, homelessness, and mental illness, any significant move to address those problems in communities where people cannot easily seek help can significantly reduce costs and serve a core social function. Justice is better served by providing services, solving problems, and strengthening communities than by blindly arresting, prosecuting, and incarcerating.

Beyond costs and simple justice, holistic representation increases systemic efficiency as well. Contrary to popular belief, judges regularly make decisions without any true understanding of what challenges the people before them face. They do not know about the battles with alcoholism. They do not know about the recent job loss. They do not know about the history of abuse in the home. Hence, they make critical decisions without critical information. Without that information, judges are reluctant to give clients the benefit of the doubt by releasing them without bail, referring them to a program instead of prison, or dismissing the charges. Much of this is because they have little assurance that the person before them will respond well, given the chance. In other words, they do not know when to take a chance on a client.

This information deficit is something directly addressed by a holistic model of advocacy. Through better understanding of clients and their circumstances, lawyers can provide judges with the tools and the assurances they need to feel comfortable rendering a pro-defense decision. Moreover, and perhaps surprisingly, prosecutors too can become more flexible when presented with a client's compelling life circumstances. Most advocates recognize this; however, most are neither equipped nor impelled to gather this information. In a holistic office, gathering these persuasive details is seen as part of the representation, and although social workers often undertake such work, the team concept and seamless integration of various professionals working together allow the information uncovered by social workers to be integrated into a persuasive presentation by the lawyers.

Taken together, the benefits of holistic advocacy—in terms of client outcomes, lawyer satisfaction, community empowerment, and enhanced public safety—represent a highly rewarding, morally superior, and cost-effective approach to legal representation for the poor.

## 8. Conclusion

Public defenders serve a critical purpose by aggressively fighting for the rights of their clients in the courtroom. Unfortunately, zealous courtroom advocacy is not enough to make a real difference in the lives of poor people in the United States. Criminal cases plague indigent clients, as well as alcohol and drug addiction, joblessness, homelessness, family violence, mental illness, and lack of access of health care and other social services. The truth is that poor people require a different kind of advocate, one who will fight for them on a number of fronts, not just in the courtroom.

The burgeoning movement toward holistic defense is a powerful response to the realities that poor clients face every day. It is a model that responds to the needs of poor communities and that brings together lawyers and other advocates to make a difference in the cases and the lives of poor people.

No matter how holistic defense is structured, translating this idea into reality is difficult. It requires a cultural shift away from the traditional conception of dealing with the case to a broader and more humane approach that focuses on the client. Since holistic representation relies on interdisciplinary work groups of lawyers, social workers, and investigators, it works best in the organized setting of a public defender system. Not every jurisdiction is able to field a public defender, of course, but even systems that will rely on individual attorneys or bar associations can incorporate the critical features of a holistic approach. Organizing affiliations with other lawyers doing criminal and civil representation and ensuring easy access to a centralized group of mental health professionals, social workers, and investigators are critical.

Holistic defense is more than just a challenge. It is a critical opportunity to alter, fundamentally, the way justice is experienced—both for indigent clients and for the advocates who represent them. Indeed, the holistic defender movement has the capacity to change the way justice is experienced in poor communities. By engaging the whole client, holistic advocacy actually improves the criminal justice system by finally delivering on the long-held but seldom-attained goal of individualized and delicately calibrated justice.

### Note

1. These new holistic defenders have founded offices such as The Bronx Defenders, The Neighborhood Defender Service, the Knox County Public Defender Community Law Office, the Maryland State Public Defenders Office/Neighborhood Defender, and the Georgia Justice Project.



**p a r t t w o**

# Reforming Legal Aid in Central and Eastern Europe



# Regional Overview

*by Nadejda Hriptievschi*

This paper reviews the main legislative developments related to legal aid in Central and Eastern European countries between 2002 and 2005, when two seminal events bringing together relevant government and civil society stakeholders reviewed progress in implementing legal aid reform in the region. The paper suggests areas where legal aid legislation should be improved and ways to implement existing norms in the field more effectively.<sup>1</sup>

## 1. Introduction

This paper reviews the main legislative developments related to legal aid in Central and Eastern European countries between two major events: the First and Second European Forums on Access to Justice held in Budapest in 2002 and 2005.<sup>2</sup> These events focused on access to justice issues, gathering civil society actors and governmental officials to discuss problems, progress, and transferable good practices of legal aid provision. The paper presents positive developments that may contribute to improving legal aid delivery in the region and highlights concerns to be addressed through further action by relevant stakeholders. In addition, this paper reviews legislative developments and the state of affairs in ten Central and Eastern European countries, eight of which were admitted into the European Union (EU) in 2004 (Estonia, Czech Republic, Hungary, Latvia, Lithuania, Poland, Slovenia, and Slovakia) and two of which were admitted to the EU in 2007 (Bulgaria and Romania).<sup>3</sup>

## 2. Major Legislative Changes

A series of country reports presented at the first European Forum on Access to Justice, which took place from 5–6 December 2002, displayed shortcomings in several countries' legal aid systems. Among the most notable were: narrow or vague statutory eligibility criteria for legal aid, lack of norms for provision of legal aid in criminal cases outside cases requiring mandatory defense, lack of procedural norms for enforcing the statutory right to legal aid in noncriminal matters, lack of quality assurance mechanisms for legal aid services, and weak or complete lack of management capacity of the legal aid system.<sup>4</sup> These shortcomings stemmed both from gaps in the legislative framework and faulty implementation. In addition, several EU accession reports<sup>5</sup> pointed out various shortcomings in the systems of the then “accession countries,” encouraging governments to institute relevant reforms.<sup>6</sup>

The pace and direction of activity since the first Access to Justice Forum were encouraging, with several countries moving to adopt legal aid laws unifying rules and redefining the scope and authority of management and provision of legal aid services.<sup>7</sup> For example, in Hungary,<sup>8</sup> the organization and delivery of legal aid in civil and public administrative procedures, as well as of court and extrajudicial proceedings, was reformed, while Estonia<sup>9</sup> reformed its law to provide for a broad scope of legal aid in courts and before administrative and enforcement authorities in criminal, misdemeanor, civil, and administrative matters. Furthermore, the law in Latvia<sup>10</sup> was reformed to provide legal aid in civil, administrative, and criminal matters, during and prior to trial. In Lithuania,<sup>11</sup> legal aid was provided for primary<sup>12</sup> and secondary legal aid<sup>13</sup> in civil, administrative, and criminal matters. In Bulgaria,<sup>14</sup> the law expanded the scope of legal aid to include criminal, civil, and administrative matters and establish a new legal aid management institution. Moreover, legal reforms in Slovakia<sup>15</sup> provided legal aid in civil, labor, and family matters<sup>16</sup> while establishing a new institution charged with delivery and management functions. Drafts of legal aid laws have also been prepared in Czech Republic, Poland, and Romania.

Although legal aid policies are crucial to developing frameworks and regulations for legal aid systems and effective implementation, such laws are only effective if they complement other relevant acts, which frequently results in additional reforms. However, drafters of legal aid laws in some countries do not pay sufficient attention to important provisions in other laws and neglect certain criminal and civil procedure codes, as well as laws regulating the legal profession. For example, the amendments to the Lithuanian Law on the Bar in 2006 do not have any references to the new model of delivery of legal aid or the new full-time legal aid lawyers. This leaves this category of attorney with an ambiguous status vis-à-vis the Bar Association and other lawyers, which may in turn negatively affect their performance and relationship with clients. In many countries, legal aid reform extends only to noncriminal matters, leaving law enforcement authorities and the courts to appoint legal aid attorneys according to regulations set by the criminal procedure codes, thereby maintaining the old status of dependent and inefficient legal aid attorneys.

Most of the region's governments have acted to implement the European Council of the EU Directive 2003/8/EC of 27 January 2003, which aims to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.<sup>17</sup> The new Bulgarian, Estonian, Hungarian, Lithuanian, Slovakian, and Slovenian legal aid laws all contain chapters regulating legal aid in international disputes; in addition, Czech Republic and Poland adopted new laws regarding cross-border disputes within the EU.

Many hoped that the framework decision on certain procedural rights in criminal proceedings throughout the EU<sup>18</sup> would be adopted in 2007, and that member states would respond appropriately for immediate implementation. Unfortunately, this decision did not pass. Such a decision would have ensured minimum procedural guarantees throughout the EU, including the right to legal advice paid for by the state in cases where a defendant cannot afford it. This provision would have been especially important in countries where legal aid is not widely guaranteed under law, and where no sufficient guarantees are in place for prompt appointment of legal aid, and where legal aid is not subject to effective quality standards. The European Commission is currently preparing new proposals for the common minimum

standards of the suspects' and the defendants' procedural rights, which are expected to be published in the second half of 2009.<sup>19</sup>

Some countries' developments target improved implementation of the right to legal aid even where acts specifically concerned with legal aid have not passed. For example, the Czech criminal procedure code has made several amendments, including: determination of the mechanism for the appointment of legal aid attorneys (April 2004); extension of the possibility to request free legal aid to a defendant's relatives, spouse, and other persons; and provision for "immediate" appointment of an attorney upon the defendant's request when entitled to such aid (July 2004).<sup>20</sup> A Polish act of Parliament regarding procedure before administrative courts entered into force on 1 January 2004 and includes a separate chapter regulating the procedure for providing legal aid.<sup>21</sup> Bulgarian practice reflects a positive development where appointing legal aid to "indigent" defendants has been in force since 1 January 2000.<sup>22</sup> As a result, *ex officio* appointments in Bulgaria increased from 1996 to 1999, according to data presented in the study on legal aid provision in criminal cases.<sup>23</sup> In Romania, a 2003 amendment to Article 171 of the criminal procedure code provides that an *ex officio* attorney<sup>24</sup> must be appointed in cases "when the criminal investigation body or the court considers the suspect or the accused unable to make his own defense." Moreover, the defendant now needs to be "immediately informed of the charges, before any hearing, and be given the opportunity to prepare a defense."<sup>25</sup> In Poland, the amendments to the July 2006 Law on the Bar, Legal Advisers and Public Notaries, changing the admission procedures, are believed to have led to growth in the numbers of lawyers, consequently broadening the access to legal services, which was one of the main problems of the system.<sup>26</sup>

On the other hand, legislatures in some countries have regrettably rescinded provisions of legal aid that were more expansive previously. In Poland, for example, the presence of a lawyer is no longer mandatory during case file review at the pretrial stage and the institution of safeguards to ensure access to counsel for vulnerable groups did not accompany the adoption of an adversarial system in civil proceedings.<sup>27</sup> Furthermore, in Romania, there are still inadequate safeguards to ensure lawyers have access to court files before trials; in addition, the process for appointing legal aid lawyers usually leaves insufficient time to prepare for the defense.<sup>28</sup> Hopefully, such practices will be discontinued with the effective implementation of the new provision in the criminal procedure code requiring time to prepare for defense.<sup>29</sup>

### **3. Review of Selected Legal Aid Issues in the New Laws Bulgaria, Lithuania, Estonia, Hungary, and Slovenia**

#### **3.1 Scope of Legal Aid**

All of the newly adopted legal aid laws mentioned above have considerably broadened the scope of legal aid as compared to the laws analyzed in 2002, when legal aid in criminal matters was primarily available in cases of mandatory defense and aid was not available in civil and administrative proceedings.<sup>30</sup> The new laws in Bulgaria, Estonia, Hungary, Lithuania, and Slovenia provide for legal aid beyond cases of mandatory defense to all indigent persons when the interests of justice so require. In Estonia, Lithuania, Poland (the act on procedure before administrative courts), and Latvia (the Administrative Procedure Law), legislation provides

for legal aid in civil and administrative procedures, including some procedures aimed at enforcing this right. Moreover, legal aid is generally available not only in court proceedings, but also throughout the procedural stages of a case and in extrajudicial proceedings. For example, legal aid is available in extrajudicial and court proceedings in Hungary<sup>31</sup> during proceedings in courts or before administrative authorities in enforcement proceedings.<sup>32</sup> Aid is also available for submissions of applications to the European Court of Human Rights in Estonia, and for the provision of legal advice and in extrajudicial, court, and administrative proceedings in Lithuania.<sup>33</sup> Slovenian law provides for a broad scope of legal aid, including advice, representation, and other services for “all forms of judicial protection before all courts of general jurisdiction and specialized courts based in the Republic of Slovenia. In addition, before all authorities, institutions or persons in the Republic of Slovenia are authorized out-of-court settlement.”<sup>34</sup> This is very expensive and it is possible that maintaining such a broad scope of services undercuts the quality of service.<sup>35</sup>

### 3.2 Eligibility Criteria

The eligibility criteria in the previously mentioned laws are all similar. Tests evaluate whether “the interests of justice so require,” as well as “indigence” or other financial criteria for criminal cases. If defense is mandatory,<sup>36</sup> the state provides legal aid irrespective of the financial status of the defendant,<sup>37</sup> though in some countries the expenses are recoverable after the trial.<sup>38</sup> In noncriminal cases, legal aid provision depends on the interests of justice, merit, and financial tests.

For noncriminal cases, certain matters are excluded from legal aid. These include disputes related to libel and defamation in Slovenia.<sup>39</sup> In Hungary, these include constitutional complaints, customs matters, cases related to contracts unless both parties are indigent, entrepreneurial activities of private persons, establishment or maintenance of social organizations, and advice for matters concerning raising loans disbursed by a financial institution and certain types of legal transactions.<sup>40</sup> In Estonia, there are many reasons for refusal to provide legal aid, including moral damage claims that do not raise any public interest, claims related to business activities that do not entail violations of other rights, and a list of intellectual property-related complaints.<sup>41</sup>

Administration of the financial test varies by country; thus, Hungary utilizes the Legal Aid Service, Lithuania uses Legal Aid Services, and Bulgaria, Estonia, and Slovakia refer to the courts, investigative bodies, and the prosecutor’s office to determine eligibility of applicants. The level of detail for test regulation also varies. For example, the financial test is linked to the minimum old-age pensions and/or minimum wage in Hungary.<sup>42</sup> A ministerial decree regulates indigence in criminal proceedings by setting different thresholds for persons living alone or with others and requiring consideration of assets.<sup>43</sup> Estonia law regulates only the list of factors that the court, investigating body, or prosecutor should take into account when deciding on eligibility. Moreover, in Lithuania primary legal aid<sup>44</sup> is provided to all applicants irrespective of their financial situation, while for secondary legal aid<sup>45</sup> the government looks at two levels of assets and income, which is established by government regulation; in addition, proof of income must be obtained from the local tax authorities.

A common feature of these laws is that certain categories of vulnerable and dependent people are entitled to free legal aid automatically. Such categories include the homeless,

beneficiaries of social welfare assistance, and asylum seekers in Hungary<sup>46</sup> and socially vulnerable groups or persons with disabilities in Lithuania.<sup>47</sup>

Estonia is the only country discussed in this paper in which nongovernmental organizations (NGOs) and legal entities other than natural persons are entitled to legal aid. Moreover, nationals and residents of a particular state, as well as the nationals or residents of other EU member states and asylum seekers, are generally entitled to legal aid. In addition, other categories of people may be entitled to legal aid based on various reciprocity agreements.<sup>48</sup>

### 3.3 Management Schemes

An important innovation introduced in most of the newly adopted legal aid acts is a set of provisions setting up management schemes for the legal aid systems. In Hungary, for example, the Ministry of Justice established the Legal Aid Service (LAS) integrated into the Justice Office (which also includes the Parole Office, the Crime Victim Support Service and the Office for Restitution) to assess applications, grant legal aid, and provide basic information and assistance. LAS also collects data and manages the legal aid budget. In Slovenia, the Legal Aid Professional Services are part of the judiciary and responsible for legal aid administration in district and regional courts. Latvia has established the Legal Aid Administration, which administers the eligibility test, contracts legal aid providers, and monitors quality of legal aid delivery. The 2005 Polish draft law provided for a combination of new Legal Aid Offices, a National Legal Aid Office, and a Legal Aid Coordination Board to manage and deliver legal aid, while the 2008 draft law provides that the system would be administered by existing District Centers for Family Assistance at the level of the district.<sup>49</sup>

Lithuania established State-Guaranteed Legal Aid Services, budgetary institutions created by the Ministry of Justice, to manage legal aid in five appellate court districts. In addition, Lithuania created the Coordination Council for State-Guaranteed Legal Aid to act as an advisory body to the Ministry of Justice regarding legal aid policies, as well as a special department within the Ministry to work on legal aid policy, among other legal policies. The Legal Aid Services are in charge of eligibility determination, legal aid appointments, payments to legal aid attorneys, data collection, and reporting to the ministry, while the Coordination Council analyzes relevant data, conducts necessary studies, and advises the Ministry on legal aid policy issues. The new structures are expected to considerably improve the management of the legal aid system, ensuring timely decisions regarding grants of legal aid in individual cases and appropriate national and local policies advanced by well-informed bodies. The law also divides responsibility for monitoring quality between the Ministry of Justice and the Bar.

The Bulgarian government created the National Legal Aid Bureau (NLAB) to act independently in implementing the legal aid policy. It consists of five members and an administrative apparatus, so far with only one central office. The chairman and the vice chairman of the NLAB are appointed by the government, upon nomination by the Ministry of Justice, and are civil servants working full time for the NLAB; the other three members are appointed by the Bulgarian Bar Association and work on a part-time basis for the NLAB. The NLAB is responsible for establishing the national registry of legal aid lawyers, paying legal aid lawyers, monitoring the quality of legal aid services, collecting data, and analyzing legal aid needs and expenditures. The establishment of the NLAB was a major achievement in Bulgaria

since it centralized legal aid policy implementation, which was dispersed among various uncoordinated institutions without clearly defined responsibilities. However, the composition of the NLAB (three practicing lawyers and two staff members) and the lack of local offices to implement the NLAB functions raise serious concerns about the effectiveness of this body.<sup>50</sup> The law also created an independent budget for legal aid, which was previously funded through the insufficient and over-extended judiciary budget.<sup>51</sup> On the other hand, the NLAB has some provisions limiting its potential impact;<sup>52</sup> namely its (1) composition;<sup>53</sup> (2) structure;<sup>54</sup> (3) limited monitoring functions;<sup>55</sup> and (4) planning functions.<sup>56</sup>

### 3.4 Delivery of Legal Aid Services

The *ex officio* appointment system remains dominant, with important improvements in some countries. Under the Soviet system, law enforcement authorities or courts appointed Bar-registered *ex officio* legal aid attorneys in cases requiring mandatory defense where the defendant had not retained a private lawyer. *Ex officio* lawyers received payment by the same bodies that appointed them or by the Bar Associations from funding provided by the Ministry of Justice. This system suffered from inherent shortcomings, including the dependence of lawyers on law enforcement agencies and courts for appointments, the system's limitations to cases of mandatory defense, reduced scope of defense actions compensated by the system, emphasis on formalities over real defense actions, and unrealistically low fees.<sup>57</sup>

The system in countries where law enforcement authorities are solely responsible for appointment of *ex officio* legal aid lawyers in criminal cases, without transparent mechanisms for making appointments, is ineffective. It is also against clients' interests, and one of the main reasons for inefficiency among legal aid attorneys.<sup>58</sup> This is because clients depend upon law enforcement authorities to inform them if they are entitled to legal aid, which often does not happen during the first hours of detention.<sup>59</sup> In addition, appointed legal aid attorneys do not usually challenge violations of clients' rights, particularly at pretrial stages, because attorneys have a stake in continuing to receive cases from law enforcement agencies and therefore do not want to antagonize them by claiming violations occurred at pretrial stages. This is particularly the case when the attorney needs the verification of law enforcement authorities that he or she completed the actions for which he or she is seeking payment before receiving it.

Throughout the region, courts and law enforcement authorities are still largely responsible for appointments of legal aid attorneys. In Lithuania, however, appointments are handled by Bar coordinators, and there are plans to assign this function to the Legal Aid Services. Legal aid attorneys in Bulgaria are appointed by local Bar councils. On the other hand, the new legal aid institutions, such as the Legal Aid Center in Slovakia, the staff of legal aid authority in Slovenia, and the Legal Aid Services in Lithuania and Hungary generally appoint legal aid lawyers in noncriminal cases.

### 3.5 Legal Aid Providers

Lithuania has introduced a mixed system of delivery where full-time legal aid lawyers, equivalent to "public defenders" in common law countries, provide legal aid alongside private lawyers appointed to legal aid cases that cannot be handled solely by the full-time legal aid lawyers.<sup>60</sup> Anecdotal evidence (no study has been undertaken yet) shows that the creation of the offices

of full-time lawyers has been beneficial both for the clients and the state, with these full-time lawyers providing higher quality legal aid, on average, than the previous *ex officio* lawyers. At the same time, financially they are cheaper for the state budget than the private lawyers if costs are assessed per case.<sup>61</sup> The experimental office of public defenders (lawyers providing legal aid on a full-time basis with no private clients) in Veliko Turnovo, Bulgaria, has also shown the advantages of such a model over the previous system of lawyers appointed *ex officio*, especially concerning the attitude toward the client, the quality of the delivered services, and the efficiency for the justice system as a whole.<sup>62</sup>

Hungary, which allows lawyers, law firms, NGOs, minority self-governments, and university-based legal clinics to register as legal aid providers, is a good example of a system allowing for a variety of legal aid providers and the provision of state funds for legal aid delivery to civil society actors.<sup>63</sup> Regretfully, however, this system only applies in noncriminal matters; in criminal matters, individual lawyers still take legal aid assignments through *ex officio* appointments, and there are no alternative methods available.

New legislation in Slovakia has established the Center for Legal Aid to both assess eligibility for legal aid and provide such aid in civil, labor, and family matters in domestic and cross-border disputes within the EU.<sup>64</sup> Hopefully, the existence of diversified systems of delivery will contribute to raising the quality of legal aid services in the region, which is commonly low.

In Estonia, on the other hand, the law has limited the range of legal aid providers to attorneys registered with the Bar. In light of growing legal aid needs, the efficiency of imposing such a restriction is questionable. In the countries not discussed above, only individual attorneys registered with the Bar to receive *ex officio* legal aid appointments can provide such services.

### 3.6 Payment Schemes

One of the main criticisms of the 2002 reports was the fact that payment schemes put a premium on formalities, offered very low fees, and maintained a narrow scope of legal aid costs covered by the system, thereby negatively affecting the quality of legal aid services available. Since 2002, there have been some positive innovations: Hungary introduced contracts and increased the legal aid fees (although the increase is quite modest so far);<sup>65</sup> Lithuania introduced fixed per-case fees and fixed monthly honorariums; and Estonia established a combined system of fixed payment for procedural actions and time-based payment for court hearings. Estonia determines the fixed amounts through ministerial regulation,<sup>66</sup> according to the stage of proceedings and the nature and complexity of the case.

The tendency toward increasing the range of legal aid costs covered by the state is a positive development. For example, the Lithuanian legal aid law significantly broadens the types of expenses included in “legal aid costs,” including expenses related to drafting procedural documents, collecting evidence, and providing representation in out-of-court disputes. The Hungarian decree “on application of personal exemption of costs in criminal procedures” requires that the state cover “fee and expenses of the appointed defense counsel” when the defendant is granted “personal exemption of courts” by the court or prosecutor’s office and the inclusion of consultation with the defendant and inspection of the case file in the legal aid costs covered by the state.<sup>67</sup> The Estonian law includes costs related to travel, accommodations, and presentation of evidence, as well as interpretation fees.

Innovations regarding payment models for legal aid services will contribute to raising the quality of legal aid services by increasing the fees and legal aid costs covered by the state. However, there are certain drawbacks. For example, the determination of legal aid fees by a prosecutor or by an investigative body, provided for in Article 22 of the Estonian law, limits the independence of legal aid providers and negates an otherwise seemingly progressive legal aid reform. The low fees and cumbersome payment procedures for *ex officio* lawyers are still present in Romania, although mitigated to some extent by a 2005 payment regulation that has increased fees for criminal cases and set fees for noncriminal cases.<sup>68</sup> However, it did not include reimbursement of transportation costs, which sometimes reduce the number of meetings with detained clients and negatively affect the overall quality of legal aid services.

Provisions for post-trial recovery of legal aid costs vary by country. Presently, it is impossible to reach any conclusions regarding the adequacy of such provisions. The Estonian provision regarding the possibility of recovery within five years of receiving legal aid, with no differentiation between types of defense<sup>69</sup> or legal aid costs may prove problematic since it may deter applicants from applying for legal aid.

### 3.7 Quality of Legal Aid Services

One of the major criticisms of the region's legal aid systems is the low quality of legal aid services found in the Bulgarian, Hungarian, and Lithuanian studies and pilot projects, mentioned in all Access to Justice Reports of 2002 and in studies conducted in Hungary in 2003 and 2006, in Lithuania in 2004, and in Bulgaria in 2004. Improving the quality of legal aid services has been the main purpose of reforms in Bulgaria and Lithuania, which both have laws providing for the legal aid management bodies and the Bar Association to share responsibility for quality assurance. However, since the law entered into force so recently and no mechanisms are in place to assure quality, this goal is yet to be achieved. Throughout the region, admission to the Bar and disciplinary proceedings seem to be the only mechanism for assuring quality of legal aid services. Notwithstanding the importance and the relevance of these mechanisms, one should acknowledge that both rely on the effectiveness of the Bar as an organization to ensure fair admission procedures, and well-educated and assertive clients who will complain when the quality of services they receive is poor. Both of these elements in the context of legal aid are quite weak. Legal aid is not the most popular area for lawyers and where clients are usually the most disadvantaged and therefore less likely, or able, to complain. Additional mechanisms for ensuring quality are critical. It is hoped that once basic legal frameworks are in place, every country will turn to issues of quality.

### 3.8 Legal Aid Budgets

The short period since the new laws have entered into force and lack of data from previous years in many of the countries examined in this paper prevent the development of a meaningful analysis of the adequacy of funds.<sup>70</sup> However, a note should be made about the process of developing the legal aid budgets. The development of separate legal aid budgets is a notable achievement. The next goal is to develop a capacity within the respective governmental bodies to make budget estimates and plan the legal aid budget according to demand. The budgets in a few countries where the laws have been adopted have still been determined based on previous

years' expenditures with some vague additions rather than on predictions of actual needs. This is understandable when legal aid systems are new and do not have previous data to rely on and since new laws tend to significantly broaden the scope of, and therefore increase the needs for, legal aid. However, this is problematic for these very reasons, as demonstrated in Slovenia, where the entire legal aid budget for 2004 was depleted by the summer.<sup>71</sup>

#### **4. The Role of Civil Society and Incentives in Reforming Legal Aid Systems in the Region**

A common feature in all countries reviewed is the significant role played by civil society actors in the field. These range from delivering legal aid using mostly external donor or non-state funding<sup>72</sup> and researching legal aid delivery and assessing the system<sup>73</sup> to lobbying to change state legal aid policies,<sup>74</sup> working with government representatives to draft new legal aid laws,<sup>75</sup> and cooperating with the government in carrying out reform.<sup>76</sup>

Efforts to initiate reform in the region have been successful in part due to human rights ideals, with reformers using the European Convention and the EU accession process as both a stick and carrot for governments. The vigilance of civil society actors and the willingness and openness of governments have been instrumental in the advancement of legal aid reforms in the region. For reform to be successful, this cooperation between government and civil society must continue past accession to the EU, with civil society actors continuously monitoring and helping governments with implementation at various levels of the newly adopted laws. Hungary has set a positive precedent in the region by allowing NGOs and university legal clinics to receive state funds to provide legal aid. While civil society actors and university-based legal clinics should play important roles in the delivery of legal aid, they cannot, and should not, replace the government. However, NGOs in the region can share the expertise in monitoring and researching legal aid they have acquired with governmental bodies in charge of legal aid policy implementation.

The Bar Association plays an important role in all the countries of the region, ranging from delivery of legal aid<sup>77</sup> to a combination of delivery and management.<sup>78</sup> In Romania the Bar helped initiate reform of the legal aid system, while the Bars of the other countries under review have tried to keep the status quo or to prevent radical changes to the system.<sup>79</sup> Bars should be active in initiating reform of ineffective delivery systems; however, to date few, if any, Bars have done so.

Public awareness and education about rights and opportunities are essential to the achievement of access to justice for all. Without such efforts, implemented reforms will not be successful. For example, primary legal aid in Lithuania is underused and allocated funds are unspent due to low public awareness of the availability of legal aid.<sup>80</sup> In addition, research carried out in Czech Republic has found that legal aid was provided only in cases requiring mandatory defense and that even judges were not aware that legal aid was available in other types of cases.<sup>81</sup>

## 5. Conclusions: Remaining Work

Of great significance in all ten countries reviewed here is that access to justice and legal aid matters are under the scrutiny of governments, civil society, or both. Reform efforts are under way and many important innovations in the management, delivery, and scope of legal aid have already been introduced in several countries. However, there are a number of areas in need of focused reform:

- Determining eligibility criteria for legal aid is the most crucial and difficult step of developing a legal aid system. The significantly broadened scope of legal aid in all the recently adopted laws, while positive, means that more state funds are necessary to cover the larger demand. As a result, careful consideration and planning are essential to ensuring that legal aid budgets match eligibility criteria and predicted needs. A mechanism for permanently monitoring the satisfaction of legal aid needs is also necessary, as are creative solutions for meeting these needs. When there is not enough funding, the scope of legal aid should be reviewed in order to realize the right to legal aid in as many cases as financially feasible, rather than merely creating an illusion of an expansive legal aid system.
- The Ministry of Justice plays a key role in the management of the legal aid system and the development of legal aid policy in nearly all of the reviewed countries.<sup>82</sup> Hungary, Bulgaria, Lithuania, and Latvia created specialized agencies to help the Ministry implement legal aid policies. These agencies help remedy many shortcomings in the system that stemmed from a lack of coordination and unclear responsibilities. In addition, they are in a better position to assess needs and possibilities, as well as to advise the Ministry regarding realistic legal aid policies, as they are charged with data collection, processing, and analysis. However, they need more safeguards to help them function properly. Thus far, only Bulgaria has established a somewhat independent legal aid management body, but its handicap is its lack of local branch offices. Legal aid management agencies need to function independently to make decisions on individual cases and provide accurate information regarding legal aid needs and budgetary predictions.
- The Bar Associations should become more active in developing quality assurance schemes, which all ten countries under review lack. Although it is a broadly acknowledged problem, Bars in the region are still reluctant to engage in the development of new mechanisms that would contribute to raising and maintaining a high level of quality legal aid services. This is an area where representatives of the Bar, legal aid management structures, and legal academics should work together to set appropriate quality assurance mechanisms.
- Many of the countries in the region still exclusively use the *ex officio* system of appointment by law enforcement authorities and/or courts.<sup>83</sup> Such a system is not conducive to a zealous defense of clients' interests, nor is it efficient in terms of state funding.<sup>84</sup> The system where law enforcement agencies appoint legal aid lawyers needs revision.
- The exclusive use of one model of delivery should be reconsidered. The relatively new practice in Lithuania of having full-time lawyers work only on legal aid cases and private lawyers contract within a "mixed" system demonstrates the advantages of involving full-time lawyers in the delivery of legal aid in terms of quality and efficient use of funding.<sup>85</sup>

Similar are the results of the pilot Public Defender Office from Veliko Turnovo, Bulgaria. Creating alternatives for delivery puts the state in a better position to choose the most convenient avenue for delivery and create productive competition for state funds between alternative providers.

- Payment schemes for legal aid lawyers should reflect a focus on the quality of services provided to clients. While it is too early at this stage to assess the existing schemes, an in-depth assessment should be conducted in the future.
- Governments and civil society actors should concentrate on raising public awareness of rights to legal aid.
- Civil society actors in the region have been active in spurring reform and cooperating with governments in the initial stages of implementing reforms. They should continue monitoring systems currently in place to ensure that reform does not stop with the adoption of laws. Cooperation with governments in developing sound methods for monitoring the implementation of legal aid laws, budget planning, and measuring public satisfaction with legal aid services is necessary.

This overview does not analyze the implementation of the new legal aid laws discussed in this paper. Our hope is that such an analysis will be undertaken after the laws have been in place for some time so that their adequacy can be assessed and necessary reforms made.

## Notes

1. Drafted by Nadejda Hriptievshi, Open Society Justice Initiative, with contributions from Atanas Politov, Public Interest Law Initiative (PILI), based on the information provided in the following country updates and papers prepared for the Second European Forum on Access to Justice, 24–26 February 2005, available at [www.justiceinitiative.org](http://www.justiceinitiative.org) and [www.pili.org](http://www.pili.org): Bulgaria by Martin Gramatikov (in this publication), Czech Republic by Barbora Bukovska, with contributions by Pavel Cizinsky (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102814](http://www.justiceinitiative.org/db/resource2?res_id=102814)), Estonia by Tatjana Evas (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102815](http://www.justiceinitiative.org/db/resource2?res_id=102815)), Hungary by Márta Pardavi and András Kádár (in this publication), Latvia by Kristine Jarinovska (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102858](http://www.justiceinitiative.org/db/resource2?res_id=102858)), Lithuania by Linas Sesickas and Paulius Koverovas (in this publication), Poland by Łukasz Bojarski (in this publication), Romania by Georgiana Iorgulescu and Nicoleta Popescu (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102824](http://www.justiceinitiative.org/db/resource2?res_id=102824)), Slovakia by Jan Hrubala (February 2005), Jan Fiala, and Anna Ogorodova (March 2006) (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102825](http://www.justiceinitiative.org/db/resource2?res_id=102825)), and Slovenia by Mihaela Anclin (the country update is available at [www.justiceinitiative.org/db/resource2?res\\_id=102826](http://www.justiceinitiative.org/db/resource2?res_id=102826)).
2. These two conferences were organized by the Public Interest Law Institute and the Open Society Justice Initiative, together with other partners.
3. Throughout the paper, the terms “Central and Eastern Europe” and “the region” will be used in reference to these countries.
4. For a comparative analysis, see Vessela Terzieva, “Access to Justice in Central and Eastern Europe: Comparative Report,” in *Access to Justice in Central and Eastern Europe: Country Reports*, PILI, INTERIGHTS, Bulgarian Helsinki Committee, and Polish Helsinki Foundation for Human Rights (2003), 7–40.
5. Available at [www.ec.europa.eu/atoz\\_en.htm](http://www.ec.europa.eu/atoz_en.htm).

6. See *2003 Regular Report on Romania's Progress towards Accession*: "Limits to the right to legal representation are a human rights issue that needs to be addressed." *2003 Comprehensive Monitoring Report on Poland's Preparations for Membership*: "Efforts are still needed to improve the efficiency and transparency of the judiciary, with particular attention to further developing and organizing the system of legal aid." *2003 Regular Report on Bulgaria's Progress towards Accession*: "The reform and further enhancement of the legal aid system should therefore be a priority, in order to guarantee equal access to justice for all citizens." *2003 Comprehensive Monitoring Report on Latvia's Preparations for Membership*: "In the field of legal aid, planned legislative measures have been delayed. It is important to complete the legal framework to improve citizens' access to justice and to ensure adequate funding of legal aid." *2004 Regular Report on Romania's Progress towards Accession*: "There are shortcomings in the implementation of the legal aid system and effective defense for the accused is not systematically guaranteed. The lack of precise definitions of the criteria for receiving assistance may lead to arbitrary and non-uniform application of the rules." *2004 Regular Report on Bulgaria's Progress towards Accession*: "Regarding legal aid, studies show limited improvements in access to legal assistance during trial. A significant number of defendants are still being tried without a defense counsel. The situation regarding the pretrial detention phase has not improved over the reporting period but the adoption of the law on lawyers in June 2004 should guarantee some improvement in the access to justice for all citizens. A legal aid fund, separate to the budget of the judiciary, has not yet been established." All reports are available at [www.ec.europa.eu/atoz\\_en.htm](http://www.ec.europa.eu/atoz_en.htm).
7. In 2002, only Lithuania and Slovenia had legal aid acts, while in the other countries legal aid organization and delivery were regulated by provisions contained in the Civil and Criminal Procedure Acts, acts regulating the administrative procedure, acts regulating the legal profession, laws on budgets, etc., with often contradictory provisions and several agencies mandated regarding different aspects of legal aid, with little or no coordination between their activities.
8. Act LXXX on Legal Aid, adopted in October 2003, entered into force in two stages: provisions on legal aid in extrajudicial procedures, on 1 April 2004, and provisions on legal aid in court procedures, which was supposed to be launched in January 2006 but, due to budgetary constraints, has been postponed to January 2008.
9. State Legal Aid Act, adopted on 28 June 2004, entered into force on 1 March 2005.
10. Law on State Guaranteed Legal Aid, adopted on 15 March 2005, entered into force on 1 June 2005.
11. Law Amending the Law on State-Guaranteed Legal Aid of the Republic of Lithuania, adopted on 20 January 2005, entered into force on 1 May 2005, excluding the provisions of the Law Amending the Law on State-Guaranteed Legal Aid related to selection of attorneys providing secondary legal aid and conclusion of agreements with them.
12. Legal information and consultation, legal documents drafting excluding procedural documents, and advice on extrajudicial dispute settlement.
13. Drafting of procedural documents, defense, and representation in court proceedings, in procedures of execution and out of court dispute hearings when such hearing is mandatory according to the law or court judgment.
14. Legal Aid Act, adopted on 21 September 2005, entered into force on 1 January 2006.
15. Act No. 327/2005 on provision of legal aid for people in material need, adopted on 23 June 2005, entered into force on 1 January 2006.
16. Provision of legal aid in criminal matters is regulated by the Code of Criminal Procedure, adopted on 24 May 2005.
17. Available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). *Official Journal* L026 (31 January 2003), 41–47.
18. Available at [www.eu.int/comm/justice\\_home/doc\\_centre/criminal/procedural/doc/com328\\_28042004\\_en.pdf](http://www.eu.int/comm/justice_home/doc_centre/criminal/procedural/doc/com328_28042004_en.pdf).
19. See the summary of the conference proceedings, "Towards Effective Criminal Defence in Europe: An Opening Debate, which took place on 27–28 November, in Maastricht, organized by Maastricht University, University of the West of England, Open Society Justice Initiative and JUSTICE. More information about the conference is available at [www.unimaas.nl/default.asp?template=werkveld.htm&cid=2FU733SN1NG53C6JS7D5&taal=en](http://www.unimaas.nl/default.asp?template=werkveld.htm&cid=2FU733SN1NG53C6JS7D5&taal=en).
20. See the country update on the Czech Republic by Barbora Bukovska, cited above, note 1.
21. See Łukasz Bojarski's paper in this publication.

22. Criminal Procedure Code of Bulgaria, Art. 70, Sec. 1, para. 7.
23. See the study in this publication, as well as the results of the first studies carried out by the Bulgarian Helsinki Committee in 2000–2002, explained in the first Country Report on Bulgaria (2002) by Krassimir Kanev and Giorgi Mitrev in *Access to Justice in Central and Eastern Europe: Country Reports*, PILI, et al. (2003).
24. See below in the section on legal aid providers for a brief explanation of the term “*ex officio* system” in the region.
25. For details, see the country update on Romania by Georgiana Iorgulescu and Nicoleta Popescu, cited above in note 1.
26. For more details, see “The Role of the Nongovernmental Sector in Pursuing Reform of the Legal Aid System: the Case of Poland” by Łukasz Bojarski in the current publication.
27. As pointed out by Łukasz Bojarski in the country update prepared for the 2005 Forum.
28. See the country update on Romania for details. The practice in other countries may be quite similar.
29. See the 2003 amendment to Art. 171 of the Romanian criminal procedure code that provides that an attorney must be appointed *ex officio* in cases “when the criminal investigation body or the court considers the suspect or the accused unable to make his own defence” and that the defendant needs to be “immediately informed of the charges, before any hearing, and be given the opportunity to prepare a defence.” See for details the Romanian country update on Romania by Georgiana Iorgulescu and Nicoleta Popescu, cited above note 1.
30. See Terzieva.
31. See Hungarian Legal Aid Act, Chap. I, Sec. 3; Chap. II, Sec. 11; and Chap. III, Sec. 17.
32. See Estonian Legal Aid Act, Art. 4, para. 3.
33. See Lithuanian Law Amending the Law on State-Guaranteed Legal Aid, Art. 2.
34. See Legal Aid Act of Slovenia, Art. 7.
35. For example, the planned budget for 2004 had already been spent by the summer of that year. For details, see the country update on Slovenia by Mihaela Anclin, cited above in note 1.
36. Mandatory legal aid in the region is usually connected to the severity of the potential sentence, e.g., a certain minimum number of years of imprisonment or life imprisonment, and specific categories of defendants (e.g., minors, persons with mental or physical disabilities, persons who do not speak the official language, or defendants who were detained prior to or during trial).
37. See, e.g., Art. 12 of the Lithuanian law, Art. 6 of the Estonian law.
38. See, e.g., the provisions on compensation in Art. 25 of the Estonian law.
39. See Legal Aid Act of Slovenia, Art. 8.
40. See Act on Legal Aid of Hungary, Sec. 3, para. 3.
41. See Act on State Legal Aid of Estonia, art. 7.
42. See the paper on the Hungarian legal aid system by Márta Pardavi and András Kádár in this publication.
43. For details, see the paper on the Hungarian legal aid system in this publication, which explains the content of Decree No. 9/2003 of the Hungarian Ministry of Justice.
44. Legal information and consultation, legal documents drafting excluding procedural documents, and advice on extrajudicial dispute settlement. See Art. 2 of the Lithuanian law.
45. Drafting of procedural documents, defense, and representation in court proceedings, in procedures of execution and out-of-court dispute hearings when such hearing is mandatory according to the law or court judgment—for details, see Art. 2 of the Lithuanian law.
46. See Act on Legal Aid in Hungary, Sec. 5 para 2.
47. See Lithuanian Law Amending the Law on State-Guaranteed Legal Aid, Art. 12.
48. See Act on State Legal Aid in Estonia, Art. 6.
49. See Bojarski (this publication).
50. See “The Development of the Legal Aid System in Bulgaria” by Martin Gramatikov in this publication for deeper analysis of the flaws of the new law and the management of the legal aid system.
51. See the 2002 *Bulgarian Access to Justice Report*.
52. See “The Development of the Legal Aid System in Bulgaria” by Gramatikov in this publication.
53. The majority of its members (three) are appointed by the Bar Association; this may create tension with the other two members and limit the NLAB’s ability to make decisions that do not comport with lawyers’ interests.

54. The NLAB only has a central apparatus located in the capital; administration of legal aid on the ground is delegated to local Bar councils, thereby limiting the impact of the NLAB outside the capital.
55. Although the NLAB is charged with monitoring the quality of legal aid services, the law does not provide for more details regarding monitoring mechanisms.
56. The NLAB's ability to effectively estimate its budget and formulate a plan is considerably limited due to the fact that it is not responsible for determining legal aid eligibility (except for primary legal aid, which is not a reasonable task given the location of the body in the capital only).
57. For more detail, see the country update on Romania, particularly on the efforts of the Bucharest Bar Association to improve the *ex officio* system. See *Access to Justice Comparative Reports, 2002*. See also Valerie Wattenberg, "Making Way for Justice: Breaking with Tradition in the Former Soviet Bloc," in *Justice Initiatives: Legal Aid Reform and Access to Justice*, Open Society Justice Initiative (February 2004), available at [www.justiceinitiative.org/publications/jinitatives](http://www.justiceinitiative.org/publications/jinitatives).
58. These problems were highlighted in Lithuania's pilot public defender offices (see Wattenberg, and the paper by Linas Sesickas and Paulius Koverovas in this publication) and the legal aid board model pilot project in Hungary (see the paper on the Hungarian legal aid system in this publication).
59. See the results of the legal aid studies in 2002 and 2004 Bulgarian Access to Justice Report (summarized in Martin Gramatikov's paper and the study itself, available in this publication), the Hungarian Helsinki Committee's review of pretrial detainees in 2003, summarized in Márta Pardavi and András Kádár's paper in this publication. Similar results have been found in PILI's 2005 reports in Serbia and in Bosnia and Herzegovina, and in the Soros Foundation–Moldova's 2004 study on criminal cases, not published, available upon request from Soros Foundation–Moldova.
60. See the paper on Lithuanian legal aid reform by Linas Sesickas and Paulius Koverovas in this publication.
61. The conclusion is based on private discussions with lawyers from Lithuania and review of the assessment of the full-time law offices undertaken by the Ministry of justice in 2006, which proposed increasing the number of full-time legal aid lawyers as being more efficient than the private lawyers providing legal aid on request.
62. See "The Development of the Legal Aid System in Bulgaria" by Martin Gramatikov in this publication.
63. See "Hungarian Legal Aid System" by Márta Pardavi and András Kádár in this publication.
64. See the Slovak Ministry of Justice website available at [www.justice.gov.sk/a/wfn.aspx?pg=h40&htm=h4/clabi.html](http://www.justice.gov.sk/a/wfn.aspx?pg=h40&htm=h4/clabi.html), and the country update on Slovakia by Jan Hrubala, Jan Fiala, and Anna Ogorodova, cited in note 1.
65. See "Hungarian Legal Aid System" by Márta Pardavi and András Kádár in this publication.
66. Regulation no. 2 of the Ministry of Justice of Estonia, from 26 January 2005, cited in the country update on Estonia by Tatjana Evas, cited in note 1.
67. See "Hungarian Legal Aid System" by Márta Pardavi and András Kádár in this publication.
68. See the country report on Romania, cited in note 1.
69. It is questionable if such post-trial compensation should be applicable in cases of mandatory defense where the presence of the lawyer is required by domestic laws.
70. For data on 2002 and 2004, see the European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems* report, 2002 and 2006 editions, available at [www.coe.int](http://www.coe.int).
71. See the country update on Slovenia by Mihaela Anclin, cited in note 1.
72. So far, only in Hungary can NGOs and legal clinics bid for state funding to deliver legal aid in noncriminal matters, while in Lithuania the law provides for the opportunity for municipalities to contract with public institutions for delivery of primary legal aid.
73. See, e.g., the country report on Czech Republic—research by the Center for Citizenship; the Open Society Institute–Sofia; the Law Institute, in cooperation with Justice Initiative, in Lithuania; and the Center for Legal Resources in Romania.
74. See the Polish experience of the informal coalition of four NGOs (Helsinki Foundation for Human Rights, Foundation of Legal Clinics, Union of Citizens Advice Bureaus, and Polish Association of Legal Education), which during a number of meetings prepared a strategy and a common list of proposed changes and reforms. The coalition also organized a conference, which had an impact on several decision-making bodies, including

the Ministry of Justice and the ombudsman's office. See also the experience of the working group of NGOs set up under the Center for Citizenship's Project in Czech Republic, in commenting on the Draft Law on Legal Aid of the Ministry of Justice and in currently drafting a new legal aid law. See the efforts of the Center for Legal Resources in Romania, which has held various events to raise awareness and interest, as well as to find solutions to problems relating to legal aid delivery.

75. This was the case with civil society actors in Bulgaria (Open Society Institute–Sofia and Open Society Justice Initiative), the Czech Republic (Center for Citizenship's Project), Lithuania (Open Society Fund–Lithuania, Open Society Justice Initiative), Poland (the Coalition of Four NGOs), and Romania (Center for Legal Resources).
76. This was the case in Lithuania, Bulgaria, and Hungary.
77. For example, in Hungary and Slovenia.
78. Specific roles include: in Lithuania, the organization of secondary legal aid in districts where no Legal Aid Services are established; in Estonia, the handling of legal aid payments; in Bulgaria, organizing legal aid in local districts; in the Czech Republic, handling payments through the Bar Association, and in Romania, Bar-supported creation of centers for legal aid delivery and handling payment of individual lawyers from funding received on a quarterly basis from the Ministry of Justice.
79. For example, in Bulgaria and Lithuania.
80. See Linas Sesickas, "A New Model of State-Guaranteed Legal Aid in Lithuania," in *Legal Aid Reform and Access to Justice*, Open Society Justice Initiative (February 2004), available at [www.justiceinitiative.org](http://www.justiceinitiative.org).
81. The research findings are mentioned in the country update on Czech Republic, available at [www.justiceinitiative.org](http://www.justiceinitiative.org) and [www.pili.org](http://www.pili.org).
82. The exception is Slovenia, where legal aid is under the authority of the Supreme Court.
83. The exception is Lithuania, where the Bar and Legal Aid Services share the appointment function.
84. See studies conducted in Hungary, Lithuania, and Bulgaria: András Kádár, Márta Pardavi, and Zsolt Zádori, "Access to Justice Country Report: Hungary," *Access to Justice in Central and Eastern Europe: Country Reports*, Public Interest Law Institute, 2002, available at [www.pili.org/en/dmdocuments/CR\\_Hungary.pdf](http://www.pili.org/en/dmdocuments/CR_Hungary.pdf); András Kádár, *Presumption of Guilt: Injurious Treatment and the Activity of Defense Counsels in Criminal Proceedings against Pre-trial Detainees*, Hungarian Helsinki Committee, 2004; Krasimir Kanev (ed.), *Access to Justice: International Standards and the Bulgarian Status Quo*, Sofia: Bulgarian Helsinki Committee, 2003; *Study on Free Legal Aid in Criminal Cases in Bulgaria*, 2004, Sofia: Open Society Institute, 2004; and *Study on the Status of Legal Assistance in Assigned Criminal Cases in Lithuania*, Law Institute, Vilnius, 2003.
85. See the Lithuanian Ministry of Justice report on the first year of implementation for the new legal aid law, available at [www.justiceinitiative.org](http://www.justiceinitiative.org).



# Legal Aid Reform in Lithuania: A System in Transition

*by Linas Sesickas and Paulius Koverovas*

This article presents the process of legal aid reform in Lithuania and discusses the legal aid system adopted in 2005.

## 1. Introduction

The right to legal aid and the system for its delivery have evolved rapidly since Lithuania's independence. The fundamental right to legal assistance in criminal matters has not only been included in the Lithuanian Constitution,<sup>1</sup> but it has also received recognition in various international agreements to which Lithuania has become a party. Although officially recognized during the Soviet era, it was not adhered to in practice. Post-Soviet efforts to give meaning and force to such rights through the development of an effective system for administration have faced significant institutional, financial, and societal challenges.

