Legal Services:
Pro Bono and State Guaranteed Aid

Jiří Kopal (ed.)

RIGHTS in Context

LEAGUE OF HUMAN RIGHTS

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Liga lidských práv

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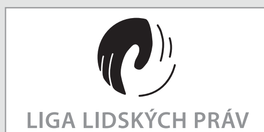

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Introduction

The publication *Legal Services: Pro Bono and State Guaranteed Aid* is published at a time when there are simultaneous discussions on the advantages of developing a *pro bono* legal culture in cooperation with law firms and legal NGOs, and on the adoption of state guaranteed legal aid. There are differing opinions on these issues in Czech legal society and they are discussed in a growing number of publications, expert articles and proceedings from round tables. Opinions also differ between lawyers in different states, depending on the development of the society, the traditions of each particular country, and the experience drawn from their respective legal histories and values. The aim of this collection of selected contributions from the years 2005—2008 is not to deepen the polemic against the inclusion of NGOs and other groups into state guaranteed legal aid; such debate has already been conducted in discussions for the draft of the law on state guaranteed aid; the aim of this collection is just simply to inspire. Based on League of Human Rights (LIGA) experience it is beneficial to evaluate the success of foreign legal institutes and institutions and to transfer that knowledge to the Czech Republic, which is not difficult to put into practice through well placed effort and insight of the local dynamics.

The bulk of contributions that fill the second half of this collection deal with state guaranteed legal services and were presented in late 2005 at the International Conference on State Guaranteed Legal Aid organized by the League of Human Rights in cooperation with the Austrian League for Human Rights and School of Law, Masaryk University in Brno. In the first part of this collection papers are assembled which provide a better picture of the benefits of *pro bono* legal aid. The overall arrangement of this publication reflects the gradual tendency of LIGA to increase the scope of awareness on legal services from the state to include legal services provided by private subjects.

The expansion of the issue of legal services to indigents from the private sector stems from the experience that private initiatives of citizens and NGOs often evolve earlier than the activities based on the decision making and legislative structures of the state. This is also evidenced by the fact, that in Czech Republic after a year of preparation, the first free *pro bono* clearinghouse opened in June of this year. Through the clearinghouse, NGOs helping the poor can submit requests with the help of a web page to twelve — at the time of publication — voluntarily cooperating legal firms offering free legal aid both in concrete cases and in organizational matters of legal character. The establishment of this clearinghouse is a consequence of the development in Central Europe of similar cooperation between legal firms and NGOs which has evolved for a longer period of time in countries like Hungary and Poland. In addition, similar partnerships have developed more and more on the Pan-European scale thanks to the nongovernmental Public Interest Law Institute (PILI).

Experience and priorities of LIGA in the area of legal services for the indigent

The agenda of LIGA is framed by the aforementioned issues on reciprocally tied pillars.

1) Owing to our work on concrete cases of human rights violations we have cooperated on a local level in the last 6 years with more than thirty attorneys, especially in the field of human rights in health care, criminal justice and rights of the child. Based on this experience we consider it crucial to place emphasis on an often neglected issue: the need for quality legal aid for victims in criminal proceedings. The need for legal aid encompasses victims of violent crimes, because of the difficulties victims of racial, domestic, sexual, and police violence have to accessing legal aid, and by this also to justice as such. Our goal is to cooperate in these areas with other attorneys in the coming years and increase the number of stable partnerships.

2) LIGA has also gained experience through cooperation with international legal firms. This was possible thanks to the cooperation of the International Senior Lawyers Project (ISLP), whose establishment and development was supported by large practices from the United States. These firms often permit their most experienced attorneys to transfer their legal and managerial experience to NGOs in a number of countries. With the collaboration of these senior lawyers we have established long term understandings with two experienced legal experts from the U.S. Moreover, current interaction with international law firms proceeds on the basis of the European clearinghouse of *pro bono* legal aid under the leadership of PILI, based in Budapest, Hungary. Currently, international legal firms have begun voluntary work on comparative research in concrete areas of human rights protection, particularly in European countries. The results will be included by LIGA into its legal analysis and legislative proposals.

3) From an institutional standpoint, it is important that we have been aware from the very beginning that the realm of *pro bono* and state guaranteed legal services go beyond the issues of human rights protection LIGA is active in. It is also important to support the development of legal services in other spheres of social life. That is why we have also supported the establishment and growth of the private institution, Public Interest Lawyers Association (PILA), in cooperation with the Environmental Law Service. Although PILA in the course of time has begun to shape its own path as it achieves autonomy, two lawyers active in LIGA are current members in PILA. This institutional cooperation between PILA and LIGA has resulted in the opening of the *pro bono* clearinghouse mentioned at the beginning of the introduction. The clearinghouse will be administered and developed by the PILA office in Prague. Furthermore, students of law are trained in social responsibility through additional institutional development and increased assistance to indigents. The law student internship is derived from the Human Rights Clinic established in

2006 in cooperation with the School of Law, Palacky University in Olomouc. The students become familiar with concrete cases of human rights violations at the LIGA office, and they may go on to provide legal advice to indigents under the supervision of LIGA lawyers.

4) In the area of finding a solution to the lack of state guaranteed legal aid we have since 2003 been gradually contacted by the Government's Council for Human Rights, representatives of Czech Chamber of Attorneys and the Justice Ministry. While working towards a solution, an international conference in 2005 was organized on this topic, several legal articles were published, and instructive criticism furnished to an NGO — Counseling Center for Citizenship, Civil and Human Rights — concerning a proposal for free legal aid law. Thanks to the long term cooperation with legal experts we have also taken part in the current discussion for the best state model of a guaranteed legal aid system prepared by lawyers of the Justice Ministry.

These four pillars suggest that for LIGA, the inclusion into the debate on the form of a free legal aid system guaranteed by the state or the level of support of *pro bono* development in the Czech Republic and Europe means much more than providing legal aid to poorer citizens, although we regard this as the primary issue. Of almost equal importance in our view is the mutual communication of for-profit, state and non-profit nongovernmental organizations in the legal field; and to include more issues in the joint effort with the aim of solving some of the pressing problems of society through concrete projects and cases. After almost twenty years of democracy in the Czech Republic, we envision a society that should provide access to justice for all citizens, which out to be a higher priority on the government's hierarchy of values. Under the free conditions in present Czech society opportunities exist for law firms to both prosper as providers of paid legal services and to support NGO activities. A number of legal firms recognize the importance of contributing to the protection of human rights during more oppressive times in democracies, which was demonstrated by the rush of *pro bono* legal aid in the era of Brother Kaczynski rule in Poland. Similarly, during the last seven years the New York based public interest law NGO, Center for Constitutional Rights, easily acquired more than five hundred *pro bono* attorneys from the largest and wealthiest law firms to represent prisoners held in Guantanamo Bay at a time when their fundamental rights were being violated — and still by and large are.

Finally, onto the actual content

After such drawn out prefatory remarks, some explanatory comments about the actual contributions are required so we do not forget the purpose of this publication. The first contribution, prepared on the keyboard of Michael J. Haroz, provides an account of the historical origins of legal aid to indigents

in the United States, the pitfalls of relying on state guaranteed legal aid and the factors leading to the emergence of *pro bono* assistance. The same author in the subsequent article argues that *pro bono* aid represents a good business opportunity for legal firms. Michael Haroz is an attorney with almost forty years of legal experience from working in a legal NGO and then in a large law firm. He visited the Czech Republic in 2006 and 2008, and as part of intensive voluntary aid at LIGA he expertly promoted the strengths of *pro bono* legal service at public meetings and discussions. Correspondingly, Veronika Kristková shows us how we could approach free legal aid in a historical context in the Czech Republic. She also brings to light the weaker points under the present conditions in Czech society and how further development of *pro bono* services could help the impoverished. This author is also the main developer behind the Prague based PILA *pro bono* clearinghouse. She will coordinate the clearinghouse activities from July of this year and move on from her current engagement with LIGA.

Next, the theoretical reasoning of free legal aid is explained by Martin Škop from the Department of Legal Theory, School of Law, Masaryk University in Brno. His contribution is a perfect segue for the work of Atanas Politov from PILI, who uncovered the best practices of current state guaranteed aid systems in Europe — specifically in Slovenia, Scotland and the Netherlands. After that, detailed papers from Austria, Slovakia and Poland show that the Czech Republic can have better conditions in comparison to countries with systemic access to free legal aid. The final contribution is an example of legal NGO practice from Markéta Višinková illustrating the legal counseling centre for citizens managed by Environmental Law Service.

This brochure is published in mirror like form, both in Czech (including one Slovakian contribution) and English language for the purpose of international accessibility to the debate.

June 2008

Jiří Kopal, Chair, League of Human Rights

Legal aid and *pro bono* — who should care and why

Michael J. Haroz, Senior Partner, Goulston and Storrs, Boston, USA

The United States, one of the most prosperous countries in the history of the world, has lots of lawyers. Many might argue that it would even be more prosperous if it had less lawyers. By one recent count there is one lawyer for every 525 people in the U.S.[1] I have been told that the Czech Republic also has lots of lawyers, perhaps as many as 8,500 for a population of 10 million — a ratio of roughly one lawyer for every 1200 persons.[2] Lawyers in the United States are required so that ordinary people have access to the justice system, and, furthermore, are needed by the many people, often poor, who lack economic and political power to protect their basic rights. A poor person who is fired from a job or denied housing because of racial discrimination, who requires protection from an abusive spouse or whose child is wrongfully denied health or education services often cannot obtain redress for violations of their basic human rights without the help of a lawyer.

Yet, as we all know, lawyers are expensive and it is simply not possible for a poor person and even often a middle class person to hire a lawyer with his or her own private funds. So far I assume all that I have said about the U.S. is equally, if not more, true for the Czech Republic — a fair supply of lawyers but economically inaccessible to many particularly those at the lower end of the economic scale.

Some might say so what. There are lots of things a poor person cannot afford. The problem, however, is that in a democratic society governed by law, the law must be accessible to everyone. Otherwise, you do not have a society governed by law since a number of your citizens are, in effect, disenfranchised and isolated from the legal system. Access to the legal system cannot be rationed and only made available to a segment of citizens in any civil, democratic system. This is particularly true when you speak of human rights issues and the need for law to protect basic human rights of each person.

To address this problem, the United States has developed a three-pronged system of publicly funded legal aid, privately funded legal aid, and professional volunteer work by private attorneys and law firms, commonly referred to as "*pro bono*" services. The publicly and privately funded efforts take the form of full-time lawyers hired by nonprofit organizations and funded through a mix of public and private grants. The largest programs are those funded by the federal Legal Services Corporation through grants provided to legal aid offices generally offering a range of services by full-time staff attorneys to persons who meet financial eligibility

1 Documenting the Justice Gap in America, A Report of the Legal Services Corporation, September 2005 ("LSC Report"), p. 15.

2 Interview with Jana Wurstova, et al, Czech Bar Association, February 9, 2006 ("Czech Bar Interview").

guidelines.[3] Privately funded offices with full time attorneys often are focused on specific areas like environmental or discrimination matters and may or may not limit their services to particular income levels.

The American Civil Liberties Union is an example of a privately funded organization with full time staff focused on certain issues rather than a segment of the population. *Pro bono* services, that is, in-kind services donated by private lawyers to individuals facing legal problems lacking resources to hire lawyers or to organizations servicing the needs of such persons, are provided in a great variety of settings and across a multitude of legal issues. The U.S. system is a mix of public and private, full time and volunteer programs. It is a system that has evolved for over 100 years with certain components at times being more dominant than others.

On the one hand, it is truly an impressive commitment to address the need to insure equal access to the protection of the law and the advancement of human rights. Despite this commitment of public and private sources and even though America has an overwhelming number of lawyers, the number of lawyers estimated to be actually available to provide legal services to those unable to afford such services remains woefully inadequate. A recent report published by the Legal Services Corporation estimates that there are about 20 million low income households in the U.S. and according to studies these households experience some 20 million problems annually that warrant some level of civil legal aid.[4] The same study shows, however, that it is likely that only 20 % of these problems are addressed with the benefit of trained legal aid from the various delivery systems, public and private.[5]

The study aptly refers to this situation as the “Justice Gap” in America. Essentially, each year some 16 million civil legal matters, many involving fundamental civil and human rights of poor people, may go without legal redress because there is no available lawyer to provide the necessary access to the legal system. In reality, and despite huge gains in addressing this issue in the United States, our legal system, which on paper claims to be a system that provides equal justice for all, rich, middle class, or poor, is closed to a significant portion of the population. This portion is, in reality, legally disenfranchised.

Is there a similar or worse “justice gap” in the Czech Republic? I could not find any similar empirical study that would document the existence and extent of a “gap”. Such a study would be helpful and perhaps one will soon get done. However, even without a study, I suspect many here would answer yes to that

3 LSC Report, p. 15.

4 LSC Report, p. 13.

5 LSC Report, p. 13.

question although, having read your express law and ethical codes, this is not the way your law intends it to be. I note with admiration that the Czech Republic is committed to provide equal access for all to your legal system. Your Charter of Fundamental Rights and Freedoms, in Article 37, expressly recognizes the right of every person to have available to them legal assistance in legal proceedings. The oath of office taken by each of your Advocates when they are admitted to the Bar requires each lawyer to expressly pledge to defend human rights. Article 18 of your Law Governing the practice of legal Advocacy provides for the appointment of legal counsel for a party who cannot otherwise afford to hire a lawyer. This provision is to be strengthened under currently proposed legislation to be a matter of right, not discretion.[6] The Czech Republic is bound by EU Directive dated 27 January 2003 to provide counsel to those unable to afford counsel in cross-border claims.

In this respect, the law as written here on paper, gives greater recognition to the right of a poor person to trained legal assistance than do the basic laws in the United States. Our Constitution, the equivalent of your Fundamental law, has only been interpreted to require this right in criminal proceedings, not civil matters.

Implementation of these lofty principals is another matter. Without effective implementation, lofty principals invite disrespect for the law and cynicism destructive to the development of democratic societies. It is my opinion that it is against the fundamental interests of lawyers, law firms, government and society in general, both here and in my home country, to tolerate such a gap between rhetoric and reality, to tolerate a situation where large numbers of people in a society lack effective access to justice because they cannot afford a trained and competent lawyer.

I will go into the basis for this opinion a little later, but first, I want to take you on a short historical journey that may help answer the question of who and why anyone should care about closing the justice gap. Obviously, in my short time here I cannot pretend or hope to fully understand Czech legal history or fully appreciate the complexities of your system of justice. However, I think it will be useful for me to paint a picture of the historical evolution of legal aid in the United States with the hope that you might see parallels and learn from our successes and mistakes as you seek to develop your own workable system of public and privately funded legal aid.

First, let me clarify, if it was not already clear, that in this talk I am focused on "civil" legal aid that is legal assistance in a non-criminal matter. Legal aid for criminal matters is beyond the scope of my presentation.

Legal aid to the poor in America traces its roots to the late 1800's and early 1900's. Lawyers did not start legal aid agencies and were not initially the prime

6 Czech Bar Interview.

movers. Rather, the first legal aid organizations were organized by social service agencies and were often started to address the particular needs of a specific group. One writer cites as one of the first agencies, The German Society in New York City, who in 1876 established a legal aid effort to protect newly arrived German immigrants from discriminatory treatment.[7] This organization started with one lawyer who handled 200 or so cases in the group's first year. Today this organization is known as the Legal Aid Society of New York which presently handles some 300,000 cases a year.[8] The Protective Agency for Women and Children in Chicago was formed in 1886 to protect young immigrant girls from employers who would systematically try to cheat them out of their wages and often subjected them to inappropriate treatment.[9]

Similar to what I see today in the Czech Republic, legal aid thus began under the sponsorship of private social service agencies focused on certain vulnerable segments of the population. Other than the few individual lawyers directly involved, the organized bar was not involved.

This began to change in the first part of the 1900's. Credit for this change largely goes to one person, a 25 year old Harvard Law School graduate named Reginald Heber Smith. Upon graduation from law school in 1914 he accepted a job as one of two attorneys working for what was then called the Boston Legal Aid Society. Apparently, Smith was so appalled as to how poor people were being treated by the law that he undertook a national survey to determine how poor people were treated in the courts. He then wrote a book describing the systematic discrimination against the poor in many courts throughout the nation. The book, Justice and the Poor, caught the attention of some influential leaders of the American Bar Association and galvanized the organized bar to get involved.[10] Like with many changes sometimes it only takes the dedication of a single, undeterable person to effectuate change. Hopefully, today there is among you a Reginald Heber Smith who might do here what he did in the U.S. years ago. Documenting the scope of a justice gap with facts not just rhetoric has always been critical to any expansion of legal aid in any country.

Progress was, however, painfully slow and encountered resistance among certain parts of the legal profession. Funding still came from local charities for the most part and there was little or no governmental support. In fact, governmental support was widely viewed as a threat to the independence of the profession and not only was not sought but was feared. The fear of government control actually

7 Justice and Reform, The Formative Years of the American Legal Services Program, Earl Johnson, Jr., Transaction Books, New Brunswick, N.J., 1974, p. 4 ("Johnson").

8 Legal Aid Society of New York Web Site.

9 Johnson, pp. 4—5.

10 Johnson, pp. 5—8.

spurred a breakthrough; in 1950, Great Britain instituted a publicly funded legal aid program. Rather than finding precedent for similar action in the States, the publicly funded program was seen as a threat and motivated many in the private bar to expand their bar-sponsored efforts so as to avoid government "socialization".[11]

We now come to the 1960's which was a period of great change in America witnessing a dramatic and revolutionary expansion of legal services to the poor. America's legal aid programs at the beginning of the '60's had grown since Smith's time with private funds and support from charities and in certain cities, local bar associations, but were still woefully inadequate to the task. One fourth of the population could not afford basic legal protection. In 1962 the combined budget of all legal aid societies in the country totaled only $4 million. There was one legal aid lawyer for every 120,000 indigents while, like in 2005, the population as a whole had a ratio of 1 lawyer for every 560 persons.[12] None of this was new as these statistics were basically the same throughout the first 60 years of the 20th century. The slow, incremental growth of legal aid up to the sixties reflected the inherent difficulties of relying upon private charity for its financial foundation. There just was not nearly enough.

Then an explosive expansion of legal aid occurred, an expansion that saw before the end of the 1960's the advent of major governmental funding for full time legal aid offices, the opening of more than 800 new legal assistance offices, the addition of almost 2,000 lawyers and a 800 % increase in funding for legal aid. In the 18 month period between January 1, 1966 and June 30, 1967, there was an eightfold increase in legal aid over the growth level obtained in the prior 90 years.[13]

It was not religion that was discovered. It was an awakening of sorts, but not one driven principally or solely by charitable impulses. It was an awakening to the threat of poverty and civil unrest that drove these dramatic changes. In large measure it was Watts, Harlem, Selma, Chicago, Cleveland and a dozen other places that erupted into protests, uprisings and riots by people trapped in inner city areas with more or less permanent poverty and shackled by systematic racial discrimination.

Reginald Huber Smith's prophecy in the 1920's became true. Then he had warned that: *"Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes. …And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end."*[14]

11 Johnson, pp. 17—18.

12 Johnson, pp. 9—10.

13 Johnson, p. 71.

14 Quoted in Johnson, p. 6.

Of course, the cause of the unrest went way beyond the lack of effective access to justice. Joblessness, poor housing conditions, racial discrimination, crime, hunger, poor education, etc. were at the heart of the problem. No one carried a protest sign demanding more legal aid lawyers, indeed for most poor people lawyers who represented debt collectors and landlords were part of the problem not part of a solution. However, it was commonly recognized that the cures for joblessness, homelessness, hunger, and poor education would require the poor to have access to legal protections and such access would require having lawyers available to them.

This awakening did prompt one of the few wars I have thought was a good war, the War on Poverty started by then President Lyndon Johnson. An amazing array of new social programs were initiated and vast sums were poured into them as the country was scared, ashamed and motivated to do good all at the same time. The government leaders in charge of the War on Poverty realized that legal aid had to be an essential part of the overall program not only to better insure access to the legal machinery but was needed to help make the other social programs effective. Expanded governmental benefits and rights often could not make their way through bureaucracies or local governmental resistance to intended beneficiaries without pushes along the way from legal advocates for the poor.

But not only did the War on Poverty spur more legal aid, it also spurred the birth of a different kind of legal aid, one not satisfied with helping poor people simply gain access to the law but one that saw legal advocacy as a weapon to be used to attack some of the underlying causes of poverty. This latter trend was born out of the obvious realization that no matter how much legal aid expanded there was no hope of providing anywhere close to adequate coverage and the not so obvious recognition that if one had limited resources in a war, a person had to employ them strategically and not just tactically. Getting one person the right to a government benefit is tactical; bringing a lawsuit to challenge and do away with residency restrictions that improperly deny thousands access to the benefits is strategic.

The nature of legal assistance took a dramatic turn not only in quantative terms but in qualitative terms as well. Class actions, test cases, and legislative advocacy resulted in many far-reaching expansions of the rights of poor people and people suffering discrimination of one sort or another. The purpose of legal aid became, in the words of one of its early leaders, Clinton Bamberger, “to provide the means within the democratic process for law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty”.[15]

15 Quoted in Johnson, p. 75.

Well, as we all know, wars have a way of solving some problems but can create others. Wars not only win allies they create enemies. The War on Poverty was no exception and, in particular, the legal aid part of the war which became quite aggressive in attacking certain monied interests created its own backlash. Business interests such as landlords, credit card companies, and employers were being financially impacted by legal actions that gave tenants the right to rent strike, consumers the right to void hidden interest charges and employees the right to challenge discriminatory job decisions. Allied with conservative political interests that came to power in the "1980's", these interest waged a successful counteract on the federal legal service program, effectively cutting its funding and severely restricting the scope of actions. Legal assistance programs funded by the federal government were stripped of the ability to file class actions or to represent certain groups like undocumented aliens.[16] This has remained the case until today; in Boston, for example, the number of legal aid attorneys has remained roughly cut in half.

Depressing, but fortunately not the end of the story. Adversity begets resilience and innovation and the legal service movement was no exception. Poverty did no go away but the relationship between effective legal aid and poverty reduction had been established. The concept of legal assistance as a necessary ingredient in righting the wrongs of economic, racial and ethnic discrimination had become a well-established concept for much of the professional bar, private philanthropy and various public authorities at state and local levels if not so much at the federal level.

Perhaps the reaction in the professional bar was the most profound and important. In the U.S., the organized bar has an effective monopoly on the delivery of legal services to everyone, poor or rich. Only a person who has graduated from a law school and who has passed a bar examination can represent another person in most legal proceedings. In the early days of legal aid for the poor the Bar mostly opposed publicly-funded legal aid for fear of government infringement on the independence of lawyers and potential government support for loosening the rules to permit non-lawyers to practice law.[17] This fear subsided with the experience of the 1960's expansion of federal funding for legal aid. Astute leaders of the bar realized that politically this expansion was inevitable given the times. So rather than opposing it they sought to be involved in shaping it and were successful in maintaining the notion that a legal service lawyer was professionally and ethically bound to represent his or her individual client and was not a lawyer who

16 "Civil Legal Aid in the United States: An Overview of the Program in 2003", Alan W. Houseman, September 2003, unpublished paper by Center for Law and Social Policy, p. 6 ("Houseman").

17 *Pro Bono* in Principle and in Practice, Deborah L. Rhode, Stanford University Press, Stanford, California, 2005, p. 13 ("Rhode").

represented the government's interest even though government funds were the source of salaries. In effect, the experience demonstrated to the organized Bar that government funding did not inherently mean government control of the profession or the loss of its independence. Also, a growing number of lawyers realized that their involvement in and support for legal aid tended to promote a better image of lawyers in general.

The experience with expansive legal services, while unpleasant for certain business interests, overall won the support of many leaders of the bar, particularly those in major law firms. Many of these firms did not represent conflicting business interests as their clients were not slumlords or companies preying on inner city residents. The lawyers in these firms had come of age in the '60's" and '70's" and, in large part, were politically sympathetic to the notion of fighting poverty and its effects.

Accordingly, the organized bar reacted to federal government funding cutbacks by (1) leading the political battles in Congress to mitigate the damage to the federal program, (2) sponsoring the efforts in State legislatures to adopt State-funded programs and (3) expanding the bar's efforts to foster and grow *pro bono* services and programs in law firms and among lawyers as a way to help bridge the gap. Similar reactions to governmental retrenchment also occurred in other parts of the world such as Canada and England.[18]

The last of these, the expansion of *pro bono* services, was also driven by some fundamental internal changes in the practice of law in the 1980's and 1990's. These internal changes are important to understand as I am of the opinion that they present a great opportunity for a marked expansion of *pro bono* work both in the U.S. and globally.

Law firms and the legal profession in general have had to become more "business-like" in order to survive in an increasingly competitive marketplace for legal services. This has meant that law firms have had to market their services to potential clients in ways never imagined even 20 years ago. The competition for recruits out of law schools and lateral hires from other firms grew more intense and law firms had to develop distinctive workplace environments to compete for talent. The grind of legal work lead to more billable hour pressure and more tedious work, requiring more attention by firm management to the day to day morale of its lawyers and staff. Increased specialization within law firms often meant that younger lawyers did not have the opportunity to develop client relations skills or overall case management skills. The greater number of law firms and lawyers made it a buyer's market for clients and retaining client loyalty became harder than ever.

18 Rhode, p. 103.

While law firms adopted many strategies to address these issues, a principal strategy has been to utilize *pro bono* programs and efforts as a way to help a firm gain a competitive edge and create a law firm reputation and internal environment that sustains morale and promotes client and staff loyalty and provides younger lawyers with broader training opportunities. In other words, enlightened law firms have seen the business sense in having *pro bono* programs as well as the moral and ethical sense that obviously should also drive these efforts.

Taking a page from the trend in the corporate world for “Corporate Social Responsibility”, law firms realize that buyers of legal services are often confronted with choices of two seemingly equally qualified law firms and are searching for something that distinguishes one from the other. In business terms this “something” is a business’s competitive edge.

To illustrate, suppose you are a corporation trying to choose to hire law firm “X” or law firm “Y” for an important assignment. The two law firms seem equally competent and are equally priced. How do you choose? Flip a coin? Toss a dart? Most likely you will consult your instinct and gut feeling which will often lead you to the one you just feel better about, that you feel may be more reliable and trustworthy in general.

Knowing this, what should a law firm do to make it be viewed as reliable and trustworthy where the lawyers will act honorably towards the client’s interests. Any marketing person will tell you that few things help establish this identity better than engagement in good works that show one is a good citizen in its community. On a gut level, whether it is always deserved or not, we tend to trust a minister more than a car salesman. As I said earlier, corporations large and small have realized this for some time and devote enormous resources to establishing a “good citizen” reputation as, in part, a means to create a favorable perception of their product by association. Companies understand the business value of being seen as “good citizens”.

Law firms world wide are coming to this realization for themselves and see *pro bono* as a major way to establish as part of their brand the sense that they are good corporate citizens.

Having good *pro bono* programs also help law firms in their recruitment, retention and training of staff. People generally want to work at places they perceive as humane rather than harsh or crass. *Pro bono* helps firms be this way and to be perceived this way. Work in a law firm is largely tedious and often, for a younger lawyer, far removed from the actual client. Participating in a *pro bono* effort affords a lawyer the chance to be the lead lawyer with a client and to often feel responsible for achieving an emotionally satisfying result for someone. This in turn helps with retention and morale in tremendous ways. *Pro bono* also affords

“hands on” experience for lawyers and can very much help them practice and develop their legal skills of research, writing and advocacy. For all these reasons corporate philanthropy has been embraced by the business world as being good for business; the same is true for law firms and individual lawyers. There is an old saying that says “doing well by doing good” and it is quite true.

Some may not like thinking of *pro bono* this way. It may be seen as not sincere. I disagree with that view as I know many fine *pro bono* lawyers who combine a sincere desire to be helpful with a sense that to do so is also good for their firms. Most charitable work is done for a variety of internal and external reasons and this is no different. Believe me, the additional client who may avoid eviction from their home who has a *pro bono* lawyer because no other was available will not care a bit about the motivations behind the *pro bono* effort. The result will be what matters.

There are some other interesting reactions to *pro bono* work by both the nonprofit or NGO party who desires the *pro bono* services and the lawyer or law firm asked to provide the service. On the NGO side one often encounters skepticism about the lawyers performance given pressures of paid work or that the *pro bono* lawyer possibly could know what to do in a matter. On the *pro bono* lawyer’s side one often finds fear, fear of being overwhelmed by the demands of a *pro bono* case or fear of not knowing what to do.

In any good *pro bono* relationship between an NGO and a *pro bono* lawyer this skepticism and fear should expressly be discussed and acknowledged with an eye to how best to manage the situation so that each side’s worst fears do not become true. Many successful *pro bono* relationships have successfully dealt with these challenges. One good idea is to try to get a good match between the help needed and the skill set of the *pro bono* lawyer. Sometimes this will mean asking the *pro bono* lawyer to help with some of the business needs of an organization rather than handling direct client services. Help with incorporating employment issues, or help with office lease contracts are examples of where *pro bono* help can save an NGO money or protect its ability to operate soundly, help, which in the end helps the NGO accomplish its core mission. Other techniques involve having the NGO undertake much of the factual investigation in a matter and do the time-consuming field work of meeting with the clients, in other words to act as a paralegal to help the *pro bono* lawyer manage his or her time demands. It is often critical to have a liaison between the firm and the NGO who is a senior attorney at the firm so that those doing the work, often younger attorneys, have some internal accountability for performance. Finally, I am a believer in starting slow, of trying out a relationship as a trial marriage rather than trying something too ambitious. Both sides need to test the relationship and in the end it has to work well for both if it is to become sustainable and satisfying.

In the Czech Republic NGO's skepticism can be addressed by the express ethical code governing Czech Advocates. The ethical code explicitly requires an attorney appointed by the Czech Bar to handle the appointed matter as conscientiously as any other matter. The Czech Bar has indicated that the failure of an attorney to do so is grounds for disciplinary action.[19]

Lawyers, law firms and bar associations have other pressing reasons for supporting legal aid programs. It is even more compelling than the "business" case I have just discussed. As mentioned earlier lawyers have been granted an effective monopoly by society, a monopoly on the delivery of legal services. Monopolies are privileges not rights and can be revoked if wrongfully exercised. A monopoly that fails to serve a large portion of the people who are compelled to get their services from the monopoly often will have its monopolistic rights revoked or will invite intrusive regulation to set matters straight. This may not happen in every political climate but at some point the climate may change to allow it to happen. In return for this monopoly lawyers are sworn to act and conduct themselves in certain ways. These ways are prescribed in the ethical norms that govern the practice of law.

In the United States these ethical norms include an ethical obligation that compels a lawyer to act in a certain way in the face of injustice. One norm states, "If a lawyer believes that the existence or absence of a …law… causes or contributes to an unjust result, he should endeavor to change it"[20]. Other ethical norms require lawyers to endeavor to promote by words and deeds equal access before the law, including making up to 50 hours a year of otherwise billable time available for representing poor people or nonprofit organizations working for poor people.[21]

While I am far from an expert on the ethical rules governing lawyers here I am confident that there are similar norms and expectations for the profession to undertake *pro bono* work. Indeed, the ethical rules in the Czech Republic may even be stronger and more explicit. Article 18 of the Ethical Rules is entitled "Publicly Serviceable Activity" stating that attorneys are expected to participate in protection of human rights even if such activities are to be conducted "free of reward".

Full, faithful and thorough compliance with these norms is a reasonable expectation by the society that has granted the monopoly. I am also confident that failure of the profession to live up to these expectations and norms is a certain recipe for losing the privileges that come with being a member of a special profession. As one authority has stated, society may not expect the grocer to give away food to the poor but then society does not grant the grocer a monopoly on

19 See Article 6, Basic Principle of the Professional Ethics of the Czech Bar; also Czech Bar Interview.

20 Quoted from former Ethical Consideration 8—2, American Bar Association.

21 Rule 6.1 of the Model Rules of Professional Conduct of the ABA, quoted on Rhode, p. 16.

a vital service. Lawyers here and most everywhere are given this privilege and with awesome privilege comes awesome responsibility.[22]

Legal aid has other constituencies as well. Foremost among these should be democratic societies and their governments. As I have described, democracy cannot exist without the rule of law and the rule of law cannot be obtained without equal access to the law. A legal system that, in words provides this equality, but in practice and operation deprives a significant portion of its population from real access to such equality is a fraud. People who are victims of fraud have a historical habit of rejecting and rebelling against fraud and the deprivation and inequality that results. For poor people access to the mechanisms of the law are perhaps more important than for other groups. Their day-to-day lives are much more affected by laws than others. Having enough food for dinner depends on the weekly pension or welfare check. There is no margin, no credit card to charge groceries. Delays and denials of benefits have life and death implications. Getting an abusive spouse out of the house requires quick legal actions and access to the judicial system. Access to legal redress is more frequently and often more urgently needed by poor people than others.

As stated earlier I am pleased to see that Czech and EU law recognizes the central importance of access to justice for all elements of the population.

In this manner you have moved well ahead of the United States as our Federal Constitution has no such explicit guaranty and has only been interpreted to provide a limited guaranty for criminal defense matters. There still is no fundamental right in the United States to civil legal aid for those who cannot afford it.

Your society has a strong interest in making sure these guarantees are implemented in practice and application. As I view it this means the government and all those in the society who care about democracy should see legal aid as a vital necessity.

In conclusion, it seems clear to me that effective, and I mean effective rather than a showpiece, legal aid for the poor is a necessity for a democratic society, serves the business, professional and ethical interests of the organized bar and private lawyers and has many personal benefits for both the public and private lawyers who provide legal services for those unable to access the legal system because of their poverty. So, with the history of the legal aid movement in the United States as a guide, my answer to the question of Legal aid; Who Should Care and Why, is simple. You and everyone of you who value a functioning democracy under a rule of law and who are honored to be a member of a responsible and respected legal profession.

22 The Law Firm and the Public Good, "Themes in Context", Robert A. Katzmann, The Brookings Institution, Washington, D.C., 1995, p. 6 ("Katzmann").

The "good people" test

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Here is a little test. Suppose you are a business person trying to choose an important vendor for your company. You have competing proposals which are basically equivalent in price and quality of goods and services from two vendors, vendor X or vendor Y. Each seems fully capable of fulfilling your needs. Or suppose you are a commercial loan officer for a bank and you have been approached to either make a loan to customer X or customer Y, both of whom fully satisfies all of the bank's underwriting criteria. Or suppose you are an inventor with a blockbuster patent and investors X an Y have asked to become your money partner with both being equally capable to fulfill the role.

So how do you choose between the "X's" and the "Y's"? Coin toss? One potato, two potatoes? Throw a dart? Probably not even though they are equal on all objective accounts. More likely you will consult your subjective or gut feeling about the quality of the characters of X and Y. Does one appear to be more honorable than the other or better project an image of trustworthiness? Put simply does one seem like really "good people" with whom you would have a great deal of confidence that future snags could be worked out smoothly and fairly. I believe that this kind of thought process frequently occurs and often is the critical factor in business decisions such as described.

What does this tell an astute X or Y? Well, I believe it should tell them, loudly and clearly, that an important part of their respective competitive edges might lie in whether they are perceived as "good people" or not. In other words, are they generally perceived in the community as good and trustworthy, as well as competent and price competitive? Will their assurances of trustworthiness ring true or simply be seen as "sales talk"? Are they seen as people with whom a client would like to be with and with whom a long-term relationship may seem inviting?

In the business world smart companies and individuals recognize the importance of having "good people" reputations associated with their product or services. Savvy companies and individuals also know that reputations cannot be conceived during sales pitches, but must be earned and earned through long term, sustaining actions rather than words. We all know this from our personal lives and it is no different in the business world. The companies that "get this" are the ones who are careful to cultivate an image of integrity and trustworthiness in their dealings and more generally as part of their "brand" identification. While there are many ways to do this, increasingly companies are adopting or expanding corporate philanthropy as a means of creating an aura of responsibility, caring and trustworthiness. Millions of dollars are spent on cultivating this image as part of

a company's brand, the same way that millions are spent on cultivating images of competence, responsiveness and intelligence as ingredients of the brand.

And companies have more than one audience needing to become believers in the "goodness" of the company. While customers are critical, the internal audience of those who work for the companies is also of critical importance, particularly in environments where worker loyalty is threatened by the greater mobility of today's workforce. Whether it be workers thinking of joining a company or tempted to leave for greener pastures, an important factor in the decision is the general, visceral view or feeling the worker has for the company. A decision to join a company is akin to a decision to get engaged if not married. A decision to leave to join another company is similarly a decision to get engaged or married to a new suitor. Like our earlier examples, in many situations the concrete issues of pay, benefits, title, and opportunity for advancement may essentially be the same between competing choices. When this is the case a person is likely to resort to his or her "feel" for the personality of the company. Is it a place that cares for people? Is it a place that is trustworthy? Does it evidence a respectful attitude toward people of all types and stations in life? Or, in other words, is it "good people"?

Again the same question is being asked about the company. Smart and savvy companies realize this and that having a good answer to this question will provide them with an important and distinguishing competitive edge within their internal marketplace. Part of the answer will be found in good training programs and career advancement policies. Another important part of the answer will come from the company's philanthropic activities as these will resonate well with the innate charity found in most people. Charitable and civic undertakings vividly demonstrate that a company does care for people and that it is respectful of people from diverse backgrounds and stations in life. Action will again speak volumes and create for companies important advantages in recruitment and retention.

Equally important to the internal health of a company is overall employee morale. One can talk abstractly about this or one can just think about the topic from one's own perspective. Day in and day out performing the same work function and working on essentially similar tasks is a recipe for boredom and depression no matter how much money is made in the process. Breaks are needed and are often taken through vacations, being "sick" or otherwise becoming unproductive on the job. While I am no expert in human psychology, I think it is only human nature for the mind and body to rebel at times against monotony. Smart and savvy companies know this and need antidotes to monotony among their workers. There are many programs designed to do this. Exercise programs and office social functions are used for this purpose. Participation in companies' charitable programs or participating in one's own charity with the support of the company has also become a major weapon in a company's efforts to maintain healthy morale among its employees.

For all these reasons, we see today a bigger and stronger embrace by corporate America of philanthropy and charity as a “core” function of overall business strategies. While this is obviously strongly motivated from the heart of the people making the decisions, it also plainly makes good business sense and in many ways significantly improves a company’s competitive edge, both externally and internally. Creating and sustaining competitive advantages are keys to business success and corporate participation in philanthropy is a principal means of establishing a distinct competitive advantage. No external professional code of ethics is needed for this. It does not have to be mandated. Individual hearts and cold business reality cause this to happen.

Do law firms “get it” in the same way? Few can doubt, although many view with nostalgic misgiving, the profound changes in law firm culture over the last 15 years. Gone are the days when law firms and lawyers in law firms viewed themselves as members of a more genteel profession that could all but ignore such things as cut throat competition, huge marketing expenditures and focus on bottom line economics even at the expense of collegiality. The change is profound, far-reaching and irreversible.

Regrettably, however, the drumbeat normally used to arouse a firm to undertake *pro bono* work harkens to a vanishing era. To talk to law firms or lawyers about their responsibility as institutions or practitioners within a system of justice or to abstract ethical principles to “do justice” has nostalgic, guilt value but no real staying power in the new climate. Of course, the appeal to ethical aspirations as the basis for *pro bono* efforts will, and does, work to a certain degree. In some situations, it works to a remarkable degree. But it is a message that needs to be buttressed by a different message, one that demonstrates to skeptics, not just the choir members, that *pro bono* activities make good business sense and actually contribute value to the bottom line.

Can the case be made? Is it really true that *pro bono* contributes value to the bottom line? I believe the answer is yes for the same reason that corporate America has embraced philanthropy. *Pro bono* work can be a positive and significant contributor to a law firm’s competitive edge, externally with clients and internally with its workforce. Indeed, rather than seeing the business metamorphosis of law firms as the enemy of *pro bono*, I believe a more complete embrace of the corporate philanthropic model may actually enhance the firm’s commitment to *pro bono*.

Law firms, like corporate businesses, increasingly need to develop unique ways to be competitive, externally with clients and internally with employees and recruits. By building and maintaining a better client base and attracting and retaining talented employees, a firm will more likely be able to satisfy its investor stakeholders, the firm’s partners. To do this, like their corporate cousins, law firms need to develop competitive edges that will help clients and potential and actual

employees develop feelings of comfort with and loyalty to the firm. *Pro bono* work, when viewed as part of a firm's philanthropic program, can play, as it generally does for corporate America, a terrific way for the firm to establish its "good people" image and brand. Clients of law firms want not only competent and price-competitive lawyers, but they want lawyers they can trust, lawyers whom they know will be responsible human beings and true fiduciaries for their interests. This is not to say that the "good guy" brand attracts clients on its own, no more than any marketing device works by itself. Rather, like an important instrument in the orchestra, it contributes to the overall, favorable image of a firm which, in turn, often plays a role in a client's decision to choose between otherwise equivalent "X's" or "Y's".

There is a major problem with all this, however. As accurately stated to me in a recent conversation with the head of a major, national law firm, "lawyers are seen as takers, not givers". Lawyers and law firms in general have terrible reputations and are quite far from being viewed as "good people". In becoming more "business-like" lawyers have jettisoned a prior and more favored image as professionals without replacing this image with anything positive. In the meantime, with notable exceptions, Corporate America has been polishing up its image and now more than ever attempts to appear as the good citizen, one that gives off an aura of trustworthiness and integrity. The aura given off by lawyers, on the other hand, is easy to imagine, but hard to put in respectful words. Has this happened because all the ethical genes have somehow been diverted to business school types with lawyers being left out of the pool? No, the reason is that Corporate America has realized the business value of good works and have found ways to combine what's in the heart with what builds a competitive business edge for the benefit of the bottom line.

Smart and savvy law firms who want to be more "business-like" will recognize the business value of having strong *pro bono* programs. They will further recognize that they cannot have truly strong programs unless *pro bono* is regarded as a core function and not a sideline. While *pro bono* coordinators and *pro bono* committees may be helpful to administer programs, they should not substitute for *pro bono* as an executive function of the firm's executive committee or its managing partners. In many businesses with extensive charitable programs, it is the CEO not some amorphous committee that leads the charitable program.

In writing this I want to assure the reader that I do understand that the motivation from the heart is really the fuel for law firm *pro bono*. But like any fuel, it has limited utility standing alone. It needs to be used to make something work or it is not of core interest. The something is the bottom line, like it or not. I happen to like the bottom line and I believe it can be enhanced, not diminished, by good corporate philanthropy. I believe many executives in the business world agree with me. Hopefully, more managing partners will awaken to this possibility as well.

On lack of *pro bono* legal services in the Czech Republic[23]

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“If the practice of law is reduced to competence and ethical minimums, it ceases to be a profession in the traditional sense of the term. If its practitioners define themselves in terms of competence and ethical minimums, they risk losing an integral and essential part of their identity as professionals. They may well be very competent technicians and decent people, but they have lost something of who they were meant to be through their failure, refusal or neglect to promote the public good in meaningful ways. Lawyers can make a commitment to serve the public good in the face of the forces that conspire against it and spend time on many worthy initiatives including law reform and pro bono representation of clients and causes. This commitment in the face of the ethos of commercialism is a matter of courage and resolve.”[24]

Despite the state-sponsored system of legal aid in judicial proceedings, the insufficiencies of which are briefly discussed in this article, many indigent people lack access to legal services indispensable to exercising their rights. There is no statistical data available on how many people apply for free legal aid with the court (appointment of a legal representative by the court) and how many of them are rejected, being forced to turn elsewhere for legal aid. Although there is no statistical data, the practical experience of non-governmental organizations providing free legal aid services shows that the need for free legal service is much greater than the NGOs are able to provide. This article illustrates the need for *pro bono* services and advocates for the development of *pro bono* legal services as a tool for increasing access to justice for the indigent population. First, the article argues that there is a tradition of *pro bono* legal services in the Czech legal profession. The flaws of the current state-sponsored system of legal aid are briefly discussed to highlight the need for *pro bono* legal services. The current practice of providing free legal services is described; including appointment of an attorney by the Bar Association and other forms of free legal services. Lastly the article argues that *pro bono* legal services benefit both indigent clients as well as law firms. Aside from the moral obligation to ensure equal access to justice for all, that is imposed on lawyers when they become members of this profession, there is also business rationale for providing *pro bono* legal services to the poor.

23 Acknowledgements: Substantial part of this article was drafted for Public Interest Law Institute, Budapest, http://www.pili.org/en/ with substantial support of Tamas Barabas (*Pro Bono* Coordinator).

24 A. Kronman: *The Lost Lawyer: Failing Ideals of the Legal Profession*, Belknap Press of Harvard University Press: 1993, p. 365.

The historical development of the free legal services[25]

In the 14th Century, a concept similar to free legal counseling was provided by “experts in law” during dispute proceedings. So called “Lords from benches” these members of the judiciary instructed the parties in the procedural aspects of their disputes, later focusing on aid for the poor and indigent. The regulation of the rights of the poor can be found later in the provincial order from 1530 as well as in municipal law.

Provisions concerning “rights of the poor” were embodied in imperial order no. 364 of 1849, which proclaimed the adoption of Advocate Regulation. According to Article 19 of the imperial order, the courts would decide if the party was entitled to the rights of the poor. The Committee of the Bar Association, which was an organ similar to the current board of directors for the Czech Association Bar, was entrusted to choose the specific free of charge representative to be assigned to the party. The court would then also decide whether to withdraw the advocate from free legal representation after hearing the advisory opinion of the permanent Bar Committee.