It took several years after the adoption of the Lithuanian Constitution for the Seimas (the Lithuanian Parliament) to develop a coherent strategy for providing legal aid; however, provision was flawed and incomplete even after the law went into effect. An amended Law on State-Guaranteed Legal Aid (New Legal Aid Law) came into effect in May 2005.<sup>2</sup> The New Legal Aid Law enacted a number of fundamental reforms that legislators and commentators hope will result in a system that delivers legal aid efficiently and effectively to Lithuanian citizens, foreigners permanently residing in Lithuania, and stateless persons, thereby making Lithuania a legal aid role model for other former Soviet republics. This article will analyze both the previous statutory framework and new legal aid system within the context of the fundamental rights of Lithuanian citizens, foreigners permanently residing in Lithuania, and stateless persons.

## 2. The Fundamental Right to Legal Aid in Lithuania

The right to civil, administrative, and criminal legal aid in Lithuania is a fundamental right embodied in a number of national documents, as well as in several international accords that

Lithuania has signed, ratified, and incorporated into its legal system. The rights enumerated in the New Legal Aid Law stem from, and are designed to work in conjunction with, these other documents.

## 2.1 The Right to Legal Aid in Criminal Matters

The right to legal aid in criminal matters under Lithuanian law is set forth in a number of different governing instruments. Article 31(6) of the Constitution guarantees those individuals suspected or accused of committing a crime the right to defense, including the presence of a lawyer from the beginning of detention interrogation. In addition, on 27 April 1995, Lithuania ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), which guarantees the right of every person charged with a criminal offense to defense by a personally selected defense counsel. If the person cannot afford to pay for defense counsel, the Convention guarantees their right to receive free legal assistance if the interests of justice so require.<sup>3</sup> Furthermore, the Criminal Procedure Code of the Republic of Lithuania, adopted in 2003,<sup>4</sup> establishes grounds for the mandatory participation of an attorney in criminal matters.

## 2.2 The Right to Legal Aid in Civil and Administrative Matters

While the right to legal aid in civil and administrative matters is not explicitly set forth in the Lithuanian Constitution, Lithuania is subject to a number of binding resolutions and recommendations adopted by the Council of Ministers as a member of the European Union. These include resolutions relating to “legal aid in civil, commercial and administrative matters”<sup>5</sup> and “legal aid and advice,”<sup>6</sup> as well as recommendations relating to “measures facilitating access to justice”<sup>7</sup> and “effective access to the law and justice for the indigent.”<sup>8</sup> The Lithuanian Civil Procedure Code also guarantees legal aid in certain civil cases.<sup>9</sup>

## 3. Prerequisites for Legal Aid Reform

In 1993, the Seimas approved “Concept for Reform of the Legal System,”<sup>10</sup> an instrument establishing guidelines and key goals for reform of the national legal system, striving for compatibility with the standards of the Council of Europe and the European Union. In 1998, a second Concept for Reform of the Legal System was drafted that incorporated provisions of the Civil Procedure Code and guaranteed the provision of legal aid to socially disadvantaged segments of the population for civil, administrative, and criminal proceedings.<sup>11</sup> It also advocated government support for the establishment of public institutions to help provide such legal services.

In March 2000, the Seimas adopted the original Law on State-Guaranteed Legal Aid (Prior Legal Aid Law). The Prior Legal Aid Law established the provision of legal aid for citizens of Lithuania, foreigners permanently residing in Lithuania, and stateless persons in criminal, civil, and administrative cases, based upon property and annual income calculations. The law was groundbreaking in its aspirations, but plagued by a number of problems in practice. The system suffered from excessive fragmentation—fiscal and management responsibilities lay with both

central and local institutions—and lacked a national legal aid body to coordinate the activities of the players, manage overlapping responsibilities, or monitor and enforce compliance.

In addition, the method for paying providers and determining client eligibility for aid was ineffective. For example, the law established eligibility requirements for receiving primary legal aid, but the responsibility for determining eligibility and making initial payments to legal aid providers was delegated to municipalities. Many municipalities remained unaware of these obligations or simply declined to fulfill them. Municipalities could seek reimbursement from the state for costs incurred, but the reimbursement process proved complicated and time-consuming, leading to further confusion and resistance. The ultimate result was that the system virtually stopped functioning. Of 500,000 litas (approximately 166,000 USD) directly allocated each year for the delivery of legal aid in 2001 and 2002, less than 30,000 litas was actually spent across both years. In addition, clients who actually sought to receive legal aid through the program faced a bureaucratic maze of forms, procedures, and declarations relating to their assets that proved complicated and difficult, particularly for those most in need of assistance, such as the elderly.

Secondary legal aid was available only on a sliding scale: the higher the client's assets from income or property, the smaller the share of the cost provided by the state. In addition to relatively high contribution standards, which deterred participation among poorer citizens, the array of five separate contribution categories proved confusing and unworkable.

Furthermore, under the old system, the absence of clear standards or monitoring procedures and an inadequate pay scale for participating attorneys meant that even when attorneys delivered aid, the quality of the representation was often poor. Pay for lawyers participating in the system was 12–14 litas (approximately 4–5 USD) per hour—low even by Lithuanian standards—and much of the work fundamental to any case, such as legal research and client meetings, was not reimbursed at all without an official seal from a judge or a police officer. As a result, there were few incentives for good attorneys to participate in the program.

Among the different actors in the justice system, an understanding gradually emerged of the need for comprehensive legal aid reforms in the country, such as improving the regulatory framework; building and strengthening administrative capacities; introducing information-sharing, coordination, and monitoring procedures; and raising the quality requirements for legal service.

## **4. Civil Society and Government Partnerships: Agents of Legal Aid Reform**

### **4.1 The Establishment of Pilot Public Defender Offices**

At the beginning of 1999, the Open Society Justice Initiative (Justice Initiative) and the Open Society Fund–Lithuania (OSF–Lithuania), initiated a joint project focusing on access to justice. The Project aimed to study legal aid needs and related problems within the criminal justice system in order to improve mandatory defense in *ex officio* criminal cases.<sup>12</sup> The project began in March 2000, and two public defender offices (PDOs) were established by April 2002, one in Šiauliai, the fifth-largest city, with a population of 150,000 inhabitants, and one in Vilnius, the capital. These offices arose from a joint initiative by the Justice

Initiative, the Ministry of Justice, and the Lithuanian Bar Association. The Justice Initiative signed cooperation agreements with the Ministry of Justice, under which the latter undertook the responsibility of ensuring the long-term financial sustainability and operational viability of PDOs.

The public defender offices were established as nongovernmental organizations (NGOs) under the Law on Public Institutions. Five lawyers staffed the PDO in Šiauliai and eight lawyers staffed the one in Vilnius. The office heads acted as managing partners in charge of the administrative aspects of operations and therefore had a reduced caseload compared to other public defenders of staff. Public defenders signed contracts for full-time legal service. They were paid an hourly fee on par with that paid to all *ex officio* lawyers, with an additional payment provided by Justice Initiative that increased their earnings by approximately 50 percent (up to the fixed monthly net honorarium constituting 3,000 litas, equivalent to 1,000 USD). The salaries of public defenders were thus roughly equivalent to the salaries of prosecutors.<sup>13</sup> Public defenders were subject to corporate regulations of the Bar Association (such as the Ethical Code, the Statute of the Lithuanian Bar, regulations and decisions of the Council of the Bar), which safeguard their independence and ensure adherence to ethical principles of the legal profession, as well as the ethical rules of the public defender office.

In accordance with the PDOs' bylaws, each of the founding organizations (the Justice Initiative, the Ministry of Justice, and the Bar Association) appointed a member to the board of the PDOs. The board gathered on a quarterly basis to discuss the PDOs' statistical, financial, and operational reports on substantive operational issues and matters relating to structural problems, as well as deficiencies in the legal aid system. The involvement of the Ministry of Justice and the Bar Association in PDO management strengthened the institutional and personal partnership of the founders, enabling them to address outstanding systemic shortcomings and raise awareness of the need to undertake countrywide legal aid reform.

Public defenders worked exclusively on mandatory legal aid cases and did not take on private cases. The pilot PDOs focused on the needs of their clients and on delivery of quality legal aid services. To reach this goal, the offices developed and implemented office management procedures (such as case intake and distribution, case-tracking forms, collaboration on cases, conflict-of-interest policies, and statistical data collection tools). Offices also developed and followed minimum quality performance standards, such as checklists of procedural actions to be implemented by defenders, aimed at creating a unified system of tools to help defenders better organize their work and maintain a high level of quality in the services provided.

In addition to providing legal aid, PDOs fulfilled other functions as part of the program's holistic approach to legal aid reform. The offices, in collaboration with a Bar-appointed team, coordinated assignments of *ex officio* cases to private lawyers and certified their payment vouchers.<sup>14</sup> The public defenders also carried out various activities to raise legal awareness and other public outreach activities, such as internships and apprenticeships for law students, free consultation for inmates and indigent applicants for legal aid in criminal matters, meetings in schools, and publication of articles in newspapers and law magazines. In addition, the offices also gathered various statistical data that may prove helpful for government bodies in identifying deficiencies in the legal aid system.

The PDO's operations revealed a number of structural shortcomings in the legal aid system. First, the absence of clear quality assurance standards or monitoring procedures often resulted

in poor representation of indigent defendants. Second, limited interest by and inadequate incentives for *ex officio* lawyers affected the quality of services they provided. *Ex officio* lawyers were paid only 12–14 litas (approximately 4–4.50 USD) per hour, and much of an *ex officio* lawyer's standard work, such as research or client meetings that take place outside the presence of a judge or law enforcement official, went uncompensated. Furthermore, the absence of clear procedures for appointing lawyers in *ex officio* cases led to corrupt *ex officio* appointment practices by law enforcement bodies and courts.<sup>15</sup>

In 2003–4, the PDOs' founders made efforts to strengthen both pilot offices. They aimed to demonstrate that PDO operations presented a viable model of legal aid delivery alongside other models, such as private lawyers, and to demonstrate the need for and benefits of institutionalized defense. Annual training related to criminal defense for the poor was held for public defenders in the Vilnius and Šiauliai offices in October 2003 and July 2004.

#### 4.2 The Collecton of Empirical Data about the State of Legal Assistance in the Country

The local Law Institute performed a *Study on the Status of Legal Assistance in Assigned Criminal Cases in Lithuania* in summer 2003. The study evaluated the need for legal aid and the payouts to *ex officio* lawyers in criminal cases. It analyzed 1,046 cases that had been investigated and terminated by prosecutors between 1 January 2002 and 1 January 2003, as well as cases tried in the first instance courts of the city of Vilnius and of the Kaunas region during the same period. The cases were analyzed using methodology developed by the Law Institute in cooperation with the Justice Initiative. The study revealed the following problematic trends and structural defects in the current legal system:

- The number of cases where the state covered the costs of legal aid was high; *ex officio* lawyers participated in approximately 95 percent of the criminal cases. This raised doubts about whether all of these defendants were genuinely in need of *ex officio* appointed defense counsel. (Approximately 30 percent of the cases fell outside the scope of mandatory *ex officio* defense.)
- The efficiency of free legal aid decreased due to the frequent replacement of defenders in *ex officio* criminal cases, including 571 of the 1,046 analyzed cases. In some instances, as many as twenty lawyers worked on one case. Such high lawyer turnover not only undermined the quality of services provided, but prolonged proceedings and caused unjustified public expenditures for legal aid, since each new *ex officio* lawyer appearing in the same case was entitled to compensation in return for familiarization with file materials.
- The study indicated that the need for legal aid was greater in rural areas than in urban areas.

In October 2004, the Human Rights Monitoring Institute, a human rights NGO, initiated the project *Observation of Hearings: Evaluation of Independence and Impartiality of Judges and the Quality of Work of Lawyers*, which monitored criminal cases in the courts of Vilnius and some other regions. The monitoring project evaluated the independence and impartiality of judges, as well as the efficiency of the work of lawyers in criminal proceedings.

### 4.3 The Establishment of Governmental Working Groups on Legal Aid Reform

On 3 February 2003, the Lithuanian government set up a working group to draft a concept paper on reforms of the state-funded legal aid system and suggested legislation to address various malfunctions in legal aid management and delivery. These included the inadequate payment scheme for *ex officio* criminal cases resulting in poor representation, a lack of quality representation guidelines, and deficiency of monitoring mechanisms to ensure quality standards. The actual delivery of free legal aid in civil and administrative proceedings, as well as in primary legal aid cases, was limited by several factors. These included a lack of public awareness of free legal aid, highly complex financial eligibility requirements imposed on individuals seeking legal aid, the poorly coordinated legal aid management duties spread across different institutions (the Ministry of Justice, the Ministry of Finance, the Bar, the courts, law enforcement agencies, municipalities), and the lack of accountability mechanisms discussed above.

The working group consisted of representatives from the Ministry of Justice (the Secretary of the Ministry headed the group), the General Prosecutor's Office, the Ministry of Finance, the Lithuanian Bar Association, Parliament (the human rights and law committees), lawyers of the Vilnius Public Defender Office, and a national consultant from the Justice Initiative. The group met regularly to discuss outstanding conceptual issues such as improving management systems, delivery schemes, budgetary issues, cost efficiency, and the role of municipalities. The Justice Initiative shared information, provided expert advice, offered comparative information from foreign jurisdictions with highly functional legal aid systems, and organized study visits for key members of the working group. Visits to Israel, Scotland, the Netherlands, and the Republic of South Africa were organized to help familiarize working group members with those countries' experiences in legal aid delivery. The trips offered a real-time illustration of different legal aid management institutions, fiscal management systems, varying sources of legal aid providers (such as public defenders and private *ex officio* lawyers), and various quality assurance programs. In consultation with foreign experts, the working group drafted a concept paper on improvement of the state-guaranteed legal aid system.

The Seimas discussed the working group's draft concept paper in a resolution on 26 June 2003<sup>16</sup> and submitted it to the Ministry of Justice on 24 July 2003.<sup>17</sup> The concept paper laid out a primary path to reform and suggested a number of substantive systemic changes. Suggestions included creation of the Legal Aid Coordination Council to optimize management, retention of a pool of full-time public lawyers to work exclusively with *ex officio* cases to increase legal aid provision, and the simplification of the eligibility requirements and the payment system. Main proposals of the draft concept paper included (1) introduction of simplified eligibility requirements; (2) the assignment of an independent body to administer the legal aid system; (3) establishing a mixed delivery system (to combine full-time legal aid lawyers and private lawyers taking on legal aid assignments); and (4) a new case-based payment system for legal aid lawyers instead of the present time-based system.

The Ministry of Justice reviewed the draft concept paper and accepted all proposals, except the second, related to the creation of an independent administrative body. Instead of creating a specialized legal aid body, it proposed assigning the legal aid policy implementation function to the National Legal Aid Coordination Council,<sup>18</sup> an advisory body to the Ministry of Justice. The revised concept paper was submitted to the government in November 2003. On 25

November 2003, the government approved the final version of the Concept for Improvement of the State-Guaranteed Legal Aid System (Concept Paper).<sup>19</sup>

Another working group appointed by the government (with a large overlap in membership to the previously discussed working group) prepared a new version of the Law on State-Guaranteed Legal Aid (New Legal Aid Law) in accordance with the main reform directions defined in the Concept Paper. On 22 April 2004, the Ministry of Justice and parliamentary committees on law and human rights organized a National Conference on Legal Aid Reform in Lithuania in cooperation with the Justice Initiative and the Open Society Fund–Lithuania. The conference aimed to bring together various national stakeholders in the justice system, as well as foreign and international experts, to discuss the regulatory provisions contained in the new draft law on legal aid while keeping the conceptual directions of national legal aid system reform in mind. On 3 September 2004,<sup>20</sup> the working group submitted the draft law to the Parliament for final approval. Parliament adopted the New Legal Aid Law on 20 January 2005.<sup>21</sup>

## **5. The New Legal Aid Law**

The stated legislative intent behind the New Legal Aid Law is to improve the efficiency and effectiveness of the existing legal aid system and enable the state to meet its constitutional obligations at a manageable cost. The New Legal Aid Law introduced a number of changes to the legal aid system, all aimed at improving the administration and delivery of legal aid. It provides for two types of state-guaranteed legal aid: primary and secondary. Administration and management related improvements include the simplification of eligibility requirements for secondary legal aid,<sup>22</sup> removal of the eligibility requirements for primary legal aid, simplification of the payment scheme for legal aid providers, consolidation of the legal aid management functions, the establishment of a coordinating body with oversight and management of coordination/information-sharing procedures, and of accountability mechanisms.

### **5.1 Scope of Legal Aid and Eligibility Requirements under the New Legal Aid Law**

The New Legal Aid Law defines two types of state-guaranteed legal aid: primary and secondary. Primary legal aid sets procedures for provision of legal information, legal consulting, and drafting of legal documents intended for state and municipal institutions (excluding procedural documents). Such legal aid also includes advice on extra-judicial dispute settlements, actions for amicable settlements of dispute, and drafting of agreements for amicable settlements.<sup>23</sup> Secondary legal aid covers the drafting of legal documents, defense and representation in court procedures, and representation in extrajudicial dispute settlements if mandated by law or a court. Secondary legal aid also includes coverage of civil or administrative litigation costs, as well as witness costs.<sup>24</sup>

The New Legal Aid Law also contains a number of measures to reform legal aid eligibility under the previous law, which required a property or income test simply to qualify for primary legal aid. Under the New Legal Aid Law, all citizens of the Republic of Lithuania and the citizens of other European Union member states, as well as other natural persons lawfully residing in the Republic of Lithuania and other European Union member states, have a right to receive

primary legal aid without the requirement of a test. There is, however, a time limitation—each individual is allowed up to one hour of free legal advice and information.

In order to receive secondary legal aid, applicants must meet the following new financial and merit criteria:

- *Financial criteria:* In order to prove one's financial situation, all persons requesting state-guaranteed legal aid must submit a declaration of their property and income to local tax authorities. Instead of the previous five levels for both primary and secondary state legal aid, the new law identifies only two levels of property and income for determining secondary legal aid eligibility. If an individual is eligible under the first level, the state guarantees and covers 100 percent of the expenses of secondary legal aid; if one is eligible under the second level, the state shall cover 50 percent of the expenses of secondary legal aid. In order to safeguard the proper use of state budgetary resources, however, the law enforces strict requirements for those who receive legal aid and allows for the possibility of termination of such legal aid. However, those falling within the category of "socially vulnerable people" as defined by Article 12 of the New Legal Aid Law are exempt from showing a declaration of income. Additionally, in "mandatory defense criminal cases" (as defined by Article 51 of the Criminal Procedure Code), defendants are automatically eligible for legal aid irrespective of their financial situation.
- *Merit criteria:* The New Legal Aid Law stipulates that secondary legal aid is *not* to be provided in a number of situations, such as when: (a) the demands of the applicant are clearly unfounded; (b) representation in the lawsuit is not likely; (c) the applicant brings an action for intangible injuries (seeking damages for non-property-related harms, such as actions for injuries to dignity); (d) the application is related to a requirement arising directly from commercial activities of the applicant or from his or her individual professional activities; (e) the applicant can receive necessary legal services without using state-guaranteed legal aid; (f) the applicant is not applying because of a violation of his or her own rights, except for cases of representation according to the law; or (g) the demand for which a filed application for secondary legal aid has been forfeited in order to receive state-guaranteed legal aid.<sup>25</sup> Legal Aid Services may refuse to provide secondary legal aid when an evaluation of the applicant's claim establishes that the possible costs of secondary legal aid would significantly exceed the size of the financial claim (interest) of the applicant, when the non-property claim is of low significance, or when the applicant is able to execute or defend his or her rights or legal interests without the help of an attorney.<sup>26</sup>

Application of criteria relating to a merit test needs to be further clarified in detail to Legal Aid Services in order to prevent groundless rejection of legal aid. It should be noted that the aforementioned provisions are not applicable to secondary legal aid in criminal cases or in cases involving violations of administrative rights. The New Legal Aid Law also implements Council Directive 2003/8/EC of 27 January 2003, to improve access to justice in cross-border disputes by establishing common rules related to legal aid for such disputes. In implementation of this directive, it is necessary to safeguard the provision of state-guaranteed legal aid in cross-border disputes with a foreign person in civil cases. Therefore, legal aid in Lithuania is also available to citizens and persons lawfully residing in other member states of the European Union.

Upon revision of the eligibility determination procedure, the New Legal Aid Law specified categories of individuals eligible for secondary legal aid regardless of their assets or income levels, such as:

- persons eligible for legal aid in the hearing of criminal cases according to Article 51 of the Criminal Procedure Code;
- aggrieved parties in cases claiming compensation for damages incurred through criminal actions, including cases when the issue of compensation for damages is heard in a criminal case;
- persons eligible for social allowances according to the Law of the Republic of Lithuania on Financial Social Support to Families (or Single Persons) with Low Income;
- persons dependent on the state in residential care establishments;
- persons with a recognized disability or incapacity for work (and their guardians), when state-guaranteed legal aid is needed for representation and defense of the rights and interests of the ward;
- persons who can present proof of their inability to dispose of their property or funds for objective reasons, thus meeting the asset and income levels entitling them to legal aid under this law;
- persons suffering from a serious mental disorder, when issues of forced hospitalization in psychiatric establishments and treatment are heard in line with the Mental Health Care Law of the Republic of Lithuania, as well as their guardians, when state-guaranteed legal aid is needed for representation of the rights and interests of the ward; and
- other persons in cases provided for in international treaties ratified by the Republic of Lithuania.<sup>27</sup>

Eligibility for secondary legal aid is determined through a declaration of property stamped by the local tax authority. Persons willing to receive secondary legal aid submit a request to Legal Aid Services in person or through mail, along with documents attesting to their eligibility. The Minister of Justice must approve all prerequisites and templates of applications for secondary legal aid. At the time of application, Legal Aid Services must reach a decision on the provision of secondary legal aid immediately then inform the applicant in writing of their decision. The decision should contain the following information:

- date and place of decision;
- name and surname of the person who made the decision;
- name of the institution that made the decision;
- name and surname of the applicant;
- the type of legal aid for which the client applied;
- the basis for provision of secondary legal aid or for rejection of the application;
- the level of assets and income recognized for the person;

- the part of the secondary legal aid costs guaranteed and covered by the state;
- in cases in which the decision foresees provision of secondary legal aid, the name, surname, address, telephone number, and office hours of the attorney assigned to provide secondary legal aid;
- procedures and deadlines for appealing the decision;
- any other information that is significant in the opinion of Legal Aid Services.<sup>28</sup>

In selecting the attorney, Legal Aid Services take into account proposals for specific attorneys from the applicants, the place of residence of each applicant, the place of employment and workloads of the attorneys, and other circumstances significant for provision of the secondary legal aid. The decision on provision of secondary legal aid includes an assignment for the attorney to provide secondary legal aid and a document certifying his or her power. The attorney providing secondary legal aid may be replaced upon a written request from the applicant or his or her attorney, if a conflict of interest is determined, or other circumstances make it impossible for the attorney selected to provide secondary legal aid. In such cases, Legal Aid Services must issue a decision to replace the selected attorney.<sup>29</sup>

## 5.2 Legal Aid Providers under the New Legal Aid Law

The New Legal Aid Law also restructured the rules regarding delivery of both primary and secondary legal aid. Under the Prior Legal Aid Law, lawyers, or their assistants, were to deliver primary legal aid following agreements made with municipalities. This proved problematic, as not all municipalities could find willing lawyers for primary legal aid provision. Therefore, the new law set up delivery of primary legal aid as a function transferred to municipalities by the state. Municipalities can select specific ways of providing primary legal aid taking into account quality, efficiency, and finances specific to their situation. Attorneys, public servants of the municipal administration who perform legal functions, or public institutions with which a municipality has an agreement, can provide primary legal aid. Additionally, full-time legal aid lawyers and private lawyers who participate in the legal aid scheme provide secondary legal aid. Irrespective of the type of provider, all secondary legal aid cases involve attorneys who have made agreements with state-guaranteed Legal Aid Services. Separate agreements may be arranged with attorneys who provide secondary legal aid permanently, or with attorneys who provide secondary legal aid on an as-needed basis. Full-time lawyer selection is competitive and focuses on an attorney's professional qualities and academic achievements.<sup>30</sup> Selection of other attorneys who are willing to provide secondary legal aid on an as-needed basis is also on a competitive basis through a semi-annual procedure.

The fees paid to different types of attorneys vary. Attorneys providing secondary legal aid on a permanent basis receive permanent pay, comparable to the pay of judges in local courts. Attorneys are also entitled to an annual holiday of twenty-eight calendar days (public holidays not included) for every twelve months. Attorneys providing periodic legal aid on an as-needed basis receive a fixed fee for each matter, calculated based on complexity, the stage at which the attorney assumes control, and other factors. The fee amount is determined by the average numbers of hours usually spent for particular types of cases, multiplied by a fixed rate

per working hour, which is 27 litas (approximately 9 USD). This payment scheme resulted in a relative increase in payment for attorneys, as under the previous payment system lawyers were receiving approximately 12–14 litas (approximately 4–4.50 USD) per hour. The payments are still significantly below market rates for legal work, which normally range from 100 to 600 litas (approximately 33–200 USD) per hour. Notwithstanding the above, state-guaranteed legal aid attorneys viewed these changes in the payment system as a step forward.

### 5.3 Organizational and Administrative Reform under the New Legal Aid Law

The New Legal Aid Law restructures management of legal aid services. As detailed below, these reforms include the creation and empowerment of five state-guaranteed Legal Aid Services, the establishment of clear roles, as well as the development of specific mechanisms, for cooperation among the key actors (the Lithuanian national government, the Ministry of Justice, municipalities, the Lithuanian Bar Association, and the new Legal Aid Services).

Under the New Legal Aid Law, the national government retains principal responsibility for defining policies relating to state-guaranteed legal aid,<sup>31</sup> and the Ministry of Justice is responsible for implementing the legal aid policy.<sup>32</sup> The ministry is also required to submit drafts of legal acts related to additional reforms of guaranteed legal aid to the state government. In addition, the ministry is tasked with assessing the implementation of the New Legal Aid Law and related regulations, organizing training sessions related to provision of state-guaranteed legal aid under the new system, ensuring and monitoring the quality of state-guaranteed legal aid, and providing recommendations for further reform and suggest specific improvements.

In order to ensure that the Ministry of Justice fully and effectively executes its responsibilities, the New Legal Aid Law provides for the formation of a Council for the Coordination of State-Guaranteed Legal Aid (Coordination Council) to advise the ministry on legal aid policy implementation.<sup>33</sup> The Coordination Council intends to be a collegial advisory body operating on a voluntary basis, consisting of representatives from institutions working in fields related to legal aid provision or human rights. Presently, the Coordination Council consists of representatives from the Committees on Legal Affairs and on Human Rights in the Seimas, the Ministry of Justice, the Ministry of Finance, the Lithuanian Association of Local Authorities, the Lithuanian Bar, the Lithuanian Fellowship of Lawyers, the Association of Lawyers of the Republic of Lithuania, and other institutions whose work is related to the provision of state-guaranteed legal aid or the protection of human rights. The Minister of Justice suggests and approves representatives from each of these institutions, but law does not set the members' term of office. In 2005, the Coordination Council has thirteen members.

The Coordination Council does not have regular, set meetings yet, which may obstruct effective and continuous operation of this public body. Additionally, members of the council hold unpaid voluntary positions; this might keep council members from maximum participation with the Council's work. The Coordination Council presents proposals for the implementation and improvement of the state-guaranteed legal aid policy, analyzes the work of municipal institutions providing primary legal aid provision, and presents proposals for improvement of primary legal aid delivery. The Council also analyzes the work of Legal Aid Services and proposes improvements, proposes budgets for the efficient use of funds for state-guaranteed legal aid, presents proposals for amendments to the legal aid law, and submits fee proposals for attorneys providing secondary legal aid (as described below).

The establishment of Legal Aid Services is one of the most dramatic changes from the prior system. As government agencies operating within the jurisdiction of regional courts, Legal Aid Services controls eligibility determinations, makes referrals of secondary legal aid cases to aid providers (in criminal, civil, and administrative matters), monitors the delivery of secondary legal aid, informs citizens of the availability of legal aid, and reports regularly to the Ministry of Justice about their activities.<sup>34</sup> Five separate Legal Aid Services are located in key cities throughout the country, and each operates under the supervision of the Ministry of Justice to administer the provision of secondary legal aid. The areas of work of Legal Aid Services are the same as that of district courts.<sup>35</sup>

Legal Aid Services is charged with a number of key tasks, such as: (1) organizing provision of secondary legal aid in their district court's jurisdiction; (2) ensuring the provision of secondary legal aid for qualifying clients; (3) forming agreements with attorneys for secondary legal aid provision; (4) coordinating the provision of secondary legal aid; and (5) informing potential clients about the qualification requirements for state-guaranteed legal aid through the Internet and other media.

Municipal institutions distribute information on primary legal aid through leaflets, public announcements, the Internet, and public campaigns aimed at informing local residents about the possibility of receiving state-guaranteed legal aid.<sup>36</sup> Municipal institutions, as well as Legal Aid Services, are required to submit annual reports to the Ministry of Justice, summarizing their activities and efforts of state-guaranteed legal aid during the year.

In district court jurisdictions without a Legal Aid Services office, the Lithuanian Bar coordinates secondary legal aid delivery in criminal cases. This process involves setting selection criteria for secondary legal aid providers, appointing coordinators in regional court territories, and defining their working procedures.<sup>37</sup> Under the New Legal Aid law, the Bar is also supposed to collaborate with the Ministry of Justice in ensuring the quality of legal aid services, and it also holds the formal duty of quality control monitoring for secondary legal aid work (in line with rules for evaluation developed by the Minister of Justice in coordination with the Lithuanian Bar).<sup>38</sup>

#### 5.4 Implementation of the New Legal Aid Law

Two of the Legal Aid Services—located in Vilnius and Šiauliai—grew out of pilot public defender offices previously established by the Ministry of Justice, the Lithuanian Bar Association, and the Open Society Fund–Lithuania, as their work proved effective and efficient.<sup>39</sup> The Ministry of Justice established three more offices, in the cities of Kaunas, Panevėžys, and Klaipėda, from funds allocated for the legal aid program in the state budget. Legal Aid Services have three or four staff members with administrative and financial backgrounds.

Legal Aid Services recruited forty-six full-time lawyers to render legal aid in civil, administrative, and criminal cases. Although these lawyers work on the physical premises of Legal Aid Services, they are independent contractors who entered into partnership agreements registered with the Lithuanian Bar Association as Secondary Legal Aid Law Firms. They work pursuant to corporate regulations governing the legal profession. The average monthly workload varies from 10.6 cases per lawyer in Klaipėda to seventeen cases in Šiauliai. Furthermore, Legal Aid Services unanimously voiced their support for increasing the number of full-time lawyers in all jurisdictions of regional courts, given the proven efficiency and the quality of legal aid delivered by these full-time lawyers.

In response, the Coordination Council agreed to double the number of full-time lawyers during the course of 2006. The total number of private lawyers providing state-guaranteed legal aid as of 14 February 2006, was 377. In sum, 1,900 decisions were made to provide secondary legal aid by Legal Aid Services from the period spanning 1 May 2005 to 31 December 2005 (constituting about 72.3 percent of the total number of submitted applications).

Primary legal assistance was provided in 16,868 cases from 1 May 2005 to 31 December 2005. The information presented here concerns the nature of primary legal assistance provided to 16,781 applicants, sorted by the area of law.

*Table 1*  
**The nature of primary legal assistance**

Area of Law	No. of Cases
Family law	4,208
Labor law	1,486
Social security law	778
Land law	699
Restitution of property rights	738
Administrative law and administrative procedure	878
Civil law and civil procedure	6,566
Other issues	1,515

In total, the state budget allocated 2,624,000 litas (approximately 874,700 USD) for primary legal assistance in 2005. According to point 54 of the Methodology for Calculating the Funds Allocated for the Performance of State Functions (Assigned to Municipalities),<sup>40</sup> the following funds were allocated to municipalities as a function of the population residing in their territory.

*Table 2*  
**Allocations to municipalities**

Number of Municipalities	Amount of Funds (in litas)
2 (more than 200,000 residents)	247,000
3 (from 100,000 to 200,000 residents)	100,000
12 (from 50,000 to 100,000 residents)	45,000
43 (up to 50,000 residents)	30,000

Of these, the municipalities used 1,634,717.7 litas (approximately 544,900 USD) for primary legal assistance during 2005 (the figure includes fees paid to lawyers for the provision of primary legal assistance until 1 May 2005). This amounts to 63 percent of all funds allocated for primary legal assistance as indicated in the table above.

## 6. Conclusions

The New Legal Aid Law imposes greater costs on the Lithuanian government than the Prior Legal Aid Law. However, the marginal increase in costs, combined with effective delivery and monitoring mechanisms, should ultimately result in a significant expansion in the availability of effective legal aid at a manageable cost. This should enable Lithuania not only to meet its obligations under its Constitution and under international agreements, but also to further edify its young constitutional system.

Lithuania has long been in need of a legal aid system that can serve all of its citizens, especially the poorest and most marginalized. The Lithuanian government has finally taken a crucial step in putting the needs and rights of those individuals at the core of its public policy, and the New Legal Aid Law has benefited from the experience of prior legislative efforts to establish such a law. However, state institutions, budgets, and statutes are only the beginning. More time, experience, and patience will be required to improve the quality of legal services and to nurture a culture of inclusion and protection of rights.

It is clear, though, that the adoption of the New Law on Legal Aid *per se*, while necessary, is not sufficient to create a comprehensive legal aid system. Only full-fledged reform can result in the necessary substantive structural and functional changes to the legal aid system in Lithuania, as detailed below:

- An increase in funding is not sufficient to improve the delivery of legal services. The Lithuanian experience shows that without effective control measures in place, public funding may be used ineffectively and even misused, as exemplified by high turnover in lawyers, vouchers padded with additional hours, wasted time in collecting certifying signatures of officials for confirming defenders' work, and other costly problems.
- None of the existing legal aid delivery models ("judicare" or public defense models) are self-sufficient; only a combination model can ensure the best use of existing resources. For example, delivery models that rely solely on private lawyers gradually tend to increase in expense; Great Britain's experience expressly demonstrated this dynamic and lead to the government's inability to control delivery costs. At the same time, public defenders are not in a position to handle all *ex officio* cases because (1) it simply may not be cost-effective to open public defender offices in all jurisdictions; (2) conflict of interest issues will always exist in *ex officio* cases (as a public defender may represent only one defendant in multiple defendant cases if he or she is to maximize the benefits of joint practice and of economy of scale); and (3) there might be a caseload increase in certain jurisdictions where the PDO will not be able to handle the caseload in an efficient manner.
- Without effective administrative procedures, sufficient and well-trained staff, secondary regulatory acts, and the necessary financial means, legislative changes are simply a formality towards the state's obligation to provide legal aid to all who are in need, thereby reducing the human right to legal aid into a promise that the state cannot deliver.

## Notes

1. The Constitution of the Republic of Lithuania, adopted by the citizens of the Republic of Lithuania in the referendum of 25 October 1992, Art. 31, para. 6.
2. The Law on Amendment of the Law on State-Guaranteed Legal Aid of the Republic of Lithuania, no. X-78, of 20 January 2005, *Official Gazette*, no. 18, 2005 (hereinafter, “New Legal Aid Law”); the Law on Enactment and Implementation of the Law on Amendment of the Law on State-Guaranteed Legal Aid of the Republic of Lithuania, no. X-79, of 20 January 2005, *Official Gazette*, no. 18, 2005.
3. European Convention on Human Rights (ECHR), Art. 6, para. 3(c).
4. Criminal Procedure Code of the Republic of Lithuania, *Official Gazette*, no. 37, 14 March 2002, Art. 51.
5. Res. 76(5) of 18 February 1976.
6. Res. 76(8) of 2 March 1978.
7. Rec. 81(7) of 14 May 1981.
8. Rec. 93(1).
9. Civil Procedure Code of the Republic of Lithuania, *Official Gazette*, no. 36, 28 February 2002, Art. 20.
10. Resolution of the Seimas of the Republic of Lithuania “Concerning the Concept of the Legal System Reform and Its Implementation,” *Official Gazette*, no. 70, 14 December 1993.
11. The new version of the Concept of the Legal System Reform was approved by Seimas Resolution no. VIII-810 of 25 June 1998.
12. *Ex officio* cases are ones in which, according to the Criminal Procedure Code, the presence of a lawyer is mandatory and the lawyer is appointed *ex officio* by the law enforcement body or the court, if the defendant did not hire a private lawyer or did not refuse/waive the right to be represented by a lawyer. For participating in such cases, lawyers are compensated by the state from the legal aid budget.
13. The attorneys were also provided with free medical insurance, civil liability insurance, membership fees to the Bar, in-service training, and four weeks of vacation. The annual costs of one lawyer, including all operational costs, were approximately 60,000 litas (approximately 20,000 USD).
14. The Bar appointed the coordinators on the basis of the government’s Regulation of 22 January 2001 (Resolution of the Government of Lithuania Concerning Approval of the Order and Payment Rates for State-Guaranteed Legal Aid Provided by a Lawyer and Apprentice of a Lawyer and the Consent to Make Public Procurement from Single Source, no. 69, *Official Gazette*, no. 8, 22 January 2001, Art. 2), which entitled the Ministry of Justice to contract the Lithuanian Bar Association in a public procurement of the services relating to coordination and organization of state-guaranteed legal aid to grant up to 3 percent of the public funds allocated for state-guaranteed legal aid. In addition to this government regulation, on 1 February 2001, the Ministry of Justice and the Lithuanian Bar Association signed the Contract for Procurement of Services, under which the Bar assumed the responsibility for coordinating and organizing procurement of state-guaranteed legal aid throughout the country; the Ministry of Justice undertook to pay for such services the sum of 146,000 litas (approximately 48,667 USD). Subsequently, the Lithuanian Bar Association appointed lawyers on a yearly basis to coordinate and organize procurement of state-guaranteed legal aid by assigning to each regional coordinator a specific region and legal institutions where rendering of state-guaranteed legal aid was supposed to be coordinated. The coordinators were supposed to (1) prepare a list of lawyers working with state-guaranteed legal aid cases and submit the list to law enforcement institutions and courts, enabling them to contact the *ex officio* lawyers to render state-guaranteed legal aid; (2) prepare a list of lawyers on duty for weekends and official holidays; (3) find *ex officio* lawyers in emergency situations; and (4) ensure general communication and cooperation with law enforcement agencies to optimize procurement of state-guaranteed legal aid in the given region. The coordinators each received a monthly honorarium for services rendered (Decision of the Council of Lithuanian Bar Association Concerning Appointment of Persons Responsible for Organization and Coordination of the State-Guaranteed Legal Aid, 27 February 2001).
15. The above-mentioned regulation by which Bar-appointed coordinators are in charge of legal aid assignments was modified after the pilot public defender offices revealed the corrupt practices of appointing attorneys who were preferred by law enforcement bodies or judges, rather than attorneys who would actively defend the interests of the client. According to the new procedures for appointing lawyers in *ex officio* cases, the

- Bar coordinators receive requests from the law enforcement bodies or courts, then appoint a lawyer from the duty roster (either a private lawyer or a full-time legal aid lawyer). Only those attorneys appointed by the Bar coordinators receive payments from the Ministry of Justice. This procedure allowed for transparent appointments, and to some extent it contributed to raising the quality of representation by at least reducing the number of changes in lawyers per case (once appointed, the lawyer represents the case until the end of all procedures, except in situations mandated by the law when the lawyers cannot further represent a particular client). In retrospect, however, one could question whether the procedure is an effective way of spending the public funds: the very process of making legal aid appointments may take up to 70 percent of a lawyer's time (according to the Vilnius full-time legal aid provider's practice)—a job that could easily be done by a less expensive nonlawyer, provided that procedures are in place to ensure transparency and professionalism.
16. Resolution of the Seimas of the Republic of Lithuania on the Reform of the State-Guaranteed Legal Aid System, adopted on 26 June 2003, *Official Gazette*, no. 68-3073, 2003.
  17. The working group concept paper is available in English on the Justice Initiative website: [www.justiceinitiative.org](http://www.justiceinitiative.org).
  18. The concept paper lacked details on who would be carrying out routine legal aid management-related functions. The law later assigned such functions to the Legal Aid Services, as described in detail in the body of the article.
  19. A final version of the Concept Paper is available in English on the Justice Initiative website: [www.justiceinitiative.org](http://www.justiceinitiative.org).
  20. Resolution No. 1131 of the Government of the Republic of Lithuania of 2 September 2004, *Official Gazette*, no. 136-4958, 2004.
  21. The Law on Amendment of the Law on State-Guaranteed Legal Aid, No. X-78, adopted on 20 January 2005 (effective from 1 May 1 2005), *Official Gazette*, no. 18-572, 2005 (New Legal Aid Law).
  22. *Onus probandi* (the burden of proof) pertaining to eligibility determination for secondary legal aid was shifted from the applicant to the state (i.e., to Legal Aid Services).
  23. Law on State-Guaranteed Legal Aid, Art. 2, para. 2.
  24. Law on State-Guaranteed Legal Aid, Art. 2, para. 3.
  25. New Legal Aid Law, Art. 12, para. 5.
  26. New Legal Aid Law, Art. 12, para. 6.
  27. Law on State-Guaranteed Legal Aid, Art. 12.
  28. Law on State-Guaranteed Legal Aid, Art. 18, paras. 5 and 6.
  29. Law on State-Guaranteed Legal Aid, Art. 18, para. 3.
  30. The Order of the Minister of Justice of the Republic of Lithuania no. 1R-114 of 15 April 15 2005, approved the Regulations of the Competition of Attorneys-at-Law Providing Secondary Legal Aid.
  31. Law on State-Guaranteed Legal Aid, Art. 5 and 6.
  32. Law on State-Guaranteed Legal Aid, Art. 5 and Art. 7, para. 1.
  33. For details, see the Law on State-Guaranteed Legal Aid, Art. 5 and Art. 7, paras. 2–4.
  34. Law on State-Guaranteed Legal Aid, Art. 5 and 10.
  35. Law on State-Guaranteed Legal Aid, Art. 9, para. 1.
  36. Law on State-Guaranteed Legal Aid, Art. 5 and 8.
  37. Law on State-Guaranteed Legal Aid, Art. 5 and 9.
  38. Law on State-Guaranteed Legal Aid, Art. 10, para. 2.
  39. The Šiauliai Public Defender Office began operations in 2000, the Vilnius Public Defender Office in 2002. The offices were conceived for the purpose of organizing and coordinating state-guaranteed legal aid in criminal cases under the Prior Legal Aid Law, and they employed full-time defenders in place of appointed private counsel.
  40. Methodology for Calculating the Funds Allocated for the Performance of State Functions (Assigned to Municipalities), approved by Order 1K-268 of 15 July 2004, of the Minister of Finance of the Republic of Lithuania, *Official Gazette*, no. 113-4246, 2004.

# The Development of the Legal Aid System in Bulgaria

*by Martin Gramatikov*

This article describes the processes of reforming the Bulgarian legal aid system. It reviews several studies and assessments of legal aid in Bulgaria carried out by nongovernmental organizations. It also discusses the political pressure generated by Bulgaria's accession to the European Union, as well as the outcomes of research and pilot projects in the field of legal aid. The article identifies concerns regarding the early implementation of the new legal aid statutes and suggests areas where further reforms are necessary.

## 1. Introduction

The establishment of a legal aid system that complies with, and effectively guarantees the standards of, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (ECHR) is one of the prerequisites of EU membership, and therefore an explicit target for Bulgarian institutions of policymaking, judiciary, and law enforcement. The explicit requirement for the state to provide adequate access to legal aid is set out in Article 6(3)(c) ECHR. Access to legal aid is also a Constitutional right that Bulgarian legislation grants to all human beings regardless of nationality, citizenship, ethnicity, or gender.<sup>2</sup>

A study by the Open Society Institute–Sofia (OSI–Sofia) found that despite existing legal provisions and rights guaranteed by the Constitution, the Bulgarian legal aid system is seriously flawed and dysfunctional.<sup>3</sup> In response to the need for major reform of the legal aid system, the Ministry of Justice, in collaboration with other institutions, supported several initiatives designed to reveal policy and implementation gaps. In 2004–5, OSI–Sofia, together with Open Society Justice Initiative (JI), carried out a comprehensive study of the existing system for delivery of legal aid in criminal cases. The Ministry of Justice also provided political support for the study. Additionally, OSI and JI ran a multiyear pilot project, “Veliko Tarnovo Public Defenders Office,” designed to explore the feasibility and value of alternative models for delivery of legal aid. The Ministry of Justice and the Supreme Bar Council were official partners in this project, although they did not pledge any financial support and their political support varied throughout the project's implementation.

The combination of the increasing pressure from the European Commission and the internal drive for change resulted in the adoption of the Legal Aid Act<sup>4</sup> in 2006, which aimed to restructure the legal aid model and deliver outcomes in line with ECHR standards, the Bulgarian Constitution, and other relevant legal provisions. The Ministry of Justice did not heed calls from the Bar and human rights organizations, which cautioned against such a short *vocatio legis* period, and the Legal Aid Act went into effect on 1 January 2006. Since the law took effect so recently, it is too soon to predict how it will affect reform in the legal system. However, the first months of implementation revealed insufficient management capacity in the newly established National Legal Aid Board (NLAB).

## 2. Review of the Bulgarian Legal Aid System before 2006

From 2001 to 2002, the Bulgarian Helsinki Committee (BHK), a human rights nongovernmental organization (NGO), undertook a detailed study of the existing legal aid system in Bulgaria.<sup>5</sup> The assessment included an empirical analysis of how and to whom legal aid was provided, as well as an evaluation of the system's structure and a comparative analysis of legal aid provision in Bulgaria and other European countries. The Committee also recommended a series of reforms based upon the findings of the study, which identified numerous flaws in the existing system's delivery of legal aid, including:

- a high degree of exclusion, among those of limited or moderate means, from access to legal aid in both civil and criminal cases;
- the absence of a specialized body responsible for administering the legal aid system;
- the lack of explicit criteria for appointment of *ex officio* defenders and control over the quality of the provided services;
- the absence of functional criteria for evaluation of the financial situations of potential recipients of legal aid;
- the lack of comprehensive and accurate data reporting on the effectiveness of services provided and the system's compliance with budgetary limits;
- the nonexistence of an independent budget for legal aid; and
- inadequate incentives for attorneys who participate in the judicare-like scheme.

Extensive research on criminal legal aid delivery, carried out by OSI–Sofia from May to November 2004,<sup>6</sup> confirmed BHK's findings. The OSI–Sofia research incorporated content analysis of 900 archived criminal court files whose final court decisions was entered between 1 January 2000 and 1 July 2002.<sup>7</sup> In the next step, the samples were stratified by district courts' caseloads, if the district courts had decided as a first instance court on the case. However, if the regional court was the first instance court, the sample was stratified depending on the relative size of the jurisdiction, with the assumption that population size is a proxy for the caseload. An expert team drafted the data collection questionnaires and modeled them on a questionnaire used in the BHK 2001–2 study. Major findings of the OSI–Sofia research are:

- During the pretrial phase 34.6 percent of the defendants received no legal representation at all during the pretrial phase, while 25.5 percent received representation from *ex officio* counsel, and 38.8 percent received representation from private defense counsel.
- Approximately 25 percent of the defendants did not receive representation by counsel at the first instance court trial. When an attorney was present, it was a private lawyer in 45.4 percent of the cases and an *ex officio* defense lawyer in 29 percent of the cases.
- Although varying by jurisdiction, *ex officio* counsel fees were significantly lower than those demanded by private defense counsel. *Ex officio* fees during a pretrial phase, for example, averaged approximately 68 leva (about 35 euros), while average fees for private counsel were approximately 225 leva (about 116 euros).
- A comparison with the previously researched period (1996–9) showed that in the trial phase of the criminal procedure, there is a significant increase in the proportion of defendants represented by *ex officio* counsel. In the BHK research, 21.1 percent of all defendants received representation from *ex officio* lawyers, whereas the analysis of data on case files from 2000 to 2002 showed an increase to 38.9 percent. A plausible explanation for this increase is the introduction in the year 2000 of indigence as normative ground for the appointment of *ex officio* lawyers. Indigence of the defendant accounted for more than one-third of all appointments of *ex officio* lawyers from 2000 to 2002 during the trial phase. This suggests that the legislation in force before 2000 did not adequately reflect the need for legal aid, as it neglected the indigent defendants who did not qualify to receive legal aid on other grounds.
- Although OSI–Sofia research showed that indigence is widely used as basis for appointment of *ex officio* legal aid, especially in the trial phase, the consistency of the financial means test and its practical application is an issue of serious concern. Although legal provisions do not outline a level of precision for the scope and indicators of indigence, the courts have developed varying practices in determining indigence and, therefore, appointment of *ex officio* lawyers. Some courts do not verify declarations of insufficient means, while other courts require evidence regarding the financial status of the defendant.
- Using peer review and client satisfaction assessment to evaluate certain dimensions of quality of delivered legal services, OSI–Sofia found conclusive evidence that private lawyers consistently outperform *ex officio* appointed lawyers with active involvement in the case, collection and assessment of evidence, and regular meetings with clients.

### 3. Bulgarian Legal Aid in the EU Regular Reports

The European Commission's Pre-Accession reports on Bulgaria's progress toward accession in the years 2001–6 insisted with varying levels of urgency that the government must ensure equal access to justice and streamline legal aid regulations. The Commission has expressed concerns over the fact that approximately one-third of the defendants in criminal matters do not have access to legal counsel before trial in first instance courts. Another area of concern has been the inadequacy of financial resources spent on legal aid. The 2004 Pre-Accession Report

acknowledged that Bulgaria had achieved limited improvements in access to legal assistance during trial,<sup>8</sup> but it also warned that a significant number of defendants still faced trial without adequate defense counsel. The report also noted that there was no clear separation between the legal aid budget and the judiciary's general budget.