Articles 63 to 73 of Act no. 113 from 1895 on judicial proceedings in civil legal disputes (Code of Civil Procedure) contained detailed regulations of the rights of the poor in contentious civil proceedings. These provisions were connected with the provisions of articles 27 to 29 of the so called Advocate Procedural Code. The obligatory representation by Advocates was significantly more frequent than in current regulations. Besides the traditional obligatory representation by defense counsel in criminal proceedings, representation was also required for most civil matters.

The rights of the poor meant not only the right to free legal representation but also included the temporary relief from fee stamps and state fees, relief from the duty to give security for the costs of the proceedings, and temporary relief from a range of the fees associated with the dispute. The expenditures of the free of charge representative were reimbursed to him in advance from the state budget.

Generally, the cost subsidies were entitled to the the poor, who were not able to bear the costs of the dispute without sacrificing their nourishment and the nourishment of their dependants. Foreigners were entitled on the basis of

25 This section is translation of Balík, S., Piková, P., Podíl advokátů v Čechách na výkonu práva chudých v letech 1869—1914 / The participation of the advocates in Czech on excercise of a rights of the poor in 1869—1914 —transl. author / Vol. 10 *Bulletin Advokacie* 1997, Piková, P., Právo nemajetných občanů na právní ochranu — o právu chudých v minulosti a současnosti / Right of the indigent to legal protection — on the right of the poor in past and present / Vol. 3 *Bulletin Advokacie* 2003.

reciprocity. The application submitted at the court of first instance, should have contained an indication of the dispute as well as certification of the assets of the party verified by the municipal board of the municipality of the applicant's residence. The court of first instance would then grant the rights of the poor together with the representation by an advocate, which was appointed by the committee of the Bar Association at that time. If the underprivileged party succeeded in the dispute then the state and the advocate were reimbursed by the losing party, who paid for the expenses temporarily remitted to the poor party as well as the expenses of the advocated appointed to represent them. In cases when the reasons for granting the subsidies to the poor vanished, the costs and expenses were subsequently reimbursed.

The rights of the poor in criminal proceedings were similarly regulated. The code of criminal procedure nm.119 of 1973 distinguished among appointment of the defense counsel ex officio and genuine rights of the poor. The provision of free legal services was also regulated by advocate regulation nm. 96 of 1868, article 16 in connection with provisions of the procedural codes.

Many advocates published articles and essays during this period about the rights of the poor. The advocates were not very satisfied with their position as the "free of charge representative". The most problematic issue was the compensation of the advocate after cases when the poor party lost. In such cases it was difficult for advocates to recover their fees. The advocates were also displeased by the unequal distribution of free of charge cases to advocates in the seats of particular county courts as well as advocates with subordinate position to judges, clients and the Bar Association in providing free of charge services. Despite these factors, the common understanding was that services, which are provided free of charge cannot act as reasons for rejecting the clients.

From 1868 to 1914, the Austrian legal system regulated the institute of the rights of the poor. The regulation of the rights of the poor was in the practice, however, complicated due to the substantive as well as procedural issues. The annual number of legal services granted to the poor did not exceed 4000 and in most of the years did not surpass 1000. The cases of free representation were unequally distributed and it can be concluded that Prague advocates and local advocates, who did not practice in the court, were almost uninvolved. The strict rules for granting and recognizing the rights of the poor were designed to ensure that the institute was not abused at the expenses of the state and advocates. The advocate was entitled to reimbursement of the costs from state budget or from the adverse party. The rights of the poor in the Austrian legal system in the past century did not ensure provision of legal services to the poor on a broad scale — even though it could be a significant and unbearable burden for the advocates practicing in disadvantageous regions.

After a communist regime was installed the advocate regulation no. 322 of 1948 completely altered the availability of legal services provided by advocates. Free legal counseling was now being provided by legal counseling offices established in the districts of the regional bar associations with cooperation of the president of regional court. The members of the regional bar association had a duty to perform work in the counseling offices as regulated by the directives issued by regional associations. The regulation of advocacy in 1951 entirely omitted the need of having free legal services.

The free legal services for reduced fees were regulated again by the Act on Advocacy no. 57/1963 Coll. and no. 118/1975 Coll. The individual with justifiable personal, property or other specific needs was entitled to receive free legal services. Since 1976 the advocate associations, specifically the director of the advocate counseling office, decided on whether the party was entitled to receive free legal services with the exception of when the representative was appointed to the civil proceeding by the Court (art.30 of code of civil proceedings).

The flaws of the system of state-sponsored legal aid[26]

There is no specific law on provision of free legal aid, which would define who and in what circumstances and under which conditions is entitled to such legal aid, who, when and where should provide such legal aid, and if and how this legal aid is subsidize by the state. The current regulation is scattered within several acts, making it very difficult for layman and especially for socially disadvantaged layman to understand it. The free legal aid is not available out of the context of judicial proceeding.

The provisions on state-sponsored legal aid in civil and criminal proceedings are so vague that courts have extremely broad discretion in deciding on whether the applicant is eligible for the free legal aid. These guidelines can not be considered effective in allowing the poor access to legal aid, there are no clear and concrete standards for determining who is eligible for the free representation and the decisions on the matter are highly inconsistent.

No regulations exist in applying for free legal aid in administrative proceedings. The procedure for the appointment of the advocate for the proceeding before the Constitutional Court is not provided either, only provisions of the Civil Procedure Code relevant to the appointment of the representative can be used.

No statistics are gathered with regard to legal aid. There is no statistical data available on the number of individuals unable to secure legal representation

26 For detailed information see Access to Justice in Central and Eastern Europe: Country report: Czech Republic, PILI, 2003, available in Czech at http://www.poradna-prava.cz/dokumenty/Pristup_ke_spravedlnosti.pdf, 12/03/2007.

from their own financial means, no data on responses to that need, and no data on the distribution of legal aid. The specific budget for free legal aid is absent and there is no information available on state budgetary expenditures on free legal aid.[27]

The free legal services provided by the Chamber

The Act No. 85/1996 Coll., on Advocacy (Legal Profession) provides for the appointment of an advocate at law by the Chamber (Bar Association). The current legal basis for *pro bono* legal services is to be found in *Act No. 85/1996 Coll., on the Legal Profession* Article 18 para. 2.[28] Article 18 of the Resolution of the Directorate of the Czech Advocacy Chamber Bulletin No. 1/1997, dated 31 October 1996, specifies principles of professional ethics and rules of competition for advocates working in the Czech Republic states: If an advocate is summoned to participate by reasonable extent on projects directed toward enforcement or support of human rights and liberties, such advocates at law shall oblige, regardless of availability of reward, unless prevented by serious reasons. The advocate is also obliged under similar rules to those specified in paragraph 1 above to participate in projects which aim to implement principles of democratic lawful state and/or improvement of the legal system of the Czech Republic. Those who do not have access to legal services may, according to Article 18 para. 2 of the Act on the Legal Profession apply to the Chamber (Bar Association) for appointment of an advocate. The only statutory condition is that the applicants not have access to legal services. Upon fulfilling this condition there is a legal entitlement to have an advocate appointed by the Chamber. The institute of appointment of the advocate by the Chamber is the only supplementary possibility to obtain legal services under certain conditions. The only statutory condition for appointment of the advocate by the Chamber is that the applicant not be able to attain legal services. According to the rules of the Chamber, which do not have any legal basis, the Chamber appoints the advocate only if the applicant has exhausted all other possibilities of obtaining legal services (having sought counsel from two legal offices and having applied for the appointment of legal representation by the court) The applicant must prove that he tried to obtain legal services from at least two advocates and was rejected, regardless of reason. This condition is often problematic, not only

27 Access to Justice in Central and Eastern Europe: Country report: Czech Republic, PILI, 2003.

28 1) An advocate is entitled to refuse provision of legal services unless appointed in compliance with special regulations or by the Chamber to provide legal services as per paragraph 2 above; stipulation of § 19 is not affected. 2) If anyone is not able to achieve legal counsel as per this act of law, s/he is entitled to apply to the Chamber to appoint an advocate at law. If there are no reasons for refusal as per § 19, the advocate at law appointed by the Chamber is obliged to provide legal services under conditions specified in the appointment.

having statutory basis, but also problems with advocates often refusing to issue a certificate of rejection to the client.

The new amendment of the Act on Advocacy adopted by Parliament in March 2006, coming into force on the 1st of April 2006 specifies the conditions for appointment of the advocate by the Chamber. According to these new regulations, an applicant who applies for appointment of an advocate to represent him in judicial proceeding must prove to the Bar Association that he has exhausted all means available to him in obtaining representation – he must show that he applied for appointment of a representative to a court and his application was rejected.

The Chamber considering the application for appointment must take into account the legal characteristics of the matter (i.e., if there is a risk of forfeiture of right, preclusion of term for appeal, constitutional complaint, cassation appeal or payment order). The application for the appointment is usually processed within a week. The Chamber's decision on the application is always in writing. The Chamber may appoint an advocate for paid services or free legal services. The applications for paid legal services are rare. The applicant must provide the Chamber with a statement of his social, property conditions and income. The applicant must define the legal matter for which he seeks the provision of the advocate's services. The advocate is appointed only for specific legal matters. The Act does not specify what kind of services the appointed advocate is obliged to provide to the client. The specific conditions on the provision of legal services are specified individually for each appointment. The possibility of having an advocate appointed by Chamber is most important in regard to obtaining legal counseling without involvement in litigation.

The Czech legal system also provides for the appointment of an advocate of law in civil matters by the Court under certain conditions for those who cannot afford to pay for legal services. This appointment by the Court is only available to the poor person after commencing the judicial proceeding. The access to legal services is very much needed before the judicial proceeding commences, in fact, some of those in need are unable to commence the proceedings themselves or could avoid starting unsuccessful litigation altogether if they have prior ability to consult the matter with legal counsel. Further, the free legal counseling is needed not only in matters with potential for litigation but also in matters, which will never go before the Court, cases in which just legal advice is sufficient for the client.

The advocate appointed by the Chamber is remunerated for the services he provides neither by the Chamber nor by the state. The advocate may ask the Chamber for reimbursement of the costs associated with the services (travel expenses, post, copying etc), but not for the services themselves. The advocate profession, not the state bears the cost of free legal aid by providing free legal

services on a case-by-case basis. The state therefore transfers its duty to ensure access to legal aid to private subjects.

The advocate cannot refuse to provide services if appointed by the Chamber unless conditions are present which would allow the advocate to refuse providing services to the client under normal circumstances without appointment. The appointed advocate is therefore obliged to provide free legal services in contrast to genuine *pro bono* services when the legal provisional provides free legal aid services on his own motion. Because of the lack of the motivation of the appointed advocate of law (no financial motivation, the advocate is obliged to accept the case) the quality of the legal services provided by advocates appointed by the Chamber is often poor. The advocate prefers to concentrate her/his efforts on paying clients.

On the other hand, the advantage of a system in which the appointment of the advocate is by the Chamber is that the Chamber can appoint to the client an advocate specialized in a matter in which the indigent client seeks legal advice. There is no official specialization of advocates, but the roster of advocates usually includes the field of professional specialization chosen by the advocate. The indigent client, however, cannot ask for appointment of an advocate of his choice. Since the applicant must file the application for appointment of an advocate with the Chamber sitting in Prague, the Chamber often is not sufficiently equipped with the local conditions, with the availability of the advocate in the locality and with their specialization.

The decision-making procedure on the application for appointment of the advocate is not an administrative procedure and is not appealable; the guarantees of administrative procedures do not apply.

The new amendment of the Act on Advocacy 79/2006 Coll., which came into force on 1st April 2006 provides for detailed regulation of the institute of appointment of advocates by the Chamber and remedies most of the flaws of currently valid regulation. The new regulation specifies that if the applicant meets the conditions of being appointed an advocate by a court, he/she cannot be deemed as one who does not have access to legal services. In such cases, the applicant is not entitled to have an advocate appointed by the Chamber. The new regulation expressly states that the Chamber can appoint an advocate for provision of services free of charge if income and assets of the applicant so justify (previously regulated by implementing regulation — advocate tariff). To be able to assess income and assets of the applicant the Bar Association has been provided with new competence to make valid inquiries about the assets and incomes of the applicant. Implementing regulation of the Ministry of Justice will regulate the method and scope of this inquiry. The anticipated procedure should be similar to court decision-making of court fee exemptions. The Bar Association was given

a right to repeal the appointment of the advocate if the reasons for appointment vanish (e.g. the applicant has a right to apply for appointment of the advocate by a court) or the income and assets of the applicant no longer justify the appointment (the income and assets of the applicant change) or have never justified (the applicant provide false information of his/her income and assets). The condition persists that the appointed advocate is not remunerated for the services he has provided. The amendment therefore introduces a new provision, which states that the Bar Associations has a duty to appoint advocates for such cases equally taking into account the complexity of the legal matter and attached costs.

Statistics exist for the appointment of advocates by the Chamber for provision of free legal services according to § 18 para. 2 of the Law on Legal Profession:

Year	The Number of Applications	The Number of Appointed Advocates
2001	2940	2644
2002	3628	3074
2003	3930	3205
2004	4573	2426
I.Q.2005	1742*	703

** the most recent statistics have not been available yet, the anticipated number taking into account the intensity of applications so far is 5200 applications at the end of the year*

Even though the number of applications for appointment of advocates increases every year, the actual number of appointed advocates by the Chamber significantly decreases. Whereas in 2001 the Chamber appointed an advocate for 90 % of applicants, in 2004 it only granted 53 % of the applications. The number of appointed advocates by Chamber is marginal, as compared for example to the number of civil cases in 2004, which was 290, 307 excluding divorces (this comparison, however, has little relevance, because the person in need of legal services can apply for appointment of an advocate by the court in a civil proceeding). Public awareness of the ability to apply to the Chamber for appointment of an advocate is low. The Chamber does not set forth any campaigning efforts to inform the public about this option. The information can only be found on the Chamber's website, which is often not accessible to socially disadvantaged groups.

Besides the institute of advocates appointed by the Chamber, the Chamber organizes regional meetings on certain days and within certain office hours, where free legal aid counseling is usually at the seat of regional courts (some of them are located in the court buildings, or Chamber rents a special premises). Here, the advocates provide free legal advice. The visit of such free legal aid offices requires prior phone appointments through the office of the Chamber. This activity is purely

a voluntary activity of the Chamber and does not have any legal basis. It is of little use, however, as the general public is often unaware of this possibility, due to the Chamber's insufficient advertising methods. To obtain this legal counseling is not conditioned on proving insufficient means or other obstacles, which would prevent the client from obtaining the legal aid in a different way. This form of legal counseling is not intended for the disadvantaged. It is a service of the advocate profession to the public. According to an estimation calculated by the Chamber in the year 2001. these services are provided to 40—50 clients per week in Prague and 30 clients per week in the regions. Annually, the Bar Associations provides free legal counseling services to at least 12 000 clients.[29]

There has been no recent data collected on how these services are used by the public. What is known, however, is that they can not satisfy fully the need for legal aid, at least because the legal aid in a form of isolated consultation is not sufficient to solve most of the legal problems.[30]

The quality of the free legal aid services

The quality of free legal services enormously varies with the professional responsibility of the appointed advocate. Some advocates are not willing to devote much time or effort to cases that have been appointed to them. This holds true when advocates are appointed by the court; where the advocate's fee is covered by the state, but is usually lower than his contractual fee, as well as for advocates appointed by the Chamber, when the advocate is not remunerated for any of his expenses. A system needed to evaluate the quality of services provided by advocates is missing, thus the effectiveness of the system is not possible to assess.

In a criminal proceeding, the appointed advocate can be removed by the judge for failure to appear at certain procedural junctions. Civil law does not establish even limited control of the court over the appointed advocate's performance.

"The client can turn to Bar Association and complains about the performance of appointed advocate, as according to the Law on Legal Profession, the advocate and advocate-in-training (*koncipient*) are liable for disciplinary offences, which are serious or repeated violations of the Law on Advocacy or the internal rules of Bar Association (including professional code of conduct).

However, an assessment of the quality of provided legal aid is prevented by the fact that the Bar Association claims that it does not distinguish between

29 Poznámka České advokátní komory k příspěvku Ondruš R., Bezplatné právní zastupování v České republice (úvaha de lege ferenda) / Remark of Czech Bar Association on the article on Free legal aid in the Czech Republic (consideration de lege ferenda) / Bulletin Advokacie, 6—7, 2001.

30 A. Macková, Právní pomoc advokátů a jejich dostupnost / Advocates' legal aid and its accessibility, 2001.

complaints against privately hired advocates, and does not even differentiate between and those against ex officio appointed advocates, and does not even differentiate between the complaints on conduct in criminal civil and other proceedings."[31]

The number of the complaints received by the Bar Association

Complaints / year	1996	1997	1998	1999	2000	2001	2002	2003	2004
Total number of complaints	663	939	1102	1112	1158	1274	1391	1442	1474

The number of the disciplinary proceedings commenced

Complaints/ Year	1996	1997	1998	1999	2000	2001	2002	2003	2004
Number of disciplinary proceedings	82	154	199	261	189	141	132	127	145

The latest statistics on the results of disciplinary proceedings are available from the year 2003. From 127 disciplinary proceedings commenced in the year 2003, only 93 proceedings were closed by a final decision out of which 59 times the advocates were found guilty (in 9 cases the disciplinary measure was pardoned, 20 admonitions, 1 public admonition, 24 fines, 2 temporary prohibition of the provision of services, 3 expulsions from the bar).

The current situation on provision of free legal services

A genuine *pro bono* culture does not exist in the Czech Republic, and advocates are not motivated to take *pro bono* cases. Some of the advocates do take on *pro bono* work on a case-by-case basis for family, friends or acquaintances. These *pro bono* activities are of irregular and unorganized nature. The scope of these activities is not possible to assess. The provision of *pro bono* legal services on organized and established levels is wholly absent.

The primary reason that advocates do not provide *pro bono* services is the high costs attached to the service. This economic perspective is the primary reason for explaining why smaller legal firms or individual advocates do not provide *pro bono* service on structured levels. Only the economically sound, large legal offices can afford to establish *pro bono* programs on an organized basis.

There are significant numbers (above 20) of international corporate legal firms with offices opened in Prague. Even though *pro bono* activities form a strong

31 Access to Justice in Central and Eastern Europe: Country report: Czech Republic, PILI, 2003, p.113.

part of the culture of the same legal firms abroad, only one of the Prague-based offices runs *pro bono* programs in the Czech Republic. There is no common firm culture which would encourage implementation of a *pro bono* culture based on similar programs being performed by foreign branches.

According to a young advocate-in-training at one of the corporate law firms, who established *pro bono* services in this firm, (the firm is taking around 2 *pro bono* cases per year in cooperation with a human rights NGO) the main obstacle against establishing a *pro bono* program or taking more *pro bono* cases is the lack of support from the director of the office. This means that lawyers who provide *pro bono* services do it at the expense of their regular working duties and are not compensated for the undertaken *pro bono* work. The system of billable hours does not take into account hours which the lawyer devoted to *pro bono* work. [32]

It is therefore necessary to address lawyers working in these law firms who would be willing to take *pro bono* cases and put pressure on their employers, but more importantly, to address the heads of the law firms without whose support it is extremely difficult for the employees to take on *pro bono* work. The only exception is Linkaters Alliance, which cooperates with the Organization for Aid to Refugees through a legal clinic.

Most of the free legal advice is provided to individuals by NGOs. Of the NGOs that provide legal aid, mostly in the form of legal consultation and information, most significant is the Association of Citizens Advice Bureau (Asociace občanských poraden). Its 37 regional offices, in 2004, provided counseling to 34 699 clients. The number of clients, which seek advice from the Association of Citizens Advice Bureau, illustrates the lack of access to the legal counseling provided by advocates. Although there are a number of NGOs providing legal counseling, just a few of them provide representation in judicial proceedings. Systematic legal aid by NGOs is restricted by two factors. The provision of legal services, according to the Act of Advocacy, is reserved for the advocates. At the same time advocacy is a free profession, and advocates are prohibited from entering into an employment contract. Some NGOs employ law school graduates who are not members of the Bar. However, the Civil Procedure Code allows the court to refuse as a representative any person who repeatedly acts as a representative. Therefore NGOs are unable to provide legal representation on a regular basis and through an advocate is a member of their staff.[33]

Other problematic issues include the quality of provided legal services, because some of the employees of the NGOs providing legal advice are either not graduates of legal training or those who are not lawyers and have not passed the

32 Interview with Mr Jindřich Kloub, 6. 3. 2006 Prague

33 Access to Justice in Central and Eastern Europe: Country report: Czech Republic, PILI, 2003, p. 113.

bar exams. Another concerning issue is the duty of secrecy, which does not apply to lawyers who are not advocates or advocates-in-training.

Local governments, political parties, trade unions or other associations for protection of certain groups, such as consumers, sometimes establish free legal counseling offices. It is not possible to assess to what extent these services are provided on behalf of the NGOs by lawyers free of charge or whether such services are provided on behalf of other non-for profit entities. Mostly lawyers are contracted by these non-for profit organizations and provide such services for a reduced fee. There are also several law school based legal clinics, which provide free legal services.[34]

Advantages of *pro bono* services for lawyers[35]

Pro bono services benefit not only indigents, who otherwise would not have access to legal services, but also bring considerable benefits to the lawyers and law firms involved. *Pro bono* work increases knowledge of practice areas. Lawyers practicing in firms generally find themselves practicing in a few well-defined practice areas. Handling *pro bono* cases, from either the perspectives of plaintiff or defendant, increases the understanding of the practice area and consequently helps lawyers be able to represent better their private clients.

Pro bono enables broadening of legal knowledge and skills. *Pro bono* work enables lawyers to get experience beyond their everyday practice area and develop more in-depth skill sets. *Pro bono* services also enable lawyers to acquire practical experience. Many young lawyers learn nothing but research and drafting skills in their first years of practice. *Pro bono* work is an opportunity, especially for young lawyers, to get practical experience from real world legal problems. In a course of *pro bono* work, young lawyers have the opportunity to counsel clients, interact with other lawyers, prepare documents, and make court room appearances, which they otherwise would not be able to encounter for the first several years of their

34 *Faculty of Law, Charles University Prague, Elsa First Legal Aid* (The legal clinic is organized by student's organization; a faculty staff supervises the legal counseling provided by students in all major legal areas), *Faculty of Law, Charles University Prague, Refugee Legal Clinic with cooperation with Organization for Aid to Refugees and Linkaters Alliance private law firm* (The clinic is organized by the Organization for Aid to Refugees in cooperation wit Faculty of Law at Charles University and its aim is to provide students interested in the field of human rights detail training in the field of refugee law with subsequent practical application of the knowledge the students have acquired by the theoretical training) *Faculty of Law, Masaryk Univerzity Brno*, The faculty carries on *Environmental clinic and Refugee clinic*, which form part of the educational curriculum and can be chose as restrictive elective subject by students and *Children's right clinic*, *Faculty of Law, Palackeho University in Olomouc — Legal clinic*, The law students provide free legal aid to the socially handicapped clients, under the supervision of the advocate — member of the faculty.

35 Benefits of *Pro Bono*, North Carolina Bar Association, Young Lawyers Division *Pro Bono* Committee, avialble at http://www.ncbar.org/public/proBonoPublicService/proBono.pdf.

careers. It gives young lawyers confidence about their abilities and demonstrates to more serious lawyers their ability to handle more than just legal research and writing.

Pro bono work enables client interaction. Through the provision of *pro bono* services, young lawyers gain invaluable experiences in communicating with clients, resulting in an increase in their ability to spot legal issues, separate legitimate legal claims from illegitimates, confidently advise clients of their legal rights and obligations, and guide clients through the legal process. *Pro bono* services can improve the lawyer's standing within a law firm. By improving their knowledge about practice areas and acquiring practical experience with handling legal matters and interacting with clients through provision of legal services, young lawyers increase their value within the law firm. The supervising lawyers come to recognize skills and abilities of young lawyers earlier, due to their successful performances on *pro bono* cases, and entrust them earlier with more complex and significant tasks within the firms. *Pro bono* work is a means for young lawyers to further their careers.

Advantages of ***pro bono*** services for law firms (business case for ***pro bono***)[36]

"Essential for the development of pro bono services is that supporters, without abandoning the moral and ethical principles at the heart of pro bono service, can confidently identify those elements of pro bono practice that, when appropriately structured and integrated into the fabric of the firm, result in positive benefits for the law firm and its attorneys, as well as for the clients and communities served. While some of the benefits are relatively easy to quantify, others are not. While some pluses resulting from a firm culture that is supportive of pro bono will be immediately apparent, other beneficial results will become known only with the passage of time. Investments in pro bono services can and will, in the long term, strengthen the firm's ability to attract and serve its commercial clients."[37]

Pro bono helps in the recruitment and retention of good lawyers. *Pro bono* increases the quality of work of lawyers. *Pro bono* offers an opportunity to collaborate with other colleagues and gives the involved lawyers special satisfaction. A satisfied lawyer has a better chance of being a good lawyer, and that sense of satisfaction will be reflected in the totality of the lawyer's work. For many lawyers, their job becomes dissatisfactory over time due to the heavy workload and anonymous atmosphere within the firm. *Pro bono* culture can expand the identity

36 *What U.S. Law Firms saw as advantages of doing pro bono legal work*, Vance Center, New York City Bar, http://www.nycbar.org/VanceCenter/PDF/probono/Library_What%20do%20U.S.%20Law%20Firms_Eng.pdf.
37 *Making the Business Case for Pro Bono*, *Pro Bono* Institute 2000, http://www.taprootfoundation.org/events/probono/pbi_businesscase.pdf.

of lawyers within their firm; *pro bono* embraces individuality and promotes team spirit, it reinforces the loyalty to the firm.

For associates, *pro bono* offers the opportunity for accelerated professional development as well as a chance to vary their workload, achieve greater autonomy and work in new forums. Secondly, *pro bono* work provides good training experiences for associates and can often be more challenging than much of the work a junior associate does at a firm. Using carefully selected *pro bono* opportunities as a training vehicle will enable law firms to provide a wide variety of high-quality skills training at a very low cost. In addressing the skill sets necessary for large firm lawyers, both business lawyers and litigators, it is apparent that many *pro bono* engagements offer the opportunity for in-depth, on-the-job skills training. In light of the role that *pro bono* engagements can play in providing excellent training opportunities, firms can integrate their training and *pro bono* functions. To younger lawyers, *pro bono* offers meaningful work experience and accelerated professional development opportunities that benefit both the individual attorney and the firm.

For lawyers who have been in practice for some time and enjoy proficiency in a highly specialized area of the law, *pro bono* participation offers an opportunity to engage in the critical policy issues of our day or to serve individual clients — aspects of law practice that may not be available in their everyday practice.

Pro bono, can increase the loyalty of the lawyers to the firm. *Pro bono* matters offer the opportunity for lawyers — and other staff — who would otherwise hardly even know each other — to work together as a team for a greater good. Firm-sponsored clinics and *pro bono* recognition events, whether humorous or formal, offer opportunities for social interaction and good will. *Pro bono* helps to address issues of declining morale and job satisfaction that lawyers may experience during their professional lives. *Pro bono* addresses the need that many lawyers have to contribute to society. It has the potential to offer constructive engagement with pressing social issues. *Pro bono* work is good for the standing of the legal profession and the legal system in the eyes of the general public, to maintain public confidence in the integrity of the legal system and the practice of law. A fair and just legal system cannot exist if a large percentage of the profession has no direct contact with the problems of the poor and disadvantaged.

Pro bono is a good marketing tool. Publicity about a *pro bono* matter is generated by public interest groups involved in the matter or attracts media interest due to the issues being addressed. An increasing number of law firms in the U.S. jointly undertake *pro bono* work in conjunction with the legal departments of corporate clients. Joint *pro bono* ventures offer an opportunity to interact socially and professionally with clients on matters of common concern outside the commercial arena.

Conclusion

Pro bono legal services are an important complement to state-sponsored legal aid, as the current system of state-sponsored legal aid can not satisfy every need of the indigents for access to legal services. *Pro bono* legal services benefit not only indigent clients, but have significant benefits for their providers. Lastly, the commitment to ensure equal access to justice and to promote the public good is what distinguishes lawyering as a profession from pure business.

As the article starts with a quotation, I would like to finish with the quotation of Rosalie Abella, now a Justice of the Supreme Court of Canada:

"My thesis is that there are three basic values which merge in a good lawyer; a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the two other values. My sense is that while there is a crisis in neither of competence nor of ethics, most lawyers having both in laudable abundance, the same cannot be said of the spirit of professionalism. …how will we define success in this profession? By money? By partnership? By hard work? Of course. But also by integrity, by decency, by compassion, by wisdom, by courage, by vision, by innovation and by idealism. If we venerate these qualities and reward those who have them with our respect, we send signals to the profession that our shared values and expectations exceed the tangible economic consequences of the expertise we enjoy"[38]

38 Ontario *Lawyers Gazette*, November/December 1999 at pp. 20 and 25.

Theoretical background to the state guaranteed legal aid system and its justification

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Law is an important feature of the modern state and modern society. In the past, interpersonal relations were based more or less on trust, but nowadays in our “anonymous” society, linked by systems of expertise, the law has replaced trust. We may say that there is now less trust in the law, which is being replaced by administrative powers.

Modern law declares that every human being is the same before the law. Modern law declares that every human being should have the same access to the courts — so to say, to the law itself. This demand or rule orders the law to consider people apart from their economic status, as well as other characteristics. This approach to the relationship of human beings and the law is correct, but there are still many factual and legal obstructions preventing some from participating in the legal system and taking their rightful place among other legal subjects. One argument supporting this idea is that, in addition to the growing complexity of society and a growing dependency on experts, the law is advanced as a system of interpersonal communications, a very specific means of communication, a system based on specific knowledge. We know that sometimes even for a lawyer it is very difficult to enter the law, and how can one benefit from equality before the law when one is not able to present one’s case before it?

Modern law is a complicated system that is sometimes difficult to understand, mostly due to the many administrative regulations regulating almost every realm of social life. The rule that all men are equal before the law is complicated to keep in practice. The law in real life cannot treat a man of low social position in the same way it treats a man of higher social position, because the law sometimes does not comprehend what indigent people do or say. If I understand one man and not the other, I will probably be inclined to solve the case in favor of the man I understand — without any notion of injustice from my side. We should not presume that there is some kind of conspiracy afoot which desires to exclude indigent people from society, or at least from the legal system. However, we can see there are some barriers preventing indigent people from accessing justice.

Free legal aid — or state guaranteed legal aid — can help people to bridge the gap between the theoretical declaration of equality and free access to justice on the one hand, and the reality of inequality on the other. Free legal aid can help translate into legal action the issues of people who view legal problems as incomprehensible or strange. Often people from disadvantaged groups do not know their rights; they do not know how to protect their rights or how to use them. Lack

of this awareness can lead to anxiety among those disadvantaged and, to some, very oppressive forms of exclusion from society. They believe the society is not theirs and that they do not belong to it indeed, they have a feeling of injustice.

It makes sense to understand this form of exclusion as a failure of the entire society and the entire legal system. How can we deal with the law as an omnipotent apparatus when there is a huge social group viewing the law as something alien to them? Law is based not only on enforcement, but also on belief. Recipients of the law have to believe that there is enforcement behind it; they also have to believe the law is a very useful system of rules for managing social relations. They do not have to trust other people — as I said earlier, this part of law is disappearing nowadays. Thus, it follows that if someone is excluded from this system and can only be made to accept the law through its enforcement, then he cannot identify with this system. The problem is that a lot of people (not only from excluded social strata) easily start to think of the law as unnecessary. They start to ask, "why do we have the law in this way? Why do we have law?" The law will not protect us if a large enough number of people do not believe in it.

The arguments above, as well as arguments often used in political discussions against this system, can lead to the assumption that free legal aid is a kind of charity, a part of the social security system. We must perceive the legal aid system not as part of the social security system but as a part of the system of law itself, of the justice system. This is the system of a state based on the rule of law, because it improves the access to justice for every member of society, even for people who do not have the money to hire an attorney or pay court fees. However, we cannot speak of a functioning legal system once someone has been excluded from that system.

Now I want to offer some kind of justification for the existence of free legal aid. I offer only two justifications for state guaranteed legal aid — first, a view of legal aid as the means by which the state can bring more justice to society. The second justification is the opinion that legal aid helps remove a very specific kind of violence from the law — the violence of words and language.

One of the possible justifications for a state guaranteed legal aid system is that it helps improve the notion of justice in a society. Free legal aid includes indigent people into society, not in the way of a gift or a handout, but by offering justice, or at least the notion of justice. The law may not actually be just, but recipients of the law must believe it is just and impartial. This is very important, because if they will believe in justice and the law, they will act confidently without feeling dependent on somebody else's mercy.

The need for free legal aid begins a long time before a court issues a verdict. It begins when the law is created. To create an accurate and useful set of rules, the

norm-creator needs to know what the social reality is. He needs to know the facts and how to regulate them. The courts provide a very suitable source of information because they introduce law into life; they confront social reality and correlate the ideal expressed in law with the needs of legal subjects. Admittedly, if the courts deal only with some types of cases then they know only a part of reality. They do not know how the law affects reality, because they do not know how the law acts against (or in favor of) people who are at the bottom of society. The reason for this is obvious — those at the bottom will never confront the court with their own problems. They will face the court only as part of someone else's problems.

We can presume that a lot of people never find out that they are in a legal relationship or legal situation. If they have a relationship with someone with legal knowledge, they may then be confronted with the information that they have never had another means of accessing. The legal journey of indigent people really ends in the same place as the journey of the man from the country who wanted to enter "into the law".[39] However, on some occasions we do find some differences — in reality sometimes there is no doorkeeper, and mostly, people never trust enough to try to enter into the law. If they turn to the court for help, it is possible that even with the best will, the court will be unable accept their submission. The language of court (and language of the law) differs from common language in many things. Indeed, it differs from the language used by indigent people.

However, we can see this problem from another point of view. In the continental legal system, courts (or authorities who apply the law) are appointed especially to introduce the law into real life — we might say, to bring positive law to life. Stanley Fish said of the relationship between law and the courts: "The law (or the constitution) is what the courts say it is."[40]

Until the court brings the law to life, we can talk about bringing the law into social reality with the authority of the state itself. However, the state cannot distribute the law properly if it does not know the whole of society. For instance, a verdict has to be executable — but if judge doesn't know the web of social relations, how can he imagine how his verdict will be executed? If the law is embedded in a distorted picture of reality, the law will be distorted as well. It is impossible to see the whole of reality clearly. However, the authorities applying the law have to investigate reality, and they have to try to approximate their decisions to it. Otherwise the law will preserve the status quo without expectations of any change. This can lead to a lack of justice in society.

39 From the short story "Before the Law". Kafka, F.: *Povídky*. 1. vydání, Praha, Státní nakladatelství krásné literatury, 1964, pp. 130—131.
40 Fish, S. 1989. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham: Duke University Press, p. 504.

Absence of a system of state guaranteed legal aid — or a system of free legal aid — is also a kind of violence aimed against people from lower social strata. We can take it for granted that words can be violent. Words are a type of violence that affects discretely. As Robert Cover has stated, words are acts of interpretation that cause pain and death. The legal aid system can help to reduce this pain and death. It can help to "translate" the words of the law into the words of indigent people. The lawyers (judges, attorneys, and so on) mostly come from the upper social strata. They use the language of their society and environment and of the law itself (and the law uses a very specific language, different in many aspects from obvious language). It is very difficult to understand legal language, even for people from the upper social strata.

Some postmodern approaches to the law claim the use of an idiom that no one but the author understands as a kind of violence. Translated, this means that people who do not understand the law have to act in accordance with it, but without comprehension of it. We may then ask: Why should people comprehend the law? The law is an order, and there is no need to comprehend orders. However, the law is a very specific kind of order, and when recipients of the law do understand it, its effectiveness is improved. Of course comprehension also reduces the notion of the law as violence.

Can the existence of a free legal aid system help to solve these problems with a lack of justice and an abundance of violence in society? The answer is yes — probably; but it is not the sole solution. We can presume that when state guaranteed legal aid exists, it can help deprived people enter not only into the law, but enter also into society as a whole. Legal aid may bring more cases to court and help judges and lawyers to see reality without restrictions. Indeed, it may help people solve their problems without the courts — because the courts have to clarify what the law is and where it applies. If recipients of law know their right, then they do not have to turn to a court. They can solve their problem themselves.

Of course legal aid is not the sole, omnipotent way of bringing about justice — or that which we call justice — to the whole of society. That is impossible.

Legal aid reform: good practices and systems[41]

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PILI and access to justice: approach and activities

The Public Interest Law Initiative (PILI) is a center for learning and innovation that advances human rights by stimulating public interest advocacy, primarily through networking, information exchange, technical assistance, promotional activities and training.

PILI's approach is to develop and support institutions and individuals who devote themselves to pursuing public interest through law-based activities — an effort that is closely related to the development of civil society and the promotion and protection of human rights

Working primarily in Central and Eastern Europe, Russia and Asia, PILI conducts work in two principal areas: Institutional Reform and Training and Education. In addition, PILI puts priority on the cross-cutting theme of combating discrimination due to its fundamental importance to the very notion of public interest work. For further detailed information about PILI's program areas, please refer to the website: www.pili.org

In the modern world, access to justice is conditioned by effective legal representation. An individual defending against an unlawful governmental decision or seeking redress against a civil wrong, may be confronted with a powerful state apparatus, corporations with unlimited resources or simply with a more prosperous individual who can afford to hire a private lawyer. Legal procedures are formalized and often inaccessible to even educated individuals. However, it is poor and disadvantaged people who suffer most without effective and competent legal representation. The countries of Central and Eastern Europe have been reforming and reconstructing their legal systems for more than a decade. Yet the theme of access to justice — the reform of the region's current infrastructure for providing legal aid to the poor — is one that has been largely ignored in the first decade of this transformation.

PILI has already completed a number of projects in this field. In 2001, in partnership with INTERIGHTS, the Polish Helsinki Foundation for Human Rights and the Bulgarian Helsinki Committee, PILI undertook a two-year program entitled ‚Promoting Access to Justice in Central and Eastern Europe. The project aimed to improve access to justice by diminishing the dependency of outcomes of the legal

41 This paper is a result of the work of several PILI staff members, interns and researchers. Among all involved it is especially important to mention the contribution of Edwin Rekosh, Josef Verovic and Marija Lukic.

process on social position and material wealth, and focused on two pilot initiatives in Poland and Bulgaria. As part of this project, PILI organized the first *European Forum on Access to Justice,* an international event that brought together key stakeholders to share ideas, experiences and strategies to promote access to justice. This event was so successful that a *'Second Annual Forum on Access to Justice' Forum* was held in February 2005.

Currently, PILI's key activities in this field are focused on the Balkans. PILI's "Access to Legal Assistance and Information" project is part of the Safety, Security and Access to Justice Program (SSAJP) in the region. The SSAJP is a major justice program financed by the UK Government and aimed at improving safety, security and access to justice in order to prevent violent conflict in the Balkans. Initiated in November 2002, it is intended to last for 3.5 years. The focus of the program is on longer-term, sustainable institution and capacity building. PILI runs the access to justice and legal aid component, with activities focused mainly in Bosnia-Herzegovina and Serbia and Montenegro.

PILI's approach is founded on carefully designed and implemented research studies and empirical surveys on access to justice, to be carried out usually by local partners in the target region/country. The importance of the surveys and studies can hardly be overstated. Usually, in the countries where we work, data collection on legal aid issues is scarce or non-existent. Institutions and players do not have a clear idea of important issues such as how many cases there are per year, how much money is spent for legal aid (in criminal and civil), how many people are left without representation or how many of these individuals are poor or disadvantaged. Careful study of the system plays a crucial role in several aspects. On the one hand, it is a very good way to spot the real issues to be able to later focus attention on the most important aspects of reform. Studies also help decision makers and NGOs build their case for the need for reform. Solid statistical data, documented opinions of players in the field (lawyers, judges, prosecutors), and surveys of public opinion combined with rigorous legal analysis of existing legal and institutional frameworks provide a solid background for discussions and future reforms. The surveys also provide clear benchmarks for evaluating the success of future reform initiatives.

In order to illustrate these points here are few examples from our recent work in Serbia and Bosnia-Herzegovina.

A recent survey executed by PILI, in cooperation with YUCOM and the Center for Policy Studies,[42] revealed serious problems in access to legal aid in criminal cases. For example, 79 % of those accused did not have a lawyer present while giving statements to the investigating judge. Additionally, 15 % of those imprisoned,

42 The survey is based on 684 criminal case archived files in 14 courts throughout Serbia.

never saw a lawyer at any stage of the criminal procedure. In non-criminal cases, the situation is even more complicated. The Civil Procedural Code provides a legal basis for the assignment of an ex officio lawyer in case of poverty, but not a single judge from those we interviewed was able to remember a case of granting legal aid in non-criminal cases.

In Bosnia-Herzegovina (BiH), in 2003 and 2004, PILI conducted two independent surveys in order to assess the true dimension of the problems in criminal cases in the country. Some of the most important survey findings underline the need for comprehensive and well thought-through reforms in the field. A brief summary of the most shocking findings reveal that: 45.3 % of prisoners did not have legal representation at their first appearance before a judge; 15.6 % did not have legal representation during the entire pre-trial proceeding; 16.2 % did not have legal representation during trial; and 35.1 % did not have legal representation on appeal. We also found that accused persons are not well informed of their rights: 42.1 % of those prisoners who had no lawyer at their first appearance before a judge, said the reason was that they were not informed of the right, 78.2 % of respondents did not ask for an ex officio attorney to be appointed at the police station.

In the next phase of our activities, equipped with results from studies and surveys, we apply our experience in engaging stakeholders at all levels to develop policy recommendations and justice sector pilot projects. This is usually realized in a series of meetings and conferences in order to foster a stakeholders' participatory approach and build political will for reform. A specific aspect of legal aid is that there are several stakeholders, which have vested, but sometimes naturally opposing interests: the ministry of justice and ministry of finance, judiciary, professional bar associations, the NGO community and prosecutors.

As a next step in building a case for reform, PILI is working closely with the decision makers (usually the respective Ministry of Justice) to further advance legal aid reform by assisting directly in their work and reform initiatives. Our work in Bosnia, for example, was instrumental in building political will for reform and helping to eventually realize our objective of establishing mechanisms which enable justice-sector reform through legal aid reform Working Groups and cooperation with civil society organizations with newly acquired expertise in the area officially-established by the Ministry of Justice in BiH. Specifically, PILI played an influential role in helping the State Ministry of Justice in BiH and the Ministry of Justice in Serbia each establish stakeholders' working groups to draft new legislation concerning free legal assistance. PILI also channeled large quantities of information, analysis and other lessons learned from across the region to the Working Groups.

In the course of our work in the region, we have identified common problems and key issues to be researched, discussed and reformed in each of the countries. Key events that shaped our vision, were the 1st and 2nd European Forums on Access to

Justice, which PILI co-organized[43] in December 2002 and February 2005, respectively. In the course of the organizations of the 1st European Forum PILI commissioned, and later published, comprehensive country reports regarding access to justice from the then 10 EU accession countries of the region.[44] In preparation of the second forum, we commissioned a compilation of country updates aiming to highlight the developments related to access to justice with a focus on legal aid that had taken place in Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

As a result of these two events and our extensive project work in several of the countries mentioned above, we have developed a good understanding about the common issues which need addressing. To summarize all this, the following is a quote from the Overview of Legal Aid Developments in Central and Eastern Europe[45], included in the background materials for the Second European Forum on Access to Justice: *"Overall, perhaps the most significant aspect noticed in all countries is that access to justice and legal aid matters are under the scrutiny of governments, civil society, or both. Reform efforts are underway and many important innovations in management, delivery and scope of legal aid have already been introduced in several countries.*

However, there are a number of issues and areas that could still benefit from focused reform, such as:

- Clear separations of policy, management and delivery functions;
- Ensuring mechanisms of accountability for legal aid services;
- Introduction of quality assurance mechanisms for legal aid services;
- Application of a comprehensive reform strategy, incorporating relevant criminal and civil justice provisions and practices;
- Ensuring the cooperation and commitment of all relevant stakeholders in carrying out the reforms;
- Clear formulation of what constitutes legal aid (e.g. legal information, legal advice and legal representation) as well as the costs covered;
- Payment schemes for legal aid lawyers reflecting a focus on the quality of services to the client;

43 Partners for the first European Forum were the Open Society Justice Initiative, INTERIGHTS, the Polish Helsinki Foundation for Human Rights, and the Bulgarian Helsinki Committee. PILI co-organized the Second European forum in partnership with the Open Society Justice Initiative.
44 For more information and the full version of the country reports in English, you can visit http://www.pili.org/2005r/content/view/51/53/
45 Drafted by Nadejda Hriptievschi, the Open Society Justice Initiative, with contributions from Atanas Politov, PILI.

- Attention to strategies for raising the public awareness of existing rights and safeguards for legal aid in criminal and non-criminal matters;
- Attention to strategies and tools for assessing the level of provision and satisfaction of legal aid needs;
- Increased budgets for legal aid.

It is hoped that the reform initiatives (that are only beginning) can benefit from some lessons from the countries that already have some experience in implementing similar reforms."

European best practices and legal aid systems

Having identified some of the most important issues reformers need to take into consideration when reforming the legal aid system of the country, we now need to highlight some important experiences and developments from reforms across the continent. In order to do that, we will focus on the most important aspect: how the legal aid system is managed and what is the relevant institutional structure. In the course of the exposé I will also focus on some other issues including: eligibility for providing legal aid, eligibility criteria for the applicants, legal aid funds, appointment of attorneys procedures, etc.

The main focal point of the discussion is the question of how legal aid is managed and the related question of how to collect and manage relevant data in order to predict costs and therefore ensure effective policy formulation and planning. These are crucially important issues, especially in countries where state funds are limited. All other issues, in many ways, are a function of this important question.