#### **4. The Veliko Tarnovo Public Defenders Pilot Project**

Following the BHK 2001 study, with the support and cooperation of several local and national government entities and agencies (including the Supreme Bar Council, the local Bar Council, and the local judiciary), JI and OSI–Sofia developed a pilot project in Veliko Tarnovo.<sup>9</sup> In March 2003, Bulgaria established the Public Defender's Office (PDO), which started working as a new organizational model for delivery of legal aid. The project designers expected that the PDO would show whether an alternative to the *judicare* model could redress the problems identified in the 2001 and 2004 studies.

The PDO is essentially an institutional arrangement for delivery of legal aid services. Full-time, in-house attorneys specialize in delivery of legal aid to defendants in criminal cases (a small minority of the cases were noncriminal). The public defenders<sup>10</sup> act as *ex officio* lawyers in criminal cases in which, according to Bulgarian law, the defendant must have representation from an attorney. The model resembles, to some extent, a “public defender” model in that there is a “staff” of attorneys providing aid; however, the PDO attorneys are not necessarily PDO employees. In contrast to the official *judicare*-like model, the PDO attorneys do not take private cases. This ensures that they concentrate and specialize in the delivery of legal aid and there is no trade-off between paying and non-paying<sup>11</sup> clients. The PDO staff consists of a manager, five attorneys, and a technical assistant.

Attorneys form the core staff of the PDO, providing legal aid for a large proportion of general criminal proceedings in cases handled by Veliko Tarnovo's Regional and District Court. Selection of attorneys occurred through a public contest and five years later, the retention rate is almost at 100 percent—only the manager left the office due to a decrease in the workload. Selection and appointment of the PDO manager also took place in 2003 through a public job announcement. The manager's principal functions are to secure political support for the project at the local level, manage case distribution among the attorneys, and provide office attorneys with professional guidance on legal norms. Due to these and other responsibilities, the position requires that the manager have considerable professional experience.

During evaluation interviews, representatives of OSI, judges from the Veliko Tarnovo courts, and prosecutors and investigators generally stated that the PDO has significantly improved the performance standards, and enhanced the effectiveness, of the legal aid system. Specifically, the interviewed judges claimed that the PDO program had almost entirely resolved the difficult problems that plagued the *ex officio* legal aid scheme in Veliko Tarnovo before the beginning of the project. Among other improvements, the judges cited the following as the most crucial:

- the time for appointing *ex officio* attorneys has been significantly reduced since the PDO started functioning;

- PDO attorneys appear according to the schedule (no scheduling conflicts with the more appealing private clients cases) and are well prepared for their cases, therefore defending the interests of their clients more efficiently than the other *ex officio* appointed lawyers; and
- PDO attorneys regularly meet with the defendant in advance of the proceedings and collaborate with the defendant to develop a coordinated strategy.

The interviewed judges largely agreed that the quality of legal aid services rendered by the PDO attorneys contributes significantly to guaranteeing fair and impartial trials. Prior to the commencement of the PDO project, the judges often felt compelled to perform, to some extent, the functions of a defense counsel in cases where the *ex officio* legal counsel was not sufficiently prepared or motivated. This is not surprising since the Bulgarian criminal procedure is reputedly inquisitorial. In cases in which the defendant is self-represented or the *ex officio* defense is of substandard quality, the judges declared that they would intervene and pay more attention to safeguard the procedural rights of the defendant. This intervention was justified as a moral rather than legal norm of procedural fairness. Such interventions, however, are disturbing for the judges. First, the need to advise the defendant proactively compromises their role as a neutral decision maker. Second, interventions reveal the constant pressure for case management and quick disposition of the cases. The PDO project relieved the judges from the need to perform unwanted functions in the criminal proceedings without jeopardizing the fairness of the procedure and the outcome.

## 5. The Bulgarian Legal Aid Law from 2006

The results of the publicly announced OSI–Sofia study and the EU Accession Reports focused public attention on the problems of the legal aid system and generated a momentum for change. In a form of public-private partnership, a working group under the auspices of the Ministry of Justice developed a concept for reform of the system for delivery of legal aid. The fundamental principles reflected in the proposed reforms were coded in mid-2004 in a Concept Paper for legal aid reform developed by experts from the Ministry of Justice, JI, OSI–Sofia, and the Supreme Bar Association. The Concept Paper stemmed from the principle that the Bulgarian legal aid system should comply with the ECHR standards for effective access to legal aid. The Minister of Justice at the time issued an executive order, declaring the official position of the Ministry of Justice. The strategy was in the form of a policy proposal and had non-normative and non-binding effect. Responding to the external pressure from Brussels in early 2005, the Ministry of Justice quickly developed a Draft Legal Aid Act. The provisions in the Draft Act had three sources. First, the strategy insisted that a body with invested interest in the legal aid system should manage it. Second, the provisions of the Draft Legal Aid Act were based on existing procedural provisions that regulated the delivery of legal aid. Lastly, due to pressure from the Bar, the provisions tried to balance the existing policy interests. At that time, and at later stages, the Bar actively lobbied to receive as much control as possible on the legal aid system, insisting that the profession of attorneys requires independence from any form of

external control or influence. Independent experts, however, commented that the Bar aims to guarantee its control over the spending of the legal aid budget and to minimize options for control on the quality of the performance.

Without much debate, the Parliament adopted the Law on Legal Aid (LLA) in October 2005, and it went into effect on 1 January 2006. In accordance with Art. 6 para. 3 of the ECHR, the LLA provides for legal aid in criminal, civil, and administrative matters. Thus the scope of the previous system, which provided for assistance only in criminal cases, expanded significantly.

One of the central features of the reforms is the establishment of an independent regulatory body, the National Legal Aid Bureau (NLAB), to administer the provision of legal aid and the distribution of budgeted expenditures, as well as to monitor and control the quality of services provided. Unlike the situation prior to the adoption of the LLA, the budget for the NLAB will be separate from that of the judiciary. In addition to failing to guarantee any coherence in the access to legal aid, the old system failed to provide for a budget separate from the judiciary budget, which made it difficult to plan legal aid spending effectively. Under the Law, the national budget provides funding for the NLAB's activities. A chairperson and a vice chairperson, appointed by the government upon the Minister of Justice's nomination, govern the NLAB. The Supreme Bar Association appoints the remaining three NLAB members.

The LLA guarantees access to legal aid in two forms—primary legal aid and secondary legal aid, which is the representation at trial. Article 21 of the LLA provides for legal aid at four procedural stages:

- prior to making an agreement to represent a client in court and filing a petition to the court;
- in connection with drafting documents for filing a petition to the court;
- during actual court proceedings; and
- in the course of pretrial detention.

The scope of legal aid under the LLA covers all cases in which representation is mandatory by law, as well as all cases in which the claimant or defendant does not have adequate financial resources to pay for an attorney but wishes to have one and the interests of justice so require.

The LLA establishes the procedure and general financial criteria for assessing whether a defendant or a party in a civil or administrative case has the means to pay for an attorney. Generally, the assessment should occur before the court hears the case or action. In criminal cases, the court is to base its judgment on the “estimated financial situation” of the defendant. This provision allows the judge to use discretion in evaluating the defendant's ability to afford a private lawyer, which results in a large degree of variation in application similar to the previous system. In addition, a discretionary means test deprives the legal aid policymaking body of its primary authority to manage the legal aid system by monitoring the level of need for legal aid and adjusting resources accordingly. In civil and administrative cases, the judgment of the court should reflect a number of specific factors, including the income of the client and his or her family, a certification of financial condition prepared by the client, family status, medical condition, employment status, and other relevant circumstances. A court may decline to require the provision of legal aid where it determines that such aid is not justified.

The LLA establishes detailed procedures for selecting and registering a lawyer as a legal aid provider. The NLAB maintains a national registry of lawyers who have applied to enter the legal scheme, and it determines criteria for selection and dismissal of legal aid lawyers. The LLA details the grounds for expulsion of attorneys from the registry as a sanction for actions that are not compliant with the LLA or with their obligations as legal aid providers. Another mechanism for monitoring is the reimbursement system for legal aid delivered, under which attorneys must submit written reports on the type and number of actions performed for the NLAB. Reports must be presented in a form approved by the NLAB and subsequent payment from the NLAB is conditioned on submission of the report.

The local Bar Councils<sup>12</sup> nominate an attorney to provide aid in the case of each applicant who is to receive aid, and the presiding body<sup>13</sup> is obliged to appoint the nominated counsel to provide the aid. The Bar Council also maintains a list of designated “attorneys on duty,” from which its secretary must select and appoint on-duty attorneys on a twenty-four-hour basis in cases of particular urgency, such as interrogations by a judge in pretrial proceedings.

The LLA also regulates the provision of legal aid in cross-border disputes by adopting provisions implementing EU requirements in this area. These provisions became effective upon Bulgaria’s accession to the EU.

## **6. Concerns Regarding the Implementation of the Law on Legal Aid**

Since the first days of enforcement, the LLA has revealed critical shortcomings that raise serious concerns and indicate the need for further legislative amendments. Most of the problems are traceable to the resistance of the Ministry of Finance to support the establishment of a fully functional NLAB with local structures that conduct selection of service providers and control their performance. Active lobbying from the Supreme Bar Council and the unwillingness to consider the issue of lawyers’ accountability further decreases the potential of the LLA. The NLAB designed as an institution that was supposed to protect the interests of justice, taxpayers, and legal aid clients. However, during the discussions of the draft LLA in Parliament, the Ministry of Justice took a conformist position and abandoned many of the principles included in the Concept Paper and early drafts of the Law. Expected problems with the enforcement of the LLA fall in two categories—administrative deficiencies and policy predicaments, both of which are detailed below.

### **6.1 Administrative Deficiencies**

The radical restructuring of the legal aid system envisaged by the LLA depends upon the establishment of an adequate administrative infrastructure with the capacity to implement the reform and achieve the set goals. Despite the warnings expressed by experts, the law was passed with a *vocatio legis* period of less than three months and as result of this, during the first year of enforcement of the LLA, the NLAB did not have adequate staff and premises, so the legal aid system was in a state of uncertainty. Especially critical were the first four to six months of the law’s application, when the workload of pending criminal cases was pressing for delivery of legal aid but the system was dysfunctional.

An additional problem is the NLAB's composition: three of the five members are attorneys appointed by the Supreme Bar Council. Currently the appointees are practicing lawyers and active members of the Supreme Bar Council. During the legislative phase, experts expressed their concerns that the predominance of practicing attorneys in the NLAB may negatively affect its independence and operational capacity to implement the legal aid policies. Lack of commitment from these members is already raising concerns. A proposal for reforming the composition of the NLAB through a legislative amendment should be formulated to allow representatives of the judiciary and nongovernmental organizations to actively participate in the NLAB.

Furthermore, the funding for legal aid for the 2006 fiscal year was inadequate with regard to the increasing demand for legal aid services and the new fees for legal aid providers. On the other hand, the budget for the administrative overhead of the NLAB is sufficient for the development of sound human and technical resources.

An additional administrative deficiency of the NLAB is the inconsistent scheme for the remuneration of *ex officio* defenders. The bylaw establishing the tariff for legal aid links each lawyer's fee in criminal cases to the severity of the penalty. This is a traditional scheme in Bulgarian legal culture and is relatively easy to manage. However, problems arise because the level of penalty is not a good indicator of the amount of legal services delivered in each particular case. Furthermore, the statistical data collected in the Bulgarian judiciary does not classify crimes according to the foreseen punishment, but by the type of the crime. This misalignment means that the trends in the courts' workload cannot predict the demand for legal aid. Hence, the NLAB is extremely limited in its ability to plan the development of the legal aid system based on the trends in the general legal system.

## 6.2 Policy Concerns Regarding Implementation

The major policy problem of the Legal Aid Law is the absence of clear distinctions between the functions of service providers and those of service regulators. This distinction has been compromised at both central and local level due to active lobbying from the Bar and lack of sufficient commitment from the Ministry of Justice. At the central level, the composition of the NLAB gives clear advantages to the Bar, which is the professional organization of the service providers. The extent to which the NLAB will be an institutional safeguard for high quality, efficient, and affordable legal aid remains to be determined but the imbalance in its decision-making body poses serious risks.

Management of legal aid at the local level is predominantly vested in local Bar Councils, whose officials appoint a defender for each particular case and then assess his or her performance. The NLAB therefore lacks authority over appointment and assessment, which places it in a poor position to formulate and implement coherent legal aid policies. Although there are some options for the NLAB to carry out peer reviews as a quality assurance strategy, the delegation of controlling functions to local Bar Councils could compromise the new legal aid system.

Furthermore, according to the Law, the NLAB does not have any role in the establishment of eligibility criteria for the granting of legal aid. In secondary legal aid, judges, investigators, and police officers are entitled to assess the financial abilities of potential legal aid clients and the requirements of the interests of justice, and then to decide whether to grant legal

aid. Indigence is the major ground for the appointment of an *ex officio* defender in criminal, civil, and administrative cases. Hence, the NLAB is extremely limited in formulating the eligibility criteria for legal aid while balancing between legal aid in criminal, civil, and administrative cases.

The establishment of the NLAB through legislative amendments of local offices should be considered. Decentralization would allow the NLAB to assume some of the core functions that are now delegated to the local Bar Councils and to become a real policymaking and policy-implementing authority.

## 7. Other Developments

### 7.1 Enforcement of Relevant Criminal Procedure Code Provisions

Other positive developments in the reform of Bulgaria's legal aid system are noticeable in the application of the provision of Article 70(1)(7) of the Criminal Procedure Code (CPC),<sup>14</sup> which provides for appointment of *ex officio* legal counsel to indigent people in criminal cases. The 2004 research project indicated that this particular ground for legal aid is widely used in different phases of a criminal case. The Supreme Court of Cassation (SCC), the court of last instance in Bulgaria, has produced a significant body of case law on the application of Article 400 CPC, which establishes the standards for guaranteeing adequate access to legal aid for indigents.

In decision no. 231 from 24 April 2002, the SCC held that a trial court must articulate its reasons for refusing to appoint a legal counsel in cases where a defendant has requested one—a conviction is reversible if the court fails to state the reasons for the refusal to provide counsel. However, in decision no. 415 from October 2002, the SCC was on a position that a trial court is not bound to appoint *ex officio* legal counsel on the basis of Article 70(1)(7) in cases where the defendant has not made an explicit request.

In January 2004, a nongovernmental organization appealed a decree of the Council of Ministers that substantially increased court fees before the Supreme Administrative Court (case 7738/2003). The Council of Ministers justified the increase on grounds that per capita income in Bulgaria had increased over the last few years. In its decision no. 295 from 16 January 2005, the Supreme Administrative Court explained that court fees directly influence access to justice and that tax increases did not properly reflect the social and economic realities in the country; thus, the increase in court fees effectively hindered people's ability to exercise their rights. Based on the collected evidence, the Court concluded that the increase in fees was disproportionate to the increase in income and could leave sizable portions of Bulgarian society without adequate means for protecting their rights and legitimate interests.

In 1996, in its decision 479 from 8 January 1996, the SCC declared that indigent defendants' right of access to justice derives from Article 6(3)(c) of the ECHR. Recent case law provides valuable interpretations for courts and pretrial authorities on the application of this rule. SCC decision no. 475 from November 2001 established that when a defendant requests the appointment of *ex officio* legal counsel, he or she is not obliged to provide written evidence of financial status if the court has not ruled otherwise. According to the decision, a court can

appoint an *ex officio* lawyer based on an oral or written request and assessment of the interests of justice, even if the financial condition of the defendant in the case are yet to be determined.

## 7.2 Regulations Regarding Attorneys

In June 2004, the *State Gazette* published a new Bar Act<sup>15</sup> that regulates the organization and management of the Bar, rights and duties of attorneys, liability of attorneys, types of attorney associations, and rules governing the practice of foreign attorneys. Regarding the institute of *ex officio* legal aid, Article 44(1) of the Bar Act stipulates that an attorney must provide legal representation when selected by the local Bar Council. An attorney can lawfully reject the *ex officio* appointment only in cases of conflict of interest or inability to provide legal aid due to lack of expertise in the areas of law involved in the case.

Chapter 13 of the Bar Act details the disciplinary liability of attorneys. In fact, this form of *ex ante* control is the only mechanism currently in place that can secure the quality of legal aid, as special provisions for monitoring legal aid delivery to indigent people do not exist. Art. 132 of the Bar Act establishes grounds for initiating a disciplinary proceeding, which can be triggered by legal or natural persons or can be started on the basis of information published in the media. Local Bar Councils form disciplinary courts, which have authority over disciplinary proceedings. However, disciplinary proceedings are rarely initiated by clients as most clients are unaware of their right to do so.

## 8. Conclusions

Several studies and assessments identified significant shortcomings in the Bulgarian legal aid system. The findings from these studies, as well as external pressures, generated certain results: implementation of pilot projects and a comprehensive review led to the adoption of a law that significantly reforms the legal aid. Whether the reforms will succeed in practice, however, remains to be determined. The Law contains many broad provisions and standards and it is unknown how and with what consistency the courts will apply these provisions. A number of significant questions surrounding funding for the new programs remain unanswered. The most important of these questions are:

- With what level of integrity will the Local Bar Councils exercise the right to select attorneys in individual cases?
- What abilities will the NLAB develop with regard to their controlling and monitoring powers?
- What is a sufficient budget for the legal aid system?
- How long it will take for the system of legal aid in civil and administrative matters to become operational?

Furthermore, if remuneration for legal aid continues to lag significantly behind the private sector, quality of aid will continue to be an ongoing problem. Nevertheless, the LLA is a significant step towards a system that provides broad-based access to justice in Bulgaria.

## Notes

1. Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5.
2. During the debates of the Draft Legal Aid Act it was argued on a few occasions whether legal entities should be granted rights to benefit from the system of legal aid. An overwhelming majority of the commentators held the opinion that at the early stage of the legal aid system's reform, priority should be given to the needs of individual human beings; the needs of legal entities should be secondary.
3. Martin Gramatikov, "Quality and Standards of *Ex officio* Legal Aid," in *Access to Justice: Ex officio Legal Aid*, edited by Gergana Marinova (2006).
4. *Zakon za Pravnata Pomosht* [Legal Aid Act] 2006, State Gazette, no. 79, 4 October 2005.
5. Krasimir Kanev, *Access to Justice: International Standards and the Bulgarian Status Quo*, Bulgarian Helsinki Committee (2003).
6. Gergana Marinova, *Access to Justice: Ex officio Defense in Criminal Cases*, Open Society Institute–Sofia (2005).
7. The lack of a unique number for each case forced the researchers to use the date of indictment as criterion for randomly selecting cases from the general population.
8. At the time, the Supreme Judicial Council started to account the legal aid budget as a separate line in the budget of the judiciary. Before that, the practice was to merge the legal aid budget into a broad category that aggregated the fees for the *ex officio* appointed lawyers, experts' fees, witness fees, and a "miscellaneous" category.
9. Veliko Tarnovo was selected for the pilot project because of its strategic location in the center of an appellate court region and because the caseload of its courts contributed to the sound management of the proposed legal aid delivery model.
10. These attorneys are admitted to the Bar and have the same status, rights, and obligations as all other attorneys. The term *public defenders* is used in the course of the project. The Bulgarian Bar Act does not recognize the concept of a *public defender*.
11. The state covers legal costs for these defendants. The trade-off is in the lower remuneration levels that the state pays as compared to the private clients.
12. There are twenty-seven local Bar Councils in Bulgaria.
13. In civil cases, the presiding body will be the court. In criminal proceedings at the pretrial phase, the presiding body is the investigating police officer, or in rare cases, this will be the investigative magistrates (*sledovateli*).
14. *Nakazatelno procesualen kodeks* [Criminal Procedure Code] 1974, State Gazette, no. 89, 15 November 1974 (repealed). The currently acting Criminal Procedure Code from 2005 sets out the grounds for *ex officio* appointment of attorney in Art. 94 para. 1.
15. *Zakon za advokaturata* [Bar Act] 2004, State Gazette, no. 55, 25 June 1974.



# The Role of the Nongovernmental Sector in Pursuing Reform of the Legal Aid System: The Case of Poland

by Łukasz Bojarski

This article presents the current structure for legal aid in Poland and civil society efforts led by the Helsinki Foundation for Human Rights, which strives to improve access to legal aid.<sup>1</sup>

## 1. General Structure of the Polish Legal Aid System

Under the Polish legal aid system, advocates and legal advisers represent the indigent in court proceedings as *ex officio* counsel. Attorneys represent clients in all kinds of cases, while legal advisers represent clients in cases involving civil, labor, and commercial law and are restricted from providing representation for criminal offenses that are more serious than petty crimes.

The system of appointing *ex officio* lawyers is different in criminal and noncriminal cases. All advocates are obliged to take on *ex officio* criminal cases and the state pays them to do so. Legal aid is granted by the president of the court, who can delegate this power to other judges, in cases of mandatory defense or at the accused's request. The president appoints advocates from an alphabetical list of all practicing attorneys. To be eligible for legal aid in noncriminal cases, applicants must be exempt from paying court costs. The judge presiding in the case determines eligibility, and the local Council of the Bar or Legal Advisors appoints the lawyer. Furthermore, procedures differ for appointing legal aid lawyers in proceedings before the Constitutional Tribunal, new administrative proceedings, and cross-border disputes. Since the Polish legal aid system does not have its own budget, particular courts are responsible for legal aid lawyer compensation.

## 2. Nongovernmental Organizations and Legal Aid Reform

The Helsinki Foundation for Human Rights (HFHR) decided to focus on access to legal aid in 1999, when legal aid was among the most problematic areas in the Polish legal system. Although interested parties appeared to be dissatisfied with the existing system of *ex officio* legal aid, access to legal aid did not receive enough attention. Government and research institutes were not conducting surveys or otherwise obtaining the relevant information, and there was no public debate on the issue. Government officials, representatives of the professional associations, and judges reported insufficient financial resources, delays in payments, and poor quality of *ex officio* legal aid. In addition, nongovernmental organizations pointed to the absence of clear criteria for granting legal aid, the small number of indigent clients covered under the system, and the limited scope of service.

Since the situation appeared to be similar in other countries, HFHR in Poland joined *Promoting Access to Justice in Central and Eastern Europe*, a common project of HFHR, the Bulgarian Helsinki Committee, INTERIGHTS, and the Public Interest Law Institute (PILI). The European Union and the Open Society Institute funded the project and collaborated with the Open Society Justice Initiative. Between 1999 and 2003, HFHR developed and conducted the *Access to Legal Aid in Poland* project.

HFHR has researched the legal aid system in Poland for the past eight years, identifying its deficiencies and attempting to initiate and influence the process of reform. Specifically, HFHR conducted surveys and active campaigns in order to assess the Polish legal aid system, identify areas for reform, and present recommendations in a report during a National Legal Aid Forum. The report and forum were part of a strategy to provoke discussions between the government, professional associations, and representatives of the nongovernmental sector about reforming legal aid regulations and practices in Poland. The activities HFHR undertook to this end included:

- reviewing laws and discovering that Poland has seventy-nine different acts with provisions concerning various aspects of legal aid rather than a comprehensive legal aid act;
- analyzing Polish and international jurisprudence concerning access to legal aid and its quality;
- gathering statistical data from different public institutions and professional associations;
- surveying both represented and unrepresented parties in court cases and prisoners regarding access to legal aid and its quality, gathering the opinions of attorneys, legal advisers, and public prosecutors concerning the legal aid system, interviewing the presidents of district and regional courts, organizing focus groups with judges to discuss their experiences and opinions, and consulting nongovernmental organizations providing advice and legal assistance;
- developing case studies illustrating the main problems with, limited scope, and poor quality of legal aid; and
- collecting and distributing materials related to legal aid.

HFHR also built on the experience and research of its international partners in this project, such as the Bulgarian Helsinki Committee in Sofia, INTERRIGHTS in London, and PILI in Budapest and New York.

## 2.1 Project Findings

The project identified several systemic issues, including:<sup>2</sup>

- *Lack of Reliable Data:* The Ministry of Justice, courts, and professional associations were not adequately collecting statistical data regarding access to justice issues. The Ministry of Justice only collected data tracking total expenditures for legal aid. Their records therefore excluded important factors such as total number of legal aid cases, a budget breakdown by type of case, and the stage of proceedings at which the legal aid was granted. The only available data on total number of legal aid cases came from professional associations, and the Legal Advisers and the Bar in particular, but it was unreliable.
- *Lack of a Separate Legal Aid Budget:* The legal aid system in Poland does not have a separate budget; rather, funds for *ex officio* cases come from court budgets. If a court suffers financial difficulties, expenses for legal representation are among the first to be cut, which has caused delays in payments lasting up to a couple of years. Although the Ministry of Justice is monitoring the increasing costs of legal aid, generally resulting from a significant increase in attorneys' fees, measures for covering these costs have not been included in the state budget.
- *Lack of State Policy:* Both the lack of statistical data and a planned budget preclude the implementation of an adequate and comprehensive state legal aid policy.
- *Lack of Clear Criteria for Granting Legal Aid:* Poland does not have a comprehensive legal aid act and clear criteria for granting legal aid. In criminal cases, a defendant "may demand to have an *ex officio* counsel appointed, provided that he/she adequately demonstrates that he/she cannot bear the costs of defense," but there is no guidance regarding how indigents are to "adequately demonstrate" their lack of resources. In addition, there is no means test, the court does not have to provide explanations for its eligibility decisions, and there is no process for appealing legal aid refusals. In civil cases, an *ex officio* attorney is available only to persons who were previously exempt wholly or in part from court costs. The client is obliged to submit a statement containing detailed data about his or her family situation, property, and income. In addition, despite widespread agreement regarding the value of a standardized means test, different courts continue to use a variety of non-standardized criteria. Courts have discretion to grant *ex officio* legal aid "if [the court] finds the participation of a lawyer necessary in the case" based on the information contained in a questionnaire that was introduced in 2006. However, as the judge presiding in the case ultimately decides to grant the *ex officio* attorney, impartiality is an issue.
- *Limited Access to Legal Aid:* Existing data demonstrate that a minimum of half of those convicted in district and regional courts of first instance did not have legal representation. In addition, the use of legal aid during and immediately after arrest is minimal. Furthermore, legal aid was provided in less than 0.2 percent of civil cases.

- *Insufficient Number of Lawyers*: Although the number of cases received by courts increased from less than three million in 1991 to about ten million in 2003, the number of attorneys during that period only rose slightly. This is attributable to the restrictive policies of the Bar and the lack of objective and transparent criteria for admission.
- *Poor Quality of Legal Aid and Lack of Control Mechanisms*: There are no standards of conduct related to *ex officio* cases or mechanisms of quality control. Although professional associations are responsible for such matters, they have generally failed to take action. The state has significant legal options to ensure some measure of control, including the initiation of disciplinary proceedings against attorneys who do not adequately perform their duties, but it rarely makes use of them. The poor quality of legal aid is in part due to the small number of lawyers providing legal aid, resulting in overburdening legal aid providers with *ex officio* cases. It is also because specialization is not taken into consideration when attorneys are appointed to provide legal aid.

## 2.2 Project Recommendations

Based on the surveys' findings, HFHR formulated a number of recommendations and divided them into two groups: reform of the current legal aid system and more expansive systemic changes.<sup>3</sup> Regarding the existing system, HFHR recommended the following:

- state agencies, professional associations, and academia should conduct research and surveys, gather statistical data to precisely identify problems, and regularly evaluate the effectiveness of the legal aid system;
- the Ministry of Justice should develop clear criteria for granting *ex officio* legal aid consistent with standards established by the European Court of Human Rights and recommendations of the Council of Europe;
- the Ministry of Justice, judicial bodies, and legal corporations should compile new lists of attorneys taking into consideration their specialization and willingness to take *ex officio* cases;
- the Ministry of Justice and professional associations should establish standards and evaluation procedures for *ex officio* counsel to ensure quality control;
- the Ministry of Justice and legal organizations should promote pro bono activities among lawyers through professional training, which could be complemented by training provided by NGOs; and
- state agencies should publish clear guidebooks explaining every citizen's right to *ex officio* legal aid and appropriate application procedures.

Regarding systemic changes, HFHR recommended:

- the Council of Ministers should adopt a comprehensive act regarding legal aid;
- the Council of Ministers should create an independent institution to handle problems relating to legal aid and a separate legal aid fund;

- the Council of Ministers should introduce alternatives to *ex officio* models for legal aid delivery, such as a public defender office or contracting system, organize pilot projects, analyze costs and effectiveness of different solutions, and adopt the most viable option;
- the Council of Ministers should develop a system for delivering legal advice to the indigent;
- the Ministry of Justice and professional associations should introduce objective criteria and procedures for recruiting advocates and legal advisers and the Bar should open access to the profession so as to raise the number of attorneys; and
- professional associations and NGOs should develop standards for cooperation.

### 3. The National Legal Aid Forum and the Final Report

The National Legal Aid Forum (Forum) was organized in June 2002 by HFHR and the Parliamentary Commission on Judiciary and Human Rights to present HFHR's findings and recommendations, survey international standards and different legal aid delivery models, and engage the Ministry of Justice, professional associations, and Parliament. The Forum drew over 100 participants representing all branches of government, professional associations, public institutions, academia, and the nongovernmental sector. During the Forum, several representatives of Parliament, the Ministry of Justice, and professional associations promised to initiate reform of the legal aid system in Poland. *Access to Legal Aid in Poland: Monitoring Report*, released by HFHR in September 2003, presented project findings, recommendations, main points from the Forum, and international standards.<sup>4</sup>

### 4. Legal Aid Developments in 2003 and 2004

Despite the declarations and promises formulated by some decision makers during the Forum, the government and professional associations failed to initiate reform. Moreover, the special team established by the Bar to examine legal aid did not disclose the results of its work. Although there were several positive developments suggesting future reform, some laws were amended to decrease access to legal aid.

A new Act of Parliament on Procedures before Administrative Courts introducing innovations into Polish legal aid practice came into force in January 2004.<sup>5</sup> It included a new, standard application procedure for legal aid and a means test and allowed for both judges and court registrars to decide whether to grant legal aid. It also separated the processes of appointing legal aid lawyers and exempting clients from court costs. Unfortunately, it did not include other innovative proposals in the draft law, such as those creating a separate legal aid fund, giving clients the right to choose particular lawyers, and advance payment of a portion of the lawyer's honorarium.

The Council of the European Union Directive to Improve Access to Justice in Cross-Border Disputes was replaced in Poland by the Civil Law Codification Commission's Law

on Legal Aid in Civil Proceedings Taking Place in European Union Member States.<sup>6</sup> The law requires the Minister of Justice to provide a model legal aid application.

In order to make the process of granting fees waivers and appointing *ex officio* lawyers more objective, the Ministry of Justice and the Civil Law Codification Commission prepared a new law on court costs in civil matters. The law envisioned the preparation of a detailed application form or a “means questionnaire.”<sup>7</sup> The Minister of Justice’s decree of January 2006 also issued regulations and a “standard form of means questionnaire.” In addition, the law on costs reduces the filing fee from 8 to 5 percent of the value of the dispute and establishes a set fee in certain cases.

#### 4.1 The Twinning Project

The Twinning Project, conducted by the Polish and French Ministries of Justice with the participation of NGOs, focused on access to legal information. The project lasted for one year and ended in September 2004. Three pilot information centers opened in regional courts because of this project. Clients receive both general information, including information regarding their rights, procedures, institutions, and standard forms of legal motions, and specific information regarding their cases at the information centers. Furthermore, the Ministry of Justice established a working team of judges to prepare informational leaflets, resulting in the production of ten leaflets on rights and procedures.

#### 4.2 Negative Developments

Reform efforts during this period were neither strategic nor comprehensive. Despite many recommendations from the nongovernmental sector, the government’s legal aid reform efforts have been fragmentary, with government offices unaware of the activities of other offices. As a result, there are distinct legal aid application procedures for proceedings involving administrative, civil, criminal, Constitutional Tribunal, and cross-border disputes.

Moreover, several aspects of the legal reform were regressive. On 1 July 2003, amendments to the Criminal Procedure Code came into force. Although their objective was to speed up the criminal process and limit costs of proceedings, they also limited access to defense and legal aid.<sup>8</sup>

While the amendments to the Civil Procedure Code that came into force on 5 February 2005 accelerated proceedings, limited costs, and established an adversarial procedure, they also significantly limited the ability of courts to instruct and help unrepresented parties.<sup>9</sup> Meanwhile, the scope of actions taken by a party in civil proceedings in which legal representation is required was broadened. These amendments were widely criticized by prominent lawyers in Poland for having weakened the position of vulnerable, unrepresented parties.<sup>10</sup>

### 5. Legal Aid Developments from 2004 to 2007

#### 5.1 The Establishment of a Nongovernmental Coalition

NGOs have initiated their own efforts at reform despite the government’s failure to develop systemic reform. HFHR, the Legal Clinics Foundation, the Union of Citizens Advice Bureau,

and the Polish Association of Legal Education created an informal coalition to improve access to justice in 2004.<sup>11</sup>

The coalition partners created the Nongovernmental Advice Platform (PPP—Pozarządowa Platforma Poradnicza), a forum for cooperation and the exchange of information, standards of work, publications, guidebooks, and leaflets among those working in the field.<sup>12</sup> Coalition partners developed a common strategy, shared their experiences with the Ministry of Justice, and advocated for a strategic approach to legal aid reform. The coalition also distributed a set of recommendations regarding access to general legal information, individualized legal information and advice, and legal aid in court proceedings in *Access to Legal Information, Citizen and Legal Advice, Legal Aid—Solutions Proposed*. The document also presented “obligations of the governmental agencies,” “responsibilities of the legal corporations,” and “responsibilities of the social organizations (NGOs).”

The coalition recommended that the Ministry of Justice establish an information unit to coordinate the creation of materials, including updates and distribution, and prepare an information database compiling all guidebooks. The coalition also proposed the creation of district legal aid offices to provide legal information, out-of-court legal advice, and trial representation based on the model of district Family Assistance Centers and Consumer Rights Ombudsmen.<sup>13</sup> In order to develop national standards, the coalition recommended creating minimum standards of quality to govern the provision of legal information and advice, training programs, materials for legal advice providers, and standardized information materials for clients. In addition, the coalition proposed adopting a strategic approach to reform by developing a single coherent system and passing a Legal Aid Act that would create a Legal Aid Board and Legal Aid Fund. It also advocated collaborating with NGOs in a working group to develop reform initiatives.

## 5.2 Ombudsman and Nongovernmental Groups Cooperation

The Polish Ombudsman played an important role in reforming the legal aid system, joining NGOs in their advocacy efforts. The Office of the Ombudsman receives complaints regarding Constitutional rights and liberties violations, examining approximately forty thousand cases a year, receiving about 3,500 personal visits from clients, and offering advice by telephone in 13,500 instances.<sup>14</sup> According to Professor Andrzej Zoll, who acted as Ombudsman between 2000 and 2005, applicants in over 50 percent of all cases need to receive simple legal information and advice regarding their legal situation, rights, and options. As a result, Professor Zoll stressed access to legal information and legal aid and took a number of different actions relevant to the provision of legal aid during his tenure as Ombudsman. For example, he changed the office’s website to feature leaflets explaining particular legal issues and procedures. Appreciating the role of the nongovernmental sector in legal aid reform, he cooperated with University Legal Clinics and the network of Citizens Advice Bureaus. As Ombudsman, Professor Zoll also stressed the need for systemic solutions and reform to improve access to legal information and aid.

In August 2004, Professor Zoll sent an official motion to Minister of Justice Marek Sadowski containing suggestions for reform. The Ombudsman suggested the “full-time lawyers model,” proposing the creation of offices similar to public defender offices, which would deliver pre-litigation advice as well as trial representation, be staffed by full-time lawyers and lawyers’ trainees, and collaborate with legal clinics. The Minister of Justice responded, as required

by law, agreeing with the Ombudsman that reform was necessary, but avoiding substantial proposals for change.<sup>15</sup>

The coalition presented its recommendations at a conference in the Office of the Ombudsman on 6 October 2004. The Ombudsman supported many of the proposed changes, such as the establishment of a working group to handle legal aid reform. In response, the Minister of Justice declared that “access to legal aid for the poor is a credo of his term,” promising to establish a working group and prepare a draft law on access to legal aid. The conference also resulted in the addition of the Stefan Batory Foundation, the Women’s Rights Center, and the Students’ Parliament of the Republic of Poland to the coalition.<sup>16</sup>

### 5.3 Ministry of Justice Working Group

In November 2004, a decree of the Minister of Justice established the working group, comprised of three judges and two prosecutors, all employees of the Ministry of Justice, to prepare a “draft law on access to legal aid” within two and a half months from the decree’s adoption.<sup>17</sup> While the working group members had practical experience in their fields, they lacked experience in the field of legal aid. Individuals with extensive experience in the field, such as members of the Civil Law Codification Commission who had prepared the law on access to legal aid in cross-border disputes, were not invited to take part in the working group. Despite invitations, representatives of the Ministry of Justice did not attend the European Forums on Access to Justice in Budapest in 2002 and 2005; however, the working group accepted several of the coalition’s recommendations.

Despite its deficiencies, the working group prepared a draft law on access to legal aid, which the Ministry of Justice presented to the public on 2 February 2005. The draft law was discussed during a conference with representatives of ministries, professional associations, and the nongovernmental coalition, accepted by the Council of Ministers, and presented to the Parliament in March 2005. However, it was ultimately not adopted.

### 5.4 Draft Law on Access to Legal Aid, 2005<sup>18</sup>

The draft law on access to legal aid established a network of Legal Aid Offices (Offices) in the forty-two seats of regional courts, a National Legal Aid Office, and a Legal Aid Coordination Board. It also called for the creation of Offices in ten regions during the first year, ten more during the second year, and the remaining twenty-two in the following years.

The Offices would deliver “basic legal aid,” consisting of pre-litigation legal information and advice, and “qualified legal aid,” appointing outside lawyers for trial representation. In addition, Offices would grant legal aid in civil, criminal, and family law cases, but not in cases involving taxes and duties or customs, bank loans, managing enterprises, and the creation or activities of nongovernmental organizations. The Offices did not seek to alter existing procedures; rather, *ex officio* legal aid appointments would continue in administrative, civil, and criminal proceedings, to be gradually replaced by Offices.

The Offices would employ law clerks and legal advisers to provide basic legal aid and appoint barristers and legal advisers on a case-by-case basis from professional associations’ lists of legal aid providers for trial representation.

According to the proposed criteria, legal aid would be available for applicants with a monthly income lower than the “minimum of existence” determined by law, which is approximately the equivalent of 124 euros for a single person and 85 euros per capita for families.<sup>19</sup>

The procedure for receiving legal aid in the draft law involved a written application, means test, and formal administrative decision, with the ability to appeal negative decisions in the Regional Administrative Court and the Chief Administrative Court. The draft law also provided for an emergency procedure for immediate legal aid in special circumstances.

The draft law forced the new institutions it created to cooperate with civil society groups working in the field. For instance, four of ten seats on the Legal Aid Coordination Board would be allocated for representatives of civil society groups. The proposed structures would be organized hierarchically, with management of the system handled by the National Legal Aid Office and the Legal Aid Coordination Board responsible for analyzing and evaluating the work of Offices and recommending reforms.

The Parliamentary Commission on Judiciary and Human Rights debated the draft for only one day on 21 April 2005. The debate was put on hold because the law was found to be too controversial, opening the floor to a motion to vote on stopping legal aid work altogether, and it was unrealistic to expect the law to pass by the term of the last parliamentary session in July 2005. Promising to prepare a new law instead, the new government withdrew the draft law from Parliament after the parliamentary election in autumn 2005.

## 5.5 Draft Law on Access to Legal Aid, 2007

The new government continued to work on the issue in 2006, using an “auto-amendment” procedure to set up a new draft law from the 2005 proposal. Several NGOs reviewed the final draft of the Law on Access to Free Legal Advice for the Natural Persons (Law). The Council of Ministers then approved it in April 2007 and sent it to Parliament for adoption into law.

The Law differs from the previous attempts at legal aid reform, which attempted to create large and expensive administrative structures out of reach of those in need. Instead of building public offices in only about forty locations, as the previous draft proposed, the Law establishes grant competitions for legal aid providers in all of the nearly four hundred districts into which Poland is divided, whereby applicants would prepare proposals and organize one or more points where legal aid is disbursed if successful.<sup>20</sup> If granted the right to disburse legal advice, applicants must sign a contract, buy malpractice insurance, and fulfill other criteria that are to be determined by ministerial decree, such as ensuring accessibility to the office and adviser-client confidentiality. The National Legal Advice Council, established by the Minister of Justice, would govern the competition and administration of the whole system.

The Law is only concerned with access to legal information and out-of-court legal advice, maintaining the existing *ex officio* appointments system for representation in court. However, legal advice includes preparation of first court motions, motions for waiver of court fees, and requests of *ex officio* counsel.

Financial criteria related to the right to legal advice are different from those of the previous draft law. Legal advice would be available for those whose monthly income is lower than 150 percent of the minimum of existence. In special circumstances involving victims of domestic

violence, the homeless, and the disabled, this sum would increase to 200 percent. Legal advice would be granted in all legal matters except those involving economic activity, the activities of NGOs, preliminary criminal procedures not involving victims, and tax and customs issues.

The Law also includes a number of provisions related to foreigners and people seeking refugee or related status. In this respect, it implements several EU-wide standards: Directive 2003/109/EC, Article 12(5); Directive 2004/38/EC, Article 24(1); and Directive 2005/85/EC Article 15.

Individuals seeking legal aid must file a motion describing the legal issue for which they are requesting aid, as well as their financial and material status. A decision to grant or deny legal advice should be made without undue delay, no later than seven days following the filing of the motion. Furthermore, once granted, legal assistance should be provided immediately, no later than thirty days following the initial decision. Defendants may challenge denials in a civil court.

The Law remedies deficiencies of the 2005 draft law, eliminating the expensive bureaucratic structure, shifting the provision of legal advice services from the regional to the district level, simplifying the procedure for receiving legal advice, broadening the range of persons and groups who can provide legal advice, and improving the financial criteria for granting legal aid. However, the Law fails to provide for representation in court, limits access to free legal information to indigents, and does not establish an advisory body.

## 5.6 Access to the Professional Associations

In July 2005, after extended debate, Parliament amended the Law on the Bar, Legal Advisers, and Public Notaries, creating new admission procedures for the professional associations. It established a state examination for apprenticeship and a final state exam for admission to the Bar, giving those who pass the right to practice the profession. The adopted law also allowed practitioners with training or practical experience equivalent to formal apprenticeship to forego the apprenticeship and enter the profession by passing the final state exam. Unfortunately, many of its provisions were declared unconstitutional for technical reasons and need to be amended.

The government has prepared a new law on “licensed lawyers,” creating a group of lawyers who would have the same rights as barristers without being members of the Bar.<sup>21</sup> The proposed law establishes a system to be administered by the Minister of Justice granting licenses on three different levels, where licensees at higher levels have more rights. While this system threatens the independence of the professional associations, a private project called “New Bar” proposed the creation of a single law profession unifying barristers and legal advisers with more objective membership criteria and simplified access to the professional associations.<sup>22</sup> Barristers and legal advisers studied and considered this project as part of the proceedings for the General Assemblies held in November 2007.

## 5.7 The Right to Deliver Legal Services

The presumption that the professions of advocates and legal advisers have a monopoly on providing legal services both in and out of court was remedied by a verdict of the Constitutional Tribunal, holding that an interpretation of the penal law provision allowing criminal punishment

for law graduates delivering legal services without being admitted to the Bar is unconstitutional. This verdict was accepted by Parliament, and the law now allows law graduates to deliver legal advice out of court. As a result, new law offices employing law graduates as legal advice providers have been opened in Poland.<sup>23</sup> These developments may lead to the broadening of access to quality legal services, since the tariffs of these new law offices are often lower than those of barristers and legal advisers.

## 6. Conclusions

Systemic change in Poland has been slow, and the country has yet to adopt a law on access to legal aid. Access to legal aid for those in need has not changed substantially while, due to the implementation of the cross-border disputes directive, citizens of other EU countries have more rights than Polish citizens in some instances; for example, they may receive free pre-litigation legal advice not available to Poles. In addition, some legal amendments have in fact weakened the position of vulnerable parties. Meanwhile, the work of different governmental bodies remains fragmentary and inconsistent.

However, there are reasons to be optimistic, including recent advances in the expansion of access to the professional associations. In addition, Poland is in the process of drafting laws on access to legal aid.

Furthermore, NGOs continue to deliver legal aid and develop strategic solutions and proposals for reform. In addition to advocating for systemic reform, NGOs have developed voluntary standards for providing legal information and advice, plans to promote pro bono work, and rules of cooperation among civil society organizations and the professional associations. HFHR also pushed for reform by means of strategic litigation, winning some crucial cases related to access to legal aid such as the case of *Laskowska v. Poland*.<sup>24</sup> HFHR continues to lobby the Polish government to adopt a law on access to legal advice, to improve access to legal aid, and to reform the *ex officio* appointments system.

The joint effort of all stakeholders is necessary for the reform of Poland's legal aid system.

## Notes

1. This paper was originally written in August 2005 and updated in November 2008.
2. Łukasz Bojarski, *Access to Legal Aid in Poland: Monitoring Report*, Warsaw: Helsinki Foundation for Human Rights (2003), available at [www.hfhrpol.waw.pl](http://www.hfhrpol.waw.pl).
3. Bojarski (2003), list of recommendations, 12–16.
4. An abridged version of the book was also published in English and Russian; all versions are available at [www.hfhrpol.waw.pl](http://www.hfhrpol.waw.pl).
5. See Bojarski (2003), 116, and Ł. Bojarski, *Legal Aid Developments: Country Update on Poland* (February 2005), drafted for the Second European Forum on Access to Justice (Budapest, February 2005), available at [www.pili.org](http://www.pili.org). See also Art. 243–263 of the Law on Procedure before Administrative Courts and the Act of Parliament of 30 August 2002, Law on Procedure before Administrative Courts, *Journal of Laws* (2002), no. 153, item 1270. See also *Ustawa z 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi* (Dz. U. z 2002 r., nr 153, poz. 1270).

6. Directive no. 2002/8/EC of 27 January 2003. See also Act of Parliament of 17 December 2004 on Legal Aid in Civil Proceedings Taking Place in European Union Member States, *Journal of Laws* (2005), no. 10, item 67.
7. Bojarski (2005). See also Act of Parliament of 28 July 2006 on Court Costs in Civil Matters, *Journal of Laws* of 1 September 2006 (in force from 1 March 2006).
8. Act of Parliament of 10 January 2003 on Amendment to Criminal Procedure Code, *Journal of Laws* (2003), no. 17, item 155.
9. Act of Parliament of 2 July 2004 on Amendment to Civil Procedure Code (additionally amended on 22 December 2004), *Journal of Laws* 2004, no. 172, item 1804 and 2005, no. 13, item 98. For example, while the law previously stated that “the court *should* deliver...the necessary guidelines and advice regarding procedural actions and the legal effects of both action and non-action,” it was amended to state “if there is a justifiable reason the court *may* deliver necessary guidelines about procedural actions.”
10. For example, by Professor Ewa Łętowska, a civil law professor and justice in the Constitutional Tribunal, and Professor Teresa Liszcz, a labor law professor and member of the Senate (the upper house of the Polish Parliament).
11. Represented by Filip Czernicki, see [www.fupp.org.pl/index\\_eng.php](http://www.fupp.org.pl/index_eng.php). Represented by Hanna Gorska and Alicja Moroz-Rutkowska, see [www.zbpo.org.pl/page/en](http://www.zbpo.org.pl/page/en). Represented by Dagmara Woźniakowska and Witold Klauss, see [www.psep.pl/](http://www.psep.pl/).
12. Within the project Citizen and the Law of the Polish-American Freedom Foundation (see [www.pafw.org](http://www.pafw.org)), administered by the Institute of Public Affairs (see [www.isp.org](http://www.isp.org)).
13. Poland is divided into mid-level administration units known in Polish as *poviats*; there are 380 *poviats*.
14. See [www.brpo.gov.pl](http://www.brpo.gov.pl).
15. Letter of 3 August 2004, RPO-481256-IV/04/BB, and Letter of 13 September 2004, P.II.4308/727/04.
16. Represented by Grzegorz Wiaderek, see [www.batory.org.pl/english/index.htm](http://www.batory.org.pl/english/index.htm). Represented by Urszula Nowakowska, see [www.cpk.org.pl/](http://www.cpk.org.pl/). Represented by Michał Ochwat, see [www.psrp.org.pl/index\\_en.php](http://www.psrp.org.pl/index_en.php).
17. This tight time frame was due to the parliamentary election calendar as elections were supposed to take place in June or September 2005 and there was little time left if the law was to be adopted by the outgoing Parliament.
18. Law on Access to Free Legal Aid Granted by the State for Natural Persons; RM 10-39-05, 23 March 2005; see [www.ms.gov.pl](http://www.ms.gov.pl).
19. “Minimum of existence” refers to the level below which people are unable to survive.
20. Advocates, legal advisers, law school graduates, university law clinics, and NGOs specializing in legal aid provision can participate in these competitions.
21. Draft Law on Legal Licenses available at [www.ms.gov.pl](http://www.ms.gov.pl).
22. Łukasz Bojarski, Adam Bodnar, and Filip Wejman, *Private Proposal, New Bar* available at [www.nowaadwokatura.org](http://www.nowaadwokatura.org).
23. See [www.krislex.pl](http://www.krislex.pl) for these kinds of law offices.
24. ECHR application no. 77765/01; judgment 13 March 2007. In this case, the Helsinki Foundation for Human Rights delivered an *amicus curiae* brief to the ECHR. There were other strategic litigation cases, at both the national and European levels.

# The Hungarian Legal Aid System

*by Márta Pardavi and András Kádár*

This overview of the Hungarian legal aid system summarizes the pre-2005 regulatory framework, as well as legislative developments as of 2008 concerning the provision of legal aid services. It also presents the results of studies and pilot projects conducted by the Hungarian Helsinki Committee.