One of the fundamental aspects of any legal aid system in Central and Eastern Europe that we believe requires very serious attention is the lack of structure for the overall system necessary to provide oversight, data gathering, stakeholders' coordination, planning and budget management. Legal aid law reform could be seriously undermined if new legislation is adopted without taking into account these issues. One of the main problems with the current systems in the region is that they are operationally dysfunctional: too many players have a role without being coordinated or monitored in any feasible way. We believe that establishing some sort of structured approach to oversight, planning and budget management is critical to ensure that legislative reform efforts translate into effectively implemented procedures and that a clear channel develops for a strong and broad-based constituency with a vested stake in legal aid. The aim is to develop an engine for further improvement of the legal aid system over longer periods of time.

Important developments introduced in newly adopted or recently amended legal aid legislation in several European countries, are the provisions setting up

clear legal aid management schemes. In one instance, the scheme, or so-called Legal Aid Boards (LAB), deals with the overall policy, management, and, in some cases, quality control of the legal aid system. In many systems, they also deal with eligibility determination, issue legal aid certificates, appoint legal aid providers, and collect data. In some countries, the Ministry of Justice or the Courts maintain key roles in managing the legal aid system and in the development of legal aid policy. The Bar on the other hand plays a relatively important role too, rendering aid that ranges from legal aid delivery to assuring quality.

Let's see how this is being done in three European countries.

Slovenia

The Slovenian legal aid system is managed at different levels by different entities within the national judicial architecture. As set forth in the Legal Aid Act of 2001 (the Act), there are three administrative entities performing different functions:

- At the highest level, the Minister of Justice weighs in on a number of matters concerning the administration of the legal aid system, including: (1) the number of LAPS employees; (2) the registration of providers; (3) the application form and type of documentation required for applications for legal aid; (4) the form for LAPS referrals; and (5) specifying the types of records to be retained. The Minister of Justice has also appointed a commission that supervises substantive and financial aspects of providing legal aid at least once a year.
- The decision-making body that is responsible for accepting legal aid applications and ascertaining eligibility is referred to as the Legal Aid Authority (the LAA). The Legal Aid Authority is the president of the District Court or the president of the Specialized Court in the first instance, or another judge at the court authorized by the President to be the LAA.
- The day-to-day administration of Slovenia's legal aid system is carried out by the Legal Aid Professional Service (the LAPS). The Act envisions the LAPS as the administrative and professional arm of the LAA. The LAPS provides free initial legal advice to applicants, provides information to all interested persons on the system of legal aid itself, assists applicants with compiling applications and otherwise gives any assistance applicants require. Each LAPS must employ one attorney and one administrative assistant.

Because the legal aid system relies on private lawyers for the provision of legal services, the Act does envision a small management role for the regional

Chamber of Attorneys (or, in the case of notaries, the Chamber of Notaries), which we presume to be the Slovenian equivalent of the bar association. The chamber's role is twofold: (1) to provide a list of attorneys from which the LAA may make appointments; and (2) to establish rules regarding attorneys' abilities to avoid such appointment, rules which are binding on the LAA.

The Supreme Court of Slovenia also has an administrative role in the legal aid system, primarily being associated with paying out funds for costs incurred. In addition, the Supreme Court must provide an annual report to the government and human rights ombudsman detailing:

- number of applications filed for legal aid;
- number of decisions issued regarding legal aid approval;
- type of matters for which legal aid has been approved;
- amount of funds allocated for legal aid by individual courts;
- amount of funds repaid; and
- statistical trends in the number of matters and funds for the past year.

Thus, funding for implementation of the Act is provided by the Slovenian Supreme Court out of the government budget. Under the Act, funds to legal aid providers are paid by order of the president of the Slovenian Supreme Court at the proposal of the relevant LAA. There is no provision for funding propaganda campaigns or other programs to popularize the Slovenian legal aid system and ensure that those who require aid are aware of its existence.

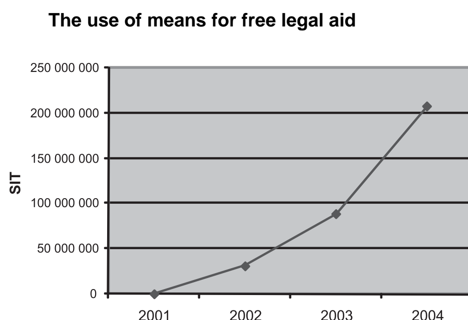
The Slovenian experience with managing and funding legal aid should be noted by any country planning on creating a new uncapped government-funded legal aid system. Although, at first sight, Slovenia's reform might look like a good option for incorporating existing practices with reform thinking, a closer look reveals some serious potential problems. The issues are mostly raised on the side of budgeting and management of the system. Allocating additional burdens on court administrations to deal with what might be considered unnatural functions (managing of legal aid budgets and operations) is always going to raise questions on the actual effectiveness of the scheme. Recently *published "Report on the Implementation of the Free Legal Aid Act"* by the Slovenia Supreme Court illustrates that point clearly. The report plainly states:

"From the aspect of the budget, the main implementation aim of the sub-program Free Legal Aid was to provide regular implementation of the Free Legal Aid Act. The goal was only partially realized, the problems having arisen at the provision of current repayment of free legal aid costs, due to the extreme increase of cases. The approved budget for the year 2004 the sum of 125.000.000 SIT was

provided, which represented the growth of 41 % as compared to the year 2002, however, even this rate of growth did not suffice, as it was necessary to provide additionally almost 83.000.000 SIT."

The report goes on saying that, "In 2004, 207.987.658 SIT were used up for this purpose. In comparison with the last year these expenses increased by **134,54 %!** (emphasis from the report itself) In the structure of the entire budget of the Supreme Court this item represents already a 9,73 % share".

The following two tables illustrate the issues clearly.



Source: FRS VS

Table 1: Use of means for free legal aid

Year	New (NO)	Pending (VD)	Resolved (RE)	Unresolved 31.12. (NE)	Applications for FLA	Granted FLA
2001	557	557	291	266	520	195
2002	3595	3861	3300	544	2973	1862
2003	9052	9596	9909	687	6060	3124
2004	11086	11773	10741	1021	8355	6156

Table 2: Number of cases

The report ends with a summary assessment of the situation and proposals for change. The Supreme Court finds that "The implementation of the Act burdens the courts with tasks that do not belong among their basic duties, i.e. the solving of court cases. The expenses deriving from the provision of free legal aid increase the scope of courts budget and thus apparently enlarge the scope of courts budget, ensured for the implementation of their basic function — judging. Besides, their growth is totally unpredictable, therefore the Supreme Court has to provide additional means already in the middle of the budget-year. Due to the legal regulation which stipulates that the means for the financing of free legal aid

are provided in the budget of the Supreme Court, while they are used by individual courts or else by concessionaries, unnecessary flow of means between the Supreme Court and other courts occur, which is accompanied also by an ample flow of documents. Some courts are also drawing attention to the fact that the presidents of the courts are not able to control the performance of the part of free legal aid, performed by concessionaries”.

In its final proposals for change, the Court suggests, “the financing of free legal aid be excluded totally from the court budget”. In the future the adequacy of the current legal solution should be seriously considered, “especially from the aspect of burdening the courts with tasks which do not belong among their basic duties, and the possibility of those tasks outside of the judicial system”.

Scotland

The Scottish Legal Aid Board (the Board), a non-departmental public body under the Scottish Executive, was established in 1987 and is responsible for the provision of legal aid in Scotland. While Scottish Executive Ministers are responsible for determining overall legal aid policy and the Scottish Parliament enacts the rules and legislation affecting legal aid, the Board runs the daily operation of the legal aid system.

Governance

The Board is overseen by 11 to 15 board members who are appointed by the Secretary of State for Scotland, the head of the Scotland Office — a part of the Department for Constitutional Affairs of the U.K. government. The members must include at least two members of the Faculty of Advocates and at least two members of the Law Society (solicitors). Each case is appointed to consult with those respective bodies, as well as at least one other person having experience with the court system and individuals from the wider community. Each board member serves a term of up to five years.

The Board is headquartered in Edinburgh and employees over 300 full-time staff. Each year the Board sets out targets for the year in a Corporate Plan that is approved by the Justice Minister.

Main responsibilities

The responsibilities of the Board include:

- Advising Scottish Ministers on how legal aid is working and ways to develop it;
- Managing the Legal Aid Fund;

- Deciding whether to grant applications for legal aid;
- Examining solicitors 'and advocates' accounts for legal aid work, and paying them for the work they have done;
- Deciding what people have to pay towards the cost of their legal assistance and dealing with all collections, refunds and queries;
- Registering firms and solicitors under the Board's Code of Practice in relation to criminal legal assistance and monitoring their continuing compliance;
- Registering firms for civil legal assistance and monitoring each firm's administrative arrangements, and funding quality assurance which is operated by the Law Society of Scotland;
- Investigating and tackling abuse of legal aid;
- and exploring different channels of delivering legal aid service.

A notable feature of the Board is that it has a strong advisory role on issues of policy to the Scottish Parliament and has recently overseen and evaluated a Public Defenders Office legal aid reform model for Scotland. The Scottish Parliament passed enabling legislation that allowed the Board to direct a sample group of clients to a publicly funded solicitors office rather than to the traditional private lawyer compensation scheme. The Board oversaw this experiment over a period of five years and will continue to oversee further trials of a Public Defenders Solicitors Scheme to determine if such as system is efficient and effective in the Scottish context.

Reforms

In cooperation with the Law Society of Scotland, the Board introduced significant reforms in 2003. Law firms that provide civil legal assistance are now required to register with the Board and to remain registered, they must show that they have met certain agreed upon standards. The Board then audits the administrative procedures of registered firms and the Law Society ensures that they meet agreed quality standards.

In addition, solicitors now must send reports to the Board about each civil legal aid case at key stages throughout the case. Solicitors' fees were increased and the process for determining fees simplified by introducing "block fees" for key stages of work.

The Board is now in the process of reviewing the criminal legal assistance system and developing reforms to improve efficiency and effectiveness. It is also testing a quality assurance scheme for criminal legal assistance in the Edinburgh Public Defense Solicitors' Office.

The Netherlands

The legal aid system in the Netherlands is currently in transition. The Dutch constitution provides for a right to legal aid, the rules of which are to be laid out by acts of parliament. A new legal aid act entered into force in 1994, replacing former legislation governing the provision of legal aid. Following several studies conducted in 2000 and 2001 evaluating the new system's operation, a further wave of reforms was undertaken in an effort to further improve the system. The changes are far-reaching and affect the division of responsibilities among the different organizations in the legal aid system, eligibility criteria and payment provisions applicable to users of legal aid services, the registration and auditing of participating lawyers, and other measures.

Governance, functions and financing of Legal Aid Boards in the Netherlands

The new Legal Aid Act created five regional Legal Aid Boards (LABs), corresponding to the five judicial districts in the Netherlands. The LABs have the status of independent administrative bodies and are funded by the Ministry of Justice. Their responsibilities include organizing and monitoring the legal aid system, advising the Parliament and Ministry of Justice on issues related to legal aid, determining which cases are eligible for legal aid, financing the organizations[46] that provide first-line legal aid (initial consultations), and paying the expenses of attorneys providing extended legal aid services. They are also responsible for policy development, research, registration of legal aid attorneys, and quality assurance initiatives.

Responsibilities are retained with the Ministry of Justice or allocated to the LABs according to the principle that the LABs should be as independent as possible, while taking into account that the Minister of Justice is politically accountable. This means that, for example, the Legal Aid Act and various regulations set out specific criteria defining eligibility for legal aid, as these relate to citizens' access to the system. In contrast, the LABs enjoy broad discretion in forming and funding the organizations that deliver legal aid services on the ground. In addition, while the statute sets out minimum registration conditions for attorneys to participate in the legal aid system and minimum quality criteria for legal personnel in the organizations providing legal aid, the LABs are empowered to define more stringent criteria, training requirements, audit programs, etc.

The Ministry of Justice provides funding to the LABs on the basis of annual budgets and work plans submitted by the LABs. The LABs are then responsible for managing their operating budgets. Accountability is ensured through a planning

46 These organizations include Legal Aid Centers and Legal Services Counters and are discussed further below in Section 5.2 below.

and control system that requires the LABs to submit work plans and associated budgets for approval by the Ministry of Justice, as well as annual reports after the close of the fiscal year. The LABs follow a similar system with the organizations they create to provide legal aid services, which submit budgets and plans to the LABs for approval and fund allocation.

Responsibilities of the LABs with respect to the provision of legal aid services

Legal service counters and publicly funded primary consultations. Primary legal aid service involves an initial, free consultation in which the staff clarifies a client's problem, gives information and simple advice, refers more complicated legal matters to private lawyers registered with the LABs, and may even refer other matters to social workers, debt counselors, mediators, and other service providers as appropriate. The goal of this service is to provide easy access to advice and assistance at a very low cost and to encourage the early resolution of most problems without unnecessary escalation.

The initial consultation provided by a Legal Services Counter lasts one hour and any need for further service must be referred to private attorneys. Any referral for extended consultation requires an application for legal aid, which is processed by the LABs.

The decision to replace Legal Aid Centers with Legal Services Counters was a reaction to the conclusions of a study commissioned by the LABs and carried out in 2000—2001. These findings included the following, among others: an under-use of primary services and a need to raise awareness of the services among potential users; a shift in the attention of Legal Aid Centers from providing primary services to extended services in order to keep more interesting cases and to act on behalf of paying clients; and a decline in the willingness of private lawyers to work on legal aid cases. The study concluded with certain proposals, including the creation of Legal Services Counters to ensure that the system remained accessible. The State Secretary of Justice (previously responsible for legal aid within the Ministry of Justice) requested an independent committee to study the proposals, resulting in the committee confirming a recommendation to create Legal Services Counters and making further proposals (e.g., to increase user fees for extended services, ensure quality of staff, etc.). Based on the committee's findings, the State Secretary of Justice recommended adoption of the proposals to the House of Representatives. After a new government took office in mid-2002, the Minister of Justice was assigned the legal aid portfolio and received permission in November 2003 to replace the Legal Aid Centers with Legal Services Counters.

The LABs have been in charge of implementing the change to Legal Services Counters that has recently taken place. They are responsible for funding and supervising the Legal Services Counters and may give them instructions.

Extended consultation provided by private lawyers.

Following implementation of the reforms described above, all extended legal aid is provided by private lawyers.[47] Private lawyers specialize in providing legal aid in fields such as criminal, family, labor, housing, social security, consumer, administrative, and asylum and immigration law. They must be registered with the LABs and meet the quality criteria set out by the LABs. Approximately sixty percent of all Dutch lawyers participate in the legal aid system. Clients must contribute to payment of the private lawyers on the basis of financial means. This co-payment is intended to provide incentives to clients to weigh the costs and benefits of using the legal system, ensure affordable legal assistance, and defray the state's costs in providing such services.[48] In order for the service to be subsidized under the legal aid system, a lawyer to whom the case is referred must submit an application to one of the five LABs on behalf of his/her client, including information on the legal problem and on the client's financial position. The LABs assess whether the legal problem and the client's financial position fall within statutory criteria. They also set the appropriate income-related contribution to be paid by the client.[49] Beginning in 2004, the data on an applicant's income was provided by the tax authorities, reducing the administrative burden associated with completing the applications.

If the application is approved, the LAB issues a certificate granting the lawyer permission to take the case and setting the contribution by the client. At the end of the case, the lawyer presents the certificate to the LAB for payment. Pursuant to an agreement reached among the Ministry of Justice, LABs, and the Law Society, the amount paid to lawyers was increased in exchange for the implementation of an auditing/quality assurance scheme.[50]

Conclusion: advantages of a hybrid system

PILI experience in studying and dealing with legal aid issues in Central and Eastern Europe is very much in line with the lessons learned from the experience of the three countries presented here. To reflect that in a brief and effective way we can say that a scheme where a single legal aid managing institution is responsible for, and oversees the entire legal aid system, is the most likely to be successful in solving the burning issue. The advantages of this formula are:

47 It is recognized that some former staff lawyers from the Legal Aid Centers will leave to enter private practice in order to continue this work.

48 The amount of the contribution was increased in 2004.

49 Legal aid is provided free of charge in criminal cases in which the defendant is imprisoned.

50 The audit covers office organization and client service and must be renewed every three years in order for a lawyer to remain registered.

- Effective management;
- Insulation from direct state control;
- Leverage of existing resources within private bar and NGOs;
- Proper monitoring of performance and funds;
- Capacity for statistical analysis, transparency and budgetary planning;
- Means for training and quality control.

Application of the Slovak law on legal aid providing to the persons in material need in practice

Maria Kolíková, attorney, former director of Legal Aid Centre, Bratislava, Slovakia

"The intention of this law is to create a system for providing legal aid and to ensure its services in the measure established of this law to the natural persons, who are not able to use legal services for an appropriate application and to have their rights protected due to their material need." This is the regulation of the art.1 of the law No. 327/2005 Coll. of law on legal aid providing to the persons in material need (further only "legal aid law"). The above mentioned law is the first systematic step by the state of Slovakia towards providing free of charge legal aid to the people who are not able to pay for such aid due to their unfortunate social situation. It will be necessary to develop a total systematic solution for applying additional steps with respect to areas where provision of free of charge legal aid is not covered by this law. As a result of the above mentioned law and its applications, the Legal Aid Centre was established.

The purpose of this article is to approach the application of the practical aspect of legal aid law according to a conception built by the creation of the Legal Aid Centre during the period between January 1, 2006 and December 2006. Creation of this legal aid concept was due to the team work of either internal employees of the centre or with the assistance of external collaborators. As the author of this article, i believe it is essential to draw the readers attention to the fact, that since 2007 the Legal Aid Centre has been under new management and since that time, has not stated whether it will carry on with or eventually divert from some of the organization's original aims.

Organizational structure

Legal Aid Centre was established as a state budgetary organization on January 1, 2006. Up to this date it had a temporary office in Bratislava and three employees: a director of the centre, a coordinator of technical support of the centre, and a first contact supervisor. People in Slovakia were unaware of what to expect or what this new state institution would bring. The Legal Aid Centre built four offices during the first year of its operation: in Bratislava, Kosice, Banska Bystrica and Zilina. Offices were gradually built on the principle of decentralization, providing daily services among the locations. The organizational structure of each office includes an average of 12 employees, consisting of a head of the office, a legal aid supervisor, a first contact supervisor, 3—4 lawyers, 3—4 first-contact employees, and one employee controlling the administration — the main telephone, personnel information, and correspondence (registry). The principle of decentralizing the

offices was brought to an end by having the jurisdictional ofices deliver their legal aid decisions on legal aid in the framework of their regional operators (territorial unit operation). Slovakia is therefore artificially divided into four territorial units.

Within its first year of operation, the centre's activities indicated that there was a great demand for its services not only from the local inhabitants, but it has also been reported that a large number of Slovakian inhabitants depend on the legal aid services of the centre. Building new offices for the centre will be necessary in the year 2007 and in coming years, making free legal aid available for everybody who needs it and is dependent on it. In a plan approved by the previous management of the centre, as well as the Ministry of Justice, there was an agreement to open the next 2—3 offices in the year 2007 and an additional 1—2 offices in 2008, creating branch offices in the most frequently visited areas. This would result in the creation of one office in each region of Slovakia (there are 8 regions in Slovakia).

Decision making about claim for providing legal aid

The centre makes decisions about a claim for providing legal aid according to the submitted application of the applicants, only considering applications of natural persons, not corporations. The legal persons have no right to apply for free legal aid provided by the centre Considering the amount of applications for free legal aid and the time limitations that must be taken into account, the competent person making decisions about whether to provide legal aid to the applicant is the head of the office in the framework of its territorial unit operation. Legal aid law determines the obligation for the center to finalize a decision within a 30-day period, which begins from the day the application is recieved.

Currently there are 4 offices in the centre of Slovakia and their expansion depends only on the financial and practical politics approved by the Ministry of Justice. Legal aid law has neither established the number of center offices nor their infrastructure. The decisions about individual claims for legal aid are made under administrative procedures without the possibility to take appeal, but with the possibility to take administrative decisions to the court for review. With the aim to unify the decision making process taken by the centre there is an idea "de lege ferenda" to amend the legal aid law by introducing the appeal procedure. The appeal location could be the center's headquarters.

The preliminary approval of the legal aid claim

The preliminary approval of the legal aid claim is a new legal concept introduced by legal aid law. The preliminary approval of legal aid is applied in cases when there is a threat to miss the legal time for claiming the applicant's legitimate

interests. For example, such cases include being able to make a timely appeal, with regard to statute of limitations for an action. In practice, there have been cases when the applicants abused the preliminary approval by getting free legal aid for some necessary legal steps. In addition the applicants did not cooperate in correctly formulating their application for legal aid.

The criteria (conditions) for providing the free legal aid

There are two tests to exhibit the main criteria for providing free legal aid: the social situation of the applicant that is determined in law as material need (means test — the minimal value of the applicant's claim has to be higher than the minimal salary) and the merit test. The main aim of the merit test is to exclude applicant's claims that cannot successfully be approved. The adequacy of the means test concept is questionable as far as the indicated maximum of the applicant's income to fulfill the requirement to be in material need. With the aim to evaluate the adequacy of the indicated maximum of income, the center collects data about the applications for free legal aid that have been denied because the income of the applicants was too high (the means test was not satisfied).

According to legal aid law, the centre does not have any legal means to eliminate the effects of the strict application of legal text. In cases when the income of the applicant is higher than the determined maximum of income (the means test) by one Slovak crown (cca 0.03 Euro), or 100 Slovak crowns (cca 2.9 Euro) the center must deny access to free legal aid. In these cases the centre must provide to the applicant at least the basic legal orientation of his legal problem including assistance in writing the petition to initiate the relevant proceedings, if necessary.

The legal aid services provided by the centre — the lawyers of the centre and the attorneys

The centre provides legal aid to the approved claims having decided them worthy of aid after inspecting the applications submitted by the applicants. Criteria surrounding the decision to provide legal aid includes: the identification of the applicant to whom the free legal service is provided, the identification of the lawyer who will provide the free legal aid, the determination of the legal aid service, and the identification of the legal problem, which should be solved by giving the free legal aid. The legal aid services provided by the center cover all the services from legal counseling to legal representation in court proceedings, ranging from writing the petitions to initiating the proceedings. The legal aid services also cover the services of the mediator of the center. In the case that the applicant asks for solving his legal problem by mediation, the center considers the adequacy of such a form of dispute resolution according to the merits of the case and the protection of the legitimate interests of the applicant.

The center can determine whether it will provide free legal aid with the help of the lawyer of the centre, and the attorney or the mediator of the centre. The lawyer of the centre and the mediator of the centre are employees of the centre. The attorneys, who are assigned by the centre to provide free legal aid are registered in accordance to their free will on a special list administered by the Slovak Bar Association. The centre can determine the attorney who will provide the legal aid only in cases of legal representation in front of the courts, but the centre can also determine the general lawyer of the centre.