## 1. Introduction

In 1996, the Hungarian Ombudsman investigated the legal aid system in Hungary. The Ombudsman's examination focused on legal aid in criminal cases, stating, "Within the [Hungarian] justice system, the performance of *ex officio* lawyers fails to provide protection against the violations and errors of the authorities." The shortcomings of the *ex officio* program, however, were merely symptomatic of larger problems with the system. At the time of the investigation, legal expenses were merely "advanced" by the state in criminal cases (with an obligation of reimbursement on the defendant), no legal aid was provided in connection with administrative cases, and legal aid in civil cases was limited to the court proceedings.

The government did not initiate serious efforts to improve the legal aid system until six years after the Ombudsman's investigation. In its 2002 party program, the Socialist-Liberal coalition government stated its intention to build a system of government that would ensure solidarity and equal opportunities for all members of Hungarian society. The government proposed to create a system that would provide quality legal advice and representation for indigent individuals. The aim of this system, or "people's attorneys," as the initiative is commonly known, is to enhance access to justice for persons who, because of financial limitations, would not otherwise be able to effectively exercise their rights. Reforms have included the adoption of a comprehensive law providing for legal aid in civil and administrative cases, as well as the expansion of the availability of legal aid in criminal cases. However, significant problems remain despite these improvements.

## 2. Legal Aid in Criminal Cases

### 2.1 Regulatory Framework and Scope

Under the new Code of Criminal Procedure (CCP) which went into effect in July 2003, provision of defense counsel is mandatory in the following cases: if the defendant is deaf, mute, blind, mentally disabled, does not speak Hungarian, is a juvenile, is detained and has not retained a private defense counsel, or if an indigent defendant is granted personal exemption of costs and requests the appointment of a defense counsel.

Some of the provisions of the CCP were designed to address one of the principal points of criticism of Hungarian criminal procedure in recent years; namely, that the fee of the defense counsel appointed for indigent defendants was only advanced and not borne by the state.<sup>1</sup> Article 74(3) of the CCP provides an exemption from legal aid costs for defendants of limited means.<sup>2</sup>

The detailed rules relating to the degree of indigence required for exemption and the procedure that applicants should follow are set forth by Decree No. 9/2003 (V. 6) of the Minister of Justice on the Application of Personal Exemption of Costs in the Criminal Procedure (Decree). The Decree exempts a defendant from personal costs if he or she (1) lives alone and has a monthly income that does not exceed twice the legally required minimum pension; (2) lives with others and the household per capita monthly income does not exceed the legally required minimum pension; or (3) does not possess assets other than those necessary for everyday living, work (under this rule, for instance, a taxi driver's automobile would qualify as asset necessary for work, but a private car would not), and a residence. As the legally prescribed minimum pension is relatively low, the number of defendants for whom free legal aid is available is very limited.

The Legal Aid Law, implemented in 2003, applies to civil and administrative cases, granting legal aid to crime victims so they may seek legal advice in reporting a crime or seeking damages, and makes legal assistance available for filing requests for extraordinary legal remedies in criminal procedures.<sup>3</sup> Due to the Legal Aid Law, amendments to the CCP now provide legal assistance for indigent crime victims and for the hiring of "private prosecutors" (attorneys who assist victims in initiating court procedures).<sup>4</sup>

### 2.2 Continuing Structural Problems in the Delivery of Legal Aid in Criminal Cases

Despite these improvements to the Hungarian criminal legal aid system, many observers contend that the system is still largely ineffective. While the principal public critic within Hungary has been the Hungarian Helsinki Committee (HHC), the European Commission also raised a number of criticisms of the Hungarian legal aid system in its Regular Reports regarding Hungary's progress toward EU accession for 2002 and 2003.

In 2002, HHC undertook a comprehensive review of the Hungarian legal aid system,<sup>5</sup> finding that the core problems with the existing *ex officio* system were threefold: inadequate financing, deficiencies in the legal framework, and deeply rooted structural problems. These structural problems included fragmented responsibility for the management of the legal aid system, insufficient quality assurance and monitoring of systemic performance and performance in individual cases, the allocation of budgetary responsibilities without corresponding monitoring

powers, and inadequate collection of statistical information regarding the operation of the legal aid system in criminal matters. HHC contends that performance by appointed attorneys is often poor, which may be a result of limited oversight and quality control, the lack of adequate sanctions for malpractice, and low legal aid fees as compared to fees demanded by attorneys in private practice. The 2003 revisions to the CCP did not address these problems.

Observers have also noted that the mechanics for actually appointing an attorney in those cases in which such appointments are mandatory are not conducive to providing indigent defendants with effective representation. An independent party or the defendant does not select the attorney, but the investigating authority (usually the police), which has little incentive to appoint counsel that will actively pursue a defense. In addition, appointed counsel is generally not advised of where his or her client is being held; therefore, many appointed attorneys may not have an opportunity to represent the accused in preliminary questioning. In some cases, it can take days for defense counsel to locate the defendant, by which time the defendant has invariably already been subject to initial, and perhaps repeated, interrogation by police. The absence of counsel during these early stages of an investigation is often crucial, even decisive, in determining the defendant's fate at trial.

In 2003, HHC conducted a comprehensive study of the experiences of pretrial detainees defended by *ex officio* appointed lawyers.<sup>6</sup> The results showed that only 23 percent of the interviewed defendants who had appointed legal counsel were contacted by their lawyer before the first interrogation (as opposed to 40 percent of defendants with privately retained lawyers). In addition, 26.4 percent of defendants with an *ex officio* appointed lawyer indicated that they had not met their defense counsel at the time of research (as opposed to 4.9 percent of defendants with a privately retained lawyer).

### 2.3 The Model Legal Aid Board Project

HHC initiated a Model Legal Aid Board Project in 2004 (Model Project), in cooperation with relevant governmental institutions and with funding from the Dutch Ministry of Foreign Affairs, in order to present a model for legal defense performed by *ex officio* appointed attorneys. The project addresses many of the structural problems with the current legal aid system.

Under the Model Project, the investigative authority does not appoint mandatory counsel; instead, under the terms of the cooperation agreement between HHC and the head of the Budapest police, referrals are made to a 24-hour dispatch system established by HHC. When the dispatch service receives a call from the police, it selects from its list a lawyer based on a previously set duty schedule and certain criteria specific to the case (such as area of expertise and languages spoken). The selected attorney must appear at the police station within one and a half hours. The approximately forty criminal lawyers participating in the Model Project were selected through an open tender and each has entered into a contract with HHC, whereby he or she has committed to be on duty at least once per week. Fees paid to lawyers participating in the Model Project are higher than fees paid under the CCP, but still below market rates (7,200 HUF, or approximately thirty euros, per hour).

The cases included within the Model Project are limited to those involving defendants whose monthly net income does not exceed 50,000 HUF (205 euros) and who do not have property worth more than 300,000 HUF (1,225 euros). The attorney must confirm that the defendant meets a means test that relies on information provided by the defendant. If the

defendant confirms that he or she is willing to participate in the Model Project and have the attorney selected by HHC provide representation, HHC will cover attorney's fees. Defense is provided until the first instance decision is delivered.

HHC has established a Model Legal Aid Board (MLAB) to be responsible for monitoring the performance of attorneys participating in the Model Project. Participating attorneys are required to submit monthly reports to the MLAB summarizing time spent on cases for which they are responsible and including relevant documents prepared by the attorney. The MLAB evaluates the quality of the attorney's work and responds to complaints from defendants. If the MLAB finds that an attorney's work does not meet minimum professional standards, the attorney may be excluded from the program and another attorney will be provided for the defendant.

HHC's initial experiences with the Model Project have tended to validate its concerns and survey results. For example, suspicions that the police repeatedly tended to appoint certain "friendly" attorneys were confirmed, at least in part, on the first day that the Model Project was in operation: an attorney angrily contacted the office claiming that HHC's diversion of appointments from the local police would destroy his livelihood because his career depended on those repeated appointments. HHC also learned through implementation of the Model Project that many police headquarters interpreted the CCP *contra legem* by preventing the participation of lawyers in interrogations held during the so-called short-time arrest (which can be ordered for a maximum of twelve hours by the police), claiming that these were not "detentions" as defined under the CCP—the distinction is critical because detention is one of the instances in which defense is mandatory under the CCP. HHC turned to the Chief Public Prosecutor's Office to assess whether the police interpretation was correct, which supported HHC's position that the police were violating the CCP. HHC has also generally concluded that the fragmented nature of responsibility for the legal aid system makes it difficult to achieve real structural improvements.

The Model Project initially included 120 cases and was scheduled to continue through 2006, after which time HHC expected to address the findings in a report, a conference, and a detailed legislative proposal.

### **3. Legal Aid in Civil and Administrative Cases**

The Ministry of Justice drafted a concept paper for legal aid reform in early 2003, in which it took into consideration many recommendations from nongovernmental organizations. The concept paper resulted in Act LXXX of 2003 on legal aid (Legal Aid Law), adopted by the Hungarian Parliament in October 2003.<sup>7</sup> The reforms implemented by the Legal Aid Law concern only civil and public administrative procedures. The Legal Aid Law is being implemented in two phases. The first phase, which reformed extrajudicial procedures, went into effect in April 2004. The second phase, which would have reformed legal aid in court procedures, did not go into effect in January 2006 as originally planned but was postponed until 1 January 2008, due to budgetary constraints.

The Legal Aid Law introduced three main reforms. First, it revised the existing provisions on legal aid in court procedures, such as cost exemptions and patron lawyers—*ex officio* lawyers

appointed to assist indigent parties in civil court procedures. Second, it created new forms of legal aid for administrative actions and actions prior to, or in lieu of, court procedures. Third, a separate administrative body, the Legal Aid Service (LAS), was set up under the Ministry of Justice, alongside the Parole Office.

The LAS is organized with offices at regional and central levels. These legal aid offices are charged with examining applications for, and granting legal aid to, those who are eligible and providing basic legal information and assistance to any person. The Legal Aid Service is also responsible for management of the legal aid budget and data collection.

Only natural persons are eligible for aid under the Legal Aid Law. Qualifying persons include Hungarian citizens, nationals or residents of another EU member state, foreign residents in Hungary and foreigners whose claim for asylum is pending in Hungary, and other aliens to whom reciprocity agreements apply.<sup>8</sup> Eligibility for legal aid is also limited to individuals meeting a means test pegged to the minimum amount of an old-age pension or the minimum wage.<sup>9</sup> If a prospective recipient's income does not exceed the minimum pension rate and he or she has no substantial assets beyond those necessary to maintain a minimum standard of living, the applicant is entitled to a full cost exemption. Those individuals whose earnings exceed the minimum pension but not the minimum wage are exempt from advancing the costs of procedures, but are required to pay for services if they lose the case. Certain persons, such as the homeless, beneficiaries of social welfare assistance, and asylum seekers, are automatically entitled to a full cost exemption.

The Legal Aid Law also covers legal services in extrajudicial procedures that supplements traditional representation in regular judicial proceedings. Clients who are eligible for legal aid may engage a legal aid provider to receive general legal advice or draft legal briefs or other documents; fees for such services are either borne or advanced by the state. Legal aid may also be provided to indigent clients who are involved in settlement negotiations, mediation hearings, administrative procedures, or other extrajudicial procedures.<sup>10</sup>

The Legal Aid Law expands the number of institutions and individuals who may provide state-funded legal aid. While only attorneys and law firms could register as legal aid providers previously, under the Legal Aid Law other institutions, such as NGOs, minority self-regulatory organizations that contract attorneys, and university-based legal clinics, may do so.<sup>11</sup>

Furthermore, registration as a legal aid provider is no longer compulsory for all attorneys. Instead, the Ministry of Justice contracts with lawyers or NGOs that voluntarily apply; parties applying to provide legal aid may elect to limit their area of practice and specify the number of cases per month they are willing to assume. A searchable online register of legal aid providers is also available on the Ministry of Justice's website.<sup>12</sup> As of 23 March 2006, 431 legal aid providers were registered; of these, 404 were law firms or private attorneys, thirteen were notaries public, two were law schools, and eight were nongovernmental organizations.<sup>13</sup>

Under the Legal Aid Law, clients have two ways of securing a legal aid provider. The first is to submit an application for legal aid to the LAS office for determination of eligibility.<sup>14</sup> If legal aid is granted, the client can select a legal aid provider from the register. The provider will invoice the LAS after services are delivered. The second method is for a client to contact the legal aid provider directly. This is authorized where the need for legal aid is urgent (for example, when a deadline is about to expire) and requires four hours or less of service or, in non-urgent circumstances, when the assistance can be provided in two hours or less.<sup>15</sup> In these cases,

the legal aid provider will assess the client's eligibility, assist the client in completing the aid application form, and provide the legal assistance. The provider then forwards the completed application to the legal aid office.

Certain matters are excluded from extrajudicial legal aid even when a client meets the means test. These include the drafting of contracts unless both clients are indigent, legal advice about bank loans and mortgages, constitutional complaints, cases relating to business activities, the establishment and operation of civic organizations, and customs matters.<sup>16</sup> In addition, clients failing to repay legal aid fees or providing false data in their legal aid application become ineligible for legal aid.

Fee levels for legal aid cases continue to receive criticism and fall markedly short of average market rates for legal services. In 2004, legal aid service providers received 2,000 HUF (approximately 10 euros), plus 25 percent value-added tax per hour as fees, increased with a fixed rate of 15 percent of the hourly fee as expenses. In 2005, fees increased to net 2,500 HUF per hour.<sup>17</sup>

During the period from 1 April 2004 to 31 March 2005, more than 21,304 people sought assistance from regional Legal Aid Offices; of these, 15,994 received legal advice on site and 5,223 clients were granted legal aid.<sup>18</sup> The main types of legal matters concerned labor law, family law, and social security law. The most frequent grounds for refusing legal aid were either that the person's income exceeded the minimum wage or that the legal matter had already reached the courts, where legal aid offices could not provide assistance until 2006.

#### **4. Conclusions**

The reforms enacted by the CCP amendments and the Legal Aid Law have significantly altered the legal aid system in Hungary. The truly indigent are now entitled to receive state-provided legal defense free of charge. The scope of coverage and the number of potential legal aid providers in noncriminal matters have been significantly expanded and the LAS manages of the budget and data relating to the program. Eligibility criteria have also become more precise and inclusive. A graduated means test extends legal aid to people who live just above the poverty level.

Significant problems remain, however. HHC, the EU, and other critics have identified a number of systemic failures in the use of *ex officio*-appointed criminal defense counsel, including intrinsic conflicts of interest in the appointment of counsel, inadequate funding, and the absence of effective quality control mechanisms. HHC Model Project has provided further support for these positions, as well as a significant base of practical experience through which these concerns could be addressed. The realistic prospects for significant reform in the short term, however, are uncertain, since the government indicated that it would indefinitely defer a detailed assessment and any corresponding reform of the criminal legal aid system after the Legal Aid Law passed.

## Notes

1. Act XIX of 1998 on criminal procedure.
2. Such an exemption guarantees the following rights: (a) upon request of the defendant granted personal exemption of costs, the court, prosecutor, or investigating authority is obliged to appoint a defense counsel for the defendant; (b) the defendant and his or her defense counsel may copy the case files free of charge (though only on one occasion); (c) the fee and the expenses (e.g., postage, telephone, travel costs) of the appointed defense counsel are borne by the state.
3. Legal Aid Law Sec. 3(1)(g)–(h).
4. Code of Criminal Procedure, Sec. 343(3), effective from 1 July 2003.
5. András Kádár, Márta Pardavi, and Zsolt Zádori, *Access to Justice Country Report: Hungary*, in *Access to Justice in Central and Eastern Europe: Country Reports*, Public Interest Law Initiative (2002), available at [www.pili.org/en/dmdocuments/CR\\_Hungary.pdf](http://www.pili.org/en/dmdocuments/CR_Hungary.pdf).
6. András Kádár, *Presumption of Guilt: Injurious Treatment and the Activity of Defense Counsels in Criminal Proceedings against Pre-trial Detainees*, Hungarian Helsinki Committee (2004).
7. Full text of the Legal Aid Law is available at [www.im.hu/adapt/letoltes/jogseg-elfogadott.doc](http://www.im.hu/adapt/letoltes/jogseg-elfogadott.doc) (Hungarian), [www.im.hu/legal\\_aid/?ri=505](http://www.im.hu/legal_aid/?ri=505) (English). More information on legal aid in Hungary is available at [www.im.hu/legal\\_aid/](http://www.im.hu/legal_aid/) (English). The government, and specifically the Minister of Justice, issued several decrees to implement the Legal Aid Law: Government Decree No. 254/2003 (XII. 24.) on the Ministry of Justice National Office of the Probation Service and Legal Aid Service; Decree No. 10/24 (III. 30.) of the Minister of Justice on the detailed rules on benefiting from legal aid; Decree No. 11/2004 (III. 30.) of the Minister of Justice on the fees of legal aid providers; and Decree No. 42/2003 (XII.19.) of the Minister of Justice on the detailed rules of the register of legal aid providers.
8. Legal Aid Law, Sec. 4.
9. Legal Aid Law, Sec. 5. The minimum amount of an old-age pension in 2004 was 24,700 HUF (approximately ninety-seven euros). The minimum wage in 2004 was 57,000 HUF (approximately 223 euros).
10. Legal Aid Law, Sec. 3(1): Legal aid in extrajudicial procedures may be granted if the party:
  - (a) is involved in a legal dispute, in relation to which an action may follow, and is in need of legal advice in order to assess his or her procedural rights and liabilities, or when a petition has to be prepared for a subsequent contentious legal statement;
  - (b) is involved in a legal debate that can be settled out of court and it is appropriate to provide the party with information as to the opportunities of an extrajudicial settlement or needs a settlement prepared;
  - (c) participates in an extrajudicial mediation procedure aimed at the out-of-court settlement of a legal dispute and is in need of legal advice prior to signing an agreement terminating the mediation action;
  - (d) requires information regarding legal status in respect to matters directly concerning his or her everyday subsistence (in particular, issues related to dwelling, labor law, or the use of public utility services);
  - (e) participates in an administrative procedure that generates an obligation and is in need of legal advice in order to become aware of his or her procedural rights and liabilities or needs a petition to be prepared for a legal statement;
  - (f) requires legal advice regarding what type of proceedings to initiate in order to protect his or her rights and with which authority to initiate them with or if a petition has to be prepared for such a proceeding to commence;
  - (g) is the victim of a criminal offense in need of legal advice or if a petition has to be prepared in order to file charges or to institute an action for compensation for the damage caused by the offense; or
  - (h) asks for assistance in the preparation of an application for extraordinary legal remedies in a civil or criminal procedure.
11. Legal Aid Law, Chap. VIII, Sec. 64–71.
12. See [www.im.hu/nepugyvvedje/?ri=516](http://www.im.hu/nepugyvvedje/?ri=516).
13. Data posted as of 23 March 2006 on the Hungarian Ministry of Justice's Legal Aid website.
14. Legal Aid Law, Sec. 22.
15. Legal Aid Law, Sec. 43(1).

16. Legal Aid Law, Sec. 3(3).
17. Act CXXXV of 2003 on the state budget for the year 2005, Sec. 58(3).
18. For the practical experiences of the legal aid system, see Annex to Government submission No. IM/IGKOD/2005/JOGS/1996, 30 August 2005.

**p a r t t h r e e**

# Empirical Research



# Researching Legal Aid: Quality as a Case Study

*by Richard Moorhead*

This paper addresses the relevance of policy-oriented research on legal aid for the protection of legal aid systems in times of budgetary crisis. It also discusses the challenges and methods used by policy-oriented research, highlighting as a case study research conducted in the United Kingdom on the quality of legal aid.

## 1. Introduction

In the United Kingdom, Canada, and Australia, there has been a growing interest in research on legal aid. This has been stimulated by three things: a shift away from legal aid systems, largely managed by the legal profession, toward greater governmental intervention and bureaucratic methods of management; the desire to control the costs of legal aid systems; and the need to provide research-based arguments to protect legal aid against the budgetary crises that are now common in developed legal aid systems.

This paper seeks to describe some of the benefits produced by such research. In particular, it examines the different methods employed and some of the results coming from major studies relevant to legal aid. It provides some pointers for those considering commissioning or conducting research in the legal aid field. Many of the studies mentioned here are available over the Internet or from the relevant government departments (usually the Department for Constitutional Affairs) in England and Wales.

This paper begins by considering the research process in outline. There are many textbooks on conducting social science research and evaluations.<sup>1</sup> It would not be sensible to seek to summarize those here. Instead, I try to give some insights into how to conduct research that is meaningful and stimulating but also relevant to policymakers in the access to justice field. The second half of the paper considers the issue on which I have worked most extensively: quality. It acts as a case study to explore some of the issues raised by policy-oriented research work.

## 2. Policy-Oriented Research Work: Some Pros and Cons

Conducting any social science research is difficult. It seeks to answer questions about the “real world” in ways that reflect the truth; research must simultaneously simplify social situations and capture the complexity of them. Often the basic concepts that such research seeks to

explore are highly contested. In our own field, for example, the idea of equal access to justice holds a prominent position. Its meaning, however, can be analyzed from many perspectives, depending on how one answers the question “What is justice?” What does it mean to want equal access to it? Different people with varying political perspectives and experiences have different understandings about the meaning of such ideas.<sup>2</sup>

Good research often balances the need for truth with the need for simplicity or focus. The ability to hone in on the crucial issues and explore those in a way that is both meaningful and useful is critical to successful research. Policy-oriented research has a further complication: it needs to provide practically relevant answers to questions that are currently of interest to policymakers. This is harder than it sounds. Policymakers frequently have agendas that are highly fluid and contingent; budgets or politics often determine the issues that are important to them, and these can change rapidly. As a result, it is very important for researchers working in the field to understand what policymakers want to know, and why they want to know it. Similarly, policymakers need to articulate clearly what they want to know and why, prior to commissioning any research. Once research is under way, researchers and policymakers must continue to communicate about their work to ensure that new developments are taken into account wherever possible. Policy interests can change dramatically during the life of a research project, and, while it is not always possible, researchers may be able to adapt their work to accommodate new or changed interests.

A final point about policy-oriented research is the need to protect the independence of those doing the research. There is a temptation for policymakers, particularly when they are funding the research in which they are involved, to want to shape the findings or make decisions about eventual dissemination; this, of course, can neutralize or modify the impact of the research. It is important to remember that both policymakers and researchers have significant interests in protecting the independence of research. It is vital to the credibility of any findings and the long-term health of a research evidence base in an area. Policy-sponsored research that holds good news for policymakers will *never* be credible if it is not the product of independent minds working to high standards. Similarly, policymakers who simply seek to bury or ignore bad news in research effectively disregard the importance of the evidence base in policy formulation.

There are a number of mechanisms for dealing with this potential problem. Clear agreements about dissemination of results and publication timetables are crucial. In addition, the appointment of independent steering groups can sometimes provide reassurance of proper management of the relationship between policymakers and researchers.

### **3. Before the Work Starts . . . What Is the Question?**

The subject of a research project often seems obvious, but one should not consider this lightly. A key part of a successful research project is the formulation of suitable and specific research questions that are meaningfully answerable by the methods eventually chosen. Good research questions are:<sup>3</sup>

- clear and easily understood;
- sufficiently specific for it to be clear what constitutes an answer;

- answerable so that we can see what data are needed to answer them; and,
- worthwhile, meriting the resources needed to research them.

It is important to be clear about research questions for a number of reasons. If policymakers are commissioning research, a clear question provides a clear indication of what they are requesting. For researchers, clear questions communicate the main purposes of the research both within the research team (in other words, all those collecting data know why they are doing so) and outside of it. Often the methods necessary for the project will flow from the research questions themselves. Research questions can be broad (exploring the way something happens on the ground), descriptive (attempting to describe something objectively or comprehensively), or explanatory (seeking to demonstrate that a problem is caused by something else). While exploratory studies can lend themselves to flexible research methods, the more rigorous and specific the research question, the more carefully one has to think about methods that will effectively explore the specific question and generate meaningful results. There is a wide range of approaches to research: quantitative and qualitative methods, experimental and non-experimental designs, descriptive and experiential methods, theory-based approaches, research synthesis methods, and economic evaluation methods. The appropriateness of each of these should be considered against the research questions, the availability and ease with which data can be collected, and the time constraints within which the researchers and policymakers are working.

Other important issues to consider include (1) who the audience is for the research, (2) what kinds of evidence are going to be meaningful and persuasive, and (3) what resources are available to conduct the research. For example, if researchers are trying to prove whether there is enough “access to justice” in their country, they have to think carefully, asking questions such as these: “What do I mean by access to justice?” “How will I measure it?” “What will I compare the findings against to show whether it is enough?” Through this careful exploration, a set of research questions will emerge that focuses the research and enables the researchers to decide the questions they want to tackle and how they want to tackle them; it also forces researchers and policymakers to set priorities and to compromise on what they are able to do in a research project.

## 4. Methods

### 4.1 Literature Reviews

An important starting point for any study, but one that is often neglected, is a review of available evidence on a topic. There is growing international literature on many aspects of access to justice and legal aid policy. A thorough, detailed review of that literature from the perspective of the unique characteristics of a particular jurisdiction or a particular policy problem can help significantly in contextualizing and focusing a research study. Such reviews as stand-alone pieces of work can also help policymakers formulate policy options. Two interesting examples of such reviews are P.S.C. Lewis, *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research*, London: Department of Constitutional Affairs (2000), and T. Goriely, *Legal*

*Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience*, London: Department of Constitutional Affairs (1997).

#### 4.2 Data Collection from Files

Many studies rely on data collection from files. Plenty of legal work is paper-based, and files from courts, lawyers, or legal aid boards represent a relatively objective source of information that, if easily accessed, can provide evidence on many hundreds or even thousands of cases. There are disadvantages to using files, however. First, the quality of information in files is rarely perfect. Those handling the files will often determine the quality and nature of information retained in files. This information is rarely collected with a view toward helping researchers. Similarly, those handling the files may not always be reliable in recording the information they are supposed to be handling. This is not fatal to this method, but it does cause problems. Data collection instruments need to be carefully designed and piloted to be sure that data of interest to researchers are available in a sufficient number of files to be worth collecting. Information in files may be somewhat self-serving; for example, people working on a file might sometimes record what should have happened on a case rather than what actually happened. Where information on files is coded using administrative categorizations, those filling in the information may code it incorrectly. For example, where a caseworker is coding the ethnicity of a client, he or she might assume a client's ethnicity and record it inaccurately, or simply misclassify it. These sorts of problems may mean that samples of data collected from files need to be crosschecked with other sources.

Official bodies often collect statistical data on their work. There are numerous advantages for a researcher if he or she can gain access to the data. Since the data does not need to be collected, it is a low-cost resource for information. Often the data is comprehensive in the sense that information is from an entire population of cases. However, as with data collected from files, there may be problems. In particular, data collected for official statistics are often collected for purposes other than that which particularly interests the researcher. For example, data collected from a legal aid board's billing system focus on the billing requirements of the board. Those supplying and entering the data have only that purpose in mind, and often have only a minimal interest in ensuring that the data are accurate. As a result, official data sources can be prone to error and omission, as well as containing only information of limited relevance to the needs of a particular research project. As with data collection from files, a sample of this data may require an in-depth crosscheck against other data sources. While data collection through paper records has the advantage of enabling research to cover many more cases than is possible by other methods, it can be disproportionately time-consuming and expensive.

Many studies have used data collected from files as a part of their methodology. Two recent studies on courts offer examples this method: C. Smart et al., (2003) *Residence and Contract Disputes in Court*, volume 1, London: Department of Constitutional Affairs (2003), and Richard Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, London: Department of Constitutional Affairs (2005).

### 4.3 Observation

Observation has an inherent appeal. Seeing how things happen provides the researcher with direct access to an experience not interpreted through paper records or through the words of an interviewee. For this reason, it often gives the impression of being truer or more accurate than other forms of research. Observation certainly does have some advantages along these lines; interviewees may say they will do one thing, but direct observation allows the researcher to see whether, in fact, they do another.

Observation also has disadvantages. Most importantly, there is the capacity for the presence of the researcher to affect the behavior of those he or she is observing—this is known as the “experimenter effect.” Any researcher who has conducted observation-based work will have noticed that those being observed will try self-consciously to show the researcher that they are doing the right thing. Although the researcher wants to see what really happens, the research participant’s change of behavior can effectively mean the researcher is watching a simulation. There are some ways around this problem. One is to devote a great deal of time to observing the same people. The participants may become used to the researcher, and therefore less threatened by his or her presence and less prone to adapt their behavior. A second is to check observation findings against other sources of data to see if they are consistent.

Even after overcoming those problems, a researcher must give special attention to organizing observation. Is the observation to be relatively unstructured, allowing the observer lots of opportunities to record what is of interest, or more structured, requiring the observer to collect specific key information in a routine format? How will the researchers make sure the information collected is as consistent and objective as possible (for example, if more than one observer is collecting information through observation, how do the researchers make sure they record things in the same way)? Is the observation interested in verbal or nonverbal behavior, or a combination of both? How is nonverbal behavior to be documented and reported? Once observation is complete, how will the complex and detailed data be coded and analyzed?

There are also practical problems to consider. Observation is time-consuming and expensive. It is also the most intrusive method for research participants. As with most methods, a researcher must consider ethical issues, in particular, seeking an individual’s consent to be observed. In legal settings, the researcher may be observing highly charged situations where research subjects do not want to be subject to any outside scrutiny for numerous reasons.

For an excellent example of an observational study, see McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford: Clarendon Press (1994).

### 4.4 Interviews

One of the most common research methods is the interview. It provides manageable and clear data, relatively quickly and cheaply. Furthermore, the researcher can tailor questions to very specific research issues. There are a range of interviewing techniques and styles, with three main paradigms: structured, unstructured, and semi-structured interviews. Although these are paradigms, they are effectively points on a continuum of interviewing styles, with structured interviews tending to have more closed questions with fixed answers (which are, in fact, more commonly thought of as surveys and are discussed below), and unstructured interviews being

much more akin to conversations without clear and fixed directions from the interviewer. C. Robson describes the three types of interview as follows:<sup>4</sup>

- A fully structured interview has predetermined questions with fixed wording, usually in a preset order. The use of mainly open-response questions is the only essential difference from an interview-based survey questionnaire.
- A semi-structured interview has predetermined questions, but the order can be modified based upon the interviewer's perception of what seems most appropriate. The wording of questions can be changed and explanations given; particular questions that seem inappropriate to a particular interviewee can be omitted, or additional ones included.
- An unstructured interview can be completely informal. The interviewer has a general area of interest and concern but lets the conversation develop within this area.

One of the limitations of interview data is that the data depend on the knowledge and openness of the interviewee. The interviewee's responses to questions are limited by his or her perceptions of the issues that are discussed, his or her quality of recall, and social pressures to give certain answers to interviewers. For some questions, the reason for a limited answer is obvious. For example, even under conditions of anonymity an interviewee may not want to answer the question, "Have you engaged in criminal conduct?" However, there are potential problems with questions that might involve the interviewee's motivations or abilities in a certain area. For that reason, interviews are most helpful as a way of gauging a person or group's perception of a particular issue, rather than taking individual views as an accurate account of "reality." To give a mundane example, one study compared how lawyers spent their time (measured through observation) with how the lawyers themselves thought they had spent their time (measured through interviews).<sup>5</sup> The results were that solicitors gave a picture of how their time was spent that was very different from reality.

Even given this limitation, interviews can be tremendously useful for understanding how people feel about certain phenomena. Interviews may be the only way, alongside archival work, of looking for historical explanations for situations. Because interview instruments can be easily adapted, sometimes in the course of an interview itself (for example, if the interview is semi-structured), they allow the researcher to adapt the study as information is learned about events from the respondents. Researchers can also use interviews to gather information that is within the direct knowledge of the respondents. There are a number of practical issues to be considered in interviewing:

- Who should be interviewed? How many people, and from which groups?
- What should the topics be? How should questions be phrased?
- How should the interviews be recorded and analyzed? (In larger and better studies, interviews are often tape-recorded; those tapes are then transcribed and the transcripts analyzed, often with the assistance of specialist software.)
- How should the data be made anonymous?
- Who should conduct the interviews? The knowledge and skills of the interviewer are crucial to getting the most out of interviews, particularly where the interviewer is dealing with an experienced interviewee.

Many studies use interviews. The following are recent examples: Smart et al., *Residence and Contract Disputes in the Court Service*, volume 2, and Moorhead and Sefton, *Litigants in Person* (see “Data Collection from Files,” above, for complete citations).

#### 4.5 Surveys

Surveys, particularly postal questionnaires, are often considered the cheapest and easiest form of research. The researcher designs a questionnaire, mails it to a set of respondents, and analyzes the responses. They have some of the strengths and limitations of interviews: the researcher can adapt the research instrument specifically to research needs through careful design, and the data retrieved are relatively clear and easy to analyze. There are four principal forms: face-to-face surveys (essentially highly structured interviews); telephone surveys (structured interviews conducted over the telephone); postal surveys (written questionnaires filled in by the respondent and mailed back to the researcher); and Internet-based surveys (interactive written questionnaires filled in online by the respondents, with results being sent electronically to the researchers).

Good design is a crucial part of survey work. Making sure questionnaires are intelligible, easy to interpret, and likely to result in responses to the questions that a researcher wants answered is difficult and requires skill. It is important to test out draft surveys, and to get enough respondents to answer the survey. Postal questionnaires, in particular, typically have low response rates. Questionnaires that are short and attractive may be more likely to receive responses than longer ones. Researchers may offer financial incentives to those filling out the questionnaires, but there is a possibility that incentives will prejudice the participant’s response. Low response rates of many questionnaires from a random sample of the relevant population call into question the validity of generalizing any results.

An excellent study, which has had an important impact on legal aid policy and has now been adopted by the Legal Services Commission as part of an ongoing survey process, is Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law*, Oxford and Portland: Hart Publishing (1999); see also Pleasence et al., *Causes of Action: Civil Law and Social Justice*, Norwich: TSO (2004), for a follow-up to Genn’s work.

#### 4.6 Focus Groups

I use the term “focus groups” to describe any group-based interview situation. These typically have the characteristics of interviews and discussions. The researcher leads off the discussion by asking questions, but then the group dynamics dictate how that discussion works. Focus groups are sometimes considered to be more efficient than individual interviews, because more people can be asked the same questions in a condensed period. Answers, however, are likely to be limited by the need for other people in the group to speak, and the nature of responses may be modified to respond to group pressures (subtle and unsubtle). Group dynamics can be quite useful; they help keep people focused on what is most important; in addition, because participants respond to one another’s views, they can help to reveal thought processes and attitudes. For a study that used focus groups, see Richard Moorhead, M. Sefton, and G.F. Douglas, *The Advice Needs of Lone Parents*, London: One Parent Families (2005).

#### 4.7 Other Approaches and Issues

The sections above simply touch on the major research methods typically used in social science research. Much research relies on a number of methods in order to compensate for the weaknesses of each one, and in the process, it builds up a triangulated picture of any particular research problem. There are also variations on each research method. For instance, researchers can employ a combination of observation and simulation when using “model clients.” These model clients act out the role of real clients to see how service providers deal with them. For an example of this method, see Richard Moorhead and Avrom Sherr, *An Anatomy of Access: Evaluating Entry, Initial Advice and Signposting Using Model Clients*, London: Legal Services Research Centre (2003).

Research design is often related to program evaluation. It is very important to consider carefully how research can help provide realistic evidence on whether or not a program works. Evaluating counter-factual outcomes is often crucial—though understanding what would have happened had a program not been introduced, or had been introduced in a different way, can be difficult. For a discussion of this in the context of an evaluation of public defenders in England and Wales, see Bridges et al., *Methods for Researching and Evaluating the Public Defender Service*, London: Legal Services Commission (2002). There are quasi-experimental methods that have been used in the implementation and evaluation of legal service programs. In England and Wales, for example, a pilot program introduced three experimental methods of payment to lawyers to test legal aid contracting and compare the quality of provision of legal aid services by lawyers and non-lawyers. See Richard Moorhead et al., *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot*, Norwich: Stationery Office (2001). The randomized control trial is one of the gold standards of scientific research, although in the socio-legal world, while some quasi-experimental approaches come close to this, few are truly randomized control trials. The closest study of which I am aware is Seron et al., “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment,” *35/2 Law & Society Review* 419–34 (2001).

#### 4.8 A Final Word on Methods

In selecting methods, the researchers designing studies and the policymakers commissioning them have to think carefully about how the methods fit their research aims and their budgets. What is the research trying to show? This is always a key question. Knowing what kinds of data will be helpful or persuasive is also crucial. Balancing the benefits of quantitative data and qualitative data is often important. Is it necessary to have hard statistical proof of the validity of findings, or is the research simply trying to generate ideas and insights? Is it as, or more, important to have explanations and theories generated about what is happening on the ground? Furthermore, each method brings its own demands in terms of managing and analyzing the projects, and writing up the data when that comes in.

It is almost impossible to convey a sense of the interrelationships between theory, policy, and research practice in the abstract. The second half of this paper, therefore, offers a case study using research in a policy context, examining the development of the issue of professional competence within legal aid work.

## 5. Researching the Quality of Legal Aid Lawyers in the United Kingdom

Until the end of the 1980s, the government of the United Kingdom funded the legal aid scheme for England and Wales but the Law Society, the solicitors' professional body, administered it. At the end of the decade, the government decided to transfer administration to a non-departmental governmental body, the Legal Aid Board (now known as the Legal Services Commission, or LSC). The author was part of a team, with Avrom Sherr and Alan Paterson, which spent the last fifteen years looking at the issues of quality in legal aid.

### 5.1 What Is Quality?

The first element of the work on quality was to explore some of the theoretical issues associated with quality. Seeking to measure quality in an objective way was bound to be controversial. It represented a potential challenge to the legal profession's status, and it took place in the context of the LSC's attempts to take greater control of legal aid spending. Many of the initial issues discussed were theoretical in nature, but they had significant policy implications. Most of these issues related to the definition of quality.

Paterson and Sherr, drawing on the US literature,<sup>6</sup> led this debate by identifying the links connecting quality, access, and cost, beginning with the suggestion that the quality of legal services be considered to exist on a continuum. Quality ranged from non-performance, through inadequate professional services, basic levels of quality ("threshold competence"), higher levels of quality ("competence-plus"), and excellence. While the professional ideal aspired to excellence, it was suggested that the legal aid system could fund services at lower levels of quality but somewhere above the threshold competence mark. The reasoning behind this suggestion took into account the relationship between cost and access. The cost of funding cases at the level of excellence was expected to be much higher than the cost of funding cases at a lower point on the continuum, such as competence-plus. In circumstances where there is need to restrain legal aid expenditure, it was thought better to fund a larger number of cases at adequate levels of quality than a smaller number of cases at the level of excellence. Thus, the quality level against which those in the profession doing legal aid must be judged in relation to the economic context in which the work was being done.

The idea of judging quality against standards of adequacy rather than excellence was controversial. It fit well with managerial notions of quality, particularly the idea that goods and services should be "fit for their purpose" and provide "value for money." The intention of the researchers was to measure quality, to ensure that quality did not drop below adequate levels; however, by installing a "quality floor," in effect, through measurement of quality, there was a concern that the government would seek to define quality at low levels of adequacy so that it could cut costs. There was also a concern that it did not fully reflect the adversarial notion of legal work. In particular, there was a growing debate about the standard of work on criminal cases carried out by legal aid lawyers. It became increasingly clear that too many criminal defense lawyers were not providing even minimal standards of representation for their clients in the police stations or the courts.<sup>7</sup> The concern was that a quality system with notions of adequacy at its theoretical heart rather than excellence would lead to further routine legal aid work and would not address the need for an increase in standards.

## 5.2 How Should Quality Be Measured?

A second aspect of the debate was how to measure the quality of lawyers. There were four main options.

First, examination of quality of inputs, such as the qualifications of the lawyers involved. However, there was little, if any, evidence of a connection between prior qualifications and a lawyer's performance.

Second, examination of structure: the quality of the institutional arrangements within firms for training, library resources, supervision, and so on. The LSC took a keen interest in institutional proxies for quality, persuaded by the managerial interest in international quality assurance systems, such as ISO 9001. The idea behind this systems-based approach to quality was that if legal aid firms were required to have the right structures and systems in place, they would be more likely to manage their firms effectively and therefore provide better quality service. The approach passed through three main versions: franchising, one known by the acronym LAFQAS, and later an approach called the Quality Mark,<sup>8</sup> with the LSC moving to combine the auditing of management structures with requirements that legal aid firms have specialist supervisors. This appears to have had some, albeit limited, impact on the quality of legal aid work.<sup>9</sup> The principal problem with systems-based approaches to quality assurance is they do not directly measure the quality of actual work carried out.

The two remaining possibilities for determining the quality of legal aid work include examination and measurement of the processes that lawyers go through in assisting their clients; and examination of the outcomes of lawyers—do they generally get the results that one would expect or hope for? Initially, it was felt that it would be too difficult to measure outcomes, partly because the outcome of a legal case is contingent on a number of factors other than the quality of the lawyer and because of difficulty in defining and measuring outcomes in a manageable way. There was, however, a concern that outcomes were an important constituent of quality and required measurement in some way.<sup>10</sup>

As a result, the researchers' analysis of the theory of competence and the practicalities of measuring in a research context led them to the view that, initially, process measurements were likely to be the most fruitful way of looking at professional legal competence.<sup>11</sup>

## 5.3 From Theory to Practice: Operationalizing a Way of Measuring Quality

Having undertaken the theoretical task of looking at quality, the researchers then undertook discussions about the practicalities of looking at quality. This was not purely a research exercise. The LSC wanted the researchers to develop a useable approach for its franchising scheme. At the time, franchising was to be a preferred supplier relationship. In return for meeting quality standards, legal aid firms would receive marginally preferential rates of pay and have greater power over their own work. This eventually developed into an exclusive arrangement, whereby all legal aid firms now have to meet quality standards to be able to provide legal aid services (effectively a form of licensing).

The researchers considered a number of methods:<sup>12</sup>

- Asking clients about their views on the service. Although this was likely to give a limited view on quality, especially one that would concentrate on client-handling skills rather than professional competence, the researchers were able to test this method in detail.<sup>13</sup>

- The researchers could observe lawyers in action in their offices, in court, and in other locations. However, this was an expensive and time-consuming option. Much of a lawyer's work is paper-based, and the amount of time spent observing lawyers would need to be significant in order to see sufficient levels of visible activity to judge their competence. While it might form a useful part of a research project, it was too time-consuming to form a likely basis for the LSC to assess quality on an ongoing basis.
- The researchers could analyze lawyers' case files. In theory, these should provide an indication of the information a lawyer had gathered as part of a client's case, the steps taken on the client's behalf and the advice provided. They also constituted a plentiful resource, and the LSC could overcome any objections about privilege and confidentiality and secure access to the files as the funders of the service.

The decision was made to rely primarily on a system of file review as the basis of the initial quality assessment conducted by the researchers. The next issue was to determine who would be the assessor of quality, and the specific criteria that should be used to judge the files. Due to the need to develop a system that the LSC could use, the team decided that the system had to be operable by people who might not be qualified lawyers. The criteria thus needed to be applicable by trained individuals who would not necessarily be able to make fine legal judgments about quality. Since the assessors might not be lawyers, there was particular emphasis on the criteria being objective. Thus, detailed checklists were developed regarding information, advice, and action, specific to each of the main legal aid areas of law. The checklists showed what could be found in files based on the following: a review of a substantial number of case files; a review of the literature on the best practices in legal aid; and an extensive consultation with the profession about the appropriateness of the criteria. The result was a system of quality assessment that looked directly at the information in files of legal aid lawyers, referred to as "transaction criteria."<sup>14</sup> Transaction criteria were validated through the extensive consultation; solicitor assessors, using criteria that are more flexible, compared the results with some peer review of files. Clients whose files were assessed were sent client questionnaires, thus allowing a comparison between the results of some transaction criteria audits and thoughts on quality offered by the clients and lawyers involved in some of those cases.

In spite of this, transaction criteria were controversial. The in-depth detail (caused by the need for objectivity) seemed overwhelming and encouraging of a "checklist culture." Firms adapted their working practices to ensure that their files passed; they had detailed lists of information in them that their fee earners had to complete. More detail appeared in written records of advice—and, in many cases, more formulaic. While some saw this as part of a bureaucratization of legal aid practice, others saw it as having some impact on raising the quality of information recorded in files and the service provided to clients.<sup>15</sup>

The approach to measuring quality was based on the administrative needs of the LSC. In the next phase of the development of research into quality in legal aid, the researchers were able to take a broader look at quality.

## 6. The Quality and Cost Project

Once franchising had been introduced, and the LSC's approach to quality assurance (based on a combination of ISO 9001-style management audits and transaction criteria audits conducted by the LSC's staff) had begun to settle, the LSC began to turn more specifically to ways in which it could control the cost of legal aid work. One approach was to try "block contracting." Historically, solicitors in the legal aid scheme had charged on a "time and line" basis. Within certain limits, lawyers would charge by the hour for the time spent on their case. The LSC felt that this was inefficient; it required the submission of bills for every case and it encouraged solicitors to spend more time than needed on cases due to financial benefits of doing so. As a result, the LSC wanted to move toward a system whereby solicitors were paid to provide blocks of cases, and those costs could be controlled at a higher level than individual cases. The LSC was uncertain about the best way to specify the balance between quality and price, so it commissioned the same team of researchers that had worked on transaction criteria to evaluate a pilot program of three different methods of payment.<sup>16</sup> The researchers designed three models:

- Model 1 was a payment method that was designed to operate as closely as possible to the system generally already in existence. This was designed to act as a kind of control group, to see how one of two potential models of contracts worked when compared with this model.
- Model 2 provided the lawyers with a sum of money and allowed them to decide how many cases they should provide and how much work should be done on those cases. This model was designed to be as close to total professional freedom as possible.
- Model 3 specified the number of cases each lawyer had to deal with and the price he or she would get paid. This model was the one that put solicitors under the most economic pressure.

The researchers were also asked to compare the quality of solicitors operating under these three models with work being carried out by the not-for-profit sector. Whereas solicitors carrying out legal aid would typically be doing so for profit, the not-for-profit sector consisted of agencies and legal centers that were completely or largely without qualified lawyers.

To be able to evaluate such a complex set of models of service, the researchers developed approaches that went far beyond the transaction criteria.<sup>17</sup> A system of data collection was designed, with matter report forms that suppliers of legal aid had to complete. This contained information on the characteristics of the cases, some information about processes (such as the time spent on cases), and information on the outcomes achieved for the clients. The collection included information on tens of thousands of cases. It provided a detailed understanding of the nature of cases, and it enabled us to conduct a relatively sophisticated analysis of outcomes on those cases.

A stratified random sample of these cases was selected from each contractual group being assessed. The cases peer reviewed and client questionnaires distributed for feedback. Anonymous model clients (actors pretending to be clients and attending the offices of the research subjects with a mock legal problem to see what advice they would get) were employed for the first time in an academic legal context in the United Kingdom. The results of the project, described

elsewhere,<sup>18</sup> were able to inform both the nature of contract models employed by the LSC and policy in relation to whether legal aid lawyers should be subject to competitive tendering. They were also able to provide critical information on the importance of economics in determining quality levels, as well as confirming that non-lawyers are capable of providing quality as adequately as qualified lawyers, at least where they are working in specialist fields.

## 7. Conclusion

The quality and cost research, and other work that has shown the strengths and limitations of a systems-based approach as described above,<sup>19</sup> seems to have persuaded the LSC to encourage more use of peer review in its quality mechanisms and to draw back from the use of detailed management system types of approaches. Shifting peer review from a research tool to a system for policing the quality of legal aid proper will bring its own challenges. Now, ultimately, poor marks in a peer review can lead to the prevention of a firm from providing legal aid. The LSC continues to investigate the potential for outcome measurements to act as a trigger for quality concern—for example, that a lawyer whose firm has a “bad” profile of outcomes would then be more likely to be subject to peer review. The LSC has also begun to experiment with other forms of delivery, such as public defenders. The project evaluation is expected to take five years and was due for publication in 2006.<sup>20</sup>

## Notes

1. See, for example, Colin Robson, *Real World Research*, Oxford: Blackwells (2002). There is also a useful guide online called “the Magenta Book” from a UK government site, [www.policyhub.gov.uk/evalpolicy/magenta/guidance-notes.asp](http://www.policyhub.gov.uk/evalpolicy/magenta/guidance-notes.asp).
2. The best discussion of the different meanings of access to justice that I am aware of is contained in the introduction to T. Goriely and Alan Paterson, *A Reader on Resourcing Civil Justice*, Oxford: Oxford University Press (1996).
3. These are derived from Robson, 59.
4. Robson, 270.
5. A. Sherr, *Solicitors and their Skills*, London: Law Society (1991).
6. B. Garth, “Rethinking the Legal Profession’s Approach to Collective Self Improvement: Competence and the Consumer Perspective,” *Wisc. L.R.* 639 (1983).
7. See McConville et al. cited in Section 4.3 of this article.
8. For details of the Quality Mark, see [www.legalservices.gov.uk/civil/qm/index.asp](http://www.legalservices.gov.uk/civil/qm/index.asp).
9. Richard Moorhead and R. Harding, *Quality and Access: Specialist and Tolerance Work under Civil Contracts*, Norwich: Stationery Office (2004).
10. Richard Moorhead et al., “Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity,” *2 Intl. Journal of the Legal Profession* 191–210 (1994).
11. Avrom Sherr et al., *The Quality Agenda*, vol. 1, London: HMSO (1994), and Sherr et al., “Assessing the Quality of Legal Work: Measuring Process,” *2 Intl. Journal of the Legal Profession* 135–58 (1994).
12. For a full discussion, see the references cited in note 11.
13. Richard Moorhead et al., “What Clients Know: Client Perspectives and Legal Competence,” *10 (1) Intl. Journal of the Legal Profession* 5–36 (2003).
14. Avrom Sherr et al., *Lawyers: The Quality Agenda*, vols. 1 and 2, London: HMSO (1994).