The fee that the attorney is paid for legal services is reimbursed by the centre. The centre makes decisions about attorney fee reimbursement according to the legal regulation, which determines the flat rates of attorney fees for legal services provided to persons in material need. Generally, it is said that there are cases, when there are advantages for the attorney for providing free legal aid. For example, if it's not necessary to make too many procedural actions, and the action is finished in the first, the second, or the third trial. In more difficult cases with greater amounts of procedural actions needed, reward for the attorney seems to be symbolic. The attorney has the right to all of his expenses (travel costs, communication costs) concerning the case to be covered. The will of the applicant and the particularity of the case are the main criteria in the decision making process by the centre in determining the lawyer or the attorney. The essential criterion for appointing an attorney would be, for example, if the applicant expresses his will to be represented by the particular attorney and the attorney has shown interest in representing the applicant, mainly, by having already made some procedural action. Another factor taken into account when appointing an attorney is when the attorney's office is closer to the residence of the applicant than the regional office of the centre. Nowadays, there are only four offices in Slovakia but 20 lawyers working for the centre; this means that the close proximity of the attorney is important for providing accessible legal aid for the applicants. The centre, in the frame of its practice takes certain steps prior to appointing a concrete attorney, which include contacting the attorney and deciding whether he is prepared to take the particular case, and whether he has the capacity to take the procedural actions in a sufficiently timely manner. For example, when there is only one day left before the expiration date for an appeal, this urgency has immediate impact on the applicants rights, therefore it is necessary to institute preliminary court measures, etc.

In accordance with law, in order to be provided legal aid, the applicant has to sign a contract about provision of aid with the appointed lawyer of the centre /mediator or attorney. The applicant has to assign powers of representation to the attorney as well. It was shown in practice that signing contracts for provision of legal aid bring about positive results; for example the applicant is able to realize and become knowledgeable about all aspects of legal aid being provided.

The contract itself contains the rules for providing legal aid, which are in fact a repetition of the legal regulation. However, from the point of view of the applicant, the signing of the contract and the assignment of powers of representation confirm the applicant's will that the legal aid is to be provided in the particular case by the appointed lawyer or attorney and at the same time while concurrently providing the opportunity to realize again the legal consequences in case of breach of contractual obligations. In practice, cases occurred where attorneys were not aware of a legal obligation — the necessity of signing a contract, and other times attorneys signed contracts containing the obligatory provisions to pay fees to the attorney against the law. By making the conditions of the attorneys and the procedures of the centre clear, the cooperation and communication between the Slovak Bar Association and the centre became very useful and necessary.

Responsibility of the centre towards the applicants

As it results from the statute of the centre, it is necessary to distinguish between the responsibility of the centre concerning the administrative procedure of the applicant's claim for providing legal aid, and the responsibility of the centre for provided legal aid by its employees, who are the lawyer of the centre or the mediator of the centre. According to law No. 514/2003 Coll. about the responsibility of public institutions for damages concerning the administrative procedure of the centre (the decision making procedure) about the applicant's claim for providing legal aid, the centre takes responsibility as the state institution for the caused pecuniary or non-pecuniary damage by taking the decision or by providing assistance not conforming with law. If it concerns the provision of legal aid by employees, the centre is responsible for the caused damage to the applicant (the client) according to the general legal regulation of the responsibility relationship between the client and the mandate in civil code. As it results from the statute of the centre, if there is a dispute between the applicant and the centre about the responsibility for provided legal aid, the centre should try to solve the case by mediation as a form of alternative dispute resolution.

The increase of legal awareness by the centre as prevention from pointed legal conflicts

According to legal aid law, the centre provides the preliminary consultations with a lawyer of the centre for a maximum duration of 1 hour, charging 150 Slovak crowns (cca 4.3 Euro). This consultation does not serve to solve the legal problem, but only to give the basic legal advice necessary to solve the problem. In case of simple legal problems, it may happen, that in the framework of the preliminary consultation, the legal problem will actually be solved. It is necessary to distinguish between these charged preliminary consultations with the lawyer and the free of

charge consultations of the lawyer with applicants in cases, where the claim for free legal aid was approved.

There are no set conditions to prove the material need of applicants during the preliminary consultations. The charged preliminary consultation is voluntary and its provision does not relate to submitting the application for claiming free legal aid. The preliminary consultations have often been concerned with basic legal information about inheritance, family law (the right to get into touch with children, divorce), property relations of the tenancy by the entirety settlement, joint ownership or labor disputes regarding the working conditions and termination of the labor contract. The preliminary consultations with the lawyer are provided in all four centre offices during the specified consultation days, which are on Mondays and Wednesdays from 8.00 AM until 4.30 PM. According to legal aid law, the attorneys subscribed in the special list by the Slovak Bar Association also provide the preliminary consultation in the same maximal duration of one hour and with the same charge of 150 Slovak crowns. It is the same special list of attorneys that is determined by the centre and used for providing free legal aid according to the center's decision to render free legal aid.

By e-mail or by phone the centre gives basic legal consultations to legal problems. In the case of an e-mail legal consultation, the lawyers of the centre do not give legal consultation continuously to one applicant. The aim of the e-mail and phone legal consultation is to provide a basic orientation of the legal problem to the applicant in the frame of one call or one e-mail answer. The lawyers of the centre provide legal consultations by e-mail and by phone during the whole week. There is no condition to prove the material need of applicants for providing the legal consultation by e-mail or phone, these services are free of charge. The phone consultations should be essentially limited, with the ideal time duration being 15 minutes. In practice, it has been difficult to keep the 15 minute limit, therefore the lawyers should be trained for effective communication, and clear, general rules should be adopted about the duration and focus of the phone consultation.

The centre developed the concept of free of charge legal consultations (basic explanations of legal problems) by phone and e-mails alongside the system of charged preliminary legal consultations with an aim to increase society's legal awareness as well as to prevent from pointed legal conflicts. Also, the concept was aimed at ensuring the provision of timely legal information, when there is a need for early enforcement of legal interests of the applicant.

The first-contact employee

The first-contact employees have an important impact on the quality of provided services by the centre. The first-contact employees explain the centre's

conditions for approving claims for free legal aid before the client submits an application. After submission of an application, the first-contact employee evaluates the fulfillment of the condition for material need (the means test). The first-contact employee of the centre is the first employee of the centre who identifies the legal problem of the applicant. In cases when additional serious social problems exist, the first-contact employee also gives basic social counseling (the initial information as well as initial assistance). For example, in the case of homeless applicants who became the victims of illegal eviction, the first-contact employee tries to look for the possibilities of accommodation, or in the case of domestic violence tries to find asylum centers for the applicants. In such difficult social cases the first-contact employee is led to make advanced contacts with selected premises to find out whether the necessary social service will be provided to the applicant. The necessary cooperation between the first-contact employee, who is in fact the social worker, and the lawyer was shown in these cases as inevitable.

Tandem of first-contact employee and the lawyer

The first-contact employee assists the lawyer of the centre in separating the applicant's legal problems from the social ones, the solution of which is not within the jurisdiction of the centre but problems which the centre cannot ignore. Applicants, especially those in socially difficult situations, who rely on state aid in solving their legal problems often require special communication methods to be used with them in order to identify the legal problem and more importantly, to solve it. The first-contact employee can be the lawyer advised of special communication methods to be able to communicate with the applicant, who is often a person with special needs, In practice, there have been many cases of applicants with serious physical or mental illnesses. In these cases the tandem of the first-contact employee and the lawyer of the centre was shown as indispensable, therefore by determining the legal representation of the applicant for trial, the lawyer of the centre seems to be more suited to represent the client.

Supervisors of the centre

The first-contact supervisors and legal aid supervisors, aside from the heads of the offices, take care of the consistent coordination and the quality of services provided by the centre. The establishment of these positions was shown as profitable. The first-contact supervisor, the mediator of the centre of Slovakia and the legal aid supervisor of Slovakia are the positions established for regulating all of Slovakia. Regular meetings of all supervisors and heads of the offices have been adopted with the aim to unify the practice and to solve the precedent problems in common throughout Slovakia.

Communication and other skills of the centre employees and their further education

From the character of centre services, which consist of communications with the applicant by solving their legal problems and from the character of additional social problems of the applicants, the employees of the centre are required to take several days of communication training. Following that, the employees also take a course called teambuilding because the effective and mutual cooperation between the centre employees and every team member was shown as necessary for providing good-quality legal aid services by the centre. Also, other trainings and courses are sporadically organized by the centre corresponding to the working employee arrangement. It appears very effective in the communication of the first-contact employees with the applicant because the first-contact employees have shown an ability to better understand a wider range of legal matters. The Centre, therefore, plans very particular courses in special legal areas for the varied activities of the first-contact employees.

Jurisdiction of the centre

The centre provides free legal aid solely to natural persons. The legal aid law distinguishes the jurisdiction of the centre in internal disputes from the cross-border disputes. According to Slovak legal aid law the *cross-border disputes* are those where the applicant has a dispute with another jurisdiction of the Slovak courts and his domicile or habitual residence is in a member state of the European Union (with exception of Denmark). The cross-boarder disputes are also those where the applicant has the dispute with a jurisdiction of member state courts other than Slovak courts (with exception of Denmark) and his permanent or temporary residence is in Slovakia. There is no further legal definition of the notion of *internal disputes* in legal aid law, therefore it is possible to use the argumentation *a contrario* for specifying the standards. The internal cases can be those where the applicant has a dispute with a court within the Slovak jurisdiction and his permanent or temporary residence is in Slovakia. However, the internal disputes could also be those where the applicant has the dispute with a court of Slovak Jurisdiction and he is in Slovakia without neither a permanent nor a temporary residence; it may concern the homeless people or the persons engaged in asylum procedures.

The jurisdiction of the centre applies in internal disputes only to civil, family and labor matters. In cross-border disputes the jurisdiction of the centre applies to commercial matters. Regarding the narrow jurisdiction of the centre in internal disputes, where the commercial matters are excluded, the strict distinction between commercial and civil matters were shown as being a serious problem in the characteristic practice of private law matters. For example, the question

of identifying, whether the appropriate criteria for determining the commercial matter based on legal regulations are described in the commercial code. Upon first glance, it may be seen as an easy question with the answer being 'yes', but the centre was not satisfied with such an approach. This is because such an approach would mean that the credit contract with commercial code citations would not be within the centre's jurisdiction while the loan contract with civil code citations would be within their jurisdiction. Both contracts, although with different names (loan and credit) may regulate the contractual relationship bearing virtually identical content. The centre has identified an approach (applied as well by Slovak courts) that the distinction between the civil matters and commercial matters results from the substance of the participants of the contract rather than from the legal regulation citations. A problem of distinction, however, between the civil and commercial matters was not solved and it came back repeatedly through other legal institutes, e.g. the disputes concerning the bonds, bills of exchange, personal bankruptcy, bankruptcy of employers, etc.

Regarding the above qualifications of jurisdictions, the centre lacks jurisdiction in social security matters, administrative matters (including the administrative procedure concerning the environment matters) as well as in misdemeanor matters and penal law matters. The narrow jurisdiction of the centre's many matters may concern human rights violations, but do not relate to any specific matters within the centre's jurisdiction nor are themselves within the centre's jurisdiction (e.g. expropriation procedures).

Direct dependency from the ministry of justice politics

The director of the centre takes responsibility for the centre's entire operation. He is designated by the minister of justice as a result of successfully completing a set of competitive examinations. The legal regulation of the centre is led by the director of the centre; his selection or nomination is not done in law, but through the internal legal proclamation issued by the ministry of justice, which is called the instruction of the ministry. The above-mentioned legal act results in the possibility of direct influence of the minister on the fulfillment of the centre's duties. The director of the centre is not designated for a functional period with a strict limitation of the reasons of recalling his nomination. On the contrary, the director can be recalled by the minister without any reasons, which indicates absolute subordination of the director to the minister. Dependence on the minister's approval applies not only to the personal dependence of the centre's statutory body, but also on its financial dependence. The Legal Aid Centre was originally established directly by law, though the ministry of justice was confirmed as the founder of the centre in legal aid law. This situation imports in fact that the ministry determines the budget of the centre and regulates directly the economy

of the centre according to ministry decrees. Since the centre's jurisdiction also covers the claims for damages against the ministry of justice in cases of unlawful treatment or unlawful decisions of the ministry, the direct dependency of the centre on ministry politics does not appear in place on this ground.

The preferable solution would include legal regulation of the centre's statutory body as conditioned by law. With an aim at providing development of the centre, and allowing it the opportunity to make independent decisions regarding damage compensation matters concerning the ministry's unlawful actions, the centre's statutory body must have a certain degree of independence and must also have a certain degree of job security, being certain of his ability to retain his position regardless of change within the political ministry government. Considering the *de lege ferenda* in law would be the legal regulation of the centre's statutory organ and assurance of appropriate statutory organ independence from ministry politics, e.g. by establishing the centre board, where the member could be the minister or there would be the member/members designated by minister. In addition to the centre's financial administration, there is a consideration of the *de lege ferenda* for the legal status of the centre as an independent institution from the ministry; its budget not being directly dependant on a ministry license and the budgetary control being provided independently by standard implementations of the Supreme Control Bureau in Slovakia.

The jurisdiction duplicity of the centre and the courts in providing free of charge legal aid

The jurisdiction duplicity of the centre and the courts in providing free of charge legal aid was shown to have positive as well as negative effects. Such duplicity takes place if there is a court proceeding in civil law, labor law or family law matters. There is no duplicity e.g. in cases of court proceeding in administrative or penal law matters. As far as proceedings at the Constitutional Court, the jurisdiction duplicity depends on if the declared human rights issue has substance in civil law, labour law or family law matters. The courts can appoint an attorney to begin the court proceeding if the partaker (plaintiff or defendant) submits the demand for free legal aid and the conditions for such appointment are fulfilled. The courts do not provide legal aid by their own lawyers and can not appoint the lawyers of the centre.

In case of duplicity the partaker of the court proceeding has a choice to demand for an attorney through the court or to submit an application to be granted legal aid through the centre. If conditions of eligibility for free legal aid are fulfilled, the court can appoint an attorney for representing the applicant in the court proceeding. The centre, in the cases where applicants meet the necessary conditions, can appoint the attorney or the lawyer of the centre. In cases where

there is a demand for alternative dispute resolution the centre can appoint the mediator. For completeness, it needs to be added that there are special court proceedings, where only an attorney can be the legal representation (e.g. constitutional court proceeding); in these cases the centre could appoint only an attorney for representing the applicant. In comparison, the centre has wider range of options in selecting the form of legal aid for the applicant than does the court. Moreover, unlike the courts, the applicant can demand from the centre provision of legal aid for initiating the court proceedings and eventually he can ask for an alternative dispute resolution without going to court, allowing the case to avoid court proceedings altogether.

The fact that the courts participate in granting accessibility to free legal aid is a positive effect of jurisdiction duplicity. Since the centre was established on January 1 2006 and there was not a time period before this day to start the operation of the whole institution, the centre by itself was not able to cover the demands for its services in an appropriate period of time. The duplicity, at least for the deferred period of time, is inevitable, however, this duplicity shows weakeness, and without any amendment of legal regulation, the duplicity might have two main negative effects in the future:

- The legal conditions for appointing an attorney by the centre or by courts are not the same. The conditions indeed come from the same general criteria include the means test (the income, capital and family situation), merit test (exclusion of obviously unsuccessful cases) and evaluation of the case for necessity of appointing an attorney for the protection of the client's interests. Unlike the centre, the court does not have e.g. strict determination for evaluating criteria under the means test. For evaluation of criteria under the merit test, the conditions are not identical because the legal text is not the same and the interpretation of the law could be different.
- The law does not solve the situation when the applicant submits an application for free legal aid to the court and to centre regarding the same matter. It may concern the cases when the applicant does so at the same time, or he submits the application at first to the court and afterwards to the centre or vice versa.

Free Legal Aid provided by other institutions in Slovakia

Slovak National Centre for Human Rights

Slovak National Centre for Human Rights is, according to law No.30/1993 Coll. of law, an independent legal body, financed by the state budget. In the area of legal aid access it has jurisdiction to provide legal aid to the victims of discrimination and intolerance, including legal representation in court proceedings in discrimination

matters. The law does not determine any other criteria that should be approved by the Slovak National Centre for Human Rights before providing legal aid. It means that no direct requirements or conditions exist and that an applicant for legal aid may not be in need with regard to his income and property situation. This legal state, considered as duplicity, relates to the conjunction of the jurisdiction with that of the centre. However, the Legal Aid Centre examines not only the existence of jurisdictional issues, but additionally examines the existence of the material need of the applicant (the means test) and the exclusion of obviously unsuccessful cases (merit test). The condition of minimal value of the dispute regarding the character of the discrimination would not likely be applied. There is a similar situation in the case of jurisdiction duplicity to that between the Legal Aid Centre and courts, in which the applicant addresses the Slovak National Centre for Human Rights and the Legal Aid Centre at the same time; in this situation the case is not determined in law.

Centre for children and youth international rights protection

The centre for children and youth international rights protection, according to the law No.305/2005 Coll. of law on social protection of children and social care, is a state administrative body operating in Slovakia. In the field of legal aid access, there is duplicity jurisdiction with the Legal Aid Centre in juvenile care matters with an international component. Similar to the situation of above mentioned Slovak National Centre for Human Rights, the Legal Aid Centre unlike the Centre for children and youth international rights protection, in cases of application for providing legal aid examines not only the existence of its jurisdiction, but the existence of material need of applicants (the means test) while also excluding obviously unsuccessful cases (merit test). There is a similar situation as in the case of jurisdiction duplicity of the Legal Aid Centre and courts and the Slovak National Centre for Human Rights; when the solution for the situation cannot be determined by law because the applicant addresses both institutions at the same time.

The NGO function

In the case of taking other systematic steps in Slovakia, toward a time when the accessibility of legal aid would be covered in all areas of law for people in social need, the role of NGO´s is irreplaceable. Non-governmental organizations will always be necessary to assist lacking legal regulation. It is also necessary to help civil society get closer to an ideal state, where people have high legal awareness and are able to anticipate the real consequences of their activities, where people are able to protect their own legal interests and demands either through their own knowledge and abilities or with the help of accessible legal aid services. An increase in the number and variety of NGO´s shows the issues not covered by the state in

every society. The state should not be satisfied with allowing activities connected with the application of fundamental rights and freedoms to be covered by NGO´s, and to be only a passive observer. Right for legal aid (access to justice) belongs among fundamental rights and therefore the state is responsible for creating a functional system; a system where the legal aid is accessible to everyone who needs it regardless of his abilities and possibilities. NGO's operate out of stereotypes of state institutions and their role is critical in evaluating existing legal conditions and practices. Their role is therefore irreplaceable regardless of the functionality of a state system.

The role of legal clinics at law schools

The role of legal clinics at law schools is often incorrectly understood in discussions about the possibility of ensuring access to legal aid within a society. Law clinics are actually academic spaces for students of law and through verifying their theoretical knowledge in practice they can help to spread the legal awareness in society and provide access to legal aid for poor people. The pedagogical aim of these institutions, however, cannot be lost sight of. The aim of law clinics is to teach law students to apply the law in practice and to be sensitive to the needs of society. For this reason the Legal Aid Centre signed the cooperation agreement with Trnava University Law School, aiming to create new law clinics based on legal practice in the Legal Aid Centre under supervision of teachers and lawyers of the centre.

Instead of conclusion — ***de lege ferenda*** in abstract

The existence of the Legal Aid Centre with determinate competence to decide about applications for legal aid and concurrently to provide legal aid by its employees was shown to be a good systematic step as determined by the need for its services as well as the registered satisfaction of applicants with the administrative and legal services provided. The interconnection of providing legal aid services with basic social work in the centre (the tandem of lawyer and first-contact employee) was shown as very effective and useful for the specific cases of the centre's clients, people who are often in difficult social situations and whose legal problems are often only fractions of their serious social problem. The accent on communication skills of centre employees, the development of the centre's team cooperation and principles, and the common goals awareness were shown as very useful not only for the establishment of the new state institution, but also for the continuity and further activities for developing the institution. Also, in case that the centre's jurisdiction will be not be enlarged, the establishment of new centre offices in Slovak regions will be necessary for the assurance of access to legal aid in the framework of actual legal regulation. In case the centre's

jurisdiction is enlarged, the increased capacity of the centre's personnel as well as infrastructural development would be necessary for the achievement of the accord between the legally stated access to legal aid and its real application in practice.

Practical experiences and actual legal regulations have demonstrated the following legal needs, deeming them necessary and adequate to solve *de lege ferenda*:

- It is necessary that the centre has a legal instrument to eliminate the effects of the strict application of the legal aid law in cases when the social situation (income, capital and family conditions) of the applicant is close to the means test limits;
- It is necessary either to abolish the jurisdiction duplicity of the centre and other above mentioned institutions (courts, Slovak National Centre for Human Rights, Centre for children and youth international rights protection) or if the jurisdiction duplicity is to be maintained, at least to minimize the differences between the conditions for providing legal aid in these institutions and to have adequate solutions when the applicant submits the claim for legal aid to several institutions regarding the same matter;
- It is necessary to determine, in law, the criteria for distinguishing the commercial law matters from civil law matters, eventually considering the enlargement of the centre jurisdiction in internal disputes to commercial law matters and adjusting the centre jurisdiction by other criteria to simply determine law areas. Enlargement of the centre's jurisdiction should be determined in consideration with other law areas, including the enlargement of the centre's jurisdiction to legal persons, namely the nongovernmental nonprofit organizations;
- It is appropriate to regulate in law the creation and condition of the statutory body of the centre and to eliminate the direct dependence of the centre on the ministry of justice,
- Regarding the evaluation of the adequacy of the indicated maximum of income in practice, it will be necessary to adjust the newly implemented criteria of the means test—that the legal aid is accessible to anyone who needs help from the state. In this context, the centre is to think about the creation of a more leveled system, where with regard to the applicant's income, the applicant shares the legal aid expenses;
- It is appropriate to regulate directly in legal aid law the responsibility of the centre to the applicant for maladministration or maledictions of the applicants claim, or in case the centre provides inadequate (low quality) legal aid;

- It is to consider the enlargement of competence of the lawyers of the centre to represent clients well in proceedings which have until now been determined strictly for attorneys, due to the fact that the lawyers of the centre take on the same responsibility for quality of legal services to their clients and the adequate quality of the legal services can be legitimately expected.

No matter the functionality and systematic methods of access to just legal regulation for socially disadvantaged people, there will always be the irreplaceable role of NGOs as watchdogs of the quality and accessibility of the services provided by the state to the people. Regarding the necessity of law students to be more sensitive of society's social needs and the role of law in society, it is appropriate that the state should create certain conditions to ensure their practical experience with legal aid by providing for socially disadvantaged people.

Implementation and changes of the free legal aid system in Austria

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This contribution is based on the author's manuscript for a speech held on November 25, 2005. Some parts of this contribution have been supplemented with additional remarks and inputs by fellow participants.

Introduction

Offering free legal aid should definitely mean that all persons must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Having said that, it is also more or less common knowledge that systems funded by the state or other public bodies certainly need subjective and objective limits, in order to aid as many applicants as possible by seriously pursuing their justified causes.