15. Hilary Sommerlad has taken a skeptical look at the impact of the Legal Service Commission's approach to quality; see Sommerlad, "Costs and Benefits of Quality Assurance Mechanisms in the Delivery of Public Funded Legal Services: Some Qualitative Views," paper presented to the LSRC International Conference, Oxford (2002).
16. For the results, see Moorhead et al. (2001), cited in the "Other Approaches and Issues" section above.
17. For full details, see Moorhead et al. (2001).
18. For full details, see Moorhead et al. (2001); see also Richard Moorhead, Avrom Sherr, and Alan Paterson, "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales," *37 Law & Society Rev.* 765–808 (2003).
19. See Moorhead and Harding (2004), and Richard Moorhead, "Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?" 11 (3) *Intl. Journal of the Legal Profession* 159–90 (2004).
20. The methods are discussed in Bridges et al., *Methods for Researching and Evaluating the Public Defender Service*, London: Legal Services Commission (2002), and an interim report on the research is available on the Legal Service Commission's website.

# Study on Free Legal Aid in Criminal Cases in Bulgaria, 2004

*by Martin Gramatikov*

The paper outlines the results from a study on the provision of legal aid in criminal cases conducted in Bulgaria in 2004.<sup>1</sup> It compares the findings with the results from a similar study carried out by the Bulgarian Helsinki Committee in 2001. The major research question of the study is to reveal the effect of a policy instituted in 2000, which grants access to legal aid to indigent defendants. In general, the study found that the amendment to the Criminal Procedure Code resulted in an increase in the coverage of the Bulgarian legal aid system. It also highlighted some of the systemic deficiencies in the implementation of the legal aid policy.

## 1. Introduction

The paper reports the results from an empirical study conducted by a team of experts from the Open Society Institute–Sofia (OSI–Sofia) during the period of May–November 2004. Trained lawyers with litigation experience examined 900 archived criminal court files in which the verdict entered into force between 1 January 2000 and 1 July 2002. Before actual work on the sample began, all lawyers involved received training in case selection methodology, the contents of the questionnaire, and the principles for filling in data. The sample is large enough to allow inferences regarding the general population of criminal court cases filed during the researched period, with a 95 percent confidence interval and a sampling error of 3 percent.

The sample selection was selected randomly based on the date on which the bill of indictment was submitted to the first instance court and was stratified based on the caseloads of district courts<sup>2</sup> whenever district courts constituted courts of first instance. At the level of the county courts,<sup>3</sup> the sample stratification was based on the size of the town in which the court was located, with the assumption that population size correlates with the caseload of the local court.

An expert team drafted the data collection questionnaires and modeled after an earlier questionnaire of the Bulgarian Helsinki Committee (BHC), developed for a similar research study regarding final court decisions entered between 1996 and 1999.

## 2. Findings regarding the Police Detention

The Bulgarian criminal justice system recognizes two forms of detention—police (administrative) detention and pretrial detention. The former is not part of the criminal procedure and no valid evidence was available at this stage. It is unknown what proportion of police arrests turn into pretrial investigation and, consequently, the percentage of these cases that receive an indictment. In most court files from our sample, there was significant information to infer whether police arrested the defendant before pretrial.<sup>4</sup> A relatively small proportion, 15.87 percent, of all defendants from our sample was subjected to 24-hour police arrest under the provisions of the Ministry of Interior Act.<sup>5</sup> It is safe to assume that in the vast majority of the reviewed cases, defendants were not apprehended at the scene of the crime. This finding is expected—a large proportion of the police arrests are on relatively minor grounds. On the other hand, the criminal justice system processes the more serious instances of crimes.

From all defendants arrested by police (administrative arrest is limited to 24 hours) approximately 85.7 percent were informed of their right to defense at the time of detention. Such a high percentage is likely the result of the fact that the detainees were required to sign a declaration form stating that they have received information regarding their rights at this stage of the proceeding. Another project run by the Open Society Institute<sup>6</sup> provides ample empirical data showing that in most cases detainees were formally asked or even coerced to sign the standard form. Thus, it is not clear what proportion of the suspects were aware of their legal rights and the possible options. Subsequently, a tiny percentage of defendants have appealed their police arrest.

In 22.6 percent of the cases with police arrest, the suspect requested the presence of private lawyer. At the time of the research, the statutory provisions did not provide for the right to request an *ex officio* lawyer while in police detention. As of 2006, the new Legal Aid Act<sup>7</sup> sets out an on-duty defenders scheme, which guarantees the right of the detainee to request that an *ex officio* lawyer be appointed to defend his or her interests. In the first six months after the new law went into effect, there was very limited practical implementation of this right. There are numerous reasons explaining the implementation gap. Most of the detainees<sup>8</sup> are not aware of the opportunity to request appointment of an *ex officio* defense attorney. Additionally, police officers themselves are not very knowledgeable about the amendments. There is an understanding among law enforcement agencies that more legal aid for police detainees will slow down police work. Lastly, the Local Bar Councils that should operate the on-duty scheme have been slow to roll the system out in practice.

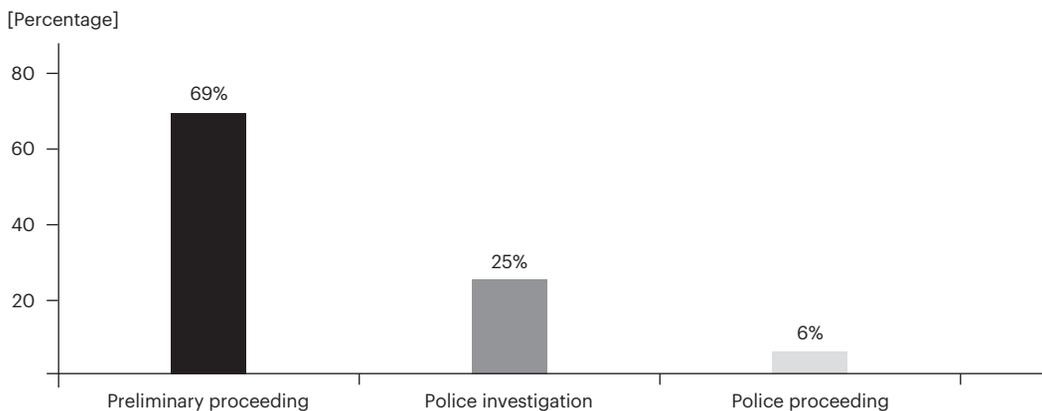
## 3. Access to Legal Aid in the Pretrial Proceedings

The study of 900 criminal cases court files find that, at the pretrial stage, 69.21 percent of the cases went to preliminary proceedings, 24.78 percent to police investigation, and 6.01 percent to police proceedings (Figure 1).

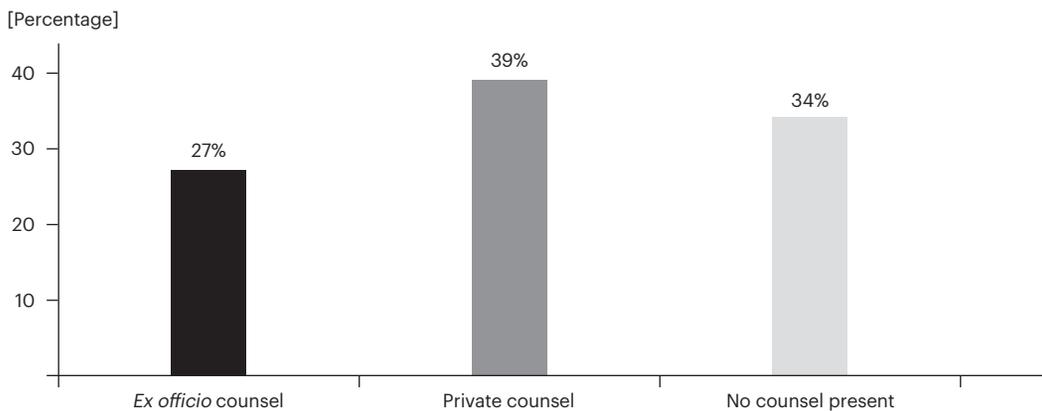
Fully understanding these results requires some background knowledge of the Bulgarian pretrial phase. According to Article 171 of the repealed Criminal Procedure Code,<sup>9</sup> the

competent authority to investigate an alleged crime at the pretrial phase could be either the Investigation Service or the Police. The investigators, considered independent magistrates, were assigned the most severe criminal cases on the assumption that their legal and investigative skills are superior to those of investigating police officers. Since 1999, the Bulgarian criminal justice system has consistently transferred more investigative authority to the police and has subsequently narrowed the powers of the Investigation Service. According to the new Criminal Procedure Code,<sup>10</sup> the Investigation Service investigates only a very small percentage of cases at the pretrial phase.

*Figure 1*  
Types of procedure at the pretrial stage



*Figure 2*  
Access to legal aid at the pretrial stage

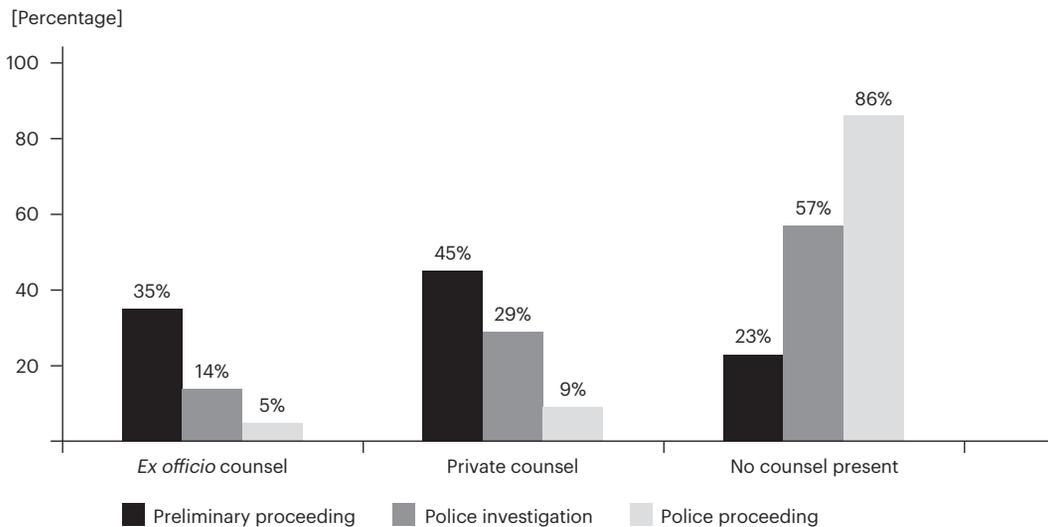


When police officers receive authorization to carry out the pretrial investigation, the investigations are broken down into two groups: regular proceedings and immediate (expedited) investigations. The latter type of cases consists of expedited versions of police investigations, allowed in cases where the perpetrator is caught *in flagrante*, where there is overwhelming evidence linking a person to a particular crime, where the suspect pleads guilty to a crime, or where a material witness testifies against the accused perpetrator.

Over one third of suspects at the pretrial stage do not receive representation from a lawyer in the most critical part of the criminal process (Figure 2). At the pretrial phase, about 34.3 percent of the suspects did not receive representation from a lawyer, 26.5 percent received aid from an *ex officio* legal counsel, and 39.1 percent had benefited from private defense counsel.

Access to legal aid varies depending on the type of the case, which in turn determines which investigating authority will carry out the pretrial investigation. Since the Investigation Service deals with more severe cases, the demand for compulsory representation in their cases is higher. In addition, the Investigation Service exclusively investigates crimes committed by juveniles, and according to the Criminal Procedure Code (subsequently repealed), representation is compulsory in these cases. On the other hand, police officers are more reluctant to appoint *ex officio* defenders in cases where it is not compulsory. The findings indicate that this difference significantly affects the access to legal aid with a clear pattern showing that the police officers are more negative towards the legal aid (Figure 3).

*Figure 3*  
Access to legal aid by type of pretrial procedure

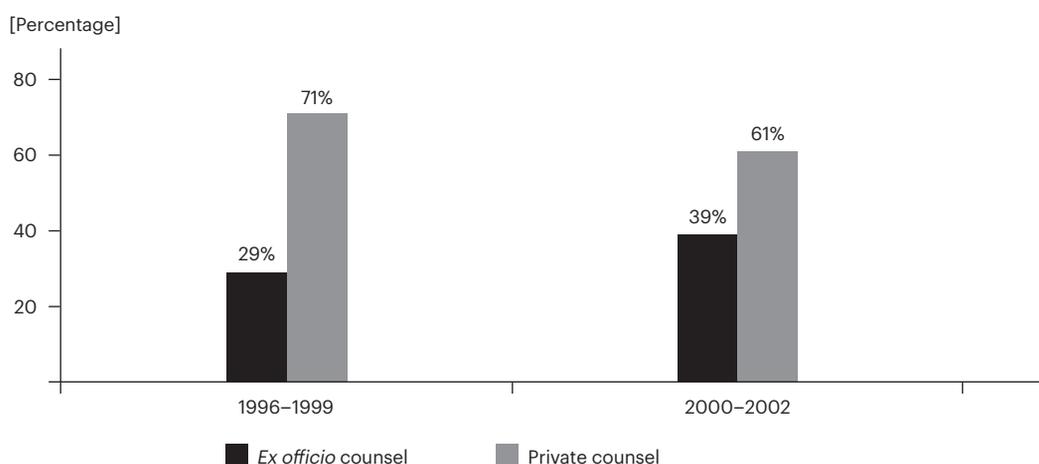


Thus, access of the accused to legal aid varies depending on the institution conducting pretrial proceedings. There is a statistically significant difference in the access to defense counsels in the different modes of the pretrial stage. In cases where investigators conducted the pretrial phase, 57.66 percent of the accused exercised their right to legal defense immediately after learning of it. In police investigations and instant police proceedings, these percentages are 25.13 and 6.25, respectively. The study clearly shows that in cases handled by investigators, the right to defense in criminal cases is more likely to be guaranteed. A possible explanation for this is that crimes falling under the jurisdiction of the Investigation Service are significantly more serious than offenses investigated at the trial phase by police officers. There is a direct relation between the risk posed by a crime and the propensity of the investigator to assign *ex officio* counsel. The more serious cases attract more public interest and are more likely to be appealed.

Therefore, investigators, prosecutors and first-instance judges have an interest in ensuring that the expected verdict will not be reversed on grounds of restrained access to legal aid. *De lege lata* the rules of criminal procedure, which will extend the investigative responsibilities of police officers, should focus special attention on guaranteeing the right to defense in criminal cases under the authority of the police due to the high degree of exclusion from legal aid exhibited in that phase.

Although the previous study carried out by the BHC did not provide cross-tabulations by type of proceedings, a comparison with cases observed in 1996–9 is possible. Compared with the previous study, the data shows increase in the appointment of *ex officio* defense counsel (assuming that the rate of hiring private counsel is constant) (Figure 4).

*Figure 4*  
**Temporal differences in access to legal aid**



*Table 1*  
**Grounds for appointing *ex officio* legal counsel in the pretrial stage**

Grounds for appointing an <i>ex officio</i> legal counsel	Percentage of legal aid cases
Underage status of the defendant	21.0
Physical or mental disability of the defendant	11.0
Severity of indictment (e.g., in cases carrying a sentence of 10 years to life)	25.7
Lack of Bulgarian language proficiency	6.7
Co-defendants with conflicting interests	6.7
Trials in absentia	2.9
Indigence of the defendant	26.2

It can be assumed that the increase in the number of suspects represented by a lawyer in pretrial proceedings is due to the higher number of *ex officio* defenders appointed by the institution that conducted the proceedings. Table 1 summarizes the grounds on which *ex officio* legal aid was appointed at the pretrial phase. The most common grounds are indigence, accounting for 26.2 percent of the cases; the severity of the indictment (25.7 percent); and the underage status of the accused (21 percent). Obviously, the provision of free legal aid to indigent people, when representation was in the interest of justice and when they had specifically requested such representation, in no way limited the possibility for other eligible accused persons to benefit from *ex officio* legal aid on other grounds.

#### 4. Fees of *Ex officio* Legal Counsel in the Pretrial Phase

Fees paid to *ex officio* defense lawyers in the pretrial phase are a key issue. They largely determine both the ability of the authorities conducting pretrial proceedings to appoint *ex officio* lawyers and the motivation of lawyers to provide effective legal aid. The data shows that the average fee for *ex officio* legal counsels in the pretrial phase is slightly less than 68 leva (approximately 34 euros). A deeper analysis indicates that the minimum fee is 10 leva (approximately 5 euros), while the maximum is 720 leva (approximately 320 euros) and the median is 50 leva (approximately 25 euros). As shown in Table 2, the fees for cases tried in district courts are higher, with an average of just under 82 leva (approximately 41 euros), than those cases heard at first instance by county courts. This finding is expected—the district courts have jurisdictions over more serious and complicated cases.

*Table 2*  
Fees of *ex officio* lawyers at the pretrial stage by type of the first instance court

Jurisdiction	Mean	N <sup>11</sup>	Std. Deviation <sup>12</sup>
County courts	55.94	85	66.75
District courts	81.89	72	94.28
<b>Total</b>	<b>67.84</b>	<b>157</b>	<b>81.32</b>

The rates for *ex officio* legal counsel differ depending on which authority in the pretrial proceedings determines the need for legal aid. Thus, investigators tend to appoint more *ex officio* defense attorneys, corresponding to an average fee of 61 leva (approximately 30 euros), with a standard deviation of 52.48 leva (approximately 26 euros), while police investigators and institutions seldom use *ex officio* legal aid, and when they do, the fees of public defenders vary significantly (Table 3).

Table 3

Fees of the *ex officio* counsel at the pretrial stage by type of investigative authority

Type of pretrial proceedings	Mean	N	Std. Deviation
Preliminary proceedings	60.79	135	52.48
Police investigation	118.06	18	188.65
Police proceedings	100.00	2	0.00
<b>Total</b>	<b>67.84</b>	<b>157</b>	<b>81.31882</b>

The regional variation in the remuneration of the *ex officio* appointed lawyers was a highly debated issue between the National and local Bars, on the one side, and the judicial authorities, on the other. Table 4 lays out these regional variations in the pretrial fees of the *ex officio* defenders when the case was heard at first instance by county courts.

Table 4

Fees of the *ex officio* counsel by county court

Location of county court	Mean	N	Minimum fee	Maximum fee
Sofia	125.00	16	30	230
Radnevo	20.00	1	20	20
Bourgas	24.17	12	20	30
Dulovo	36.67	3	30	40
Kurdjali	16.25	4	15	20
Krumovgrad	40.00	1	40	40
Dobrich	38.18	11	20	50
Balchik	30.00	2	30	30
Blagoevgrad	35.00	4	10	100
Radomir	50.00	1	50	50
Nikopol	30.00	2	30	30
Karnobat	23.33	3	20	30
Haskovo	76.25	16	30	500
Nova Zagora	20.00	2	15	25
V. Turnovo	14.00	5	10	15
Svishtov	50.00	2	50	50
<b>Total</b>	<b>55.94</b>	<b>85</b>	<b>10</b>	<b>500</b>

Table 5 provides similar information regarding the legal fees for the pretrial stage when the first instance court was the district court which by law deals with more serious crimes.

*Table 5*  
Fees of the ex officio counsel by district court

Location of district court	Mean	N	Minimum fee	Maximum fee
Sofia	112.21	19	30	220
Stara Zagora	93.22	9	10	720
Pazardjik	48.33	6	30	100
Razgrad	87.00	5	35	150
Dobrich	100.00	5	100	100
Gabrovo	47.50	4	25	80
Vratza	166.67	3	80	220
Vidin	55.00	4	40	80
Plovdiv	45.91	11	10	100
V. Turnovo	26.25	4	15	50
Rousse	90.00	2	30	150
<b>Total</b>	<b>81.89</b>	<b>72</b>	<b>10</b>	<b>720</b>

For comparison, the mean fee paid to the private defense counsels at the pretrial phase is just over 225 leva (Table 6).

*Table 6*  
Fees for private defense counsels at the pretrial stage

	N	Minimum fee	Maximum fee	Mean
Fee for contracted defense	252	5	4,000	225.28

## 5. Plea Bargains

Analysis of the data shows that plea bargaining was used in 22.8 percent of the reviewed cases. The number of cases where prosecution initiated plea bargains equaled those initiated by the defense. In 3.6 percent of the cases, both parties simultaneously proposed such bargains. In regional court cases, however, the prosecutor suggested plea bargains more frequently than the defense, while in district court cases, the defense solicited plea bargains more frequently. The research results indicate that although the sample includes many cases heard at the Sofia City Court, the court only reached one plea bargain, which the defense initiated. Various public prosecution services have discrepancies in their policies towards plea bargains. This finding is important because it indicates that *pro se* defendants are significantly less likely to receive a plea bargain offer. The data suggest that plea bargaining depends on two main factors:

- the severity of indictment; and
- the policy of the prosecutor’s office in charge of the case toward the use of plea bargaining.

The correlation between the type of pretrial proceedings and the use of plea bargains is statistically significant. Plea bargaining was not used in 81.6 percent of the cases investigated by the Investigation Service, while in police investigations and immediate police proceedings these percentages were 67.2 and 72.9, respectively. A possible influencing factor is the seriousness of the crimes being investigated by investigation authorities, for which plea bargains are less likely to be reached with the prosecution.

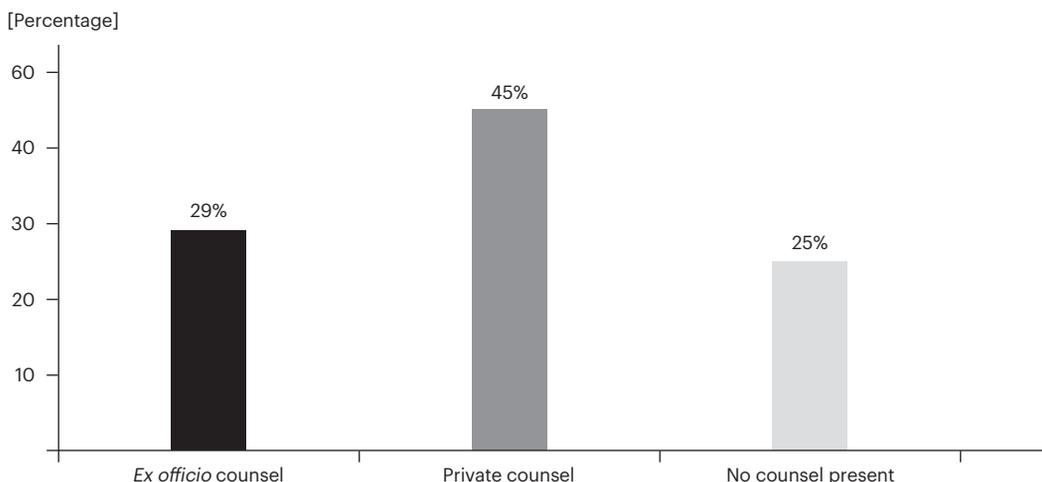
In one-quarter of the cases reaching plea bargains, an appointed *ex officio* legal counsel had negotiated the conditions with the prosecutor. In these cases, the fee of the *ex officio* lawyer on average was 74 leva (approximately 37 euros), with a minimum fee of 15 leva (approximately 7 euros) and a maximum fee of 400 leva (approximately 200 euros).

In the large majority of cases—98.4 percent—the answers to the research questionnaires specifically mentioned that the plea bargain had been favorable to the defendant/accused.

## 6. Access to Legal Aid in Court Proceedings: Courts of First Instance

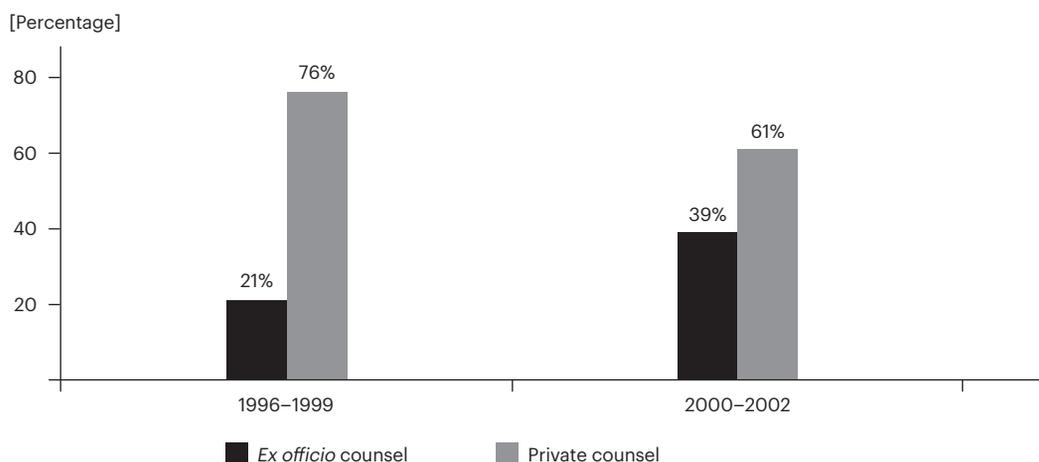
The results indicate that in 24.96 percent of the cases, defendants did not receive representation from a lawyer in first instance court proceedings. Private lawyers provided defense in 45.38 percent of the cases, while in 29.01 percent of the cases, *ex officio* defense lawyers protected the rights and legal interests (Figure 5).

Figure 5  
Access to legal aid at the first instance court



It is interesting to compare this data with the BHC research results. During the period of 1996–9, defendants received representation from a lawyer in first instance court proceedings in 53.5 percent of the cases. In 2000–04, this percentage increased to 75.04. The ratio between private and *ex officio* defense included in the current study’s cases also differs significantly from the results of the BHC research (Figure 6).

*Figure 6*  
**Comparison between the legal aid at the first instance**



*Table 7*  
**Grounds for appointing ex officio counsel at the first instance**

Grounds for appointing an ex officio legal counsel	Percentage
Underage defendant	8.1
Physical or mental disability of the defendant	8.6
Severity of indictment (e.g., for crimes carrying a 10-year to life imprisonment sentence)	17.8
Defendant unable to speak Bulgarian	5.6
Co-defendants with conflicting interests	14.2
Trials in absentia	11.2
Indigent defendant	34.5

The latter study’s findings that *ex officio* lawyers were appointed more frequently may be interpreted in different ways. It is unlikely that the increase could be a result of a methodological differences used in the two research studies; the second study deliberately followed the methodological decisions made in the former. An alternative explanation may lie in the distribution of the grounds for appointing an *ex officio* lawyer in first instance court proceedings (Table 7). An important factor is that in more than one in each three cases, the

ground for appointment of *ex officio* lawyer is the indigence of the defendant. As explained above, these grounds entered the Criminal Procedure Code in 2000, which has subsequently been repealed. It is likely that the increase in the scope of the state funded legal aid is related to the legislation amendment. The number of cases in which the defendant did not receive representation from a lawyer decreased, but it is still alarmingly high (Figure 6).

In more than two-thirds of the cases in which *ex officio* lawyers provided aid during proceedings in first instance courts, the defendant was appointed an *ex officio* lawyer only at the first court hearing.

## 7. *Ex officio* Lawyers' Fees in First Instance Court Proceedings

The mean fee of the *ex officio* appointed lawyers at the first court instance is 210.44 leva (approximately 105 euros, Table 8). On the other hand, the comparable mean fees of the privately hired defense attorneys at the first court instance are 286.23 leva (approximately 143 euros). There is relatively small difference between the fees of the *ex officio* and privately appointed lawyers. However, it is very likely that the findings in the court files do not reflect objective reality properly. For instance, some defense attorneys register with the court only a fraction of the legal fee in order to reduce their tax. In other cases, the court file contained only part of the invoices paid by the defendant in the particular stage. Despite the inconclusive data, there is wide spread attitude among the attorneys that the *ex officio* legal aid pays only a fraction of what can be charged on the paying clients.

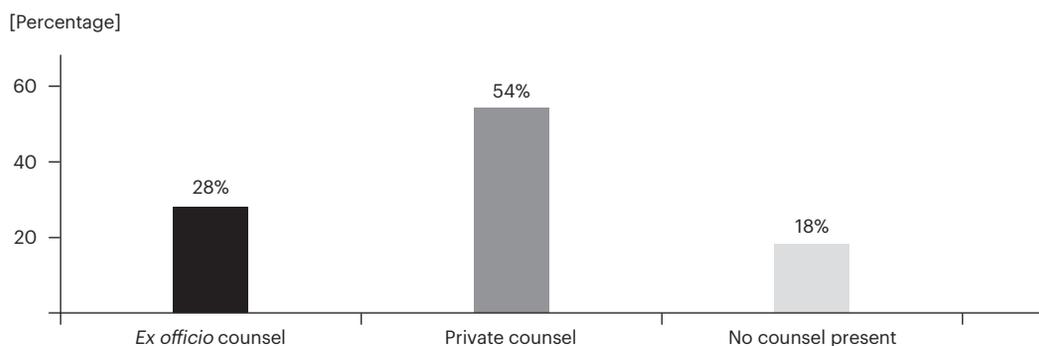
Table 8  
Fees of the *ex officio* counsel at the first instance court

	N	Minimum fee	Maximum fee	Mean fee
Rate of the <i>ex officio</i> lawyers' fee in leva	166	10.00	1,200.00	210.44

## 8. Access to Legal Aid in Appellate Court Proceedings

Research data shows that 14.34 percent of the criminal cases during the years 2000–02 were subject to appellate court proceedings. In 54 percent of these cases, the individual was represented by a privately contracted lawyer; in 28.3 percent of the cases, an *ex officio* appointed lawyer provided representation; and 17.7 percent of the cases did not have any representation at all (Figure 7). Compared with the results of BHC research on cases disposed of between 1996 and 1999, the percentage of cases without lawyers in appellate court proceedings decreased. The previous study reports that legal defense was available in 71.4 percent of the studied. In the present study, the percentage is 82.3.

*Figure 7*  
Access to legal aid at the appellate court



As indicated in Table 9, the increase of legal representation can once again be explained with the enforcement of Article 70, paragraph 1(7), of the Criminal Procedure Code. Data shows that in 28.4 percent of the cases, defendants received *ex officio* legal aid in appellate court proceedings. In 36.4 percent of these cases, the reasons for appointing an *ex officio* lawyer were that the defendant had specifically requested such representation, that the defendant had no ability to pay for a lawyer, and that it was in the interest of justice for the defendant to receive legal representation.

*Table 9*  
Grounds for appointing *ex officio* counsel at the appellate instance

Grounds for appointing an <i>ex officio</i> lawyer in appellate court proceedings	Percentage
Underage defendant	6.1
Physical or mental disability of the defendant	7.6
Severity of indictment (e.g., for crimes carrying a sentence of 10 years to life)	33.3
The defendant does not speak Bulgarian	4.5
Co-defendants with conflicting interests	10.6
Trials in absentia	1.5
Indigent defendant	36.4

The average fee of *ex officio* legal counsel in appellate court proceedings was 146.40 leva (approximately 78 euros), as shown in Table 10. It is important to note that when the fee was determined by the appellate court, it was never less than 50 leva (approximately 25 euros).

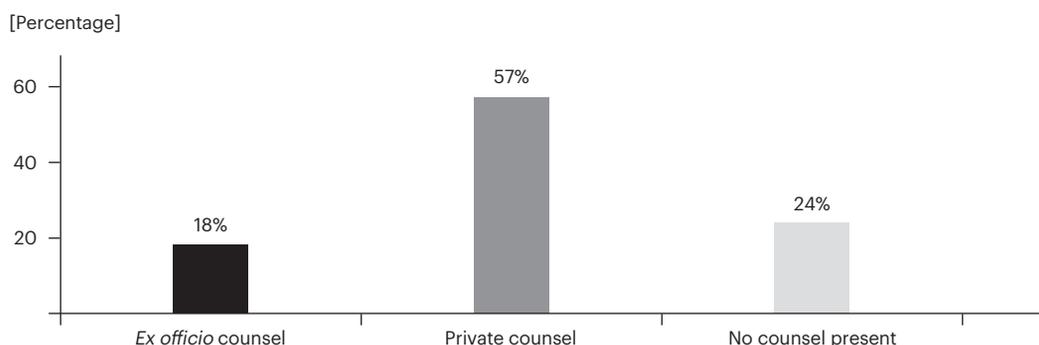
*Table 10*  
Fees of the *ex officio* lawyers in appellate court proceedings

	N	Minimum fee	Maximum fee	Mean fee
<i>Ex officio</i> lawyers; fees determined by appellate courts	64	50	400	146.40

## 9. Access to Legal Aid in Cassation Court Proceedings

Of the cases appealed or contested before the Supreme Court of Cassation (Figure 8), the defendant did not receive legal representation in 24.35 percent of the cases. In 57.39 percent of the cases heard by the Court of Cassation, a private lawyer provided representation, while an *ex officio* lawyer was present in 18.26 percent of the cases. In 42.1 percent of the cases, the *ex officio* legal aid in proceedings before the Court of Cassation had been appointed under Article 70, paragraph 1(3), of the Criminal Procedure Code (in cases in which the indictment is for crimes that carry sentences of 10 years imprisonment or more). In 31.6 percent of the cases, however, the court had appointed a public defender under Article 70, paragraph 1(7), of the Criminal Procedure Code.

Figure 8  
Access to legal aid at the cassation court



## 10. Conclusions

The results of the research study clearly indicate that the amendments in the Criminal Procedure Code from 2000, in which indigence was introduced as a ground for appointment of *ex officio* lawyer, caused a significant increase in the number of cases in which legal aid was provided. Although the poor data collection system in the Supreme Judicial Council and Ministry of Interior does not allow researchers to calculate the impact of the change in monetary terms, it is evident from the data that, compared to the evidence in previous research, there is an upward trend in the dimensions of legal aid in Bulgaria. Compared to the cases surveyed between 1996 and 1999, in which only 21.1 percent of defendants who appeared in first instance courts received representation from *ex officio* defense counsel, 29 percent received representation in the cases analyzed between 2000 and 2002. Even when slight variations in the design and administration of the two surveys are considered, the effect of the amendment still emerges as the main explanation for the upward trend in the provision of legal aid. In first instance courts, one in three appointments of *ex officio* defense counsel is due to insufficient financial means of the defendant. At the pretrial stage, this percentage is 27, a marked increase over the situation prior to 2000. Although the provision of legal aid is increasing, research reveals that there are still major gaps of coverage in the Bulgarian criminal justice system. In particular,

the quality of legal aid continues to be of significant concern, even after the adoption of the Legal Aid Act. An increase in the number of cases in which legal aid was provided still does not guarantee the adequate protection of defendants' rights in criminal procedures. Research based on perceptions of inmates suggests that the quality of legal aid differs dramatically between private and *ex officio* legal aid. The remuneration of legal aid providers appears to be directly proportional to the level of motivation, since the survey shows that private legal aid attorneys, who are better paid than publicly funded attorneys, tend to perform their duties with more diligence. Therefore, for the system is to undergo further improvements, strategic, and not just substantial, funding allocations must be implemented.

Despite the impact of the changes in the Criminal Procedure Code in 2000, the level of exclusion from legal aid is still unacceptably high. The pretrial stage presents a particular concern, because this stage is less transparent than the trial proceedings. Due to the new Criminal Procedure Code, police officers will conduct a significant portion of pretrial investigation work. This is a cause for concern, because research indicates low levels of awareness and acceptance of the need for adequate access to justice among the police. Means testing is another area of higher risk as far as implementation of the legal aid provisions is concerned. The Criminal Procedure Code does not contain any specific norms to guide the pretrial officers or the judge when a defendant could be considered indigent. This leaves enormous discretion to the decision makers, which is especially worrisome at the pretrial stage. At this stage, the officer who has to investigate the crime is entitled to decide whether the suspect has limited means to pay the legal fees for appropriate representation. In practice, the discretion may provide for flexibility, but it may result in a denial of access to legal aid without any recourse.

The findings of the OSI-Sofia research clearly suggest some of the milestones of the legal aid reform in Bulgaria. The Legal Aid Act is effective from January 2006, but many of the problems identified by the research persist need to be addressed by means of policy revisions, as well as by financial, legal, and organizational means. Ignoring the areas for reform and the benchmarks identified by the research would indicate a failure of the political ambition to put in place an adequate legal aid system that would ensure equitable access to justice in Bulgaria.

## Notes

1. For further analysis, see also "The Development of the Legal Aid System in Bulgaria," by Martin Gramatikov, in this publication.
2. Statistical data for the caseloads of criminal cases were available only for district courts.
3. In the Bulgarian legal system, there are 112 county courts and they try most criminal cases as a first instance court, whereas the district courts (there are 28) have jurisdiction as a court of first instance over the most aggravated crimes. According to statistical data from the Ministry of Justice, the caseload ratio is roughly 10:1.
4. Due to bad recording practices in 7 percent of the court files it was impossible to decide whether police arrest took place.
5. *Zakon za ministerstvoto na vatreshnite raboti* [Ministry of Interior Act] 1997, State Gazette, N. 122.
6. the scheme for lay visitors to the Sofia police stations; for more information, see [www.vblizost.org](http://www.vblizost.org).
7. *Zakon za Pravnata Pomosht* [Legal Aid Act] 2006, State Gazette, N. 79
8. According to data from the National Police Service, annually there are approximately 70,000 instances of police detention.

9. Nakazatelno procesualen kodeks [Criminal Procedure Code] 1974, State Gazette, N. 89, repealed in 2005.
10. Nakazatelno procesualen kodeks [Criminal Procedure Code] 2005, State Gazette, N. 86, in effect from 29 April 2006.
11. N=number of cases in the sample that fall into the corresponding cell.
12. Measure of the dispersion of the data. Higher standard deviation indicates more variance in the fees that the *ex officio* appointed defense counsels received in the regional and district courts. Had all lawyers per category received the same fee, the standard deviation would be equal to zero.

## Appendix I

### Questionnaire for Case File Review: Study on Free Legal Aid in Criminal Cases in Bulgaria, 2004

General Information on the Case and the Defendant

Court: \_\_\_\_\_ Local \_\_\_\_\_ Regional \_\_\_\_\_

City: \_\_\_\_\_

<b>1.</b>	<b>Start of criminal procedure:</b>	Date:
<b>2.</b>	<b>Case closure:</b>	Date:
<b>3.</b>	<b>Type of crime according to the bill of indictment:</b>	
	1.	First-degree murder
	2.	Manslaughter
	3.	Personal Injury
	4.	Rape
	5.	Carnal abuse
	6.	Other offenses against the person
	7.	Theft
	8.	Robbery
	9.	Other offenses against property
	10.	Revenue offenses and forgery
	11.	Offenses against the economy
	12.	Other offenses:
<b>4.</b>	<b>Type of punishment requested according to the bill of indictment:</b>	Type:
<b>5.</b>	<b>Result of criminal procedure:</b>	
	1.	Conviction
	2.	Acquittal
	3.	Administrative sanction
	4.	Settlement
	5.	Corrective measure
	6.	Suspension of criminal procedure

<b>6.</b>	<b>Was the defendant imposed more than one sanction?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>7.</b>	<b>Type of punishment imposed</b> (if more than one punishment was imposed, mark all relevant fields).	Degree:
	1. Life imprisonment without the possibility of parole	
	2. Life imprisonment	
	3. Imprisonment	
	4. Corrective labor without imprisonment	
	5. Confiscation	
	6. Fine	
	7. Debarment from holding office	
	8. Public reprobation	
	9. Divestiture of awarded medals, honorary titles, insignia of honor	
<b>8.</b>	<b>Special provisions applied on the account of:</b>	
	1. Recidivism	
	2. Dangerous recidivism	
	3. Cumulative sentences	
	4. Aggregations	
<b>9.</b>	<b>At what instance was the case decided?</b>	
	1. Court of First Instance	
	2. Court of Appeals	
	3. Court of Cassation	
<b>10.</b>	<b>Age of the defendant:</b>	
	1. Between 14 and 17 years	
	2. Between 18 and 25 years	
	3. Between 26 and 35 years	
	4. Between 36 and 54 years	
	5. Over 55 years	
<b>11.</b>	<b>Gender:</b>	
	1. Male	
	2. Female	
<b>12.</b>	<b>Citizenship:</b>	
	1. Bulgarian	
	2. Other:	
	3. Bulgarian and other	
<b>13.</b>	<b>Family status of the defendant:</b>	
	1. Single	
	2. Married	
	3. Widower/widow	
	4. Divorced	

<b>14.</b>	<b>Is the defendant literate?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>15.</b>	<b>Level of education:</b>	
	1. Primary	
	2. Basic	
	3. Secondary	
	4. Post-secondary	
	5. Higher	
<b>16.</b>	<b>Criminal record:</b>	
	1. Convicted and rehabilitated	
	2. Convicted and non-rehabilitated	
<b>17.</b>	<b>Ethnic background:</b>	
	1. Bulgarian	
	2. Turkish	
	3. Roma/gypsy	
	4. Other (please specify):	
5. No data		

#### Information on Police Detention

If the defendant was not detained for 24 hours, please proceed to question 22.

<b>18.</b>	<b>Was the defendant informed of his/her right to an attorney?</b>	
	1. Yes	
	2. No	
<b>19.</b>	<b>Did the defendant file a request for access to an attorney?</b>	
	1. Yes	
	2. No	
<b>20.</b>	<b>Did the defendant give explanations attached to the case?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>21.</b>	<b>Was the detention appealed?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

#### Information on the Pretrial Stage of the Proceedings

<b>22.</b>	<b>Type of proceedings at pretrial stage:</b>	
	2. Preliminary investigation	
	2. No	
	3. Expedient police proceedings	
<b>23.</b>	<b>When were the first charges brought, or when was the first action with respect to the accused conducted?</b>	Date:

<b>24.</b>	<b>What procedural or investigative actions were taken after the defendant was officially indicted, or after the first action with respect to him/her was made?</b>	
	1.	Interrogation of the defendant—number of times:
	2.	Interrogation of the defendant before a judge
	3.	Interrogation of witnesses—number:
	4.	Interrogation of witnesses before a judge
	5.	Cross-examinations
	6.	Number of expert examinations requested:
	7.	Inspection
	8.	Confiscation
	9.	Investigative test
	10.	Recognition of persons
11.	Recognition of objects	
<b>25.</b>	<b>Was the defendant/accused informed of his/her right to an attorney?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>26.</b>	<b>If the defendant/accused was informed of his/her right to an attorney, did he/she exercise this right immediately thereafter?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>27.</b>	<b>When did the defender enter the proceedings:</b>	
	1.	Immediately after indictment and detention
	2.	At the time of indictment or at the first investigative action during preliminary investigation
	3.	At a subsequent detention after the defendant was indicted
	4.	At a later stage
	5.	At the beginning of preliminary proceedings
6.	No defender has participated	
<b>28.</b>	<b>Type of defender:</b>	
	1.	<i>Ex officio</i> defender
	2.	Contracted defender
	3.	Relative
4.	No defender	

If the answer to question 28 is option 1, please proceed to question 29; if the answer is 2 or 3, please proceed to question 33; if the answer is 4, please proceed to question 45.

<b>29.</b>	<b>Did the defendant/accused make a specific request for an attorney to be assigned to him/her, and if yes, at what stage of the proceedings did he/she do so?</b>	
	1.	Immediately after indictment and detention
	2.	At the time of indictment or at the first investigative action during preliminary investigation
	3.	At a subsequent detention after the defendant was indicted
	4.	At a later stage
	5.	At the beginning of preliminary proceedings
6.	No defender has participated	
<b>30.</b>	<b>Was the defendant/accused denied an <i>ex officio</i> defender after he/she requested that one be appointed?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

<b>31.</b>	<b>On what grounds under Art. 70, para. 1, of the Criminal Procedure Code was the <i>ex officio</i> defender appointed at the pretrial stage?</b>	
	1.	Item 1 (the defendant/accused is a minor)
	2.	Item 2 (the defendant/accused suffers from physical or mental disability)
	3.	Item 3 (the crime is punishable with life imprisonment or with imprisonment for more than 10 years)
	4.	Item 4 (the defendant/accused does not speak Bulgarian)
	5.	Item 5 (there is a conflict of interest)
	6.	Item 6 (the proceedings are held in absence)
	7.	Item 7 (the defendant/accused is unable to afford a lawyer)
<b>32.</b>	<b>What was the compensation given to the public defender by the preliminary proceedings/investigation bodies?</b>	Amount:
<b>33.</b>	<b>What was the compensation of the contracted defender?</b>	Amount:
<b>34.</b>	<b>Was the defender present at the time of indictment (or at the time of the first action with respect to the accused)?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

Questions 35, 36, 37, and 38 should be answered only in case of preliminary proceedings.

<b>35.</b>	<b>Was the defender present when the case was submitted for prosecution?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>36.</b>	<b>If yes, did he/she make any claims, remarks, or protests?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>37.</b>	<b>Were the claims/remarks/protests:</b>	
	1.	Consequential
	2.	Irrelevant
	3.	I cannot judge
<b>38.</b>	<b>Did the defender make any claims, remarks, or protests that run against the interest of the defendant?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>39.</b>	<b>Was the defender present:</b>	
	1.	When the accused was indicted
	2.	When the accused was questioned—number of times:
	3.	When the accused was questioned before a judge
	4.	When witnesses were questioned before a judge
	5.	At the time of search and confiscation
	6.	At the time of inspection
	7.	When the accused was certified
	8.	At the time of the investigative test
<b>40.</b>	<b>Did the defendant or his/her defender request the collection of any evidence?</b>	Number:
<b>41.</b>	<b>Did the defender participate in any investigative actions conducted by the prosecutor?</b>	
	1.	Yes
	2.	No
	3.	The prosecutor has conducted no such actions.
<b>42.</b>	<b>Was there a change in defenders during the pretrial stage?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

<b>43.</b>	<b>What was the nature of that change?</b>
	1. A public defender was replaced by a contracted defender
	2. A contracted defender was replaced by a public defender
	3. A new contracted defender was appointed
4. Other (please specify):	
<b>44.</b>	<b>The initial restrictive measure imposed was:</b>
	1. Common bail
	2. Safe pledge
	3. House arrest
	4. Detention
	5. Restrictive measures for minors
6. No restrictive measure was imposed	

If the answer to question 44 is option 6, please proceed to question 55; if not, please continue to question 45.

<b>45.</b>	<b>Was the restrictive measure changed during preliminary proceedings (preliminary investigation):</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>46.</b>	<b>How much time elapsed from the date of detention (including police detention) to the date the defendant was brought before a judge?</b>	
	1. The defendant has not been detained	
	2. One day	
	3. Two days	
	4. Three days	
	5. Four days	
	6. Five days	
<b>47.</b>	<b>How many times was the restrictive measure changed?</b>	Number:
	<b>48. Was the defender present when detention was first imposed by the court?</b>	
<b>48.</b>	1. The defendant was not detained	
	2. An <i>ex officio</i> defender was present	
	3. A contracted defender was present	
	4. A relative was present	
	5. There was no defender	

<b>49.</b>	<b>On what grounds under Art. 70, para. 1, of the Criminal Procedure Code was the <i>ex officio</i> defender appointed when detention was imposed?</b>	
	1. Item 1 (the defendant/accused is a minor)	
	2. Item 2 (the defendant/accused suffers from physical or mental disability)	
	3. Item 3 (the crime is punishable with life imprisonment or with imprisonment for more than 10 years)	
	4. Item 4 (the defendant/accused does not speak Bulgarian)	
	5. Item 5 (there is a conflict of interest)	
	6. Item 6 (the proceedings are held in absence)	
	7. Item 7 (the defendant/accused is unable to afford a lawyer)	
<b>50.</b>	<b>What was the compensation given to the public defender when detention was imposed/appealed?</b>	Amount:
<b>51.</b>	<b>Was detention appealed to the court of appeals:</b>	
	1. Yes, by the defendant	
	2. Yes, by his/her defender	
	3. No	
<b>52.</b>	Was detention protested?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>53.</b>	<b>Was a defender present when detention was appealed to the court of appeals?</b>	
	1. The public defender was present	
	2. The contracted defender was present	
	3. A relative was present	
	4. No defender was present	
<b>54.</b>	<b>What was the result of the appeal/protest:</b>	
	1. The measure was confirmed	
	2. The measure was replaced with a milder one	
	3. The measure was replaced with a harsher one	
	4. The measure was repealed	
<b>55.</b>	<b>Did the defendant make any specific complaints/grievances for physical abuse during:</b>	
	1. Police detention	
	2. Preliminary detention	
	3. Detention in custody	
	4. No complaints/grievances have been made	
<b>56.</b>	<b>To whom were the complaints/grievances made:</b>	
	1. The investigator	
	2. The prosecutor	
	3. The court	
	4. Verbally, written down in a procedural/investigative action protocol	
	5. In writing, in a special statement to one of the above bodies	
<b>57.</b>	<b>What was the result of the complaint/grievance?</b>	
	1. An inspection was conducted	
	2. There was no result	
<b>58.</b>	<b>Did the defender plead to the detriment of the defendant in pretrial proceedings?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

<b>59.</b>	<b>Type of the final (latest) act issued by the investigator/police investigator:</b>	Date:
	1. Motion to indict	
	2. Motion to cease proceedings	
<b>60.</b>	<b>When did the prosecutor bring charges to court?</b>	Date:

### Settlement under Art. 414(g) of the Criminal Procedure Code

If the case was resolved with a settlement, after answering questions 61–65, please proceed to question 116.

<b>61.</b>	<b>Who proposed settlement:</b>	
	1. The prosecutor	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. The defender	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>62.</b>	<b>If the defendant/accused had no defender, was a public defender appointed to discuss settlement?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>63.</b>	<b>When was the public defender appointed?</b>	
	1. The day the settlement was approved by the court	
	2. One day before	
	3. Two days before	
	4. Other:	
<b>64.</b>	<b>What was the compensation given to the <i>ex officio</i> defender appointed by the court?</b>	Amount:
<b>65.</b>	<b>Was the result of the settlement favorable for the defendant/accused?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

### On the Course of Court Proceedings

<b>66.</b>	<b>Did the reporting judge order the appointment of a defender?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>67.</b>	<b>Did the defender make any protests against the bill of indictment?</b>	
	1. Yes, personally	
	2. Yes, through his/her defender	
	3. No	
<b>68.</b>	<b>Type of defender:</b>	
	1. <i>Ex officio</i> defender	
	2. Contracted defender	
	3. Relative	
	4. No defender	

If the answer to question 68 is option 1, please proceed to question 69; if the answer is 2 or 3, please proceed to question 76; if the answer is 4, please proceed to question 87.