In the following, a general overview of the legal aid system in Austria is given, focusing mainly on civil procedure law. The core provisions on legal aid are contained in §§ 63 through 73 of the *Civil Procedure Code* (*Zivilprozessordnung*, in short: *ZPO*). For more details (mostly in German) readers are referred to *"Further Reading"* at the end of this contribution.

To begin with, the term "free" in the sense of Austrian legislation has to be clarified. In every field of procedural law, where provisions on legal aid or something similar exist, applicants must prove that they are substantively entitled to receive legal aid, namely that they meet the specific conditions envisaged by legislation, in particular with regard to 1.) their financial circumstances and 2.) the merits of the case for which legal aid is being sought.

Another distinguished feature of the Austrian system has to be noted at the outset. In any case legal aid only covers an individual's costs of proceedings. In other words: If the recipient of legal aid loses his case in court, the opposing costs are imposed on him and he is obliged to pay them without aid.

Historical development

As early as 1895, when the Austrian Civil Procedure Code was enacted, provisions for the so-called "poor" (*sogenanntes "Armenrecht"*) were brought into force. During the intervening decades, society and the judiciary changed considerably. Therefore, in 1973, the Legal Aid Act (*Verfahrenshilfegesetz*) was introduced, changing the old law and adopting it to the new economic and social environment.

Some of the major changes were, for example, the loosening of formerly strict application criteria, the possibility of granting legal aid, not for all costs but to the extent necessary to help the parties, the introduction of a specific application form, and the mandate that courts enjoy exclusive competence in deciding on legal aid (by way of consequence, judicial review should also be guaranteed). All the core elements of the Austrian legal aid systems were incorporated into the Civil Procedure Code (*ZPO*) and have not been changed since. Two further milestones must be noted:

In 1983, the Civil Procedure Amendment (*Zivilverfahrensnovelle 1983*) imposed a significant step: Until then, foreigners had been granted legal aid only if bilateral or other international instruments ensured mutual recognition between Austria and the state where the applicant had citizenship. Due to a recommendation by the Council of Europe, the system of legal aid in Austria was enhanced even further. From 1983 on, any person whose claim is sufficiently founded but who cannot afford to initiate proceedings, is entitled to receive legal aid before an Austrian court. This means that neither nationality nor residence requirements are attached to the granting of legal aid.

Therefore, nearly all standards set out by the Council Directive 2003/8/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 (in short: EC Legal Aid Directive), had been in place when Austria was bound to check whether changes would be necessary in order to comply with EC law. Therefore, only two new elements had to be added to the existing legal aid system by the Civil Procedure Amendment of 2004 (*Zivilverfahrensnovelle 2004*): 1.) Now parties also get their travel costs reimbursed in case their presence before the court is required (until 2004 parties had to bear their own travel costs). 2.) Once legal aid is granted, there is no time limit with regard to any following enforcement proceedings (formerly, legal aid granted for the main proceedings just covered a one-year-period for initiating enforcement measures based on the court decision regarding the same case).

Institutional and financial framework

Under the federally organized and financed system, legal aid is provided in civil and, only with regard to the accused, criminal matters. As soon as the court has decided to grant legal aid, including a lawyer (*Rechtsanwalt*), it shall notify the committee of the Austrian Bar Association (*Österreichische Rechtsanwaltskammer, ÖRAK*), which then shall appoint a lawyer. To the extent possible and in coordination with the respective lawyer, the committee of the Bar Association shall also consider any proposal submitted by the applicant concerning the person of the lawyer to be chosen.

In principle, all Austrian lawyers (currently about 4,800) have to provide legal services when appointed by the Austrian Bar Association. In 2003, legal aid, including a lawyer, was granted in approx. 23,200 court cases (civil and criminal matters altogether) and the value of these services provided by lawyers amounted to approx. 27,6 million Euro. For 2004, the increasing numbers were approx. 24,600 court cases and an overall value of approx. 32,0 million Euro.

Generally, all legal aid services are provided by the lawyers for free. But in recognition of these services the Republic of Austria is required by law to pay a lump sum to the Austrian Bar Association's retirement fund of 15 million Euro per year. Occasionally, additional payments have also been made by the State to close the "gap" between the true value of the services and the yearly paid lump sum.

Costs caused by civil proceedings

The first costs of civil proceedings are court fees. Under the Court Fees Act (*Gerichtsgebührengesetz*), the plaintiff or appellant deposits the entire fee for trial or appeal in advance. The fee depends on the amount in controversy (*Streitwert*). Further costs, but only as far as required in the course of proceedings, are expert fees, fees for interpretation, witnesses and guardians appointed by the court (as representatives for absent parties or parties in need of guardianship), costs for publication and — above all — costs for legal representation by a lawyer.

In principle, each party has to pay its own costs, but gets reimbursed by the losing party after winning the case. According to the provisions of Austrian civil procedure, at the end the loser is obliged to pay the winner's costs including his court approved lawyer's fees. For the purpose to establish the lawyer´s fees the loser has to pay, the court has to base its cost decision on the tariffs laid out by the Lawyers Tariff Act (*RATG*).

Existing system of legal aid in civil proceedings

Scope of application

Legal aid can be granted any natural or legal person, regardless of nationality or residence, of the applicant. With regard to legal persons, it must be noted that Austrian case-law has developed rather strict tests before legal aid may be granted. It is presumed that economic entities like, for example, companies or stock corporations have sufficient financial means available to afford litigation. Therefore legal aid very often is only granted to more or less non-profit organizations like registered societies (*eingetragene Vereine*) which rely on membership fees and/or public funding.

Legal aid is applied in all civil and commercial court proceedings. It is not available for civil claims in proceedings before criminal courts because neither fees

nor legal representation are required, nor taking of evidence with regard to civil claims is allowed. Nevertheless, such claims can be brought in parallel — with legal aid — before a civil court.

Note, there is no specific procedure for urgent cases but if an emergency is implied by the application for legal aid (for example regarding legal representation in case of interim measures) the court must decide quickly.

Application stage

A party without sufficient financial means may apply for legal aid when entering or just before entering into litigation or at any time later as long as the case is still pending.

It is mandatory to submit the special application form (so-called *"ZPForm 1"*). This form contains a summary of assets (income, property, cash at the bank, insurance policies, etc.) and liabilities (maintenance, etc.), personal data and living conditions. As far as possible it should be substantiated by documents or other written proof. False or maliciously incomplete information is punishable by considerable fines and may also result in civil liability or criminal prosecution for fraud. The form must be submitted by the applicant within four weeks of the date of signature or it loses its validity.

The application form is to be filed (sent by post or placed on record personally) at the court of first instance competent to hear the case and to grant or deny legal aid. It can also be placed on record personally at the district court of the applicant's residence in Austria, even if this court has no competence to decide on the respective case. The application is then forwarded to the competent court.

Court decision on granting legal aid

The court can grant legal aid by wholly or partially freeing the party with insufficient means from court fees and other fees and by providing legal representation free of charge. Legal aid is only granted to the extent the applicant would not able to bear (any or part of) the costs without endangering the minimum subsistence necessary to allow a simple standard of living for himself and his family.

It is noteworthy that no strict financial threshold is applied to determine whether an applicant qualifies for legal aid or not. At its discretion the court may grant full legal aid or allow it only partially according to the financial situation of the applicant. Legal aid is denied if the claim or defense of the applicant is manifestly unfounded or manifestly not brought in good faith. As a general rule, any decision on legal aid can be subject to appeal to the court of second instance

whose decision becomes final. In legal aid matters an appeal to the Supreme Court (*Oberster* Gerichtshof, *OGH*) is not available.

If the court decides to grant legal aid, including the assistance of a lawyer, the local lawyers chamber (*Länderkammer* of the Austrian Bar Association) is notified to select the next available lawyer among its members. The applicant may however nominate a particular lawyer. Although this request is not binding on the local lawyers´ chamber, it will in general accept a well-founded proposal (for example if the lawyer is willing and already familiar with the case).

Stages of proceedings covered by legal aid; annulment or withdrawal of legal aid

Legal aid granted by the courts covers all stages of a particular case as long as it has not been withdrawn because of a material change of situation or annulled by the court because, if the true circumstances were known before, it would never have been granted. Legal aid also covers any possible appeal and review proceedings. Once granted, legal aid still applies when enforcement is sought, which means that expenses incurred in having a judgment enforced are included.

The court has to withdraw legal aid if the originally existing conditions for granting it do not exist any more (for example the party recovers money or property or the claim proves to be manifestly unfounded or manifestly malicious). The granting of legal aid has to be annulled if there is proof that the necessary conditions were not met at the time it was granted. In the latter case the party has to refund the benefits received.

Within a period of three years after the end of the proceedings, a party which in the meantime has probably recovered enough money, has to refund legal aid benefits as long as the minimum costs of living are not endangered. In order to examine the financial situation of the party, the court orders a summary of assets and liabilities (usually by transmitting another *"ZPForm 1"* as described above) some time after the end of proceedings. If the form is not completed in a timely manner and substantiated with written proof, legal aid may be withdrawn and the benefits received have to be refunded.

Legal aid in criminal court proceedings

A defendant may choose his own legal representative, and has to pay the lawyer's fees (*Wahlverteidiger*). If the defendant has not chosen a lawyer, but a legal representative is required under the rules of procedure (*Strafprozessordnung*, in short: *StPO*), the court must provide a lawyer who will be selected by the Bar Association (*Amtsverteidiger*). In principle, the defendant would also have to pay such a defense lawyer. If the defendant cannot afford a lawyer, he can apply for court appointed counsel, free of charge, who will also be nominated by the

Bar Association (*Verfahrenshilfeverteidiger*). Moreover, if the defendant is in preliminary detention and does not yet have counsel, the investigating judge will provide him with a lawyer for the first hearing (*Pflichtverteidiger*).

Administrative proceedings

In administrative proceedings, there does not exist a system of legal aid, with the exception of appeal cases in penal matters. Compared to legal aid in court proceedings, support of parties unable to bear the costs is differently organized. Pursuant to § 79 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*, *AVG*) incurred fees — such as administration fees, witness costs or special handling charges — shall be collected only to the extent that their imposition does not jeopardize the necessary living maintenance of the party and other dependants who are supported by the party.

Only in cases of appeal in administrative penal proceedings, Austrian law explicitly provides for legal aid before the Independent Administrative Panels (*Unabhängige Verwaltungssenate*, *UVS*). According to § 51a of the Administrative Penal Act (*Verwaltungsstrafgesetz*, *VStG*) the defendant can request legal aid if he is not in a position to assume the cost of the counsel for defense without impairing the maintenance support for himself and his family at a modest standard of living.

In the course of administrative proceedings, it is noted that parties can apply for legal aid in last instance proceedings before the Constitutional Court, as well as the Administrative Court, both federally organised and residing in Vienna. According to § 35 of the Constitutional Court Act (*Verfassungsgerichtshofgesetz*, *VfGG*) and § 61 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*, *VwGG*), the provisions of the Civil Procedure Code (*ZPO*) shall apply accordingly.

Appendix: Legal aid in the European Union

It is a corollary of the freedoms guaranteed by the EC Treaty that citizens as well as companies must be able to bring or defend actions in the courts of another Member State in the same way as nationals of that Member State. However, the fundamental differences in the legal aid systems in the Member States could constitute an obstacle to exercising these rights in practice. With a view to improving this state of affairs, the *Tampere European Council* in October 1999 invited the European Commission to put forward proposals for minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union. The *Green Paper on legal aid in civil matters*, issued by the Commission in 2000, represented the first step towards the achievement of that goal. In summation, neither a litigant's lack of resources, whether acting as claimant or as defendant,

nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.

The Council Directive 2003/8/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 (Legal Aid Directive) seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. Matters referred to in the Directive shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950 granting particular respect to the principle of equality of both parties in a dispute. The Directive itself applies between all Member States of the European Union with the exception of Denmark. Be that as it may, between Denmark and certain Member States at least the *European Agreement on the Transmission of Applications for Legal Aid of 1977* applies.

National provisions necessary to comply with the Directive had to be brought into force before December 1, 2004. In Austria, the few changes required by EC law were enacted in time by the Civil Procedure Amendment of 2004 (*Zivilverfahrensnovelle 2004*; see also above). In addition to establishing minimum standards for legal aid, the Legal Aid Directive provides for a system where transmitting authorities are competent to send applications and receiving authorities are competent to receive applications. Furthermore, two standard forms have already been introduced, one for legal aid applications and one for the transmission of such applications.

The so-called ATLAS on the Internet provides practitioners as well as the general public with information concerning the application of the Directive and a user-friendly tool for filling out the forms.

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Pursuing the reform of the legal aid system in Poland

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Summary

This paper aims to show activities and reform efforts in the various systems of legal aid that were taken by various stakeholders in Poland through the years 2000—2005. It shortly presents the activities and the roles played by the NGO sector, Ombudsperson, Ministry of Justice, Legal Profession and the Parliamentary Commission on Judiciary and Human Rights. It shows the different attempts of the reforms and their results — both successful and failed. It also describes the largest problems and challenges with legal aid we are facing in Poland.

The developments are presented in a mostly chronological order. The paper starts with a presentation of the *Access to Legal Aid* project conducted by the Helsinki Foundation for Human Rights (2000—2003), and follows with a description of changes to the legal aid system after the project was finished (2003—2004), and finally the paper presents the last and most promising developments which took place in the years 2004—2005.

Author's note

This paper is partly based on previous publications and reports of the author, including the book *Access to Legal Aid in Poland. Monitoring Report* (2003)[52] and the paper *Legal Aid Developments: Country Update on Poland* (2005)[53]. A similar version of this paper will also appear in an upcoming publication of the Open Society Justice Initiative and Public Interest Law Initiative *Making Legal Aid a Reality: A source book for policy makers and NGOs,* expected in the fall of 2006. The author wishes to thank both publishers for their kind agreement to publish it in this conference proceeding. The author also thanks Agnieszka Cieleń and Atanas Politov for their valuable comments on the draft version of the paper.

51 http://www.hfhrpol.waw.pl.

52 L. Bojarski, *Access to Legal Aid in Poland. Monitoring Report*, Helsinki Foundation for Human Rigths, Warsaw 2003, available at www.hfhrpol.waw.pl (further as: *Access to Legal Aid...*).

53 L. Bojarski, *Legal Aid Developments: Country Update on Poland*, February 2005, drafted for the 2nd European Forum on Access to Justice (Budapest, Febr. 2005), available at www.pili.org (further as: *Legal Aid Developments...*).

Introduction

Information on the Polish judicial and legal aid system

The population of Poland is approximately 39 million people. The judicial system in Poland is made up of courts in three categories (310 district courts, 43 regional courts, and 11 appellate courts), as well as the Supreme Court, which acts as a cassation court. There are also separate military courts that handle mainly criminal cases against soldiers and military employees. Legality of the administrative decisions is controlled by a separate system of regional administrative courts and a Chief Administrative Court acting as cassation court. Constitutionality of the legislation is examined by the Constitutional Tribunal.

There are two kinds of attorneys in Poland — advocates and legal advisers. The Bar (consisting of the National Council of the Bar and twenty-four local councils) and Legal Advisers (consisting of the National Council of Legal Advisers and nineteen local councils) are two separate, independent legal professions. Both influence the process of admitting new members, adopt rules of self-governance and professional ethics, consider complaints against lawyers, and conduct disciplinary procedures.

Attorneys in Poland have the exclusive right (with few exceptions) to represent clients in a court. Advocates may appear in all kinds of cases, legal advisers in all cases except criminal (they may however appear in petty crime case).

There are only around 5,500 active advocates. There are about 17,000 legal advisers, but only 7—8,000 of them may represent natural persons, the rest work as in-house lawyers in the business sector and public administration or may represent only enterprises. Legal advisers, unlike advocates, may be employed on a labor contract; however they may not represent natural persons.

Legal aid for the indigent is provided by both advocates and legal advisers through the *ex officio* system. In practice, legal aid in Poland includes only legal representation in a court. In criminal cases, only advocates are entitled to appear before the court. In other cases, such as civil, labor, and commercial, legal advisers may appear as well. In fact, legal advisers take only about 1 percent of *ex officio* cases.

The system of appointing *ex officio* lawyers is different in criminal and non-criminal cases. All advocates are obliged to take *ex officio* criminal cases paid by the state. Legal aid is granted by the president of the court (this power might be delegated to other judges) in cases of obligatory defense or on demand of the accused. The President appoints a particular advocate from the alphabetical list of all those practicing that is compiled by the profession. In non-criminal cases, receiving exemption from the court costs is a precondition of the application for

an *ex officio* lawyer. A legal aid lawyer is granted by the judge presiding in the case, but the particular person is appointed by the local Council of the Bar or Legal Advisors. Different procedures for appointment of legal aid lawyers exist in proceedings before the Constitutional Tribunal as well as in new administrative proceedings and in cross-border disputes (see below).

In Poland there is no separate budget for legal aid. Costs of legal aid are covered by the state through the budgets of particular courts that pay lawyers.

Role of the Helsinki Foundation for Human Rights

In 1999 when the Helsinki Foundation for Human Rights (HFHR) decided to focus on the issue of access to legal aid, it was (and unfortunately still is) one of the basic shortcomings in Poland. For a number of years the subject of access to legal aid has not received enough attention. Neither government nor research institutes conducted surveys concerning this problem. There was no public debate.

At the same time, all interested parties seemed to be dissatisfied with the existing system of *ex officio* legal aid. Government officials, legal profession representatives, judges (if asked) pointed out general problems related, for instance, to lack of financial resources, delays in payments, and poor quality of *ex officio* legal aid. This however, did not encourage a plan of action. Everybody was disappointed, but unfortunately no reform followed.

In the view of the non-governmental sector, other problems were also crucial; lack of clear criteria for granting legal aid, very limited number of those in need being covered and limited scope of the services being granted. Many other disadvantages of the existing system were also visible.

The situation appeared to be similar in other countries. The Helsinki Foundation for Human Rights in Poland therefore decided to join the regional project *Promoting Access to Justice in Central and Eastern Europe*. As part of this project, HFHR planned in 1999, and conducted from 2000 until 2003 the project *Access to Legal Aid in Poland*.

After the project ended, our efforts continued and still remain part of our work today. For the last six years HFHR has tried to describe the *status quo* of the legal aid system and to show its deficiencies as well as make efforts to initiate and influence the process of reform. HFHR took part in many initiatives and closely observed all activities in the area of legal aid taken by other stakeholders.

Starting point. Project ***Promoting Access to Justice in Central and Eastern Europe*** (2000—2003)

Promoting Access to Justice in Central and Eastern Europe was a common project of four partners — *the Helsinki Foundation for Human Rights in Poland, the*

Bulgarian Helsinki Committee, Interights, and the Public Interest Law Initiative (PILI). The project was funded by the European Union and the Open Society Institute.

Within the framework of the project, HFHR decided to conduct surveys and to undertake public activities concerning the legal aid system. Our goal was to describe the *status quo* reliably, to present our findings and formulate recommendations during the National Legal Aid Forum and in a final publication. Our strategy was to provoke a public debate involving government, legal professionals, and representatives of the non-governmental sector. We hoped that would result in amendments to the law, as well as changes in practices.

Activities

HFHR undertook many different activities. These included:

- **Review of law** (Poland does not have one single legislative act on legal aid; provisions concerning widely understood legal aid were found in seventy-nine acts);
- **Analysis of jurisprudence** of Polish and international courts concerning the issue of access to legal aid and its quality;
- **Analysis of statistical data** of different public institutions and legal professions (both "direct data" concerning various aspects of access to legal aid — in fact almost nonexistent, and "indirect data" which allowed us to collect certain information);
- Conducting **empirical surveys** (interviews based on a questionnaire in courts and prisons with both represented and unrepresented parties/prisoners on access to legal aid and it's quality; examination of the opinions of attorneys, legal advisers, and public prosecutors concerning the system of legal aid; interviews with presidents of district and regional courts and focus groups with judges to examine their experience and opinions; survey of non-governmental organizations providing citizens advice and legal assistance);
- **Description of case studies** (illustrating the main problems with limited scope of legal aid or it's poor quality);
- **Elaboration of problem studies** (an analysis of particular problems — both legal and coming from practice);
- **Collection and distribution of materials** related to legal aid (translation, publication of selected materials, accessible also through the foundation's Web site).

Thanks to the fact that the project was an International undertaking we could also profit from the simultaneous efforts of Bulgarian Helsinki Committee

and significant contribution from Interights and PILI who *inter allia* researched international jurisprudence and elaborated other comparative materials of great importance for the project.

Findings

What were the main findings of the research? Let us examine some of them.[54]

Lack of research and reliable data. Despite the fact that there were no comprehensive surveys on legal aid conducted in Poland before, there was also a lack of relevant statistical data collected by the Ministry of Justice, the courts, and legal professionals. The Ministry of Justice collected only data indicating the sum of expenditures for legal aid. Such data did not indicate, however, the number of cases when legal aid was granted, which amounts applied to criminal, civil or other cases, the stage of proceedings when the legal aid was granted, etc. The only data concerning the number of cases came from legal professionals — the Legal Advisers and the Bar. But this data was not reliable, as our research revealed, although it was officially published each year in *A Year-Book of the Main Statistical Office*.

Lack of a separate legal aid budget. There is no special separate budget for legal aid in Poland. The funds for *ex officio* cases are not separated in the courts' budget; instead, they are an element of a broader category of expenses. If a court suffers financial difficulties, expenses for legal representation are among the first to be cut (this happened and caused delays in payments lasting up to several years). Increasing expenses for legal aid (resulting mostly from a significant increase of attorneys fees) are being monitored by the Ministry, but appropriate amounts to cover them are not being planned for in the state budget.

Lack of state policy. Both a lack of statistical data and a lack of planned budget inhibit implementation of a thought-out state policy within the legal aid field.

Lack of clear criteria for granting legal aid. We do not have a comprehensive legal act concerning legal aid and there is no clear criteria for granting legal aid.

In criminal cases the 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 without detriment to support and maintenance for himself/herself and family". There is, however, no definition of the manner by which an indigent person "adequately demonstrates" lack of sources. Applicants don't know how to do it. Particularly difficult in this respect is the situation of persons deprived of liberty. There is no "means test," there is no explicit duty (nor such a practice) of the court to provide detailed grounds for its decision. There is no possibility to appeal the refusal.

54 Based on L. Bojarski, *Access to Legal Aid..., passim.*

In civil cases the *ex officio* attorney may only be granted to persons who have already been exempted from court costs, wholly or in part. A person is obliged to submit a statement containing detailed data about his/her family situation, property and income. However, the civil procedure lacks a uniform "means test". The need for such a questionnaire is beyond doubt: different courts develop a variety of non-standardized forms for their own use. The court grants the *ex officio* lawyer "if it finds the participation of a lawyer necessary in the case". It is the judge presiding in the case who decides whether to grant an *ex officio* attorney —the judge's impartiality in this issue may be questioned.

Limited access to legal aid. Based on existing data, we show the dimension of some problems — often through interpretation of the data relevant to legal aid indirectly.