<b>69.</b>	<b>On what grounds under Art. 70, para. 1, of the Criminal Procedure Code was the <i>ex officio</i> defender appointed at the first instance court?</b>	
	1. Item 1 (the defendant/accused is a minor)	
	2. Item 2 (the defendant/accused suffers from physical or mental disability)	
	3. Item 3 (the crime is punishable with life imprisonment or with imprisonment for more than 10 years)	
	4. Item 4 (the defendant/accused does not speak Bulgarian)	
	5. Item 5 (there is a conflict of interest)	
	6. Item 6 (the proceedings are held in absence)	
	7. Item 7 (the defendant/accused is unable to afford a lawyer).	
<b>70.</b>	<b>Was there a change in defenders during the first instance court proceedings?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>71.</b>	<b>What was the nature of that change?</b>	
	1. An <i>ex officio</i> defender was replaced by a contracted defender	
	2. A contracted defender was replaced by a <i>ex officio</i> defender	
	3. A new contracted defender was appointed	
	4. Other	
<b>72.</b>	<b>If the defender was appointed under Art. 70, para. 1, item 7, what data on the defendant's family and property status did the court use to make the decision on appointing an <i>ex officio</i> defender:</b>	
	1. No data on the defendant's family and property status	
	2. Declaration of family and property status filed by the defendant at the pretrial stage	
	3. A document on property status issued by a state/municipal body	
	4. Other:	
<b>73.</b>	<b>When was the <i>ex officio</i> defender appointed?</b>	
	1. More than a month before the first open hearing	
	2. More than two weeks before	
	3. More than one week before	
	4. Less than one week before	
	5. One day before	
	6. At the day of the hearing	
<b>74.</b>	<b>What was the compensation given to the <i>ex officio</i> defender by the first-instance court?</b>	Amount:
<b>75.</b>	<b>Was the defendant denied his right to an <i>ex officio</i> defender under the provisions of Art. 70, para. 1, item 4 and item 5, of the Criminal Procedure Code?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>76.</b>	<b>What was the compensation of the contracted defender?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>77.</b>	<b>Were any heavier charges brought during first instance court investigation?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>78.</b>	<b>Did the defender protest?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>79.</b>	<b>If yes, was the hearing postponed at the request of the defense to allow for examining the new charges?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>80.</b>	<b>Did the defender make any claims, remarks, or protests in the course of court proceedings?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

81.	Did the defender make any claims, remarks, or protests to the detriment of the defendant?	Yes <input type="checkbox"/> No <input type="checkbox"/>
82.	Did the defender file any requests for evidence collection? If yes, what kind of requests?:	Yes <input type="checkbox"/> No <input type="checkbox"/>
83.	Did the defender plead for the elimination of evidence, collected in violation of procedural rules?	Yes <input type="checkbox"/> No <input type="checkbox"/>
84.	Did the defendant give any explanations about the indictment during court proceedings?	
	1. Yes, he/she gave explanations	
	2. No, he/she refused to give explanations	
85.	Was the defender present?	Yes <input type="checkbox"/> No <input type="checkbox"/>
86.	Did the defender plead to the detriment of the defendant before the first instance court?	Yes <input type="checkbox"/> No <input type="checkbox"/>
87.	Was the case ceased and returned to the respective prosecutor?	Yes <input type="checkbox"/> No <input type="checkbox"/>
88.	When was the first instance court sentence issued?	Date:
89.	When was a protest against the sentence filed?	Date:
90.	Was the sentence appealed?	
	1. Yes, by the defendant	
	2. Yes, by his/her defender	
	3. No	
91.	Was the appeal filed within the legally established deadline?	Yes <input type="checkbox"/> No <input type="checkbox"/>

### On the Course of Proceedings at the Court of Appeals

92.	Did the reporting judge at the court of appeals order the appointment of a defender?	Yes <input type="checkbox"/> No <input type="checkbox"/>
93.	Type of defender:	
	1. <i>Ex officio</i> defender	
	2. Contracted defender	
	3. Relative	
	4. No defender	

If the answer to question 93 is option 1, please proceed to question 94; if the answer is 2 or 3, please proceed to question 97; if the answer is 4, please proceed to question 101.

<b>94.</b>	<b>On what grounds under Art. 70, para. 1, of the Criminal Procedure Code was the <i>ex officio</i> defender appointed at the first instance court?</b>	
	1. Item 1 (the defendant/accused is a minor)	
	2. Item 2 (the defendant/accused suffers from physical or mental disability)	
	3. Item 3 (the crime is punishable with life imprisonment or with imprisonment for more than 10 years)	
	4. Item 4 (the defendant/accused does not speak Bulgarian)	
	5. Item 5 (there is a conflict of interest)	
	6. Item 6 (the proceedings are held in absence)	
	7. Item 7 (the defendant/accused is unable to afford a lawyer)	
<b>95.</b>	<b>Was the defendant represented by the same public defender at the first instance court and the court of appeals?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>96.</b>	<b>What was the compensation given to the <i>ex officio</i> defender by the court of appeals?</b>	Amount:
<b>97.</b>	<b>Were any motivated claims, protests and solicitations presented at the court of appeals:</b>	
	1. No defender was present	
	2. The defender presented no claims, protests, or solicitations	
	3. The defender presented a motivated claim	
	4. The defender presented a written solicitation	
	5. The defender presented remarks	
<b>98.</b>	<b>In his/her pleadings, did the defender make any claims, remarks, or protests to the detriment of the defendant?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>99.</b>	<b>Did the defender plead for the elimination of evidence, collected in violation of procedural rules?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>100.</b>	<b>Did the defender plead to the detriment of the defendant before the court of appeals?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>101.</b>	<b>When was the decision of the court of appeals issued:</b>	Date:
<b>102.</b>	<b>The court of appeals</b>	
	1. Repealed the sentence and returned the case for a new hearing	
	2. Repealed the sentence of the first instance court and issued a new one	
	3. Modified the sentence of the first instance court	
	4. Repealed the sentence and closed the case	
	5. Confirmed the sentence of the first instance court	
<b>103.</b>	<b>When was a protest against the sentence filed:</b>	Date:
<b>104.</b>	<b>Has the sentence been appealed?</b>	
	1. Yes, by the defendant	
	2. Yes, by his/her defender	
	3. No	
<b>105.</b>	<b>Has the appeal been filed within the legally established deadline?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>

## On the Course of Proceedings at the Court of Cassation

<b>106.</b>	<b>How was the cassation procedure initiated:</b>
	1. Upon a protest by the prosecutor
	2. Upon a cassation appeal filed by the defendant through his/her defender
	3. Upon a cassation appeal filed by the defendant personally
4. No appeal has been filed	
<b>107.</b>	<b>Type of defender:</b>
	1. <i>Ex officio</i> defender
	2. Contracted defender
	3. Relative
4. No defender	

If the answer to question 107 is option 1, please proceed to question 109; if the answer is 2 or 3, please proceed to question 110; if the answer is 4, please proceed to question 114.

<b>108.</b>	<b>On what grounds under Art. 70, para. 1, of the Criminal Procedure Code was the <i>ex officio</i> defender appointed at the first instance court?</b>	
	1. Item 1 (the defendant/accused is a minor)	
	2. Item 2 (the defendant/accused suffers from physical or mental disability)	
	3. Item 3 (the crime is punishable with life imprisonment or with imprisonment for more than 10 years)	
	4. Item 4 (the defendant/accused does not speak Bulgarian)	
	5. Item 5 (there is a conflict of interest)	
	6. Item 6 (the proceedings are held in absence)	
7. Item 7 (the defendant/accused is unable to afford a lawyer)		
<b>109.</b>	<b>Was the defendant represented by the same <i>ex officio</i> defender at the court of appeals and the court of cassation?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>110.</b>	<b>Were any supplements to the cassation appeal, protests, or solicitations presented at the court of cassation:</b>	
	1. No defender was present	
	2. The defender presented no supplements to the cassation appeal	
3. The defender presented supplements to the cassation appeal, protests, or solicitations		
<b>111.</b>	<b>Did the defender make any claims, remarks, or protests to the detriment of the defendant?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>112.</b>	<b>Did the defender plead to the detriment of the defendant before the court of cassation?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>113.</b>	<b>Did the defender plead for the elimination of evidence, collected in violation of procedural rules?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>114.</b>	<b>When was the decision of the court of cassation issued:</b>	Date:

<b>115.</b>	<b>The court of cassation:</b>
	1. Validated the sentence or the decision
	2. Ceased the criminal procedure
	3. Modified the sentence
4. Repealed the sentence partially or entirely and returned the case for a new hearing	

### On the Defense Provided

Questions refer to both types of defense, *ex officio* and contracted; if no defender was present in the case, please do not answer any further questions.

<b>116.</b>	<b>Was the case postponed because of absence of the defender?</b>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>117.</b>	<b>What was the reason for the defender's absence from court hearings?</b>	
	1. He/she was never absent	
	2. He/she was busy elsewhere	
	3. He/she was ill	
4. There was no specific reason		
<b>118.</b>	<b>How many defenders has the person used at:</b>	
	1. Pretrial stage:	
	2. First instance court:	
	3. Court of appeals:	
4. Court of cassation:		
<b>119.</b>	<b>Has the defender represented more than one defendant/accused?</b>	
	1. Pretrial stage	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. First instance court	Yes <input type="checkbox"/> No <input type="checkbox"/>
	3. Court of appeals	Yes <input type="checkbox"/> No <input type="checkbox"/>
4. Court of cassation	Yes <input type="checkbox"/> No <input type="checkbox"/>	
<b>120.</b>	<b>Did the accused have any conflicting interest with other defendants/accused?</b>	
	1. Pretrial stage	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. First instance court	Yes <input type="checkbox"/> No <input type="checkbox"/>
	3. Court of appeals	Yes <input type="checkbox"/> No <input type="checkbox"/>
4. Court of cassation	Yes <input type="checkbox"/> No <input type="checkbox"/>	
<b>121.</b>	<b>Were there any contradictions between the positions of the accused/defendant and the lawyer?</b>	
	1. Pretrial stage	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. First instance court	Yes <input type="checkbox"/> No <input type="checkbox"/>
	3. Court of appeals	Yes <input type="checkbox"/> No <input type="checkbox"/>
4. Court of cassation	Yes <input type="checkbox"/> No <input type="checkbox"/>	

122.	<b>Please describe in short what actions of the defender were not in the best interest of the accused/defendant?</b>	
123.	<b>Did the decision-making body explain to the accused/defendant that he/she has the right to an attorney even if he/she is unable to afford one?</b>	
	1. Pretrial stage	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. First instance court	Yes <input type="checkbox"/> No <input type="checkbox"/>
	3. Court of appeals	Yes <input type="checkbox"/> No <input type="checkbox"/>
	4. Court of cassation	Yes <input type="checkbox"/> No <input type="checkbox"/>
124.	<b>When the participation of a defender was mandatory by law, was the accused/defendant informed that he/she must have an attorney?</b>	
	1. Pretrial stage	Yes <input type="checkbox"/> No <input type="checkbox"/>
	2. First instance court	Yes <input type="checkbox"/> No <input type="checkbox"/>
	3. Court of appeals	Yes <input type="checkbox"/> No <input type="checkbox"/>
	4. Court of cassation	Yes <input type="checkbox"/> No <input type="checkbox"/>

## Appendix II

### Questionnaire for the Interview of Inmates: Study on Free Legal Aid in Criminal Cases in Bulgaria, 2004

Name of interviewer: \_\_\_\_\_

Detention facility: \_\_\_\_\_

Number of interviews in that facility: \_\_\_\_\_

Consecutive number of the person interviewed: \_\_\_\_\_

Date: \_\_\_\_\_

#### General Information about the Respondent

1. Gender:

- Male
- Female

2. Place of birth (village, town, city; populated area). *Interviewer: please write down the place of birth inside the square to the right, then provide the appropriate coding below.*

Name of populated area:

- Sofia
- Administrative regional center
- Other city/town
- Village

3. Place of residence (village, town, city, populated area). *Interviewer: please write down the place of residence inside the square to the right, then provide the appropriate coding below.*

Name of populated area:

- Sofia
- Administrative regional center
- Other city/town
- Village

4. Nationality (*ALL APPLICABLE OPTIONS*):

- Bulgarian
- Of another state
- Bulgarian and another
- None

5. Age (completed)
- 14–18 years
  - 19–30 years
  - 31–40 years
  - 41–50 years
  - Over 50 years
6. Family status
- Single
  - Married
  - Widower/widow
  - Divorced
7. Education
- Higher
  - College
  - Specialized/technical
  - High school
  - Primary
  - Less than primary
8. Did you have an occupation at the time of the criminal act you were convicted of committing?
- Yes
  - No
9. Ethnicity:
- Bulgarian
  - Turkish
  - Romani
  - Other (please specify): \_\_\_\_\_
10. Children:
- None
  - One
  - Two
  - Three
  - More than three

11. Social status at the time of the criminal act:
- Non-qualified worker in the industries or services
  - Special-qualified worker in the industries or services
  - Agricultural worker
  - Director/manager
  - Specialist with higher education
  - Owner/associate in a company without hires
  - Owner/associate in a company with up to 10 employees
  - Owner/associate in a company with up to 50 employees
  - Owner/associate in a company with more than 50 employees
  - Arts and crafts
  - Freelancer
  - Without permanent work or occupation
  - Other (please specify): \_\_\_\_\_
12. Monthly income at time of commission of the criminal act: \_\_\_\_\_ leva
- Can't remember
  - No income
13. Have you been previously convicted?
- Yes, but rehabilitated
  - Yes and have not been subsequently rehabilitated
  - No
  - Don't know/no answer

### General Data on the Criminal Proceeding

14. Year the criminal act was committed:
- prior to 1980
  - 1980–1989
  - 1990–1995
  - 1996
  - 1997
  - 1998
  - 1999
  - 2000
  - 2001
  - 2002
15. Pretrial proceedings opened:
- Prior to 1 January 2000
  - After 1 January 2000

16. What act(s) have you been accused of committing on account of which you are now deprived of your liberty?

- Theft
- Robbery
- Murder
- Personal injury
- Setting a fire
- Abuse of rights of others
- Hooliganism
- Sexual harassment
- Abuse of power to obtain material advantage belonging to another
- Forgery
- Other (please specify):

Please pay SPECIAL ATTENTION to this option, if relevant!

17. Year of conviction:

- Prior to 1980
- 1980–1989
- 1990–1995
- 1996
- 1997
- 1998
- 1999
- 2000
- 2001
- 2002

18. To how many years were you sentenced deprivation of liberty?

- Up to 6 months
- Up to 1 year
- Between 1 and 3 years
- Between 3 and 5 years
- Between 5 and 10 years
- Over 10 years

19. At which instance was your case ended? (*for the convicts*)

- First
- Appellate
- Cassation
- Following reopening
- I don't know

20. Did you enter into a case settlement with the prosecutor?
- Yes
  - No (go to 23)
  - I don't know (go to 23)
21. Were you appointed a defender with whom the prosecutor could negotiate the settlement?
- Yes
  - No
  - No, because I had a hired lawyer at the time
22. Who proposed the settlement?
- Defendant
  - Prosecutor
  - Defendant's lawyer
23. Did you appeal the court of first instance sentence?
- No, (future tense):
- I still can appeal but will not do it because I don't have money to hire a lawyer
  - I do not want to appeal
- Yes, (future tense):
- My lawyer has filed an appeal
  - I will file an appeal
- No, (past tense) because:
- I had no money to hire a lawyer
  - I missed the deadline and had no lawyer
  - My *ex officio* lawyer missed the deadline and didn't file an appeal
  - The lawyer whom I paid did not file an appeal/missed the deadline
  - I did not know whether I had a procedural possibility for filing an appeal, and I had no lawyer before the court that sentenced me
  - Other (please specify): \_\_\_\_\_
- Yes, (past tense):
- I did appeal
  - My lawyer had appealed
  - No answer
24. If the answer to question 23 is Yes, to which instance did you appeal:
- Courts of appeal
  - Cassation court
  - I don't know
  - Proceedings terminated with an agreement (go to 31)

- I have no money to hire a lawyer (go to 31)
- I have no lawyer, I cannot afford one, and I cannot defend myself in person (go to 31)
- Other (please specify): \_\_\_\_\_ (go to 31)

### Information on the Pretrial Stage and the Rights of the Detainees

25. Did you have a lawyer during pretrial proceedings?
- Yes
  - No (go to 28)
26. What type of lawyer did you have at the pretrial stage?
- Ex officio*
  - Hired lawyer
  - A relative
27. How did you get in touch with your lawyer?
- I hired him/her myself
  - My relatives hired him/her
  - He/she was appointed *ex officio*
28. How long have pretrial proceedings lasted/How long will they last?
- Up to 2 months
  - Up to 6 months
  - Up to 1 year
  - Up to 2 years
  - More than 2 years
29. Have you been detained?
- Yes, they came and arrested me when I was at home
  - Yes, at the scene of the crime
  - Yes, at another place
  - Yes, they called me on the phone, invited me to go to the police/investigation, and then arrested me
  - Yes, I turned myself in to the police at investigation
  - No (go to 37)
30. Were you immediately brought before a judge following your arrest?
- Yes
  - No (go to 32)

31. Did you have a lawyer when you appeared before the judge?
- Yes, I had hired a lawyer
  - Yes, I had an *ex officio* lawyer
  - No
32. At the moment of arrest, was it explained to you that you were entitled to inform a person of your choice that you had been arrested?
- Yes
  - No
33. Has a person of your choice been informed of the arrest/detention?
- Yes
  - No (go to 35)
34. In what way precisely was the person of your choice informed of the arrest/detention?  
(*ALL APPLICABLE OPTIONS*)
- A policeman/investigator called a person I had chosen
  - They allowed me to call a person of my choice
  - They allowed me to write to a person of my choice
  - A person of my choice was notified in writing by the police
  - People I would wish to be notified had already been informed of my arrest
  - In another way—please specify: \_\_\_\_\_
  - I do not remember exactly in what way; however, people were notified of my arrest/detention
35. When you were arrested, was it explained that you had the right to contact a lawyer if you so wished?
- Yes
  - No
36. If you were allowed to contact a lawyer, when did you do that?
- Immediately
  - I waited for more than 24 hours
  - I did not contact a lawyer
  - I was not offered such an option
37. In what way did you learn that proceedings had been opened?
- During interrogation in the capacity of an accused
  - During interrogation in the capacity of a witness
  - At the moment of arrest/detention
  - Other (please specify): \_\_\_\_\_

38. When you were served the indictment order, what non-deviation measure was imposed?
- A promise to report regularly to the police
  - Bail
  - Home arrest
  - Detention
  - I was on bail; however, they arrested me, because I had no means to pay the required sum
  - I don't know
39. Have any other non-deviation measures been imposed on you, besides the above-mentioned one? (*ALL APPLICABLE OPTIONS*)
- Yes, a promise to report regularly to the police
  - Yes, they put me on bail
  - Yes, house arrest
  - Yes, detention on remand
  - Yes, but don't remember what exactly
  - No
  - Don't know
40. Did you file a complaint based on the use of physical force against you by the investigating authority? (*ALL APPLICABLE OPTIONS*)
- The investigator did not use physical force
  - Yes, personally
  - Yes, through my lawyer
  - No
  - I do not wish to answer
41. If the non-deviation measure in your pretrial proceeding was detention, how long has detention lasted?
- Up to 1 month
  - Up to 6 months
  - Up to 1 year
  - More than 1 year
  - Can't remember
42. Has your non-deviation measure been modified to a more favorable measure?
- Yes
  - No
43. If you were placed on bail, it:
- Has been paid
  - Has not been paid, because I had no money
  - Has not been paid for other reasons
  - Don't know

44. Have you appealed the bail amount? (*ALL APPLICABLE OPTIONS*)
- Personally
  - Through my lawyer
  - Has not been applied
  - Don't know
45. While you were being detained at pretrial, were you having meetings with your counsel?
- Yes, but only once
  - Yes, occasionally
  - Yes, frequently
  - No (go to 47)
46. How were meetings with defense counsel held during your detention?
- Face-to-face
  - Sometimes they were held face-to-face
  - In the presence of the prison/investigation administration
  - Sometimes in the presence of the prison/investigation administration
  - No answer
47. While you were being detained, were there cases where correspondence with defense counsel had been read or had not reached addressee?
- Yes
  - No (go to 49)
  - Don't know (go to 49)
  - I have never written to counsel (go to 49)
48. To whom did you complain? (*ALL APPLICABLE OPTIONS*)
- The prison warden
  - The prosecutor
  - An attorney
  - Someone else
  - I did nothing to complain
49. How often have you had the chance to use defense counsel services?
- In all procedural activities in which I was involved
  - In only some of the procedural activities
  - I never saw him/her
50. Was your counsel present during interrogations?
- Yes, at all of them
  - Yes, at some of them
  - Yes, only once
  - No

51. How would you rate your counsel's activities at pretrial, ranging from 2 (poor) to 6 (excellent)?
- Poor 2
  - Average 3
  - Good 4
  - Very good 5
  - Excellent 6
  - I can't make a judgment
52. What weaknesses did your counsel demonstrate? (*ALL APPLICABLE OPTIONS*)
- Uninterested attitude
  - Insufficient activity
  - Inadequate conduct
  - Insufficient contact with the accused
  - Other (please specify): \_\_\_\_\_
  - No weaknesses

Question 53 will be asked if option 2 for question 25 was selected (absence of counsel at pretrial). For all others, go directly to question 54.

53. What was the reason you had no counsel at the pretrial stage?
- I had no money, so I could not afford one, and no *ex officio* counsel was appointed for me because I was not entitled to one
  - I did not need one
  - I did not find a suitable one
  - I decided not to use his or her services anymore
  - Don't know/no answer

**The next questions should be read to everyone.**

54. Did you ask the investigator to appoint an *ex officio* counsel to you?
- No
  - Yes, and did so insistently
  - Yes, but I was not insistent
55. Did you ask the investigator to record your request for the appointment of a defense counsel in the protocol of proceedings?
- No
  - Yes, and did so insistently
  - Yes, but I was not insistent

56. Was your request for the appointment of counsel for the defense recorded in the protocol of the proceedings?
- Yes  
 No
57. Did the interrogator introduce himself/herself during the interrogations at pretrial, announcing name and position?
- Yes  
 No
58. Were you subjected to brutal or humiliating treatment during interrogation, and if yes, what did this consist of? (*ALL APPLICABLE OPTIONS*)
- Abusive language  
 Slaps  
 Insults  
 Threats  
 Prolonged interrogation  
 Dismissive attitude  
 Spitting  
 Other (please specify): \_\_\_\_\_  
 No (go to 60)  
 Don't wish to answer (go to 60)
59. Did you file a complaint? (*ALL APPLICABLE OPTIONS*)
- In person  
 Counsel did that  
 No

### Information Regarding the Trial Phase

60. Did you have a lawyer before the first judicial instance? (*ALL APPLICABLE OPTIONS*)
- Yes  
 No (go to 62)
61. What type of lawyer did you have at the trial stage:
- Ex officio*  
 Hired lawyer  
 A relative
62. Did you appeal your sentence?
- Yes  
 No

63. If “yes” on question 62, then: Did you have a lawyer during appeal?

- Yes, in the Courts of Appeal
- Yes, in the Court of Cassation
- No

Questions 64–70 should be read only to those who had lawyers in the trial stage. If “no” on question 63, then go to question 71.

64. How often were you able to use your lawyer’s services?

- At all hearings
- Only at some hearings

65. Were pleadings of your lawyer good?

- Yes
- No
- Don’t know/can’t say

66. Did your last word coincide with what your counsel requested?

- Yes
- No
- Can’t tell
- No last word (e.g., in the case of plea bargaining followed by settlement)

67. Did you see your lawyer before the hearing to discuss your conduct?

- Yes
- No

68. Did you have enough time meeting with your lawyer to get ready for the courtroom?

- Yes
- No
- Can’t tell

69. If you had counsel, how would you rate your counsel’s activities at hearings, 2 (poor) to 6 (excellent)?

- Poor 2
- Average 3
- Good 4
- Very good 5
- Excellent 6
- I can’t tell

70. What weaknesses did your counsel demonstrate? (*ALL APPLICABLE OPTIONS*)

- Uninterested attitude
- Collaboration with the authorities to the detriment of my interests
- Insufficient activity
- Inadequate conduct
- Insufficient contact with the accused
- Other (please specify): \_\_\_\_\_
- No weaknesses

Questions 71–74 should be read only to individuals who did/do not have a lawyer in proceedings before the first judicial instance. In the case of others, conclude the interview.

71. What was the reason you had no lawyer in the proceedings before the first instance?

- I did not have money to hire one and no *ex officio* counsel was appointed
- I did not find a suitable one
- Other; please specify: \_\_\_\_\_
- I did not need one

72. Did you ask the judge to appoint counsel for you?

- No
- Yes, and I did so insistently
- Yes, but I was not insistent

73. Did you ask the judge to record your request for the appointment of counsel?

- No
- Yes, and did so insistently
- Yes, but was not insistent

74. Was your request/objection to appointment of counsel recorded in the protocol of proceedings?

- Yes
- No
- Don't know

**p a r t   f o u r**

# International and Regional Standards on Legal Aid



# European Court of Human Rights Jurisprudence on the Right to Legal Aid

*by Open Society Justice Initiative and the Public Interest Law Institute*

This paper,<sup>1</sup> updated in 2007 on case law through 2006, summarizes and analyzes selected European Court of Human Rights (Court) case law relevant to the right to legal aid.<sup>2</sup>

## 1. Introduction

Justice system reformers, especially in newer member states of the Council of Europe, naturally look to the Court for guidance on many of the fundamental issues they face. Issues of fair trial, central to the European Convention on Human Rights (Convention), are among those where the Court's case law can provide specific guidance. However, although the Court's jurisprudence covers a wide range of issues, it also has limitations. For example, its decisions are restricted to specific problems raised by applicants.

This paper focuses specifically on issues of legal aid: fully or partially free legal consultations and representation in judicial proceedings

## 2. Overall Scope and Eligibility for Legal Aid

Article 6 of the Convention guarantees the right to a fair trial in both civil and criminal proceedings. The overall structure of the Article and related case law of the Court stress the vital connection between the right to legal assistance and the fair trial guarantee. This has been interpreted as providing for a general requirement of some measure of "equality of arms" between the state and the individual or between parties in the case. The Court in *Golder v. United Kingdom*, Series A, no. 18, 1975, found that the Article 6(1) guarantee of the right to a fair trial includes the right of "access to the courts" in civil and criminal matters. Applying and expanding upon this decision, the Court in *Airey v. Ireland*, Series A, no. 32, 1979,<sup>3</sup> found that Article 6(1) also implies the right to free legal assistance in certain civil cases. The Court determined that this right applies to cases where such assistance proves indispensable for

effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of the procedure or the type of case. The Court noted, however, that the right of access to the courts is not absolute and may be subject to legitimate restrictions, including the imposition of fees and the requirement that the case be well founded and not vexatious or frivolous.

While the right to legal assistance in criminal trials is explicitly set out in Article 6(3)(c),<sup>4</sup> their provision makes no reference to civil and administrative cases. The right to legal aid, however, has been extended through jurisprudence to cover cases where its absence would make any equality of arms illusory or effectively deprive an applicant of access to the proceedings.<sup>5</sup> The guarantee of legal aid in civil proceedings predominantly extends to “civil rights and obligations,” which may exclude some forms of hearings such as those relating to refugee claims. However, other hearings required by the Convention may attach an entitlement to free legal aid. For example, in *Jordan v. United Kingdom*, Application no. 24746/94, 2001, the Court found a violation of the state’s procedural obligations under Article 2 when the family members of a man unlawfully killed by the police were not given legal aid during the investigation.<sup>6</sup>

In *Artico v. Italy*, Series A, no. 37, 1980,<sup>7</sup> the Court found that the right to free legal assistance in Article 6(3)(c) is not satisfied simply by the formal appointment of a lawyer; rather, it requires that legal assistance must be effective. The state must take “positive action” to ensure that the applicant effectively enjoys his or her right to free legal assistance. While a state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, the authorities in this case were obligated to take steps to ensure that the applicant fully enjoyed the right to legal assistance. Further, the Court ruled that to find a violation of Article 6(3)(c), the applicant does not need to prove that the absence of counsel was in fact prejudicial or that another attorney would have been successful.

### 3. Free Legal Assistance in Criminal Cases

Article 6(3)(c) requires that “a person charged with a criminal offense” has the right to defend him or herself *pro se*, through legal assistance of his or her own choosing, or, in cases involving indigent defendants where required by the interests of justice, through free court-appointed counsel.

The Court has its own interpretation of the meaning of “criminal.” The Court ruled in *Engel and Others v. the Netherlands*, Series A, no. 22, 1976, that a matter is considered criminal in nature if the relevant domestic law classifies it as such or if the Court concludes it is according to its own independent analysis of the nature of the offense and the nature, duration, or manner of execution of the punishment that may be imposed.

As previously mentioned, Article 6(3)(c) consists of three separate prongs: (1) the right of *pro se* defense; (2) the right to legal assistance of the defendant’s choosing; and (3) the right of indigent defendants to free legal assistance. The first two prongs are not absolute in their protection. Regarding the right to defend oneself *pro se*, the Court decided in *Croissant v. Germany*, Series A, no. 237-B, 1992, that an individual cannot insist upon representing him or herself without the assistance of a lawyer in all circumstances and that compulsory legal representation before a court does not violate the Convention. In *Croissant*, the applicant was a

lawyer who wished to defend himself in criminal proceedings but German criminal procedure stipulated that he should be represented at all stages of the first instance proceedings. The Court held that this requirement was not incompatible with Article 6(3)(c) of the Convention, stating that the appointment of more than one defense counsel is not in itself inconsistent with the Convention and may indeed be justified in specific cases in order to meet the interests of justice. However, before nominating more than one counsel, a court should pay heed to the opinion of the accused as to the number needed especially where, as in Germany, the defendant will in principle have to bear the costs if convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under Article 6(1) if it lacks relevant and sufficient justification.<sup>8</sup> However, the defendant's right to be present at a hearing and to put forward a defense must be guaranteed even when a lawyer is assigned to him or her. Thus, in *Sejdovic v. Italy*, Application no. 56581/00, 2006, the Court found a violation of Article 6 where the applicant was tried *in absentia* but had not sought to escape trial, unequivocally waived his right to appear in court, or had an opportunity to obtain a fresh determination of the merits of the charge against him by a court that had previously heard his case. The Court held that the assignment and active participation of a lawyer does not absolve the authorities from guaranteeing the defendant's right to be present in court unless it had been established that the defendant had absconded from justice or unequivocally waived his right to appear.<sup>9</sup>

With regard to the third prong, a defendant must show that he or she lacks sufficient means to pay for legal assistance and that the interests of justice require that free legal assistance be provided. It is for domestic authorities to define the financial threshold triggering the right to free legal assistance and to apply a means test. The Court assesses only whether the decision on financial eligibility for legal aid is based on law and not made in an arbitrary manner. Therefore, in *Santambrogio v. Italy*, Application no. 61945/00, 2004,<sup>10</sup> the Court found no violation of the Article 6(1) right of access to a court where an applicant requested legal aid for divorce and child custody proceedings but was refused on the grounds that his means exceeded the statutory limit. The Court determined that the refusal to grant legal aid was based on the law and did not appear arbitrary, finding that the Italian legal system afforded sufficient guarantees against arbitrariness in the determination of eligibility for legal aid. The Court further found that although the proceedings for which legal aid was sought could raise potentially complex issues, legal representation was not compulsory. Moreover, the Court has stated that it is not usually in a position to assess the financial means threshold.<sup>11</sup> In *Pakelli v. Germany*, Series A, no. 64, 1983, the Court ruled that a violation of Article 6(3)(c) does not require that a defendant lack sufficient means to pay for legal assistance "beyond all doubt." Rather, the Court determined that the financial prong of the test is satisfied if there are "some indications" that an applicant is indigent and no "clear indications to the contrary." For example, in *Twalib v. Greece*, Application no. 24294/94, 1998, the Court found a violation of Article 6(3)(c) where legal aid counsel was not provided during cassation proceedings. The Court found sufficient indicators of the defendant's inability to pay for legal assistance where the defendant had been represented by court-appointed counsel at trial and by counsel provided by a humanitarian organization on appeal, and where he had been in prison for the previous three years. However, the Court found in *Croissant*, Series A, no. 237-B, 1992, that the individual claiming a lack of sufficient means bears the burden of proof in presenting some indication of his or her indigence.

In deciding whether legal assistance is required for the interest of justice to be met in a particular case, the Court in *Quaranta v. Switzerland*, Series A, no. 205, 1991, developed a three-prong test, holding that courts must consider the seriousness of the offense, the complexity of the case, and the ability of the defendant to provide his or her own representation. Thus, in *Quaranta* where the applicant was accused of drug use and trafficking and faced up to three years of imprisonment or a fine, the Court found that free legal assistance should have been granted because “so much was at stake.” The Court discussed the complexity of the case, noting the wide range of measures available to the court, including activation of a suspended sentence or imposition of a new one. The Court further considered the applicant’s personal situation—that he was a “young adult of foreign origin from an underprivileged background” without any occupational training and with a criminal record. Likewise, in *Perks and Others v. United Kingdom*, Application nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95, and 28456/95, 1999, the Court found a violation of Article 6(3)(c) noting that the applicants lacked sufficient means to pay for legal representation and that free legal assistance before the magistrates’ court was not available at the relevant time. Considering the severity of the potential penalty (up to ninety days in confinement in this case) and the complexity of the applicable law, the Court found that the interests of justice demanded free counsel represent the applicants before the magistrates.

The seriousness of the offense criterion includes an assessment of the severity of a potential sentence, such as the length of deprivation of liberty, and other adverse consequences of the conviction for a defendant. In *Benham v. United Kingdom*, Application no. 19380/92, 1996, the Court applied and extended its decision in *Quaranta*, finding that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation. Therefore, in *Padalov v. Bulgaria*, Application no. 54784/00, 2006, the Court found Articles 6(1) and 6(3)(c) were violated, holding that given the severity of the sentence the defendant faced (eleven years’ imprisonment for theft and three-and-a-half months’ imprisonment for sexual assault and escape) and the complexity of the applicable law, the interests of justice demanded that the applicant should have been provided with free legal representation in order to receive a fair hearing. The Court also took into account the deficiencies of the legal aid system at that time (improved by later legislative amendments), ruling that the national authorities should have been more active in ensuring that the applicant understood he had the right to free legal assistance.

The interests of justice generally indicate that free legal assistance be required for vulnerable groups such as minors, the mentally ill, foreigners, refugees, and asylum seekers. Thus, in *Biba v. Greece*, Application no. 33170/96, 2000, the Court found a violation of Articles 6(1) and 6(3)(c) where an illegal immigrant with no settled employment who lacked the means to retain counsel before the Court of Cassation was not appointed counsel. In concluding that it would have been impossible for the applicant to prepare an appeal without assistance, the Court considered the seriousness of the charges, the severity of the sentence, and the fact that he had difficulties pleading his case in the Greek courts because he was an alien who did not speak Greek.

Article 6(3)(c) does not grant an absolute right to choose a particular lawyer when free legal aid is awarded. Instead, the appointment of free counsel is left to the discretion of the relevant state authorities. In *Croissant*, Series A, no. 237-B, 1992, the Court found that the right of an accused to be defended by counsel “of his own choosing” is not absolute. Rather, the Court

held that this right is necessarily subject to certain limitations where free legal aid is concerned and where courts have the duty to decide whether the interests of justice require that they appoint counsel to defend the accused. Although courts should consider the defendant's wishes when appointing counsel, the courts can override them when there are relevant and sufficient grounds for holding that it is in the interest of justice. Here, the applicant had chosen two attorneys but objected to the third appointed by the court. The Court found that the domestic court's actions served the interests of justice by avoiding interruptions and adjournments.<sup>12</sup> The Court's case law, however, suggests that the appointing state authority must consider the defendant's wishes.<sup>13</sup> This implies that the defendant can refuse an appointed legal aid lawyer and ask for another one at the state's expense if sufficient reasons are presented to the relevant authority.<sup>14</sup> On the other hand, in finding *X. v. Germany*, Application no. 6946/75 (6 DR 114), Commission decision of 6 July 1976 inadmissible, the European Commission of Human Rights (Commission)<sup>15</sup> found that Article 6(3)(c) does not guarantee either the right to choose one's court-appointed lawyer or to be consulted on the choice of an official defense counsel.

The right to legal representation of one's choice is likewise not absolute. The Court's decision in *Pakelli*, Series A, no. 64, 1983, that a person charged with a criminal offense who does not wish to defend him or herself *pro se* must have recourse to legal assistance of his or her own choosing, has been greatly limited. States are entitled to regulate the appearance of lawyers in their courts and, in certain circumstances, to exclude the appearance of particular individuals. For instance, states can set qualifications that attorneys must meet as well as rules of professional conduct governing their appearance. In *Meftah and Others v. France*, Application nos. 32911/96, 35237/97, and 34595/97, 2002, the Court stressed that the right of individuals facing criminal charges to be represented by counsel of their own choosing is not absolute and may be overridden by national courts when it is in the interest of justice to do so. Therefore, the special nature of the Court of Cassation justifies limiting the presentation of oral arguments it hears to specialist lawyers. Likewise, in *Mayzit v. Russia*, Application no. 63378/00, 2005, the Court found that Article 6 had not been violated where the defendant was denied his request to have his mother and sister represent him in a criminal case. The Court accepted the state's argument that appointment of professional lawyers rather than laypersons served the interests of quality of the defense considering the seriousness of the charges and complexity of the case. The Court recalled that Article 6(3)(c) guarantees that proceedings against the accused would not take place without adequate representation for the defense, but does not give the accused the right to decide the manner in which his or her defense should be ensured. It further restated the standard set in *Croissant* that the right to choose counsel is not absolute.

Legal assistance in general and free legal aid under certain circumstances should be available at all stages of proceedings, from the preliminary police investigation to the final determination, although it may be partially restricted depending on the particular proceedings involved. The Court will find a violation of Article 6(3)(c) if the lack of legal assistance at one stage of the proceeding has prejudiced the fairness of the proceeding taken in its entirety.<sup>16</sup>

In addition, legal assistance, free when applicable, should be available for persons tried in absentia, since a person charged with a criminal offense should not lose the benefit of this right merely on account of not being present at the trial. Thus, in *Poitrimol v. France*, Series A, no. 277-A, 1993,<sup>17</sup> the Court found a violation of Articles 6(1) and 6(3)(c) where the applicant had been convicted in absentia without having an opportunity for his counsel to present a

case in his defense. The Court ruled that, although not absolute, the right of everyone charged with a criminal offense to be effectively defended by a lawyer is a fundamental feature of a fair trial and a person does not waive this right by not being present at the trial. In reaching this conclusion, the Court considered that the applicant had clearly expressed his wish not to attend the hearings against him but that it was apparent from the evidence that he intended to be defended by a lawyer who would attend the hearings. Likewise, in *Harizi v. France*, Application no. 59480/00, 2005, the Court found in favor of the applicant where he had been found guilty in a criminal trial after being tried *in absentia*. He had been deported and was refused a pass to attend the trial. In addition, his lawyer was not entitled to take part in the proceedings. Furthermore, he could not apply to set aside the judgment since for such an application to be valid he would need to be present on French territory. The Court held that the applicant had been denied representation in the appeal proceedings, a situation the Court had already found to be contrary to the Convention.

#### **4. Free Legal Assistance in Civil Cases**

Free legal assistance may be sought to protect only those civil rights that exist under domestic law. When assessing whether the applicant meets the financial criteria, the Court takes the same approach as in criminal cases, discussed in Section 2. Although Article 6 does not expressly convey an obligation upon the states to provide free legal assistance in civil matters, the Court has found such an obligation in the Article 6(1) guarantee of access to the courts, holding that indigent applicants are entitled to free counsel when such assistance is indispensable for effective access to the courts and a fair hearing. Article 6(1) leaves the choice of means to be used in guaranteeing litigants the right of access to the courts to the states. While the institution of a legal aid scheme constitutes one such means, there are others such as simplifying the applicable procedures. Furthermore, when legal aid is unavailable the requirements of Article 6(1) may be satisfied if effective access to the courts is ensured in some other way.

In deciding whether free legal assistance is indispensable for effective access to the courts or for ensuring a fair hearing in a particular case, the Court will consider the particular facts and circumstances of each case. Specifically, the Court considers: (1) the potential consequences faced by the applicant; (2) the complexity of the case or the procedure, particularly when legal representation is mandatory by law; and (3) the capacity of the applicant to effectively exercise his or her right of access to the court. Thus, in *Airey*, Series A, no. 32, 1979, the Court found a violation of Article 6(1) where the applicant was unable to obtain a judicial separation from her husband without legal assistance. The Court found that she was effectively denied access to the courts, highlighting the complexity of the proceedings and the fact that marital disputes often involve emotional involvement that is scarcely compatible with the degree of objectivity required for advocacy in court. The Court further held that the right of access to courts is not absolute and may be subject to legitimate restrictions, including the requirement that the defendant contribute to the attorney's fees or that the case be well founded, not vexatious, or frivolous. Likewise, in *P., C. and S. v. United Kingdom*, Application no. 56547/00, 2002, the Court applied the *Golder* and *Airey* line of cases to find a violation of Article 6(1) where the applicants were denied free legal aid while contesting the severance of their parental rights

in child abuse proceedings after considering the complexity of the case, the importance of what was at stake, and the highly emotional nature of the subject matter. Furthermore, in *McVicar v. United Kingdom*, Application no. 46311/99, 2002, the Court found that Article 6(1) does not require the provision of legal aid in defamation cases.<sup>18</sup> The Court reiterated that “the question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case...” Here, the law was not sufficiently complex to warrant legal assistance, so an experienced defamation lawyer represented the applicant until the commencement of the trial, and the applicant’s emotional involvement was not incompatible with the degree of objectivity required for advocacy in court. The Court concluded that the court’s denial to provide free legal aid to the applicant did not bar him from presenting his defense effectively, nor did it result in an unfair trial.<sup>19</sup> On the other hand, in *Steel and Morris v. United Kingdom*, Application no. 68416/01, 2005, the Court found a violation of Article 6(1) where the applicants were denied free legal assistance in a defamation suit brought against them by McDonalds. The Court distinguished this case from *McVicar*, noting that the applicants here faced potential financial consequences of a significant nature compared to their personal situations and the legal and procedural complexity of the case. The Court reiterated that the notions that a litigant should not be denied the opportunity to present his or her case effectively before the court and that the applicant should enjoy equality of arms with the opposing side are central to the concept of a fair trial in both civil and criminal proceedings. However, the Court noted that it may be acceptable to impose conditions on the grant of free legal assistance based on the applicant’s financial situation or prospects of success in the proceedings. Further, the Court noted that it is not incumbent on the state to use public funds to ensure total equality of arms between the assisted person and the opposing party; rather, it is only necessary that each side be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary. In addition, in *Bertuzzi v. France*, Application no. 36378/97, 2003, the Court held that the applicant had not had effective access to a tribunal, in breach of Article 6(1). The applicant had been granted legal aid in his civil suit against a lawyer but the three lawyers successively assigned to his case withdrew their services due to personal links with the defendant. In spite of his efforts, the applicant was not assigned another lawyer and was therefore unable to proceed with his case. The Court noted that the legal aid office’s provision of legal aid to the applicant, despite the fact that legal representation was not compulsory, indicated that it considered it essential for the applicant to be assisted by a qualified practitioner in the proceedings. The Court determined that the applicant should have been provided new counsel so that he could benefit from effective legal assistance. The Court considered that being forced to act *pro se* in proceedings against a legal practitioner effectively denied the applicant the right of access to the court in conditions allowing him the enjoyment of equality of arms, a principle inherent in the concept of a fair hearing. Furthermore, in *A. B. v. Slovakia*, Application no. 41784/98, 2003, the Court found that when domestic law provides that a court may grant free legal assistance to a litigant in civil proceedings the failure to deliver a formal decision to a request for such assistance constitutes a violation of the Article 6(1) right of access to the courts. The Court found that the applicant was prevented from presenting her case in conditions of equality with the defendant as she was unable to attend a court hearing due to the national court’s failure to issue a decision to her request for legal

assistance. Likewise, in *Bobrowski v. Poland*, Application no. 64916/01, 2008, the Court found that Article 6(1) was violated where the applicant had been partially exempt from paying court fees but was denied legal aid. The Court surmised that the partial exemption from court fees showed that the Polish courts considered the applicant's financial decision to be such that he could not bear the costs of the proceedings. The Court stated that since the Polish courts did not give any reason for rejecting the applicant's requests for legal aid, the principle of fairness, which is central to Article 6, was violated.

The right of access to the courts is not absolute, however, and it may be subject to restrictions, provided that they do not restrict or reduce the access in such a manner as to undermine the right altogether, that the restrictions pursue a legitimate aim, and that the means employed and the aim sought to be achieved are reasonably proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based on the financial situation of the litigant or his or her prospects of success in the proceedings. Moreover, it is not incumbent on the state to ensure total equality of arms between the assisted person and the opposing party as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary. For example, in *Thaw v. United Kingdom*, Application no. 27435/95, Commission decision of June 26, 1996 (partly inadmissible), the Commission found the applicant's complaint regarding his denial of legal aid services manifestly ill founded since he had failed to allege that the decision was arbitrary. The Commission determined that legal aid may be denied when a claim is not sufficiently well grounded, is frivolous, or vexatious, as long as the denial was not arbitrary. Furthermore, in *Stewart-Brady v. United Kingdom*, Application nos. 27436/95 and 28406/95, Commission decision of 2 July 1997 (inadmissible), the Commission noted that the lack of legal aid in defamation proceedings where the applicant was under a mental disability, and thus unable to bring the proceedings in person, could constitute a problem of access to the courts. However, the denial of legal aid here could not be characterized as arbitrary since the applicant's action for libel had no reasonable prospect of success.<sup>20</sup>

## 5. Legal Aid at Various Stages of Proceedings

Although the right to free legal assistance applies to all stages of criminal proceedings, from the preliminary police investigation to the final determination, it may be partially restricted depending on the special features of the particular proceeding involved. For example, the denial of free legal assistance at certain stages of pre trial proceedings may be found acceptable only if the adverse effects on the defendant's rights caused by the denial are offset at further stages of the proceedings.<sup>21</sup> Therefore, in *Imbrioscia v. Switzerland*, Series A, no. 275, 1993, the Court held that Article 6 applies to pretrial proceedings, finding that the application of Articles 6(1) and 6(3)(c) during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the Article 6 aim of a fair trial has been achieved, the Court will look to the entirety of the domestic proceedings conducted in the matter. In *Imbrioscia*, the Court did not find that Article 6 had been violated since the period during preliminary investigation without counsel representation was too short for the Court to conclude that the applicant's trial was unfair. Likewise, in *Murray v. United*

*Kingdom*, Application no. 18731/91, 1996, the Court applying *Imbrioscia* found violations of Articles 6(1) and 6(3)(c) since the applicant had been denied access to legal counsel for forty-eight hours following his arrest. The Court noted that Articles 6(1) and 6(3)(c) guarantee the right of access to a lawyer, even during the preliminary police investigation, though it may be restricted for good cause. The question in each case is whether the restriction, in light of the entirety of the proceedings, has deprived the accused of a fair hearing. Moreover, applying *Imbrioscia* and *Murray*, the Court in *Magee v. United Kingdom*, Application no. 28135/95, 2000, found a violation of Articles 6(1) and 6(3)(c) where the applicant had been refused access to an attorney for over forty-eight hours while being interrogated for extended periods of time and kept in solitary confinement in a detention center. The Court held that as a matter of procedural fairness the applicant should have had access to a lawyer at the initial stages of the investigation. Likewise, in *Averill v. United Kingdom*, Application no. 36408/97, 2000, the Court found a violation of Article 6(3)(c) since the applicant was denied a lawyer during the first twenty-four hours of his interrogation. The Court stated that the situation in which the accused found himself during that twenty-four-hour period was one where the rights of the defense may well have been irretrievably prejudiced due to the existing domestic law that allowed authorities to draw inferences from the silence of the accused. The trial judge did in fact invoke the applicant's silence during the first twenty-four hours of his detention against him. The Court stated that access to counsel should have been granted before the interrogation began as a matter of fairness. Furthermore, in *Ocalan v. Turkey*, Application no. 46221/99, 2005, the Court found a violation of Article 6 where the applicant was denied access to a lawyer during a seven-day period in which the applicant made several self-incriminating statements.<sup>22</sup> However, in *Yurttas v. Turkey*, Application nos. 25143/94 and 27098/95, 2004, the Court found Article 6 was not violated where the applicant was held in custody for eleven days and was not provided with legal assistance because the applicant was not questioned by the police during this period and did not make any statements to the police that could subsequently have been used against him in criminal proceedings. The Court did not ignore the possibility that the lack of legal assistance during police detention may raise issues under Article 6. However, it determined that the circumstances of the instant case did not enable it to conclude that the applicant's defense rights were irretrievably prejudiced during his detention or that he was deprived of a fair trial.

The right to free legal assistance applies at all levels of domestic proceedings depending on their special features taken in their entirety and on the role of the appellate or cassation courts. In *Delcourt v. Belgium*, Series A, no. 11, 1970, the Court found that while the Convention does not compel states to set up courts of appeal or of cassation, a state with such courts must ensure that persons brought before them enjoy the fundamental guarantees contained in Article 6. The way in which Article 6(1) applies, however, must depend on the special features of such procedures. Furthermore, in *Monnell and Morris v. United Kingdom*, Series A, no. 115, 1987, the Court reiterated that the special features of proceedings in appellate or cassation courts determine how Articles 6(1) and 6(3) apply to each case. The Court stated that it will consider the entirety of the proceedings conducted in the domestic legal system and the role of the appellate or cassation court therein. The Court further held that the interests of justice do not automatically require free legal assistance whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance

in accordance with Article 6. Rather, the right to free legal assistance on appeal depends upon the legal grounds for the appeal and whether the interests of justice require that free legal assistance be provided. Therefore, in *Granger v. United Kingdom*, Series A, no. 174, 1990, the Court found a violation of Article 6 where the applicant was not granted free legal assistance at an evidentiary hearing in his appeal of a five-year sentence for perjury. The Court held that it would have been in the interests of justice to provide free legal assistance to the appellant in order to enable him to make an effective contribution to the proceedings. In addition, in *Aerts v. Belgium*, Application no. 25357/94, 1998, the Court found a violation of Article 6(1) where the applicant's request for legal aid was rejected because his appeal was ruled "ill founded" by the domestic Legal Aid Board.<sup>23</sup> The Court found that the applicant, who could not afford counsel, could apply for legal aid to make an appeal. The Court determined that it was not for the Legal Aid Board to assess the proposed appeal's prospects of success; rather, it was for the Court of Cassation to determine the issue. The Court further found that by refusing the application on the ground that the appeal did not appear to be well founded, the Legal Aid Board impaired the very essence of the applicant's right to a tribunal. However, in *Del Sol v. France*, Application no. 46800/99, 2002, the Court found Article 6(3)(c) was not violated by the refusal of the Legal Aid Board of the Court of Cassation to provide free legal assistance for the applicant's civil cassation appeal. Although legal representation was required in order to bring the appeal, the Legal Aid Board based its decision on its determination that the applicant had no grounds for appeal. The Court considered the quality of the state's legal aid system and distinguished its decision from *Aerts* by noting that the French legal aid scheme provides substantial guarantees against arbitrariness.<sup>24</sup> In *Boner v. United Kingdom*, Series A, no. 300-B, 1994, the Court held that the factors to be considered in determining whether the interests of justice require providing free legal assistance in a criminal appeal include the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented appellant to present a legal argument relating to whether the trial judge properly exercised his discretion with respect to an evidentiary rule, and the importance of the issue at stake in view of the severity of the sentence.<sup>25</sup> For example, in *R. D.*, Application nos. 29692/96 and 34612/97, 2001, the Court determined Articles 6(1) and 6(3)(c) had been violated where an indigent applicant involved in proceedings for which legal representation was mandatory was denied legal aid. The Court found that as both the financial and "interests of justice" criteria were met, the domestic court deprived the applicant of having his case brought in a "concrete and effective way." Likewise, in *Tabor v. Poland*, Application no. 12825/02, 2006, the Court found a violation of Article 6(1) where the regional court rejected the applicant's request for legal aid in making a cassation appeal. The Court found that the applicant's request for legal aid was not handled with the requisite degree of diligence since the regional court did not provide reasons for the rejection and issued its decision one month after the deadline for lodging a cassation appeal.

## **6. Right to Free Legal Assistance in Proceedings for Review of Detention Falling under Article 5(4) of the Convention**

Although there is no express right to counsel in proceedings for review of detention, case law suggests that such a right should be recognized. Since the proceedings referred to in Article 5(4) are judicial proceedings, applicants should have effective access to these proceedings and

the opportunity to be heard either *pro se* or with adequate legal representation. It is difficult to imagine how a trial can be fair in the absence of such representation, especially in systems where great emphasis is placed on the pretrial phase. Thus, in *Winterwerp v. the Netherlands*, Series A, no. 33, 1979, the Court found a violation of Article 5(4) where the applicant was not given an opportunity to participate in proceedings reviewing his confinement and was not represented by a lawyer. The Court stated that even though the judicial proceedings referred to in Article 5(4) did not warrant the guarantees found in Article 6(1) it was essential that the person concerned have access to a court and the opportunity to be heard either *pro se* or through some form of representation where deemed necessary. The Court also determined that special procedural safeguards may be necessary in cases of detention on mental health grounds on account of the applicants' mental disabilities. The Court expanded upon this in *Megyeri v. Germany*, Series A, no. 237-A, 1992, holding that individuals found not guilty by reason of mental illness confined in psychiatric institutions should receive legal assistance in subsequent proceedings relating to the continuation, suspension, or termination of their detention, unless special circumstances overriding this requirement are present. While determining that Article 5(4) does not require persons of "unsound mind" to obtain legal counsel without the assistance of a domestic court, the Court found that the domestic court in this case should have appointed a lawyer to the applicant.<sup>26</sup> Likewise, in *Bouamar v. Belgium*, Series A, no. 129, 1988, the Court held that the applicant should have had the effective assistance of a lawyer in juvenile court proceedings. The Court determined that the mere fact that the applicant appeared before the court was not enough to provide him with the Article 5(4) safeguards to which he was entitled.<sup>27</sup>

## 7. Effectiveness of Free Legal Assistance

The Convention guarantees rights that are practical and effective, not theoretical and illusory; therefore, in *Artico v. Italy*, Series A, no. 37, 1980,<sup>28</sup> the Court found that the right to free legal assistance guaranteed in Article 6(3)(c) is not satisfied by formal appointment of a lawyer if the lawyer is not effective. It held that the state must take "positive action" to ensure that the applicant effectively enjoys his or her right to legal assistance. Further, the Court held that finding a violation of Article 6(3)(c) does not require proving prejudice against the applicant or that another attorney would have been successful.<sup>29</sup> Thus, the state is responsible for the replacement of ineffective legal aid lawyers or for ensuring that the ineffective lawyer's performance improves. In addition, in *Goddi v. Italy*, Series A, no. 76, 1984, the Court held that failure of state authorities to provide sufficient time and facilities for an officially appointed lawyer to prepare for a case violates the Article 6(3)(c) right to free legal assistance. The Court has also ruled that it is not first necessary to establish that the failure to provide assistance actually harmed the defendant's interests in finding Article 6(3)(c) was violated.

Since domestic courts are in a better position than the Court to examine complaints about legal representatives, the Court is generally prepared to consider the domestic court's assessment to be adequate as long as it is properly conducted. The Court will find Article 6(3)(c) has been violated if state authorities failed to act although the ineffectiveness of legal aid counsel was manifest or sufficiently brought to their attention. Therefore, in *Goddi*, Series

A, no. 76, 1984, the respondent state was held responsible for the absence of the applicant's chosen representative because it had sent notification of the proceedings to the wrong lawyer. The Court further found that the authorities' attempts to remedy the situation by nominating an alternative lawyer for the applicant at the hearing did not rectify this breach since the lawyer was clearly ill prepared and did not follow the applicant's instructions. The Court stressed that an adjournment would have been the appropriate remedy. On the other hand, in *Tripodi v. Italy*, Series A, no. 281-B, 1994, the Court found Article 6 was not violated, determining that the state could not be held responsible for the misconduct of the applicant's lawyer. The lawyer in that case failed to appear at a hearing in the Court of Cassation, take any action to be replaced with another lawyer, and file a written memorial despite having been informed of the day of the respective hearing and knowing that he would be unable to attend.

State officials that play prominent roles in the pretrial procedure, such as investigators and prosecutors, are also required to take measures to ensure that representation is effective, regardless of whether the defendant complains to the court or contacts his or her legal aid lawyers. Therefore, in *Daud v. Portugal*, Application no. 22600/93, 1998, the Court found a violation of Article 6(1) in conjunction with Article 6(3)(c) where the shortcomings of the officially appointed lawyers were so manifest that the authorities were required to intervene. Specifically, the applicant's first legal aid lawyer did not take any part in the proceedings and withdrew from the case at an early stage while the second lawyer was appointed too late to have sufficient time to prepare for an appellate hearing resulting in the appeal being declared inadmissible by the Supreme Court. The Court reached the same conclusion in *Sannino v. Italy*, Application no. 30961/03, 2006, where the applicant was assigned a legal aid lawyer who failed to appear at hearings because he had not been duly informed of his assignment by domestic authorities. As a result, the court assigned different lawyers to the applicant at each hearing who were unprepared and unfamiliar with the case. The Court determined that the authorities were not released from their responsibility even though the applicant did not complain to the authorities or contact his attorneys. Likewise, in *Czekalla v. Portugal*, Application no. 38830/97, 2002, the Court found a violation of Article 6 where the court-appointed legal aid attorney's failure to comply with legal requirements for lodging the applicant's appeal led to a ruling that the appeal was inadmissible. The Court determined that the applicant was denied practical and effective defense as a result of this failure and that although deficiencies or errors in the presentation of the defendant's case by an officially assigned lawyer generally does not engage the state's responsibility, this situation is different where the attorney's negligence deprives the defendant of a particular remedy. The attorney's noncompliance with procedure in this case was a "manifest shortcoming" requiring positive steps to be taken by the competent authorities in order to ensure the applicant's practical and effective exercise of defense rights.

However, when the errors in the conduct of the defense are not so explicit as to be automatically manifest to the state authorities, the applicant has to show that he or she has taken sufficient steps to bring these errors to their attention. Therefore, although in *Imbrioscia*, Series A, no. 275, 1993, the Court determined that the applicant did not receive adequate legal support, it held that the relevant authorities "could scarcely be expected to intervene" since the period during which the applicant was not represented was very short and the applicant had not complained about his lawyer's shortcomings and withdrawal. Similarly, while finding that there had been "serious shortcomings" in the fairness of the proceedings in *Twalib*, Application

no. 24294/94, 1998, the Court nonetheless dismissed the applicant's complaint because the applicant failed to raise the issue on appeal. It found that Article 6(3)(c) was not violated since the respondent state was unaware of the applicant's inadequate legal representation. On the other hand, in *Daud*, Application no. 22600/93, 1998, the Court found that the applicant's request for new counsel should have alerted the relevant authorities to a manifest shortcoming on the part of the officially assigned lawyer and the domestic court should have inquired into the manner in which the lawyer was fulfilling his duty.

If the applicant complains about the refusal of the domestic authorities to replace an allegedly ineffective legal aid lawyer, the Court will consider (1) whether the applicant supported the request to replace his or her legal aid lawyer with any plausible evidence and (2) whether the domestic authorities had valid reasons to refuse the request such as reluctance to interfere with the client-lawyer relationship and the fact that the public defense lawyer has already undertaken some amount of work on the case. Therefore, in *Kamasinski v. Austria*, Series A, no. 168, 1989, the Court determined Article 6 had not been violated, ruling that the state cannot be held responsible for every shortcoming of appointed counsel. The Court determined that the independence of the legal profession from the state requires that competent national authorities intervene only in instances where ineffective representation is manifest or sufficiently brought to their attention in some other way. Furthermore, in *Erdem v. Germany*, Application no. 38321/97, Admissibility decision of 9 December 1999 (partly inadmissible), the Court declared that the applicant's complaint of an infringement of his right to free legal assistance was manifestly ill founded. The Court determined that the refusal of the domestic court to replace the assigned legal aid counsel with legal aid counsel chosen by the applicant was not arbitrary since its decision was based on the fact that the assigned lawyer had firsthand knowledge of the entire proceedings and was therefore no less qualified to represent the applicant than the counsel proposed by the applicant. Moreover, in *Lagerblom v. Sweden*, Application no. 26891/95, 2003, the Court found Article 6(3)(c) was not violated by the domestic court's refusal to replace appointed counsel in response to the applicant's complaint that counsel did not speak his language and therefore could not communicate with him without an interpreter. The Court found the refusal was justified because the appointed counsel had already begun work on the case, the defendant was appointed a pro bono interpreter and allowed to address the court in his native language, and the defendant had not notified the court of his willingness to defray the costs of appointing new counsel. Furthermore, in *Balliu v. Albania*, Application no. 74727/01, 2005, the Court found Article 6(3)(c) was not violated where the domestic court took appropriate steps to ensure the defendant's attorney, who was not appointed by the court, could prepare an adequate defense. For example, the court adjourned hearings to give the defendant's attorney time to prepare and appointed an additional lawyer under the legal aid scheme. The Court found that the continuation of the trial without the lawyer, who was absent at the most important parts of the trial, was compatible with Article 6 in light of the court's duty to conduct the trial within a "reasonable time." In addition, in *Ramon Franquesa Freixas v. Spain*, Admissibility decision of 21 November 2000 (inadmissible), the Court found the applicant's complaint that his Article 6(3)(c) rights were violated because he had been assigned a lawyer specializing in labor matters to defend him in a criminal case was manifestly ill founded. The Court reiterated that Article 6(3)(c) did not guarantee a defendant the right to choose which lawyer the court should assign him and found that the applicant failed to present any plausible evidence to support his assertion that the lawyer was incompetent.

Although the Court bases its determination of the authorities' duty to act on whether there has been a manifest shortcoming on the part of legal counsel, it has not sufficiently defined what "manifest" errors in legal aid counsel's services and "ineffective" or "inadequate" representation are. In fact, the Court has been reluctant to make any kind of ruling on the adequacy of legal representation in individual cases. It seems that the Court's criticism of a lawyer's conduct has been restricted to questions of absenteeism or unwillingness to act; the Court has thereby avoided making qualitative assessments of what a present and willing state-appointed lawyer should do or say in his client's defense. However, the Court's reluctance to do so is understandable in light of the nature of the relationship between a lawyer and his or her client and the risks involved in outside interference with this relationship. The Court clearly does not consider that it is within its jurisdiction to judge the competence of any individual lawyer, nor does it encourage such interference by state authorities.

Judges may also be required to ascertain the defendant's fair trial rights, including the rights to be present in court and have an interpreter, even when they are not claimed or expressly waived by the defendant's legal aid lawyer. For example, in *Michael Edward Cooke v. Austria*, Application no. 25878/94, 2000, the Court found Articles 6(1) and 6(3)(c) were violated where the applicant was not present at his appellate hearing because his officially appointed counsel falsely informed the court that he did not wish to be present. The Court determined that it was essential to the fairness of the proceedings that the applicant be present at the appellate hearing regarding a possible increase in his sentence and that it was the judge's responsibility to ensure the applicant's presence.<sup>30</sup> In addition, in *Cuscani v. United Kingdom*, Application no. 32771/96, 2002, the Court found Articles 6(1) and 6(3)(e) were violated due to the judge's inaction where the applicant's legal aid lawyer did not request an interpreter so as to communicate with the applicant and to allow the applicant to understand the proceedings. The Court determined that the judge was required to treat the interests of the accused with "scrupulous care" as judges are "the ultimate guardian[s] of the fairness of the proceedings." Furthermore, in *Magalhães Pereira v. Portugal*, Application no. 44872/98, 2002, the Court found that special procedural safeguards may be necessary in order to protect the interests of certain categories of persons who are not fully capable of acting for themselves, such as persons with mental disabilities.

## **8. Issues Related to the Procedures of Legal Aid Application and Appointment of Legal Aid Lawyers**

Although Article 6 does not apply to proceedings relating to applications for legal aid<sup>31</sup> per se, the Convention is applicable to these proceedings to the extent that serious deficiencies in such proceedings may lead to arbitrary denial of free legal assistance or access to courts.

The procedure of applying for legal aid should not be so complex as to put a disproportionate hindrance in the way of the applicant's right of access to the courts. In addition, the determination of the "reasonable prospects of success" of cases should not allow the authority deciding on the legal aid application to act as a substitute for the court—for example, by usurping the court's role in interpreting controversial legal issues pertinent to the merits of the case. This was demonstrated in *Aerts*, Application no. 25357/94, 1998, where the

Court stated that it was not for the Legal Aid Board to assess the appeal's prospects for success; rather, this assessment was the Court of Cassation's responsibility.

Furthermore, legal aid eligibility determinations should not be arbitrary. Since special emphasis is placed on the "appearance of fair administration of justice" and on such guarantees in the national legal systems, the state authority responsible for granting legal aid should examine the relevant eligibility factors and either inform the applicant of the reasons for refusal of legal aid or deliver a formal decision, as required by domestic law. Moreover, the refusal of legal aid should be subject to appeal. Thus, in *Del Sol*, Application no. 46800/99, 2002, the Court found Article 6(3)(c) was not violated where the legal aid system at issue contained sufficient guarantees against arbitrariness. The Court looked at the nature of the legal aid eligibility test in cassation proceedings, which excluded only applications that were "manifestly ill founded," and found that its provisions were intended to meet the legitimate concern that public money should be made available only to legal aid applicants whose appeals to the Court of Cassation have a reasonable prospect of success. The Court further noted that the quality of the state legal aid system is of crucial importance, finding adequate safeguards where the applicant had the right to appeal decisions of the Legal Aid Office to the president of the Court of Cassation, who could objectively scrutinize the grounds for the appeal. On the other hand, in *Gutfreund v. France*, Application no. 45681/99, 2003, the Court held that Article 6 does not apply to decisions regarding applications for legal aid since they only concern the provision of legal assistance to the applicant and not the establishment of guilt or the determination of the penalty. However, the Court noted that procedural deficiencies in the determination of eligibility for legal aid may raise a problem of access to the courts under Article 6(1). The Court further stated it is conceivable that a violation of Article 6(3)(c) may be found in the presence of gross procedural unfairness in the determination of legal aid applicability in cases of exceptional complexity, seriousness, and importance for the applicant. Furthermore, in *A. B.*, Application no. 41784/98, 2003, the Court found Article 6(1) had been violated because domestic courts failed to assess the conditions for granting legal aid in the applicant's case and to deliver a formal decision regarding the refusal of legal aid that could be challenged before a higher court as was required by domestic law. The Court found the "appearance of fair administration of justice" to be of crucial importance in this case.<sup>32</sup> On the other hand, in *Santambrogio*, Application no. 61945/00, 2004, the Court held that the refusal of legal aid in a civil case based on financial ineligibility did not violate Article 6(1). The Court determined that the Italian system offers substantial procedural guarantees against arbitrariness in the determination of financial eligibility for legal aid; namely, legal aid commissions established at every first instance court are presided over by a judge and include three representatives, one chosen by the Prosecutor's Office, one by the president of the advocates' bureau, and one by the applicant himself. In addition, the system allows for a refusal of legal aid to be appealed to the legal aid commission of the Court of Appeal.

## **9. Costs of Court Proceedings and Repayment of Legal Aid Fees**

Although court fees and other litigation costs are not strictly legal aid costs, many member states of the Council of Europe link granting legal aid to an exemption from court fees and litigation costs. The Court has found that the requirement to pay fees or other costs in connection with

civil claims is compatible with Article 6. In *Ashingdane v. United Kingdom*, Series A, no. 93, 1985, the Court ruled that the Article 6 right of access to the courts is not absolute. Rather, it may be subject to limitations provided that they do not impair the very essence of the right and pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aims sought to be achieved.<sup>33</sup> Specifically, the factors that the Court will consider in assessing whether the restriction has impaired the right are the amount of the fees assessed in light of the particular case and the applicant's ability to pay and the phase of proceedings at which fees are imposed. Therefore, in *Tolstoy Miloslavsky v. United Kingdom*, Series A, no. 316-B, 1995, the Court found Article 6 had not been violated where the applicant complained that the requirement to pay 124,000 GBP as security for costs in order to pursue his appeal violated his right of access to the courts. The Court reiterated its *Ashingdane* standards for evaluating limitations on the right, noting that the security for costs pursued the clear and legitimate aim of protecting the applicant's opponent from large legal bills if the applicant failed at appeal. Furthermore, the Court determined that the Court of Appeal's decision to require security for costs was not arbitrary; rather, it was based on the fact that the applicant failed to show real and substantial grounds for appeal. On the other hand, in *Ait-Mouhoub v. France*, Application no. 22924/93, 1998, the Court found that imposing a disproportionately high amount of security for costs in spite of the applicant's lack of means amounted to a violation of the applicant's Article 6 right of access to the courts. In addition, in *Garcia Manibardo v. Spain*, Application no. 38695/97, 2000, the Court found Article 6 was violated where a domestic court did not consider the applicant's request for legal aid for a civil law appeal due to an adverse interpretation of ambiguous procedural rules. The Court noted that both its precedent and domestic law allowed a litigant's economic situation to be considered and for him or her to be discharged of the obligation to make an advance deposit when he or she had been granted legal aid. Moreover, in *Kreuz v. Poland*, Application no. 28249/95, 2001, the Court found Article 6(1) was violated where the applicant complained that he was unable to bring his civil claim as he could not afford the excessive court fees. The Court stated that filing fees in civil complaints are not necessarily violations of Article 6(1); however, the amount of fees assessed in light of the particular circumstances of a given case and the phase of the proceedings at which the fees are imposed must be considered in determining whether the applicant's right of access to the courts was infringed.<sup>34</sup> Thus, in *V. M. v. Bulgaria*, Application no. 45723/99, 2006, the Court found Article 6 was not violated because the court fee was not so excessive as to hinder the very essence of the right of access to the courts and the applicant did not prove that she was unable to pay the fee. In addition, the Court restated that domestic authorities are in a better position to assess the financial situation of applicants.

Furthermore, the Court has determined that the repayment of lawyer's fees and litigation costs in criminal cases does not violate Article 6 if the defendant's economic situation improves so that legal aid is no longer justified and/or he or she is able to meet the respective costs. Thus, in *X. v. Germany*, Application no. 9365/81 (28 DR 229), Commission decision of 6 May 1982 (inadmissible), the Commission declared the application inadmissible, stating that Article 6(3)(c) does not guarantee a definitive exemption from legal aid costs. Rather, reimbursement may be required after the trial if the person concerned has the means to cover the costs. Moreover, the Commission stated that the right to free legal assistance guaranteed by Article 6(3)(c) does not have to be interpreted in the same way as the guarantee of free assistance of an

interpreter because the latter guarantee is unconditional while free legal assistance is provided only if the accused “has not sufficient means to pay.” The Commission further stated that the wording “has not sufficient means to pay” in Article 6(3)(c) refers to both the moment when the court decides that free legal assistance should be provided and the period following the final conviction. Likewise, in *Croissant*, Series A, no. 237-B, 1992, the Court found that seeking reimbursement from a defendant for court-appointed lawyers’ fees after the defendant has been convicted does not in itself violate the Article 6(1) right to a fair trial.<sup>35</sup> On the other hand, in *Stankiewicz v. Poland*, Application no. 46917/99, 2006, the Court found Article 6(1) was violated where the applicants’ requests for reimbursement of the costs they had born in a civil claim unsuccessfully lodged against them by the public prosecutor were denied, in spite of the domestic legal principle that obliging the losing party in a civil case to reimburse the litigation costs of the successful party was not normally applicable in civil proceedings involving public prosecutors in their capacity as guardians of legal order. The Court noted that while the privileged position enjoyed by prosecutors with respect to the costs of civil proceedings might be justified for the protection of the legal order, it should not be applied so as to put the opposing party at an undue disadvantage.

## List of Cases<sup>36</sup>

### 1. Overall Scope and Eligibility for Legal Aid

*Golder v. United Kingdom*, Application no. 4451/70, Judgment of 21 February 1975.

*Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979.

*Jordan v. United Kingdom*, Application no. 24746/94, Judgment of 4 May 2001.

*Artico v. Italy*, Application no. 6694/74, Judgment of 13 May 1980.

### 2. Free Legal Assistance in Criminal Cases

*Engel and Others v. the Netherlands*, Application nos. 5100/71, 5107/71, 5102/71, 5354/72, and 5370/72, Judgment of 8 June 1976.

*Croissant v. Germany*, Application no. 13611/88, Judgment of 25 September 1992.

*Sejdovic v. Italy*, Application no. 56581/00, Judgment of 10 November 2004, Grand Chamber Judgment of 1 March 2006.

*Santambrogio v. Italy*, Application no. 61945/00, Judgment of 21 September 2004.

*Pakelli v. Germany*, Application no. 8398/78, Judgment of 25 April 1983.

*Twalib v. Greece*, Reference 42/1997/826/1032, Judgment of 9 June 1998.

*Quaranta v. Switzerland*, Application no. 12744/87, Judgment of 24 May 1991.

*Perks and Others v. United Kingdom*, Application nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95, and 28456/95, Judgment of 12 October 1999.

*Benham v. United Kingdom*, Reference 7/1995/513/597, Grand Chamber Judgment of 10 June 1996.

*Padalov v. Bulgaria*, Application no. 54784/00, Judgment of 10 August 2006.

*Biba v. Greece*, Application no. 33170/96, Judgment of 26 September 2000.

*X. v. Germany*, Application no. 6946/75 (6 DR 114), Commission decision of 6 July 1976 (inadmissible).

*Meftah and Others v. France*, Application nos. 32911/96, 35237/97 and 34595/97, Judgment of 26 July 2002.

*Mayzit v. Russia*, Application no. 63378/00, Judgment of 20 January 2005.

*Poitrimol v. France*, Application no. 14032/88, Judgment of 23 November 1993.

*Harizi v. France*, Application no. 59480/00, Judgment of 29 March 2005.

### 3. Free Legal Assistance in Civil Cases

*Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979.

*P, C and S v. United Kingdom*, Application no. 56547/00, Judgment of 16 July 2002.

*McVicar v. United Kingdom*, Application no. 46311/99, Judgment of 7 May 2002.

*Steel and Morris v. United Kingdom*, Application no. 68416/01, Judgment of 15 February 2005.

*Bertuzzi v. France*, Application no. 36378/97, Judgment of 13 February 2003.

*A. B. v. Slovakia*, Application no. 41784/98, Judgment of 4 March 2003.

*Bobrowski v. Poland*, Application no. 64916/01, Judgment of 17 June 2008.

*Thaw v. United Kingdom*, Application no. 27435/95, Commission decision of 26 June 1996 (partly inadmissible).

*Stewart-Brady v. United Kingdom*, Application nos. 27436/95 and 28406/95, Commission decision of 2 July 1997 (inadmissible).

### 4. Legal Aid at Various Stages of Proceedings

*Imbrioscia v. Switzerland*, Reference 32/1992/377/451, Judgment of 24 November 1993.

*Murray v. United Kingdom*, Reference 41/1994/488/570, Grand Chamber Judgment of 8 February 1996.

*Magee v. United Kingdom*, Application no. 28135/95, Judgment of 6 June 2000.

*Averill v. United Kingdom*, Application no. 36408/97, Judgment of 6 June 2000.

*Ocalan v. Turkey*, Application no. 46221/99, Grand Chamber Judgment of 12 May 2005.

*Yurttas v. Turkey*, Application nos. 25143/94 and 27098/95, Judgment of 27 May 2004.

*Delcourt v. Belgium*, Application no. 2689/65, Judgment of 17 January 1970.  
*Monnell and Morris v. United Kingdom*, Application nos. 9562/81 and 9818/82, Judgment of 2 March 1987.  
*Granger v. United Kingdom*, Application no. 11932/96, Judgment of 28 March 1990.  
*Aerts v. Belgium*, Reference 61/1997/845/105, Judgment of 30 July 1998.  
*Del Sol v. France*, Application no. 46800/99, Judgment of 26 February 2002.  
*Boner v. United Kingdom*, Reference 30/1993/425/504, Judgment of 28 October 1994.  
*Tabor v. Poland*, Application no. 12825/02, Judgment of 27 June 2006.

5. **Right to Free Legal Assistance in Proceedings for Review of Detention Falling under Article 5 (4) of the Convention**

*Winterwerp v. the Netherlands*, Application no. 6301/73, Judgment of 24 October 1979.  
*Megyeri v. Germany*, Application no. 13770/88, Judgment of 12 May 1992.  
*Bouamar v. Belgium*, Application no. 9106/80, Judgment of 29 February 1988.

6. **Effectiveness of Free Legal Assistance**

*Artico v. Italy*, Application no. 6694/74, Judgment of 13 May 1980.  
*Goddi v. Italy*, Application no. 8966/80, Judgment of 9 April 1984.  
*Tripodi v. Italy*, Reference 4/1993/399/477, Judgment of 22 February 1994.  
*Daud v. Portugal*, Application no. 22600/93, Judgment of 21 April 1998.  
*Sannino v. Italy*, Application no. 30961/03, Judgment of 27 April 2006.  
*Czekalla v. Portugal*, Application no. 38830/97, Judgment of 10 October 2002.  
*Imbrioscia v. Switzerland*, Reference 32/1992/377/451, Judgment of 24 November 1993.  
*Twalib v. Greece*, Reference 42/1997/826/1032, Judgment of 9 June 1998.  
*Kamasinski v. Austria*, Application no. 9783/82, Judgment of 19 December 1989.  
*Erdem v. Germany*, Application no. 38321/97, Admissibility decision of 9 December 1999 (partly inadmissible).  
*Lagerblom v. Sweden*, Application no. 26891/95, Judgment of 14 April 2003.  
*Balliu v. Albania*, Application no. 74727/01, Judgment of 30 November 2005.  
*Ramon Franquesa Freixas v. Spain*, Admissibility decision of 21 November 2000 (inadmissible).  
*Michael Edward Cooke v. Austria*, Application no. 25878/94, Judgment of 8 February 2000.

*Cuscani v. United Kingdom*, Application no. 32771/96, Judgment of 24 September 2002.

*Magalhães Pereira v. Portugal*, Application no. 44872/98, Judgment of 26 February 2002.

**7. Issues Related to the Procedures of Legal Aid Application and Appointment of a Legal Aid Lawyer**

*Aerts v. Belgium*, Reference 61/1997/845/105, Judgment of 30 July 1998.

*Del Sol v. France*, Application no. 46800/99, Judgment of 6 February 2002.

*Gutfreund v. France*, Application no. 45681/99, Judgment of 12 September 2003.

*B. v. Slovakia*, Application no. 41784/98, Judgment of 4 March 2003.

*Santambrogio v. Italy*, Application no. 61945/00, Judgment of 21 September 2004.

**8. Costs of Court Proceedings; Repayment of Legal Aid Fees**

*Ashingdane v. United Kingdom*, Application no. 8225/78, Judgment of 28 May 1985.

*Tolstoy Miloslavsky v. United Kingdom*, Application no. 35573/97, Judgment of 13 July 1995.

*Ait-Mouhoub v. France*, Reference 103/1997/887/1099, Judgment of 28 October 1998.

*Garcia Manibardo v. Spain*, Application no. 38695/97, Judgment of 15 February 2000.

*Kreuz v. Poland*, Application no. 28249/95, Judgment of 19 June 2001.

*V. M. v. Bulgaria*, Application no. 45723/99, Judgment of 8 June 2006.

*X. v. Germany*, Application no. 9365/81 (28 DR 229), Commission decision of 6 May 1982 (inadmissible).

*Croissant v. Germany*, Application no. 13611/88, Judgment of 25 September 1992.

*Stankiewicz v. Poland*, Application no. 46917/99, Judgment of 6 April 2006.

## Notes

1. The staff of the Public Interest Law Institute and the Open Society Justice Initiative prepared this paper. We also wish to gratefully acknowledge important substantive contributions by Vesselina Vandova and Kevin Kitching from INTERIGHTS, Borislav Petranov from the Ford Foundation, and Rachel Brailsford from Justice. It was copyedited and restructured, and last reviewed, in October 2008 by PILI's summer associate, Jennifer Lerman, a student at Duke Law School.
2. For the full text of judgments and decisions summarized here, see HUDOC, available at [www.echr.coe.int](http://www.echr.coe.int). For the decisions of the former European Commission of Human Rights not published in HUDOC, see *Decisions and Reports: European Commission of Human Rights (DR)*.
3. This is generally regarded as a leading case on the subject of legal aid.

4. “Everyone charged with a criminal offence [*sic*]...[has the right to] defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”
5. Examples of this include cases that must be filed with the assistance of an attorney where the applicant cannot afford one. In such instances, the applicant is effectively blocked from bringing his or her case.
6. But see *Bubbins v. United Kingdom*, Application no. 50196/99, 2005, where no violation of Article 2 was found because, even though victims were refused legal aid, they were represented throughout the proceedings by privately retained counsel.
7. Like *Airey*, this is generally regarded as a leading case on the subject of legal aid.
8. See also *Lagerblom v. Sweden*, Application no. 26891/95, 2003.
9. See also *Lala v. the Netherlands*, Series A, no. 297-A, 1994, and *Pelladoah v. the Netherlands*, Series A, no. 297-B, 1994.
10. Although this judgment concerns civil proceedings, we consider the case relevant to criminal legal aid because it establishes a test for review of financial eligibility decisions that will likely to be applied by the Court to determine eligibility in criminal matters.
11. The Court has never been called upon to examine whether a domestic system of assessing an applicant’s means is in compliance with the Convention. However, such a challenge is conceivable where the domestic threshold of income or assets demonstrating insufficiency of means is so low that, in practice, many of those whom the domestic court considers to be able to fund their own legal assistance are in fact unable to do so. Another possible challenge exists where a system of means assessment consistently leads to refusals for certain individuals or groups, giving rise to a violation of Article 14 of the Convention (prohibiting discrimination) in conjunction with Article 6(3)(c).
12. See also *Lagerblom v. Sweden*, Application no. 26891/95, 2003 (holding Article 6(3)(c) entitles an accused to be defended by counsel “of his own choosing” but that this right is not absolute. Rather, it is necessarily subject to certain limitations where free legal aid is concerned. The Court further stated that Article 6(3)(c) cannot be interpreted as securing a right to have public defense counsel replaced).
13. However, the defendant’s wishes can be overridden on relevant and sufficient grounds.
14. See Section 6: Effectiveness of Free Legal Assistance.
15. Under the original version of the Convention, the Commission was responsible for determining the admissibility of cases; however, Protocol no. 11 to the Convention eliminated the Commission in 1998 and its work was taken over by a full-time Court. See [www.echr.coe.int/ECHR/EN/](http://www.echr.coe.int/ECHR/EN/).
16. See Section 4: Legal Aid at Various Stages of Proceedings.
17. See also *Van Geysseghem v. Belgium*, Application no. 26103/95, 1999, *Van Pelt v. France*, Application no. 31070/96, 2000, and *Krombach v. France*, Application no. 29731/96, 2001.
18. Note that “proceedings wholly or partly in respect of defamation” were excepted from the scope of the UK civil legal aid scheme (UK Legal Aid Act of 1998).
19. But see *Steel and Morris v. United Kingdom*, Application no. 68416/01, 2005.
20. See also *Nicholas v. Cyprus*, Application No. 37371/97, Admissibility decision of 14 March 2000 (inadmissible).
21. Legal aid should be available immediately upon arrest, given the vulnerability of the defendant at that stage and the crucial importance of this stage in the context of the criminal proceedings as a whole in terms of evidence collection. Although the Court has not yet expressly stated this as a standard, the Court’s language in various judgments and the recommendations of the European Committee for the Prevention of Torture and Inhuman Degrading Treatment or Punishment suggest that such a standard should be adopted. See, e.g., the reports of the European Committee for the Prevention of Torture and Inhuman Degrading Treatment or Punishment (CPT); specifically see, the Report to the Government of the Slovak Republic on the Visit to Slovakia carried out by CPT from 22 February to 3 March 2005, para. 22, available at [www.cpt.coe.int/documents/svk/2006-06-inf-eng.htm](http://www.cpt.coe.int/documents/svk/2006-06-inf-eng.htm) and the Report to the Austrian Government on the visit to Austria carried out by CPT from 14–23 April 2004, paras. 22 to 26, available at [www.cpt.coe.int/documents/aut/2005-14-inf-eng.htm](http://www.cpt.coe.int/documents/aut/2005-14-inf-eng.htm).

22. However, see *Brennan v. United Kingdom* (Application no. 39846/98, 2001), (holding Article 6 had not been violated after the applicant was denied access to a lawyer for twenty-four hours during which he was interviewed and made a confession that was admitted into evidence).
23. Following the *Aerts* decision Belgium changed its standard to “manifestly ill founded.”
24. See also *Essaadi v. France*, Application no. 49384/99, 2002.
25. See also *B. v. United Kingdom* (Series A, no. 121, 1987) and *Maxwell v. United Kingdom* (Series A, no. 300-C, 1994).
26. See also *Magalhães Pereira v. Portugal*, Application no. 44872/98, 2002.
27. See also *Duyonov and Others v. United Kingdom* (Application no. 36670/97, 2001) (friendly settlement judgment regarding unavailability of legal aid for proceedings before the Privy Council reviewing detention of illegal migrants before deportation) and *Woukam Moudefo v. France* (Series A, no. 141-B, 1988) (friendly settlement judgment regarding the absence of legal aid in appealing orders of pretrial detention before the Court of Cassation).
28. This is generally regarded as the leading case on effectiveness of legal representation.
29. See also *Imbrioscia v. Switzerland* (Series A, no. 275, 1993), *Daud v. Portugal* (Application no. 22600/93, 1998), *Czekalla v. Portugal* (Application no. 38830/97, 2002), and *Sannino v. Italy* (Application no. 30961/03, 2006).
30. See also *Metelitsa v. Russia* (Application no. 33132/02 2006) (finding a violation of Article 6(1) in conjunction with Article 6(3)(c) where neither the defense lawyer nor the applicant had been present at the appellate proceedings, stating it was incumbent on the domestic authorities to ensure at least the lawyer’s presence).
31. Such proceedings include applications for legal aid, determination of eligibility for legal aid, granting of legal aid and/or appointment of a legal aid lawyers.
32. See also *Tabor v. Poland* (Application no. 12825/02) (finding the applicant’s request for legal aid was not handled with the requisite degree of diligence because the court issued its decision late and did not give any reasons for refusing legal aid).
33. It should be noted that the *Ashingdane* standards are applied broadly throughout the Court’s Article 5 and Article 6 jurisprudence.
34. See also *Kniat v. Poland* (Application no. 71731/01, 2005) (finding Article 6(1) was violated where domestic authorities did not properly assess the financial situation of the applicant and the fee required to proceed with the applicant’s appeal was excessive).
35. See also *Lagerblom v. Sweden* (Application no. 26891/95, 2003) (finding that mandatory legal defense does not violate Article 6 notwithstanding the applicant’s post-conviction obligation to pay a minor part of the litigation costs).
36. Note: Not all cases in this list are summarized in the paper.

# International Standards on Legal Aid: Relevant Texts and Summaries of Documents<sup>1</sup>

*by Open Society Justice Initiative and the Public Interest Law Institute*

This document, updated as of early 2007, is a compilation of excerpts from the texts of international treaties and other instruments as well as summaries of selected case law of the United Nations Human Rights Committee, the Inter-American Court, and the Commission of Human Rights.<sup>2</sup>

## 1. The United Nations (UN)

### 1.1 International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup>

- *Relevant text:* Article 14.3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.
- General Comments Adopted by the Human Rights Committee (HRC)<sup>4</sup>

General Comment no. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14).<sup>5</sup>

*Relevant text:* 11. Not all reports have dealt with all aspects of the right of defense as defined in subparagraph 3(d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during

the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is even more necessary.

General Comment no. 7: The right to adequate housing; forced evictions (Article 11(1) of the Covenant)<sup>6</sup>

*Relevant text:* 15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions, which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections, which should be applied in relation to forced evictions, include: ... (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

General Comment No. 28: Equality of rights between men and women (Article 3)

*Relevant text:* 18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, states parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication no. 202/1986, *Ato del Avellanal v. Peru*, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters.

- Case Law of the Human Rights Committee (Summaries)<sup>7</sup>

1. Scope of the right to legal aid

- a. Legal aid and lawyer of one's own choosing and right to defend oneself in person

- *Trevor Bennett v. Jamaica*, CCPR/C/65/D/590/1994 (1999). The author claimed a violation of Article 14(3)(d) because he was not represented by a counsel of his choice. The Committee stated that Article 14(3)(d) did not entitle the accused to choose a counsel provided to him free of charge. Thus, the respective part of communication was found inadmissible.
- *Hill v. Spain*, CCPR/C/59/D/526/1993 (1993). Where state law provides that criminal defense should be undertaken by a (legal aid) lawyer, and thus does not allow an accused person to conduct her own defense, there is an automatic violation of the right to defend oneself in person.
- *Lopez v. Uruguay*, CCPR/C/OP/1 (1984). The Committee found a violation of Article 14(3)(d) where a military *ex officio* counsel was appointed to a defendant contrary to his wishes to engage own counsel. See also *Antonio Viana Acosta v.*

*Uruguay*, U.N. Doc. Supp. no. 40 (A/39/40) (1984), and *Setelich v. Uruguay*, CCPR/C/OP/1 (1985).

b. Interests of justice test

- *Lindon v. Australia*, CCPR/64/D/646/1995 (1998). The Committee found inadmissible the author's complaint about a violation of his right to a legal aid lawyer, because he had failed to substantiate his claim that the interests of justice required the assignment of legal aid. The proceedings concerned the author's interlocutory applications regarding his defense against a trespassing charge where the penalty was a fine.

c. Capital punishment cases

- *Frank Robinson v. Jamaica*, CCPR/C/35/D/223/1987 (1989). The "interests of justice" test is met in every case concerning a capital offense, thus it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of a private lawyer is to a certain extent attributable to the accused himself or herself, and even if the provision of legal assistance would entail an adjournment of proceedings.
- *Conroy Levy v. Jamaica*, CCPR/C/64/D/719/1996 (1998). Legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. See also *Wright and Harvey v. Jamaica*, CCPR/C/55/D/459/1991 (1995), and *Robinson LaVende v. Trinidad and Tobago*, CCPR/C/61/D/554/1993 (1997). Article 14(3)(d) ICCPR is violated even if the author could apply for legal aid but did not do so.
- *Clive Johnson v. Jamaica*, CCPR/C/64/D/592/1994 (1998). In a capital case, legal assistance must also be available at the preliminary hearings of the case. When an author appears at the preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his right to legal representation and to ensure legal representation for him.

d. Constitutional motions

Although the role of a Constitutional Court is not to determine the criminal charge itself, its task is to ensure that applicants receive a fair trial, both in criminal and civil cases. Hence, when the author wished to approach the Constitutional Court in order to determine whether his or her criminal conviction was a result of a fair trial, and was unable due to unavailability of legal aid, the Committee found a violation of Article 14(1) (right to a fair hearing) and Article 2(3) ICCPR (obligation of the state to provide for effective remedies). It held that free legal aid must be provided if a convicted person who wishes to challenge irregularities in a criminal trial in a constitutional motion has insufficient means to pay for legal assistance, and where the interests of justice so require. See, for example, *Anthony*

*Currie v. Jamaica*, CCPR/C/50/D/377/1989 (1989); *Kelly v. Jamaica*, below; *Shaw v. Jamaica*, CCPR/C/62/D/704/1996 (1998); and *Rawle Kennedy v. Trinidad and Tobago*, CCPR/C/67/D/845/1999 (2002).

However, the Committee found that the constitutional challenge of the length of the sentence imposed upon commutation was not related to the determination of criminal charge. Thus, the state was not under an obligation to provide legal aid for such kind of constitutional motion; see *Xavier Evans v. Trinidad and Tobago*, CCPR/C/77/D/908/2000 (2003).

In another case, *Douglas, Gentles and Kerr v. Jamaica*, CCPR/C/49/D/352/1989 (1993), the Committee found no violation of the right of the convicted persons to have their conviction reviewed by a higher court (Article 14(5) ICCPR) in the author's claim that his appeal to one particular court, the Supreme (Constitutional) Court of Jamaica, was unavailable to him because of absence of legal aid. The Committee reasoned its view based on the fact that the author had effective access to other instances, such as the Court of Appeal, the Privy Council, and the Constitutional Court, to challenge his conviction.

See also the following:

- *P. Taylor v. Jamaica* (707/1996), ICCPR, A/52/40 vol. II (18 July 1997), 234 (CCPR/C/60/D/707/1996) at para. 8.2;
- *Shaw v. Jamaica* (704/1996), ICCPR, A/53/40 vol. II (2 April 1998), 164 (CCPR/C/62/D/704/1996) at para. 7.6 and Individual Opinion by N. Ando, P. Bhagwati, T. Buergenthal, and D. Kretzmer (dissenting in part), 173;
- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998), 174 (CCPR/C/62/D/705/1996) at para. 7.3 and Individual Opinion by N. Ando, P. Bhagwati, T. Buergenthal, and D. Kretzmer (dissenting in part), 182; and
- *Kennedy v. Trinidad and Tobago* (845/1998), ICCPR, A/57/40 vol. II (26 March 2002), 161 (CCPR/C/74/D/845/1998) at paras. 7.10, 8, and 9.

## 2. Legal aid in different stages of proceedings

### a. Pretrial detention and preliminary investigation

- *Maurice Thomas v. Jamaica*, CCPR/C/61/D/532/1993 (1997). Failure to provide the author with legal aid has denied him an opportunity to pursue further investigation and to have his case reviewed on appeal, which was found to be a violation of Article 14(3)(d) and Article 2(3) (right to an effective remedy) of the ICCPR.
- *Gridin v. Russian Federation*, CCPR/C/69/D/770/1997 (1997). The Committee found a violation of Article 14(3)(d) of the ICCPR where an author did not have a lawyer available to him for the first five days after he was arrested, although he had requested a lawyer soon after his detention, and where he

was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation.

- *Borisenco v. Hungary*, Communication No. 852/1999 (1999). The author was not provided with legal representation from the time of his arrest to his release from detention, which included a hearing on detention at which he had to represent himself. Even though the state assigned a lawyer to the author, the lawyer failed to appear at the interrogation or at the detention hearing. The Committee stated that it was incumbent upon the state party to ensure that legal representation was effective. Thus, violation of Article 14, paragraph 3(d), of the ICCPR was found.

See also the following:

- *Perdomo v. Uruguay* (R.2/8), ICCPR, A/35/40 (3 April 1980), 111 at paras. 14 and 16;
- *Sequeira v. Uruguay* (6/1977) (R.1/6), ICCPR, A/35/40 (29 July 1980), 127 at paras. 12 and 16;
- *Weinberger v. Uruguay* (R.7/28), ICCPR, A/36/40 (29 October 1980), 114 at paras. 12 and 16;
- *Carballal v. Uruguay* (R.8/33), ICCPR, A/36/40 (27 March 1981), 125 at paras. 9 and 13;
- *Tourón v. Uruguay* (R.7/32), ICCPR, A/36/40 (31 March 1981), 120 at paras. 8 and 12;
- *Machado v. Uruguay* (83/1981) (R.20/83), ICCPR, A/39/40 (4 November 1983) 148 at paras. 11.2 and 13;
- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995), 35 (CCPR/C/55/D/459/1991) at para. 10.2;
- *Wight v. Madagascar* (115/1982) (R.25/115), ICCPR, A/40/40 (1 April 1985), 171 at para. 17;
- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999), 260 (CCPR/C/65/775/1997) at paras. 6.6;
- *Aliev v. Ukraine* (781/1997), ICCPR, A/58/40 vol. II (7 August 2003), 52 (CCPR/C/78/D/781/1997) at paras. 2.1, 2.6, 7.2;
- *Jorge Laudinelli Silva et al. v. Uruguay* (CCPR/C/OP/1 at 49 (1984)).

b. Appeal

- *Collins v. Jamaica*, CCPR/C/47/D/356/1989 (1993). In a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel consulted with the accused and informed him accordingly. If not, the court must ensure that the accused is so informed and given the opportunity to engage other counsel. The upper court's failure

to do so violates Article 14(3)(d). See also *Graham and Morrison v. Jamaica*, CCPR/C/52/D/461/1991 (1994); *Burrell v. Jamaica*, CCPR/C/53/D/546/1993 (1996); *Kelly v. Jamaica*, CCPR/C/57/D/537/1993 (1996); *Jones v. Jamaica*, CCPR/C/62/D/585/1994 (1998); *Silbert Daley v. Jamaica*, CCPR/C/63/D/750/1997 (1998); *Anthony McLeod v. Jamaica*, CCPR/C/59/D/734/1997 (1998); and *Sooklal v. Trinidad and Tobago*, CCPR/C/73/D/928/2000 (2001).

- *Everton Bailey v. Jamaica*, CCPR/C/66/D/709/1996 (1999). The author claimed that his right to be effectively represented on appeal was violated because the appeal lawyer decided not to pursue some of the grounds for appeal. The Committee held that this case should be distinguished from the ones cited above, in which lawyers did not argue on appeal at all and the accused were not duly informed; in the present case, the legal aid lawyer, in fact, argued some of the grounds. Nothing in the file could suggest that the counsel was not exercising his professional judgment when choosing not to argue other grounds. Thus, there was no violation of articles 14(3)(d) and (5) ICCPR.
- *Lumley v. Jamaica*, CCPR/C/65/D/662/1995 (1999). The applicant alleged that he had not been informed of the date of the hearing of his application for legal to appeal, or of the name of his legal aid lawyer. As the state party had failed to provide any specific information as to whether and when the author was so informed, the Committee found a violation of Article 14, paragraph 3(d), of the ICCPR. But see *Berry v. Jamaica*, CCPR/C/50/D/330/1988 (1994): Even though the author was deprived of the opportunity to instruct counsel for the appeal prior to the hearing, the Committee found no violation of Article 14, paragraphs 3(b), (d), because in the present case the author would not have been allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial.
- *Hensley Ricketts v. Jamaica*, CCPR/C/74/D/667/1995 (2002). The failure of the legal aid lawyer, who represented the author for his appeal, to contact the author or the privately retained lawyer who represented the author at the first instance court was not found to be a violation of the obligation of the state to provide effective legal aid representation.

c. Ineffective representation

- *Henry v. Jamaica*, CCPR/C/43/D/230/1987 (1991). In the present case, the Committee found no violation of Article 14(3)(d) attributable to the state in the failure of the legal aid lawyer to call for witnesses on the applicant's behalf. See also *McLeod v. Jamaica*, CCPR/C/59/D/734/1997 (1998).
- *Glenford Campbell v. Jamaica*, CCPR/C/44/D/248/1987 (1992). The state was found in violation of its obligation to provide for effective legal representation

of the author in the appeal proceedings because of a combination of three factors: first, it was a capital case; second, the defense counsel failed to challenge the confessional evidence, although the author claimed that it was obtained through maltreatment; and third, the court did not provide for an opportunity for the author to instruct his lawyer on appeal or to represent himself at the appeal proceedings.

- *Beresford Whyte v. Jamaica*, CCPR/C/63/D/732/1997 (1998). The author claimed that his right to effective legal representation was violated because he was represented by an inexperienced junior lawyer, who did not call alibi witnesses and did not call for sworn evidence from an author. However, recalling its prior jurisprudence, the Committee held that the state party cannot be held accountable for alleged errors made by a defense lawyer, unless it was or should have been manifest to the judge that the lawyer's behavior was incompatible with the interests of justice. See, *inter alia*, *Lloyd Reece v. Jamaica*, CCPR/C/78/D/796/1998 (2003); *Henry v. Jamaica*, above; and *Glenn Ausby v. Trinidad and Tobago*, below.) No indication was present in the file that the counsel failed to use professional judgment in deciding not to call alibi witnesses or to take sworn testimony from an author.
- *Winston Forbes v. Jamaica*, CCPR/C/64/D/649/1995 (1998). The author alleged a violation of Article 14, paragraphs 3(b) and 3(d), of the ICCPR, because the examination of the author, the examination of alibi witness, and the closing argument were conducted by a junior counsel. However, the file showed that the junior counsel was a qualified lawyer, had worked closely with senior counsel in preparing the case, and had already conducted examination of witnesses earlier in the proceedings.
- *Junior Leslie v. Jamaica*, CCPR/C/63/D/564/1993 (1998). The author argued that he was not effectively represented on appeal, since he was represented by the same counsel as at trial, who failed to consult him. The Committee found no violation of Article 14, paragraph 3(d), because the counsel consulted with the author before the appeal and argued grounds of appeal on his behalf.
- *Smith and Stewart v. Jamaica*, CCPR/C/65/D/668/1995 (1999). The applicants claimed to be victims of a violation of Article 14(3)(d) because their legal assistance was inadequate. In particular, the legal aid lawyers failed to call any witnesses. The Committee stated that the state party cannot be held accountable for lack of preparation or alleged errors made by defense lawyers unless it has denied the author and his counsel time to prepare the defense, or unless it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. Because neither of the applicants, nor their counsel, requested an adjournment, and there was nothing in the file that would suggest that the lawyers' conduct was incompatible with the interests of justice, no violation of the Convention was found. However, the Committee found a violation of Article 14(3)(d) and (5) on the grounds that

the legal aid lawyer failed to inform the author that he was not going to argue his case on appeal.

- *Glenn Ashby v. Trinidad and Tobago*, CCPR/C/74/D/580/1994 (2002). The Committee did not agree with the author’s claim of inadequacy of legal representation during the trial and the appeal, because the defense counsel in fact had undertaken some actions at trial and in the appeal proceedings; namely, he cross-examined witnesses and argued the grounds of appeal.

See also the following:

- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999), 260 (CCPR/C/65/775/1997) at para. 6.8;
- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000), 116 at para. 10.5;
- *Pinto v. Trinidad and Tobago* (232/1987), ICCPR, A/45/40 vol. II (20 July 1990), 69 at paras. 12.5 and 13.1;
- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990), 85 at paras. 11.4 and 13;
- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995), 35 (CCPR/C/55/D/459/1991) at para. 10.5.

d. Other legal issues: The right to adequate time and facilities for preparation of the defense and to communicate with the counsel

- *Kelly v. Jamaica*, cited above. The right of an accused person to have adequate time and facilities for the preparation of his defense is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense for the trial. The determination of what constitutes “adequate time” requires an assessment of the individual circumstances of each case. The author was unable to communicate with a lawyer of his choosing until five days after his being taken into custody. His requests to speak to his lawyer were refused by the police. The Committee found a violation of the author’s right to adequate facilities to communicate with his counsel.
- *Glenford Campbell v. Jamaica*, cited above. The author claimed violation of the right to adequate time and facilities for the preparation of the defense, because he was not given a chance to communicate with his counsel before the preliminary hearing, and the legal aid lawyer visited him in prison only three days before the start of the trial. The Committee noted that in capital cases it was axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense. The determination of what constitutes “adequate time” requires an assessment of the individual circumstances of the

case. In the present case, the material did not reveal that either the author or his counsel complained to the trial judge that the time or facilities for the preparation of the defense were inadequate. Thus, no violation of Article 14 (3)(b) was found.

- *Jorge Manera Lluberas v. Uruguay*, U.N. Doc. Supp. No. 40 (A/39/40) (1984). The author was not allowed to see his defense lawyer for more than a two-year period during six years of preliminary investigation. The Committee found a violation of Article 14(3)(b), because he was not allowed adequate facilities to communicate with his counsel.
- *Leroy Simmonds v. Jamaica*, CCPR/C/46/D/338/1988 (1992). The Committee found a violation of Article 14(3)(b) of the Covenant, because the appellate court failed to inform the author with sufficient advance notice of the date of the hearing of his appeal. This delay deprived him of the opportunity to prepare his appeal and to consult with the court-appointed lawyer.
- *George Winston Reid v. Jamaica*, CCPR/C/51/D/355/1989 (1994). The legal aid lawyer was not present at all preliminary hearings and met the author only ten minutes before the start of the trial. The trial judge and the investigating magistrate must have been aware of that fact. Thus, the Committee found a violation of Article 14(3)(b) ICCPR.
- *Hill v. Spain*, cited above. The authors claimed a violation of their right to adequate time and facilities for the preparation of the defense, because the lawyer visited them only two days before the trial, for just twenty minutes. However, the Committee did not agree with the authors' claim, because, first, they had a counsel of their own choosing, though appointed under a legal aid scheme, and second, because the hearing was adjourned in order to allow the legal aid lawyer to prepare the case.
- *Perkins v. Jamaica*, CCPR/C/63/D/733/1997 (1998). The author claimed that he did not have enough time to prepare his defense, since he did not meet his lawyer until the third preliminary hearing and only once before the trial. The Committee found no violation of Article 14, paragraphs 3(b) and (d), of the ICCPR, however, because the author's lawyer met the author on at least two occasions before the trial, and neither counsel nor the author ever complained to the trial judge that the time for preparation of the defense was inadequate or requested an adjournment.

See also the following:

- *Estrella v. Uruguay* (74/1980) (R.18/74), ICCPR, A/38/40 (29 March 1983), 150 at paras. 8.6 and 10;
- *Wolf v. Panama* (289/1988), ICCPR, A/47/40 (26 March 1992), 277 at para. 6.3;
- *Marais v. Madagascar* (49/1979) (R.12/49), ICCPR, A/38/40 (24 March 1983), 141 at paras. 17.3, 17.4, and 19;

- *Nieto v. Uruguay* (92/1981), ICCPR, A/38/40 (25 July 1983), 201 at paras. 9.3 and 11;
- *Oxandabarat v. Uruguay* (103/1981) (R.24/103), ICCPR, A/39/40 (4 November 1984), 154 at paras. 9.2 and 11;
- *Conteris v. Uruguay* (139/1983), ICCPR, A/40/40 (17 July 1985), 196 at paras. 9.2 and 10;
- *Peñarietta v. Bolivia* (176/1984), ICCPR, A/43/40 (2 November 1987), 199 at para. 16;
- *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991), 219 (CCPR/C/43/D/240/1987) at para. 7.6;
- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993), 28 (CCPR/C/47/D/282/1988) at para. 10.4;
- *Reid v. Jamaica* (355/1989), cited above (CCPR/C/51/D/355/1989), at para. 14.2;
- *Brown v. Jamaica* (775/1997), cited above.

## 1.2 International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>8</sup>

- General Comments Adopted by the Committee on Economic, Social and Cultural Rights (CESCR):<sup>9</sup>

General Comment no. 7: The right to adequate housing: forced evictions (Article 11(1) of the Covenant)

*Relevant text:* 15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: ... (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

- General Recommendations Adopted by the Committee on the Elimination of All Forms of Racial Discrimination (CERD)<sup>10</sup>

General Recommendation no. 29: Article 1, paragraph 1, of the Convention (Descent)

*Relevant text:* CERD recommends that the States ... parties to the Convention adopt some or all of the following measures: ... 5. Administration of justice (21) Take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating group claims, and encouraging nongovernmental organizations to defend community rights....

General Recommendation no. 31: On the prevention of racial discrimination in the administration and functioning of the criminal justice system<sup>11</sup>

*Relevant text:* ...II. Steps to be taken to prevent racial discrimination with regard to victims of racism. A. Access to the law and to justice ... 8. In that regard, States parties should promote, in the areas where such persons live, institutions such as free legal help and advice centers, legal information centers and centers for conciliation and mediation. 9. States parties should also expand their cooperation with associations of lawyers, university institutions, legal advice centers and nongovernmental organizations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.

### 1.3 Convention on the Rights of the Child<sup>12</sup>

*Relevant text:* Article 37(d): States Parties shall ensure that: Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

Article 40. 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ... (ii) to be informed promptly and directly of the charges against him or her, and if appropriate through his or her own parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense.

### 1.4 Other Instruments

- United Nations Basic Principles on the Role of Lawyers<sup>13</sup>

*Relevant text:* Principle 3.3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

- UN Standard Minimum Rules for the Treatment of Prisoners<sup>14</sup>

*Relevant text:* Part II. Rules Applicable to Special Categories ... C. Prisoners under Arrest or Awaiting Trial ... 93. For the purposes of his defense, an untried prisoner

shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defense and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

- UN Rules for the Protection of Juveniles Deprived of Their Liberty<sup>15</sup>

*Relevant text:* III. Juveniles under Arrest or Awaiting Trial ... 18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following: (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications....

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>16</sup>

*Relevant text:* Article 18 ... 3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees: ... (b) To have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing; ... (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay....

## **2. The Council of Europe**

### **2.1 Treaties**

- European Convention on Human Rights<sup>17</sup>

*Relevant text:* Article 6: Right to a fair trial. 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....3. Everyone charged with a criminal offense has the following minimum rights: ... c. to defend himself in person or through legal

assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

- European Agreement on the Transmission of Applications for Legal Aid<sup>18</sup>

*Summary:* According to the Agreement, every person living in the territory of one state and wishing to apply for legal aid in civil, commercial or administrative matters in the territory of another state may submit his or her application in the state where he or she lives. For this purpose the states should designate a special authority that shall receive and forward the application to the other state free of charge for the applicant.

- Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid<sup>19</sup>

*Summary:* The Protocol is aimed at improving efficiency of the operation of the Agreement as regards mutual assistance between the authorities responsible for transmission of legal aid applications and communication between the applicants and their lawyers. In particular, it requires that applications for legal aid be dealt with within reasonable time, and the costs of translation that might occur in communication between the applicant and his or her lawyer be covered by the state.

- Convention on Action against Trafficking in Human Beings<sup>20</sup>

*Relevant text:* Article 12: Assistance to victims. 1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least: ... (d) counseling and information, in particular as regards their legal rights and services available to them, in a language that the victims can understand; (e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders....

Article 15: Compensation and legal redress. 1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant court and administrative proceedings in a language which they can understand. 2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

## 2.2 Other Instruments

- Committee of Ministers Resolutions and Recommendations, and Parliamentary Assembly Recommendations<sup>21</sup>
  - Resolution 76(5) of the Committee of Ministers on legal aid in civil, commercial administrative matters, adopted on 18 February 1976.

*Summary:* The Resolution recommends the member states to accord, under the same conditions as to nationals, legal aid in civil, commercial and administrative matters, irrespective of the nature of the tribunal exercising jurisdiction, a) to natural persons being nationals of any member states, and b) to all other natural persons who have their habitual residence in the territory of the state where the proceedings take place.

- Resolution 78(8) of the Committee of Ministers on legal aid and advice, adopted on 2 March 1978.

*Summary:* The Resolution declares the right of all persons to legal aid and legal advice, so that no one is prevented by economic obstacles from pursuing or defending his right in the court in civil, commercial, administrative, social or fiscal matters. It sets out the principles of granting legal aid, for instance that legal aid should embrace all the costs necessarily incurred by the assisted person, including witnesses, experts and translations; that it can be partial when a person is able to pay part of the costs of the proceedings; that the refusal to grant legal aid should be subject to appeal, etc. The Resolution states that legal aid should be provided by a person qualified to practice law, and requires that such person is adequately remunerated for her work on behalf of the assisted person.

- Recommendation no. R(81)7 of the Committee of Ministers on measures facilitating access to justice, Appendix, adopted on 14 May 1981.

*Relevant text:* 4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the court, then representation by a lawyer should not be compulsory.

- Recommendation no. R(93)1 of the Committee of Ministers on effective access to the law and justice for the very poor, adopted on 8 January 1993.

*Summary:* The Recommendation is aimed at facilitating access to legal advice and legal aid, courts and quasi-judicial methods of conflict resolution for the very poor, defined as “persons who are particularly deprived, marginalized or excluded from society both in economic and in social and cultural terms.” In the sphere of legal aid it recommends that legal aid is extended to all types of judicial proceedings and to all very poor persons, including stateless and aliens, in any event when they are habitually resident in the state where proceedings are conducted; that the persons eligible for legal aid should be given appropriate counsel, as far as possible of their own choice; that the procedure of application for legal aid should be simplified and that the only grounds for refusal of legal aid should be inadmissibility, manifestly insufficient prospect of success and where granting legal aid is not in the interests of justice.

- Recommendation no. R(95)5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases, adopted on 7 February 1995.

*Summary:* The Council of Ministers recommends that governments of member states adopt or reinforce, as the case may be, all measures which they consider necessary to improve the functioning of appeal systems and procedures in civil and commercial cases. The document states that it should be possible for any decision of a lower court (“first court”) to be subject to the control of a higher court (“second court”), that information should be available to the parties regarding their right to appeal and how to exercise it, and that judges of higher courts should not be allowed to participate in the proceedings relating to cases with which they were involved in a lower court. The documents further contain recommendations on the possible limitations on judicial control and measures for improving the appeal procedures.

- Recommendation no. (97)6 of the Committee of Ministers to member states aiming at improving the practical application of the European Agreement on the Transmission of Applications for Legal Aid, adopted on 13 February 1997.

*Summary:* The document provides a new application form for legal aid abroad, to be used when transmitting an application for legal aid to a party to the agreement. It recommends that central authorities assist applicants in completing the respective application form and offers a series of other practical recommendations for dealing with the legal aid applications in a reasonable time.

- Recommendation no. R(99)6 of the Committee of Ministers on the improvement of the practical application of the European Agreement on the Transmission of Applications for Legal Aid, adopted on 23 February 1999.

*Summary:* The Recommendation contains the application form for legal aid abroad to be used when making application under the European Agreement of the Transmission of Application for Legal Aid, and the form for acknowledgment of the receipt of such application. It also sets out numerous practical recommendations to improve efficiency of dealing with applications for legal aid abroad by the transmitting authorities. The Recommendation replaces the Recommendation no. R(97)6 aiming at improving the practical application of the European Agreement on the Transmission of Applications for Legal Aid, adopted by the Committee of Ministers on 13 February 1997.

- Recommendation (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000.

*Relevant text:* Principle IV: Access for all persons to lawyers. 1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers. 2. Lawyers should be encouraged

to provide legal services to persons in an economically weak position. 3. Governments of member states should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty. 4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds.

Principle V: Associations ... 4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to: ... c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice....

- Recommendation Rec. (2003) 18 of the Committee of Ministers to member states containing a transmission form for legal aid abroad for use under the European Agreement on the Transmission of Applications for Legal Aid (ETS no. 092) and its Additional Protocol (ETS no. 179), adopted on 9 September 2003.

*Summary:* The Recommendation introduces the form for the transmission of request for legal aid under the European Agreement on the Transmission of Applications for Legal Aid, and replaces the form for acknowledgment of receipt of the application for legal aid, contained in the Recommendation No. R (99)6 (see above) with a new form.

- Recommendation Rec. (2005) 12, containing an application form for legal aid abroad for use under the European Agreement on the Transmission of Applications for Legal Aid (CETS no. 092) and its Additional Protocol (CETS no. 179).

*Summary:* The Multilateral Committee on the European Agreement on the Transmission of Applications for Legal Aid. In accordance with Article 7 of the Agreement, the central authorities of the Contracting Parties to the Agreement must furnish each other with information on the state of their law governing legal aid. A convention-related committee, the Multilateral Committee on the European Agreement on the Transmission of Applications for Legal Aid (T-TA), has been established for this purpose. Its role is to consider problems relating to the Agreement's application, in order to improve co-operation between the contracting parties.

On 31 May 2002, at its 77th Plenary Session, the European Committee on Legal Cooperation (CDCJ) adopted an action plan on legal assistance systems. The Committee referred to previous steps made through intergovernmental programs of activities in the sphere concerned, notably the productive work of the Multilateral Committee on the European Agreement on the Transmission of Applications for Legal Aid (T-TA), which regularly examines the operation of the Agreement.

The action plan mainly focuses on four areas:

- setting up, developing and strengthening legal assistance systems;
- practical organization, administration and dispensation of legal assistance systems;
- provision of information concerning legal assistance systems on the website;
- cross-border legal assistance (legal aid).

For each of these the action plan proposes particular steps that should be taken to achieve the intended results. The implementation of the action plan is envisaged by both the Council of Europe and its member states within the framework of their activities aiming at increasing the efficiency and improving the functioning of their judicial systems.

- Recommendation 1639 (2003) 1 of the Parliamentary Assembly, Family Mediation and Gender Equality, adopted on 25 November 2003.

*Relevant text:* 8. The Parliamentary Assembly...calls on Council of Europe member and Observer states to implement the principles for the promotion and use of family mediation as laid out in Recommendation no. R (98)1 of the Committee of Ministers and to introduce or strengthen the following measures with a view to ensuring: ...iv. the inclusion of family mediation in the legal aid system....

- The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT)<sup>22</sup>
  - CPT standards, “Substantive” sections of the CPT’s General Reports: Extract from the 12th General Report (CPT/Int (2002) 15)<sup>23</sup>

*Relevant text:* 41. Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer.

### **3. The European Union<sup>24</sup>**

#### **3.1 European Charter of Fundamental Rights<sup>25</sup>**

*Relevant text:* Article 47. Right to an effective remedy and to fair trial ...3. Legal aid shall be available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

## 3.2 Other EU Instruments

### *Legal Aid in Criminal Cases*

- Treaty on European Union.<sup>26</sup>

*Relevant text:* Article 31. Common action on judicial cooperation in criminal matters shall include: ... (c) ensuring compatibility in rules applicable in the member states, as may be necessary to improve such cooperation.

- Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings (2001/220/JHA), entered into force 22 March 2003.

*Relevant text:* Article 4. Right to receive information. 1. Each member state shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows: ... (f) to what extent and on what terms they have access to: legal advice, or legal aid, or any other sort of advice....

Article 6. Specific assistance to the victim. Each member state shall ensure that victims have access to advice as referred to in Article 4(1)(f)(ii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid as referred to in Article 4(1)(f)(ii), when it is possible for them to have the status of parties in criminal proceedings.

- Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between member states (2002/584/JHA), entered into force 7 August 2002.

*Relevant text:* Article 11. Rights of a requested person ... 2. A requested person who is arrested for the purpose of execution of a European Arrest Warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing member state.

- Proposal of the Commission of European Communities for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, adopted on 28 August 2004.<sup>27</sup>

*Summary of the Proposal:* Articles 1–3 provide for a right to legal advice to all criminal suspects throughout all criminal proceedings. Legal advice should be available in any event before the start of police questioning. When the suspect is a minor or is not able to understand or follow the proceedings, or is subject to a European Arrest Warrant, extradition request or other surrender procedure, legal advice should be made available.

Article 5 of the proposal states that legal advice should be provided at no cost for the suspect in criminal proceedings if these costs would cause undue financial hardship to himself/herself or his or her dependants. Member states must ensure that they have in place the mechanism to ascertain whether the suspected person has the means to pay for legal advice.

Article 6 provides for a right of the suspect for an assistance of interpreter free of charge.

Article 14 of the proposal provides for a right of a suspect to be notified in writing of existing rights, including the right to legal aid, as soon as a person is arrested or detained. Annex A of the proposal suggests the model of the Letter of Rights—a short written statement of basic rights that has to be given to all suspects in the language they understand as early as possible, and in any event before the questioning takes place.

#### *History of the Proposal*

Conclusions of the Tampere European Council, 15–16 October 1999 (Conclusions 30, 31, 33, 35, and 40).<sup>28</sup>

Green Paper (2003) from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.<sup>29</sup>

The Hague Program (Tampere 2) of the European Council, 5 November 2004 (stating that the Framework Decision should be adopted by the end of 2005).<sup>30</sup>

2,732nd Council Meeting, Justice and Home Affairs, Luxembourg 1–2 June 2006.<sup>31</sup>

*Summary:* The Council agreed to continue working on the basis of a Presidency compromise based on the following principles:

- Only minimum standards are established and there is no “upper limit” of rights. Consequently, member states will not be prevented from providing for more far-reaching rights for suspects in criminal proceedings.
- There will be full compliance with the rights enshrined in the European Convention on Human Rights and the case law of the European Court of Human Rights. Member states will not be allowed to go below this level.
- As compared to the Commission proposal, the Presidency proposal limited the number and scope of the rights covered and focused on general standards rather than specifying in detail how the rights would be applied in each member state in view of the different procedural systems.

2,768th Council Meeting, Justice and Home Affairs, Brussels, 4–5 December 2006.<sup>32</sup>

*Summary:*

- The main outstanding issues of this proposal relate to the question whether to adopt a Framework Decision or a non-binding instrument, and the risk of developing conflicting jurisdictions with the European Court of Human Rights (ECtHR).
- The aim of the proposed Framework Decision is to improve the fairness of criminal proceedings and to facilitate judicial cooperation in criminal matters by setting out common ways of complying with Articles 5 and 6 of the ECtHR. Furthermore, the Framework Decision could bring added value to the ECtHR by strengthening certain rights and making these rights applicable also in the context of the European Arrest Warrant as well as on extradition and surrender procedures to International Criminal Courts and Tribunals.

*Legal Aid in Civil Cases*

- Treaty Establishing the European Community.<sup>33</sup>

*Relevant text:* Article 61. In order to establish progressively an area of freedom, security and justice, the Council shall adopt: ... c) measures in the field of judicial cooperation in civil matters as provided for in Article 65.

- Council Directive 2002/8/EC of 27 January 2003, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, entered into force 31 January 2003.

*Summary:* The Directive applies to “cross-border” civil cases, where the person asking for legal aid does not live in a member state where the case is to be tried or the court judgment is to be enforced. Article 3 of the Directive establishes that natural persons involved in a dispute shall be entitled to legal aid to ensure their effective access to justice, consisting of pre-litigation advice, legal assistance and legal representation in court and exemption from, or assistance with, the costs of proceedings, including the costs connected with the cross-border character of proceedings (e.g., costs of interpretation and travel costs).

Articles 5 and 6 state that provision of legal aid in cross-border civil disputes may be made conditional upon the economic situation of the person involved in such a dispute and on the merits of the dispute.

Article 10 of the Directive expands the scope of its application to alternative dispute resolution methods, when the law or the court hearing the case requires the parties to make recourse to them.

Articles 12–16 set out the procedure facilitating application for legal aid; namely, persons may submit such application in their country of residence, which has to be transmitted rapidly and free of charge to the authorities of the country which will be granting legal aid.

*History of Adoption of the Directive:*

Conclusions of the Tampere European Council, 15 and 16 October 1999, point 30: The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union. . . .<sup>34</sup>

Green paper (2000) from the Commission on Legal Aid in civil matters: the problems confronting the cross-border litigant.<sup>35</sup>

Initial Proposal of the European Commission of 18 January 2002 (ref. CE COM (2002) 0013), Proposal for a Council Directive to improve access to justice in cross-border crime disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings COM/2002/0013, final CNS 2002/0020.<sup>36</sup>

Opinion of the European Parliament of 25 September 2002 (ref. PE T5-0441/2002).

- Decision of the Commission of European Communities 2004/844/EC of 9 November 2004, establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

## **4. The Organization for Security and Cooperation in Europe (OSCE)<sup>37</sup>**

### **4.1 Meetings**

- Concluding Document of the Vienna meeting 1986 of representatives of the participating states of the OSCE, 1989.

*Principles:* The participating states will: 13.9. Ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia*, effectively apply the following remedies: ... the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice.... 23.3: observe the United Nations Standard Minimum Rules for the Treatment of Prisoners....

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990.<sup>38</sup>

*Principles:* 5.17. Any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

11. The participating states further affirm that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include:

11.1. the right of the individual to seek and receive adequate legal assistance....

- Charter of Paris for a New Europe CSCE Summit, 1990.

Human Rights, Democracy and the Rule of Law. We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights....

- Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 1991.

23.1. The participating states will ensure that: v. anyone charged with a criminal offense will have the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

#### 4.2 Recommendations

- Supplementary Human Dimension Meeting on the Prevention of Torture, Final Report, Vienna, 6–7 November 2003.

Recommendations to the OSCE participating states: All OSCE participating states must ensure that all persons deprived of their liberty are: Provided with information about their rights and how those rights can be accessed; Granted access to a lawyer, including during all interrogations, and the opportunity to consult with their lawyer in confidence. National legislation should provide for effective access to a lawyer from the moment of whatever form of detention. In all cases where a detainee may risk any kind of imprisonment he/she should be offered a lawyer recompensed by his or her work by the state, in the event that they are unable to pay for a lawyer....

- Observations and Recommendations of the OSCE legal system monitoring section; Report No. 7: Access to effective counsel; Stage 1: Arrest to the first detention hearing, Pristina, 23 May 2000.<sup>39</sup>

Recommendations: Law enforcement authorities must advise detainees immediately upon their arrest or detention that they have: ... b. the right to consult with defense counsel prior to interrogation; and c. the right to have defense counsel present during any interrogation.

- Observations and Recommendations of the OSCE Legal System Monitoring Section; Report No. 8: Access to effective counsel; Stage 2: The investigative hearing to indictment, 20 July 2000.

The accused must be immediately informed as to his right to defense counsel upon his arrest and/or detention and that this right continues throughout the entire criminal process...It is essential that [Draft Law Advocates Code of Ethics] provides, among other things, a prohibition on requesting money in court-appointed cases...

- OSCE Supplementary Human Dimension Implementation Meeting, “Role of Defense Lawyers in Guaranteeing a Fair Trial,” Tbilisi, 3–4 November 2005. Final Report.

*Summary:* The meeting was devoted to three issues: access to counsel, independence of the bar, and equality of parties in criminal proceedings. The final report contains a series of practical recommendations for implementing effectively the right to counsel in OSCE member states.

## 5. The Organization of American States<sup>40</sup>

- American Convention on Human Rights.<sup>41</sup>

*Relevant text:* Article 8. Right to a Fair Trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law....

- Case law of the Inter-American Court and the Inter-American Commission (Summaries) on the right to legal assistance in constitutional motions challenging death penalty sentence.<sup>42</sup>

In a series of cases against Bahamas, Grenada, Jamaica, and Trinidad and Tobago, the Inter-American Court and the Inter-American Commission have ruled that a convicted person seeking constitutional review of a death sentence has to be provided legal assistance by the state when the interests of justice so require (see the UN Human Rights Committee cases on the right to legal counsel in constitutional motions challenging capital sentences).

*Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, 10 March 1999. A group of children were kept in an adult prison without a court-appointed lawyer to represent them, contrary to the requirements imposed by national law. The Inter-American Commission on Human Rights found a violation of Article 8(2)(e) of the Convention (right to a public defender).

Advisory Opinion of the Inter-American Court of Human Rights OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, 17 September 2003, Inter-Am. Ct. H.R. (Ser. A) no. 18 (2003). The Court has construed the right of undocumented migrants to access to the court as a judicial guarantee of their labor rights. Since labor rights of migrants are often not recognized, often they must resort to state mechanisms for the protection of their rights. However, the risk an undocumented migrant takes, when he or she resorts to the administrative or judicial system, of being deported, expelled, or deprived of his or her freedom, and the fact that he or she is denied free legal aid, prevents him or her from asserting the rights in question. Thus, the state must guarantee that access to justice for migrant workers is genuine and not merely formal.

Advisory Opinion of the Inter-American Court of Human Rights OC-11/90, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), 10 August 1990, Inter-Am. Ct. H.R. (Ser. A) no. 11 (1990). If legal representation of an indigent person is necessary, either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized, and this person is unable to obtain such services because of his or her indigence, then he or she is exempted from the requirement to exhaust domestic remedies. To determine whether legal representation is or is not necessary the circumstances of a particular case or proceeding—its significance, legal character, and context in a particular legal system—have to be assessed. Likewise, the exemption applies where the interests of justice require legal representation, but a generalized fear in the legal community prevents an individual from obtaining such representation. Yet it is for a complainant to demonstrate that he or she could not obtain legal counsel necessary for the protection of the Convention rights either as a result of indigence or because of a generalized fear to take the case among the legal community.

Report of the Inter-American Commission on Human Rights on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Chapter V (c)4, “Access to Legal Representation through Legal Aid,” OEA/Ser.L/V/II.106, Doc. 40 rev. 28 February 2000. The Inter-American Commission stressed the obligation of the state not only to guarantee the right to legal aid to asylum seekers in domestic law, but also to make the right to judicial protection effective. The state is responsible for eliminating distinctions in the availability or coverage of legal aid provided by the provinces, which have the effect of depriving claimants requiring such services to ensure their access to judicial protection of fundamental rights.

For more examples, see the following cases:

- *Dave Sewell v. Jamaica*, Case 12.347, Report no. 76/02, 28 December 2002;
- *Desmond McKenzie, Andrew Downer et al. v. Jamaica*, Cases 12.023, 12.044, 12.107, 12.126, and 12.146, Report no. 41/00, 13 April 2000;
- *Neville Lewis v. Jamaica*, Case 11.825, Report no. 97/98, 17 December 1998;
- *Michael Edwards v. Bahamas*, Case 12.067, Report no. 24/00, 7 March 2000;
- *Paul Lallion v. Grenada*, Case 11.765, Report no. 124/99, 27 September 1999;
- *Rudolph Baptiste v. Grenada*, Case 11.743, Report no. 38/00, 13 April 2000;

- *Sheldon Roach and Beemal Ramnarace v. Trinidad and Tobago*, Petitions 12.346 and 12.377, Report no. 17/02, 27 February 2002;
- *Anthony Briggs v. Trinidad and Tobago*, Case 11.815, Report no. 37/98, 7 May 1998.

## 6. International Criminal Tribunals

### 6.1 The International Criminal Court (ICC)

- The Rome Statute of the International Criminal Court, adopted on 12 September 2003, entered into force on 1 July 2002.<sup>50</sup>

*Relevant text:*

Article 55: Rights of persons during an investigation... 2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor or by national authorities..., that person shall also have the following rights of which he or she shall be informed prior to being questioned: ... (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if person does not have sufficient means to pay for it....

Article 67: Rights of the accused. 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: ... (d) ... to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of his right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it....

- ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000).<sup>51</sup>

*Relevant text:*

Rule 16. Responsibilities of the Registrar relating to victims and witnesses. 1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules: ... (b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 and 91.

Rule 21. Assignment of legal assistance ... 2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list. 3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.... 5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 22. Appointment and qualifications of Counsel for the defense. 1. A counsel for the defense shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defense shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defense may be assisted by other persons, including professors of law, with relevant expertise.

Rule 90. Legal representatives of victims ... 5. A victim or group of victims who lack the necessary means to pay for a common representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

## 6.2 The International Criminal Tribunal for Former Yugoslavia (ICTY)

- The Statute of the International Criminal Tribunal for Former Yugoslavia.<sup>52</sup>

*Relevant text:* Article 21. Rights of the accused. 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

- The Rules of Procedure and Evidence, UN Doc. IT/32/REV.37 (1994), adopted on 11 February 1994, and as subsequently amended.<sup>53</sup>

*Relevant text:*

Rule 42. Rights of Suspects during Investigation. (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for

it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning....(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall resume only when the suspect has obtained or has been assigned counsel.

Rule 44. Appointment, Qualifications and Duties of Counsel. (A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she: (i) is admitted to the practice of law in a state, or is a university professor of law; (ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B); (iii) is a member in good standing of an association of counsel practicing at the Tribunal recognized by the Registrar; (iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defense Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel; (v) has not been found guilty in relevant criminal proceedings; (vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and (vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information. (B) At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision.

Rule 45. Assignment of Counsel. (A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel.... (E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel.

- Directive on Assignment of Defense Counsel No. 1/94, UN Doc. IT/73/REV. 10.<sup>54</sup>  
*Summary:* The Directive contains detailed procedural and substantive provisions relating to the assignment of defense counsel when a suspect or an accused does not have sufficient means to meet the costs of proceedings before the Tribunal: for instance, organs responsible for the assignment of counsel, eligibility criteria and the procedure of means testing, the review procedure of refusal to assign a counsel, etc. Furthermore, it sets out the professional and other requirements for the assigned defense counsel and the remuneration scheme for the legal service and travel expenses of the assigned counsel.

### 6.3 The International Criminal Tribunal for Rwanda (ICTR)<sup>55</sup>

- The Statute for the International Criminal Tribunal for Rwanda.  
*Relevant text:* Article 20: Rights of the Accused: identical to Article 21 ICTY Statute (see above).
- The Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995) adopted on 29 June 1995, and as subsequently amended.  
*Relevant text:*  
 Rule 42. Rights of Suspects during Investigation: text identical to Rule 42 of the ICTY Rules of Procedure and Evidence (see above).  
 Rule 45: Assignment of Counsel ... (G) Where an alleged indigent person is subsequently found not to be indigent, the Chamber may make an order of contribution to recover the cost of providing counsel. (H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings. (I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.  
 Rule 45 *quater*: Assignment of Counsel in the Interests of Justice. The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.
- Directive on the Assignment of Defense Counsel, approved by the Tribunal on 9 January 1996, last amended 15 May 2004.<sup>56</sup>  
*Summary:* The Directive covers essentially the same areas as the Directive on the Assignment of Defense Counsel adopted by ICTY (see above).

- Case law of the ICTY and ICTR.<sup>57</sup>
  - Decision on the Motions of the Accused for Replacement of Assigned Counsel, *The Prosecutor v. Gérard Ntakirutimana*, Case no. ICTR-96-10-T and ICTR-96-17-T, 11 June 1997. The defendant claimed that he no longer had confidence in his assigned legal aid counsel, solely on the ground that this counsel was a Tanzanian national and that the United Republic of Tanzania maintained special ties with the present government of the Republic of Rwanda. His claim was not found to constitute an “exceptional case” justifying replacement of an assigned counsel, as required by Article 19(D) of the Directive on Assignment of Defense Counsel. Article 20(4) of the Statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice. However, the court noted that in order to ensure that the indigent accused receives the most efficient defense possible in the context of a fair trial, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.
  - Decision on the Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-counsel to the Accused Kubura, *The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*, Case no. IT-01-47-PT, ICTY, 26 March 2002. The prosecution sought replacement of a defendant’s assigned counsel, arguing that because the counsel had previously worked with the prosecution as a legal adviser on other cases, this would cause both a conflict of interest and an undue advantage due to the counsel’s previous association with the prosecution. The Trial Chamber found that prior association in other cases alone does not justify disqualification of a former staff member with the prosecution from becoming defense counsel. In that case the test to be applied was the “real possibility” of a conflict of interest. The burden of proof of the alleged conflict rests on the party seeking disqualification of defense counsel. The Trial Chamber concluded that the prosecution failed to demonstrate that the prior association of the assigned counsel with the prosecution and the work he was required to do at that time provide a sufficient basis to conclude that a real possibility of a conflict of interest existed. Likewise, the prosecution failed to show that the alleged advantage for the defense was such that it might have an impact on the fairness of the trial.
  - Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead Counsel and co-counsel, *The Prosecutor v. Vidoje Blagojevic & Dragan Jokic*, Case no. IT-02-60-T, ICTY, 3 July 2003. The accused sought replacement of his assigned co-counsel recommended by his lead counsel, because the assignment was not carried out pursuant to his suggestion and consent. He also sought replacement of his lead counsel,

alleging that the latter's decision on the choice of co-counsel caused lack of trust in his actions on behalf of the accused, and a subsequent breakdown of communication between them.

The Trial Chamber denied the accused's motion and found that it fell within the discretion of the Registrar to appoint a co-counsel in the interests of justice upon a request by the lead counsel. While it was certainly a more favorable situation when lead counsel and an accused can agree on the selection of co-counsel, when there is no evidence that the accused had a conflict of interest with the proposed co-counsel or that he or she was manifestly unqualified or incompetent, or, that through his or her performance as legal assistant, the proposed co-counsel demonstrated that he or she was ineffective or uninterested in being a zealous advocate for the accused, the lead counsel's choice should be deemed as a valid one.

Likewise, the Trial Chamber refused the defendant's motion seeking replacement of a lead counsel stating that no grounds had been identified that would amount to an "insufficient atmosphere of trust between the accused and the defense team or which would otherwise show that co-operation between the accused and his team is no longer possible." The mere fact that the counsel took a decision against the wishes of the accused is not enough to justify the dismissal of a counsel, unless the defendant proves that the decision was made in breach of the counsel's obligations under the Rules of Evidence, the Directive on Assignment of a Defense Counsel and the Code of Professional Conduct for the Defense Counsel, namely the duty of loyalty, honesty, competency, skill and care, with open communication, and the overarching duty to act in the best interests of the client.

- Decision on Assignment of Counsel, *The Prosecutor v. Veselin Sljivancanin*, Case no. IT-95-13/1-PT, ICTY, 20 August 2003.

Whatever may be the scope of the right to counsel of one's own choosing when a defendant hires his own counsel, the right to publicly paid counsel of one's own choosing is limited. However, the Registrar should clarify the reasons for not accepting the preferred counsel of the accused, or for not applying the "interests of justice" exception pursuant to Rule 44(B) of the Rules of Procedure and Evidence (see above).

The Registrar has the authority to define the "interests of justice" exception in the first instance, but he must apply the definition consistently across cases. From the previous decisions of the Registrar it follows that, in the absence of other considerations, the interests of justice exception was deemed to be satisfied if the accused demonstrated the following criteria: (1) his preferred attorney had represented him previously before a national court in relation to the charges now being brought before the ICTY or related charges; (2) the accused (and his preferred attorney) have identified an individual willing to serve as co-counsel who speaks one of the working languages as well as

the language of the accused well; (3) the proposed co-counsel has sufficient experience as a criminal defense attorney that he could take over the case if the lead counsel were to withdraw for any reason; and (4) all expenses for interpretation and translation beyond those usually provided by the Tribunal would be borne by the accused or the lead counsel. The Registrar also has the authority to change the criteria he uses in interpreting the “interests of justice” exception but he must (1) explain that he is changing the meaning of the exception, and why he is doing so, and (2) do so in a way that does not leave a particular applicant facing new standards of which he could not reasonably be aware. For instance, he may seek an amendment to the Directive on the Assignment of a Defense Counsel; make a general statement to the Association of Defense Counsel and ask them to publicize it; announce a new interpretation in the course of ruling on a particular request for assignment of counsel, and make it clear to the affected parties that the new interpretation will be subject to a judicial review.

## Notes

1. This paper was prepared by the staff of the Open Society Justice Initiative and the Public Interest Law Institute, with the support of INTERIGHTS. It incorporates materials compiled by INTERIGHTS for a litigation workshop on access to justice held in October 2006 in London. In the preparation of those materials, INTERIGHTS drew extensively on a number of sources, including [www.bayefsky.com](http://www.bayefsky.com) and other UN-related websites. This paper was last reviewed in 2007.
2. For analysis and summaries of selected cases of the European Court of Human Rights relevant to legal aid, see the paper “European Court of Human Rights Standards on the Right to Legal Aid” in this publication, prepared by the staff of the Open Society Justice Initiative, Public Interest Law Institute, and Interights, last reviewed in December 2006.
3. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March 1976, in accordance with Art. 49, available at [www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).
4. HRC General Comments available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
5. HRC General Comments available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
6. General Comment No. 7 was provided by the Committee on Economic, Social and Cultural Rights (CESCR).
7. HRC jurisprudence available at: [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
8. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976, in accordance with Art. 27, available at [www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm).
9. CESCR General Comments available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
10. CERD General Recommendations available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
11. Recommendation adopted at the 65th session of CERD on 7 August 2005.
12. Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force on 2 September 1990, in accordance with Art. 49, available at [www.unhchr.ch/html/menu3/b/k2crc.htm](http://www.unhchr.ch/html/menu3/b/k2crc.htm).

13. Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at [www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm).
14. Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957, and 2076 (LXII) of 13 May 1977, available at [www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm).
15. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990, available at [www.unhchr.ch/html/menu3/b/h\\_comp37.htm](http://www.unhchr.ch/html/menu3/b/h_comp37.htm).
16. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly Resolution 45/158 of 18 December 1990, entry into force on 1 July 2003, in accordance with Art. 87(1), available at [www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm).
17. The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, entry into force on 3 September 1953, available at [www.conventions.coe.int](http://www.conventions.coe.int) (CETS No. 005).
18. European Agreement on the Transmission of Applications for Legal Aid (ETS 92), signed 27 January 1977, entry into force on 23 April 1983, available at [www.conventions.coe.int](http://www.conventions.coe.int) (CETS No. 092).
19. Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid, signed on 4 November 2001, entry into force on 1 September 2002, available at [www.conventions.coe.int/Treaty/EN/Treaties/Html/197.htm](http://www.conventions.coe.int/Treaty/EN/Treaties/Html/197.htm) (CETS No. 179).
20. See [www.conventions.coe.int](http://www.conventions.coe.int). As of 24 April 2008, 21 EU member states have signed this convention; 17 have ratified it.
21. Texts available at [www.coe.int/t/e/general/search.asp](http://www.coe.int/t/e/general/search.asp).
22. CPT information available at [www.cpt.coe.int](http://www.cpt.coe.int).
23. CPT standards, "Substantive" sections of the CPT's General Reports, available at [www.cpt.coe.int/en/documents/eng-standards.doc](http://www.cpt.coe.int/en/documents/eng-standards.doc).
24. EUR-Lex at <http://eur-lex.europa.eu/> provides direct free access to European Union law. The system makes it possible to consult the Official Journal of the European Union and it includes *inter alia* the treaties, legislation, case-law and legislative proposals. Also consult the Justice and Home Affairs web page for specific documents: [www.ec.europa.eu/justice\\_home/index\\_en.htm](http://www.ec.europa.eu/justice_home/index_en.htm).
25. For more information on the Charter see [www.ec.europa.eu/justice\\_home/unit/charte/en/rights.html](http://www.ec.europa.eu/justice_home/unit/charte/en/rights.html).
26. Available at [www.europa.eu.int/eur-lex/en/treaties/index.htm](http://www.europa.eu.int/eur-lex/en/treaties/index.htm).
27. Full text of the proposal is available at [www.europa.eu.int/eur-lex/en/com/pdf/2003/com2003\\_0075en01.pdf](http://www.europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0075en01.pdf).
28. Available at [www.europen.europa.eu/summits/tam\\_en.htm](http://www.europen.europa.eu/summits/tam_en.htm).
29. Available at [www.europa.eu.int/eur-lex/en/com/gpr/2000/com2000\\_0051en01.pdf](http://www.europa.eu.int/eur-lex/en/com/gpr/2000/com2000_0051en01.pdf).
30. Available at [www.ec.europa.eu/justice\\_home/doc\\_centre/doc/hague\\_programme\\_en.pdf](http://www.ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf).
31. Available at [www.europa.eu/rapid/pressReleasesAction.do?reference=PRES/06/144&format=HTML&caged=0&language=EN&guiLanguage=en](http://www.europa.eu/rapid/pressReleasesAction.do?reference=PRES/06/144&format=HTML&caged=0&language=EN&guiLanguage=en).
32. Available at [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/91997.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf).
33. Available at [www.europa.eu.int/eur-lex/lex/en/treaties.index.htm](http://www.europa.eu.int/eur-lex/lex/en/treaties.index.htm).
34. Available at [www.europen.europa.eu/summits/tam\\_en.htm](http://www.europen.europa.eu/summits/tam_en.htm).
35. Available at [www.europa.eu.int/eur-lex/en/com/gpr/2000/com2000\\_0051en01.pdf](http://www.europa.eu.int/eur-lex/en/com/gpr/2000/com2000_0051en01.pdf).
36. Available at [www.eur-lex.europa.eu/LexUriServ.do?uri=CELEX:52002PC0013:en.html](http://www.eur-lex.europa.eu/LexUriServ.do?uri=CELEX:52002PC0013:en.html).
37. OSCE documents are available at [www.osce.org/documents/](http://www.osce.org/documents/).

38. CSCE—Conference on Security and Co-operation in Europe, the predecessor of the OSCE. At the Budapest Summit in December 1994, the CSCE was renamed the OSCE, marking its transition from a conference to a full-fledged international organization.
39. The OSCE has been working in conjunction with agencies involved in the study and development of access to justice programs for BiH. OSCE field offices are monitoring access to justice issues, concentrating on eight basic themes: the existence of any indigence tests, judges' interpretation of the interests of justice requirement, the swiftness of attorneys' appointments, the implementation of the principle of instruction of rights, the manner of *ex officio* lawyers' selection, dismissal of *ex officio* lawyers, and both the adequacy and the allocation of legal aid budgets.
40. OAS documents in English are available at [www.oas.org/main/english/](http://www.oas.org/main/english/).
41. American Convention on Human Rights "Pact of San Jose," Costa Rica, adopted on 22 November 1969, entered into force on 27 August 1979, in accordance with Art. 74.2 of the Convention, available at: [www.oas.org/juridico/english/Treaties/b-32.htm](http://www.oas.org/juridico/english/Treaties/b-32.htm).
42. Case law of the Inter-American Court is available at [www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html); case law of the Inter-American Commission is available at: [www.cidh.oas.org/casos.eng.htm](http://www.cidh.oas.org/casos.eng.htm).
43. Documents of the African Union are available at [www.africa-union.org/root/au/index/index.htm](http://www.africa-union.org/root/au/index/index.htm).
44. African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, available at [www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf).
45. Adopted by the 2nd Ordinary Session of the Assembly of the Union in Maputo, 11 July 2003, available at [www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf).
46. Adopted in July 1990 and entered into force on 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990), available at [www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf).
47. Available at [www.achpr.org](http://www.achpr.org).
48. Dakar Declaration and Recommendations were a result of the Seminar on the Right to a Fair Trial in Africa held in collaboration with the African Society of International and Comparative Law and INTERIGHTS, in Dakar, Senegal, 9–11 September 1999, available at: [www.achpr.org/english/resolutions/resolution46\\_en.html](http://www.achpr.org/english/resolutions/resolution46_en.html).
49. The Guidelines on the Right to a Fair Trial were coordinated by INTERIGHTS and drafted jointly by its staff and the Human Rights Institute of South Africa (HURISA). They were developed from the Declaration and Recommendations of the Dakar Seminar on Fair Trial in Africa held 9–11 September 1999 (see above); available at [www.interights.org](http://www.interights.org).
50. Available at [www.un.org/law/icc/](http://www.un.org/law/icc/).
51. Available at [www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf).
52. Available at [www.icty.org](http://www.icty.org).
53. See note 51.
54. Full text of the Directive is available at [www.icty.org](http://www.icty.org).
55. Documents of ICTR are available at [www.icttr.org](http://www.icttr.org).
56. Full text of the Directive is available at [www.icttr.org/ENGLISH/basicdocs/defence/](http://www.icttr.org/ENGLISH/basicdocs/defence/).
57. Judgments and decisions of the ICTY are available at the ICTY site [www.un.org/icty/cases-e/index-e.htm](http://www.un.org/icty/cases-e/index-e.htm); the ICTR jurisprudence may be found at the official site of the ICTR: [www.icttr.org](http://www.icttr.org).



# Appendices



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### **Websites for Selected Legal Aid Laws, Legal Aid Management Bodies, and NGOs Working on Legal Aid**

Armenia: Law on Advocacy, adopted on December 14, 2004. Contact ABA-CEELI Armenia for the unofficial translation of the law in English.

National Legal Aid (Australia): <http://www.nla.aust.net.au/>.

Instituto Pro Bono (Brazil): <http://www.institutoprobono.org.br/>.

Irish Legal Aid Board: <http://www.legalaidboard.ie>.

JUSTICE: <http://www.justice.org.uk>.

Legal Services Commission, United Kingdom (including the Community Legal Service and Criminal Defense Service): <http://www.legalservices.gov.uk/>.

Lithuania: Law Amending the Law on State-Guaranteed Legal Aid of the Republic of Lithuania, adopted on 20 January 2005, to enter into force on 1 May 2005. Unofficial translation into English: <http://www.justiceinitiative.org>.

Legal Services Agency (New Zealand): <http://www.lsa.govt.nz/index.html>.

National Legal Aid & Defender Association (NLADA): <http://www.nlada.org/Defender>.

Open Society Institute–Sofia: <http://www.legalaidreform.net>.

Open Society Justice Initiative: <http://www.justiceinitiative.org>.

Public Defender Service for the District of Columbia: <http://www.pdsdc.org/>.

Public Interest Law Institute: <http://www.pili.org>.

Scottish Legal Aid Board: <http://www.slab.org.uk/>.

Slovenia: Legal Aid Act of the Republic of Slovenia, adopted on 31 May 2001. (English). <http://www.pili.org/en/dmdocuments/Five3Slovenia.doc>.

Legal Aid Board of South Africa: <http://www.legal-aid.co.za>.

The New Hampshire Public Defender: <http://www.nhpd.org/>.



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The Public Interest Law Institute (PILI) is an international non-profit organization that advances human rights around the world by stimulating public interest advocacy and developing the institutions necessary to sustain it. PILI pursues this mission by building the legal capacity of civil society organizations and the leadership potential of public interest lawyers, by reforming legal aid systems and legal education, and by promoting pro bono legal practice globally.

Throughout the world, millions of people are deprived of access to justice and do not enjoy fair trials because they cannot afford legal assistance. To rectify this injustice, states must create effective systems of publicly funded legal services, but they often suffer from lack of funding, limited accessibility for potential beneficiaries, and inferior quality of services.

*Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society* offers practical suggestions for improving systems of publicly funded legal services. Some of them are borrowed from the more advanced and innovative legal aid systems in the world—England, Israel, Netherlands, South Africa, and the United States. Others represent solutions that have been tested in Central and Eastern Europe. This book avoids simplistic solutions and one-size-fits-all guidelines. Instead it offers a great variety of well-tested ideas, which have proven to contribute to the process of making legal aid more accessible, more effective, and more real.



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