In criminal cases we have found that, at a minimum, half of the convicted people in courts of the first instance (district and regional together) did not have legal representation in the case. Also, the actual use of legal aid during and immediately after the arrest is incidental in practice. In civil proceedings legal aid was granted in less than 0.2 % of cases.

A too small number of lawyers. We also found that, despite the fact that the number of cases received by courts has been consistently increasing (from less than 3 million in 1991 to about 10 million in 2003) in the same period, the number of attorneys has changed only slightly (some hundred lawyers). The problem of access to legal professionals is of great importance. The number of lawyers did not increase for years due to the policy of the Bar and lack of objective and transparent admittance criteria.

Poor quality and lack of control. There are no standards of conduct related to *ex officio* cases. There is also no system of quality control. All responsibility lies within professional bodies, which are widely criticized for not fulfiiling this task properly. The State, although having serious legal responsibilities (regarding initiating disciplinary proceedings), does not use its power in this respect. One of the reasons for poor quality is, again, too small a number of lawyers who are overburdened with *ex officio* cases and do not treat them with adequate attention and diligence. The other reason is a lack of lists of attorneys specializations and, as a consequence, appointing to *ex officio* cases lawyers who have no appriopriate experience in a given field of law.

Recommendations

Based on the findings of its surveys, HFHR formulated a number of recommendations[55]. The proposed changes and reforms were divided into two

55 Based on L. Bojarski, *Access to Legal Aid...*, *passim*, list of recomendations pp. 12—16.

groups: changes within the current system of legal aid and systemic changes that require a broader discussion and thus more time and preparations. Let us list the most important.

As to the existing system, HFHR recommended that:

- State agencies, legal professionals and academics should conduct research and surveys, statistical information should be gathered to precisely identify problems and regularly evaluate the effectiveness of the legal aid system in operation;
- 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 in Strasbourg and by recommendations of the Council of Europe (including a detailed questionnaire/ means test);
- The Ministry of Justice, judicial bodies, and legal corporations should consider compiling new lists of attorneys taking into consideration their willingness to conduct *ex officio* cases and their specialization;
- The Ministry of Justice and legal professions should establish minimum standards for lawyers conducting *ex officio* cases as well as evaluation procedures;
- The Ministry of Justice and legal corporations should introduce the element of promoting *pro bono* attitudes among lawyers into their training system (part of the training could take place at non-governmental organizations); the legal circles should consider organizing a *pro bono* competition;
- State agencies should prepare clear guidebooks for citizens that explain their right to *ex officio* legal aid and the application procedures.

As to the systemic changes HFHR recommended that:

- The Council of Ministers should consider adopting a separate Legal Aid Act, which would regulate all major issues related to access to legal aid;
- The Council of Ministers should consider creating an independent institution — Legal Aid Board — dealing with problems of legal aid and administration of the system and a separate legal aid fund;
- The Council of Ministers should consider the possibility of introducing alternatives to ***ex officio*** models for legal aid delivery (for instance, Public Defenders Office, contracting), organize a pilot project, conduct a comparative survey of cost and effectiveness of legal aid provided within different solutions, and potentially introducing a mixed model;
- The Council of Ministers should consider developing a system of local legal advice centers for the indigent to ensure access to extra-

judicial legal assistance in a form of a right to free or partially paid-for consultation or legal advice';

- The Ministry of Justice and legal professions should introduce fully objective criteria and procedures for recruitment of advocates and legal advisers. The Bar should open access to the advocates' profession, to significantly raise the number of attorneys';
- Legal professions and non-governmental organizations should develop standards for cooperation.

National Legal Aid Forum and the final report

The conference *National Legal Aid Forum* was organized together with the Parliamentary Commission on Judiciary and Human Rights and took place in June 2002 on the Parliament premises. The Forum was a crucial element of the project. Its objectives were to present findings of the surveys and recommendations, to learn about international standards and different legal aid delivery models functioning in the world, as well as to hear the reaction to all this from main actors — the Ministry of Justice, the Legal Profession, Parliament. It was a high ranked event, more than 100 participants representing all branches of government, all legal professions, many public institutions, academia and the non-governmental sector were involved.

During the National Forum, several speakers representing different institutions (Parliament, the Ministry of Justice, the legal professions) promised to start reform of the legal aid system in Poland. Apart from the Minister of Justice in power, participants heard these promises from three more speakers who apparently became Ministers of Justice in the next two years. Those declarations (to start reform) were formulated by representatives of:

- The Parliament — represented by G. Kurczuk, Chairman of the Parliamentary Commission on Judiciary and Human Rights, who became the Minister of Justice two moths later;
- The Government — represented by Vice Minister and M. Sadowski, Director of the Ministry of Justice Legislative Department; who became the Minister of Justice a year and a half later;
- The Corporation of Legal Advisors — represented by its president A. Kalwas, who became the Minister of Justice two years later.

Additionally on the eve of the Legal Aid Forum, the Bar established a special team to work on the subject. Their objective, declared during the Forum, was to develop their own proposal of a new, more efficient legal aid system with reference to the solutions applied in other countries.

A year after the Forum, in September 2003, the final publication was released by HFHR — *Access to Free Legal Aid in Poland: Monitoring report*.[56] The book consists of project findings, HFHR recommendations, summaries of speeches from the National Legal Aid Forum, and a presentation of International standards and experience.

This report was again presented to all decision makers and similarly to the National Forum, received wide media coverage, and was quoted and discussed during a number of seminars and panels.

Lack of general reform. Legal Aid Developments in 2003—2004

General conclusion

In spite of above mentioned declarations and promises formulated by some decision makers during the National Forum in June 2002, neither the Government nor the Parliament started any holistic reform or even serious attempt toward reform. Also, legal corporations did nothing. The special team established by the Bar did not publish any results of its work. Despite a lack of general reform and strategic approach to the problem, there were several positive developments, which gave hope for future changes. At the same time, however, negative developments took place — amendments to some laws, which in fact worsened access to legal aid.

Positive developments

New laws

In January 2004, a new Act of Parliament on Procedures before Administrative Courts[57] came into force.[58] A special chapter on "legal aid"[59] introduced some new elements into Polish practice. For the first time, a new standard form of application for legal aid and means testing was introduced. The procedure was simplified and now the decision on whether to grant legal aid may be made not only by a judge, but also by the court registrar.[60] Additionally, the appointment of legal aid lawyer was separated from the process of exemption from court costs. Unfortunately, other innovative solutions proposed in the draft law were not passed — creation of the separate legal aid fund, the possibility for parties to choose particular lawyers, the possibility to pay part of the lawyers honorarium in advance.

56 The abridged version of the book was also published in English and Russian, all versions can be obtain from www.hfhrpol.waw.pl.

57 See more in L.Bojarski, *Access to legal aid...*, p. 116 and L. Bojarski, *Legal Aid Developments...*

58 Act of Parliament of August 30, 2002, Law on Procedure before Administrative Courts, Journal of laws 2002, nr 153, item 1270; *Ustawa z 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi (Dz. U. z 2002 r., nr 153, poz. 1270).*

59 Art. 243—263.

60 *Referendarz sądowy.*

The Council directive "to Improve Access to Justice in Cross-Border Disputes"[61] was implemented into Polish law[62] by the Law on Legal Aid in Civil Proceedings Taking Place in European Union Member States.[63] Among new solutions, it requires the Minister of Justice to issue a model of the "standard form" for legal aid applications, which is a step forward. The law does not cover pre-litigation or out of court advice (directive requires these steps from May 2006). The law was prepared by the Civil Law Codification Commission.

The next act, which introduced new elements, is a law concerning court costs in civil matters[64] prepared by the Ministry of Justice and Civil Law Codification Commission.[65] The law envisions the preparation of a detailed application form, "questionnaire of means", which is a first step to make the process of receiving fees waivers and *ex officio* lawyers more objective. Additionally the Act reduces the filing fee from 8 % to 5 % of the value of the dispute, and establishes in many cases a set fee. This would significantly reduce the cost of access to the courts.

Improvement of the Judicial System **— collaboration of the French and Polish Ministries of Justice (twinning project)[66]**

The "twinning project" was related more to the right and access to legal information than reforming legal aid systems, but its results are interesting and very much relevant. There are two important and specific effects of this project.

Firstly, three pilot "court information centers" were opened in regional courts and located at the entrance to the court. The court information center is used as the information point, as well as the court secretariat. The client may get both general information (on his/her rights, procedures, institutions, standard forms of legal motions etc.) and information on his/her case from an information center without going to a separate secretariat.

Secondly, the Ministry of Justice established a working team of its employees-judges responsible for the preparation of legal informational leaflets. As a result

61 Directive no. 2002/8/EC (of January 27th 2003).

62 See more in: L. Bojarski, *Legal Aid Developments...*

63 Act of Parliament of December 17, 2004, on Legal Aid in Civil Proceedings Taking Place in European Union Member States, Journal of laws 2005, nr 10, item 67; *Ustawa z 17 grudnia 2004 r. o prawie pomocy w postępowaniu w sprawach cywilnych prowadzonym w państwach członkowskich Unii Europejskiej (Dz. U. z 2005 r., nr 10, poz. 67).*

64 See more in: L. Bojarski, *Legal Aid Developments...*

65 Act of Parliament of July 28 on Court Costs in Civil Matters, Journal of laws of September 1st (in force from March 1st 2006); *Ustawa z dnia 28 lipca 2005 r. o kosztach sądowych w sprawach cywilnych (Dz. U. z dnia 1 września 2005 r.).*

66 Phare project PL02/IB/JH—04 *(Wsparcie dla wymiaru sprawiedliwości)*. The project lasted for 1 year and ended in Sept. 2004.

of this work ten informative leaflets on rights and procedures were developed.[67] Unfortunately, members of the team, who had no previous relevant experience, were nominated to take part in the team and as a consequence lacked dedication. It should also be stressed that throughout the project, NGO sector representatives were invited to several meetings and asked to share their experience. Their opinions ware taken into consideration by the French administrators of the project.

Pro Bono Lawyer — competition

There were also many initiatives taken by the civil society at that time (see next parts of the paper). One of them is a competition for the title of "*Pro Bono* Lawyer of the year" organized by the Legal Clinics Foundation. Three editions (2003—2005) already took place. The jury is comprised of the most eminent lawyers (*i.e.* Presidents of Legal Professions and Highest Courts) and, electing from a number of candidates, proposes an individual who has dedicated time and effort to *pro bono* legal work. The competition objective, apart from rewarding particular persons, is a promotion of *pro bono* attitudes among lawyers.

Negative developments

Besides the above-mentioned positive developments, there was no strategic, holistic approach, nor any attempts at standardization. Despite many recommendations from the NGO sector, the work within same governments is fragmentary and quite often one team does not know what the other works on. Paradoxically, NGOs on numerous occasions did inform specific units of the government about work being done by other units. Playing the role of an information channel might be seen as positive, but still shows a lack of internal governmental communication. As a result, the number of different legal aid procedures increased and currently there are five different legal aid application procedures (administrative, civil, criminal proceedings, in proceedings before Constitutional Tribunal and in cross-border disputes).

Additionally some changes to the law adopted in the meantime were in fact steps backward. Several examples are given below.

On July 1st, 2003 amendments to the Criminal Procedure Code came into force.[68] The objective was to speed up process and limit costs, but in fact some also limit the right to defense and to legal aid. These are small changes, however.[69]

67 Available in Polish and English at http://www.ms.gov.pl/przewodnik/przewodnik.shtml.

68 Act of Parliament of January 10, 2003, on Amendment to Criminal Procedure Code. . . , Journal of laws 2003, nr 17, item 155; *Ustawa z 10 stycznia 2003 r. o zmianie ustawy — Kodeks postępowania karnego... (Dz. U. z 2003 r., Nr 17, poz. 155).*

69 See L. Bojarski, *Legal Aid Developments...*

Much more serious were the amendments to the Civil Procedure Code (CPC) which came into force on February 5, 2005.[70] These amendments[71] were also introduced to speed proceedings and limit costs, but primarily to establish a fully adversarial procedure. In reality, they significantly limit the rights of vulnerable parties. They limit the right of the court to instruct and help an unrepresented party. For instance, before – as a general rule – "the court *should* deliver necessary guidelines and advice regarding procedural actions and the legal effects of both action and non-action". After the change only "if there is a justifiable reason the court *may* deliver necessary guidelines about procedural actions". In addition, the scope of actions taken by a party in civil proceedings in which legal representation is required was broadened. Establishing a fully adversarial procedure may be seen as a positive goal. However, in the absence of a synchronized reform of access to legal aid, changes weaken the position of vulnerable unrepresented parties. These amendments were therefore widely criticized by prominent lawyers in Poland.[72]

Hope for changes. Legal Aid Developments in 2004–2005

Coalition of Non-Governmental organizations

Despite the lack of systemic reform on the Governmental side, NGOs continued their efforts. In 2004, HFHR, together with three other NGOs, created an informal Coalition to approach the issue. The partners of the Coalition, besides HFHR[73], were Legal Clinics Foundation,[74] Union of Citizens Advice Bureaux,[75] and the Polish Association of Legal Education.[76] Coalition partners who joined HFHR efforts, were organizations that had their own experience in granting citizens legal advice and were already engaged in strategic activities in this field – for instance they created Non-Governmental Advice Platform (*PPP – Pozarządowa Platforma Poradnicza)*[77] – a forum for cooperation and the exchange of information, standards of work, publications, guidebooks and leaflets etc. among NGO sectors working in the field.

70 Act of Parliament of July 2, 2004, on Amendment of Civil Procedure Code. . . (additionally amended on December 22, 2004), Journals of laws 2004, nr 172, item 1804 and 2005, nr 13, item 98; *Ustawa z 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego... (dodatkowo znowelizowana 22 grudnia 2004 r.), Dz. U. z 2004 r., Nr 172, poz. 1804 oraz Dz. U. z 2005 r., Nr 13, poz. 98).*

71 See more: L. Bojarski, *Legal Aid Developments...*

72 For instance by Prof. Ewa Łętowska, civil law professor and Justice in the Constitutional Tribunal; Prof. Teresa Liszcz, labor law professor and member of the Senate (upper house of Parliament).

73 Represented by Łukasz Bojarski.

74 Represented by Filip Czernicki, http://www.fupp.org.pl/index_eng.php.

75 Represented by Hanna Gorska, Alicja Moroz-Rutkowska, http://www.zbpo.org.pl/page/en/.

76 Represented by Dagmara Woźniakowska, Witold Klauss, http://www.psep.pl/.

77 Within the project "Citizen and the Law" (*Obywatel i* prawo) of the Polish-American Freedom Foundation (www.pafw.org) administered by Institute of Public Affairs (www.isp.org).

Coalition partners met several times and developed a common strategy. Initial activities of the Coalition took place within the twinning project mentioned above, where the Coalition advised and shared its experience with the Ministry of Justice, as well as continuously advocating for a strategic approach to reforms of access to legal aid. The Coalition also prepared a common document containing the set of recommendations: *Access to Legal Information, Citizen and Legal Advice, Legal Aid — solutions proposed*. Suggested reforms were divided into three categories: a/ access to general legal information; b/ access to particular legal information/ individual out-of-court legal advice (pre-litigation advice); c/ access to legal aid in court. Additionally, all categories consisted of "obligations of the governmental agencies", "responsibilities of the legal corporations", and "responsibilities of the social organizations (NGOs)". Many recommendations were repeated from the previous research done by HFHR, while several recommendations were added. Among other things, the Coalition recommended a professional approach to providing legal information (including establishing of an "information unit" which would coordinate creation of the materials, updating and distribution; preparation of the information database where all guidebooks done by different subjects could be found). The Coalition proposed the creation of a system of "legal aid offices" which could deal with legal information, out of court legal advice and trial representation (these offices could be built in all Poviats[78] on the base of existing units — Poviat's Family Assistance Centers and Poviat's Consumer Rights Spokesman). The Coalition recommended elaborating the "minimum standards" for providing legal information and advice so the quality would be similar in the entire country; consequently we suggested the implementation of training programs and materials for providers as well as common standardized information materials for providers. Finally, the Coalition proposed a holistic strategic approach to the reforms, building a single coherent system instead of the many in existence, adopting a "legal aid act", creating a Legal Aid Board as well as a Legal Aid Budget. It also advocated for taking into consideration the experience of civil society partners and including NGOs and collaborating with them in future systems. We also proposed the creation of a working group to prepare reforms and invitations to representatives of the civil society.

NGO Coalition and Ombudsman collaboration and common activities

Simultaneously, the Ombudsperson[79] played an important role in advocacy efforts for reforms of the legal aid system.

A Polish Ombudsperson[80] receives complaints from the citizens and foreigners in cases of violations to rights and liberties guaranteed by the Constitution and

78 Administration unit of medium level, there are 380 Poviats.

79 Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*).

80 www.brpo.gov.pl/.

other legal acts. The office of ombudsperson examines about 40,000 cases each year, it also receives ca. 3,500 personal visits of clients and gives 13,500 telephone explanations and advices.[81] The experience of the office, according to the last term ombudsman (2000—2005) prof. Andrzej Zoll has shown that in more than 50 % of all cases, what applicants needed to receive was simple legal information and advice — on their legal situation and rights they have (or don't have), on legal measures they may take, on institutions they should approach, etc. This was one of the reasons that led prof. Zoll to put access to legal information and legal aid on his agenda and taking number of different actions. The Ombudsman appreciated and stressed on numerous occasions the role of the NGO sector in the field. He also started formal cooperation with University Legal Clinics and a network of Citizens Advice Bureaus by signing cooperation agreements with a number of them. The Ombudsman also introduced a new section on the office's website — containing guidebooks (leaflets) explaining particular legal issues and procedures. Finally, working on the mentioned initiatives the Ombudsman has stressed several times the need of systemic solutions and reform of the existing system of access to legal information and legal aid.

Considering the problems with initiating reform through the Ministry of Justice the NGO Coalition built a new strategy. The office of ombudsperson seemed to be most appropriate and was chosen as a strategic partner in new advocacy efforts.

The Coalition in April 2004 approached the Ombudsman with its plan of action. We proposed a one-day conference to be organized with Coalition members in the office of the Ombudsman during which the Coalition would present its list of proposed solutions and hear the response of the Minister of Justice. A document prepared before and containing lists of recommended changes and reforms entitled *Access to Legal Information, Citizen and Legal Advice, Legal Aid — solutions proposed* was sent to the Ombudsman. The Ombudsman was asked to write a formal letter to the Minister of Justice, inquiring into the status of the promised preparation of a law on access to legal aid.

Choosing the Ombudsman as a partner appeared very effective. He agreed to host a seminar together with the Coalition and invite important quests. He also sent, in August 2004, an official motion to the Minister of Justice (Marek Sadowski) which according to law required a formal reaction. In his letter, the Ombudsman not only asked the Minister of Justice about progress, but proposed directives for reforms, largely quoting Polish and Regional publications from the project *Promoting Access to Justice in Central and Eastern Europe*, mentioned above.[82]

81 See www.brpo.gov.pl/.

82 Letter of 3rd of August 2004, RPO—481256—IV/04/BB.

The Ombudsman opted for the "full time lawyers model" proposing something similar to the Public Defender Offices, the creation of offices which would deliver pre-litigation advice and trial representation, would hire full time lawyers and lawyer-trainees and collaborate with Legal Clinics.

In his response to the letter, the Minister of Justice agreed with the Ombudsman that a reform should be made, but did not propose anything substantial.[83] The situation changed during a conference, which took place on October 6, 2004 in the Ombudsman office. During the conference, the Coalition presented its recommendations. Many of the proposed changes (among them establishing working group to work on the reform of the system) were strongly supported by the Ombudsman.

In response, the Minister of Justice declared that "access to legal aid for the poor is 'credo'[84] of his term". He also promised to establish a working group and to prepare the draft law on access to legal aid.

As a result of the conference, additional NGO's have jentered the NGO Coalition and since that time joined in its work and signed its common opinions – Stefan Batory Foundation[85], Women's Rights Center[86], The Students' Parliament of the Republic of Poland.[87]

Ministry of Justice commitment and work

The working group was established by the Minister of Justice's decree in November 2004. The group comprised of five employees of the Ministry (3 judges and 2 prosecutors) but according to decree could invite other persons to it's meetings. The Working Group's task, according to the decree, was to prepare a "draft law on access to legal aid" before the end of January 2005 (that was within 2.5 months). This tight timeframe was caused by the parliamentary election calendar (elections were supposed to take place in June or September 2005) and there was not much time left if the law was to be adopted by the governing Parliament.

The members of the working group, unfortunately, lacked experience in the field of legal aid. Being judges and prosecutors they obviously had their own experiences and were dedicated, but did not have comparative knowledge and had to learn very quickly. Persons who were previously involved in the work on reform of access to legal aid in administrative proceedings, as well as members of the Commission for Codification of Civil Law who were working on draft laws regarding

83 Letter of 13th September 2004, P.II.4308/727/04.

84 From Latin, used in a sense of "goal".

85 Represented by Grzegorz Wiaderek, http://www.batory.org.pl/english/index.htm.

86 Represented by Urszula Nowakowska, http://www.cpk.org.pl/.

87 Represented by Michał Ochwat, http://www.psrp.org.pl/index_en.php.

court cost in civil matters and preparing laws on access to legal aid in cross border disputes implementing EU directive, were not invited to take part in the working group — those were persons with experience in the field.

What is additionally surprising is the fact that the Ministry of Justice seemed not to be interested in learning from others' examples. Its representatives were invited to the European Forums on Access to Justice in Budapest in 2002 and 2005 but did not accept. Nevertheless, two sets of very interesting Budapest conference materials (in English and in Russian) were presented by the author of this paper to the Minister of Justice during a debate organized by the Ombudsman.

The NGO Coalition was invited and met twice with the Working Group. It both discussed as well as submitted in writing its opinions about two documents developed in the Ministry: *Draft principles for the act on legal aid* and *Draft law on access to legal aid*. It must be noted and appreciated that opinions of the NGO Coalition did matter and several recommendations were accepted.

Despite all deficiencies and difficulties mentioned above, it must be noted and valued that the Working Group worked very hard and did a tremendous job of preparing draft laws in such a short time. On February 2nd, 2005, the Ministry of Justice presented a draft law on access to legal aid for public consultation. This document was discussed during a conference where the representatives of ministries, legal professions and the NGO Coalition were present. Finally a draft law was accepted by the Council of Ministers and presented to Parliament in March 2005.

Draft Law on Access to Legal Aid[88]

The draft law on Access to Legal Aid envisaged a gradual organization of the network of Legal Aid Offices (LAO) in the 42 towns (being seats of regional courts), a National Legal Aid Office and a Legal Aid Coordination Board. It foresees the creation of LAOs in ten regions during the first year, ten more during second year and the remaining twenty-two in following years.

The LAOs would deliver "basic legal aid" — that is pre-litigation legal information and advice as well as would grant "qualified legal aid" — by appointing outside lawyers for trial representation.

LAOs would grant legal aid in all kinds of cases: *i.e.* civil, criminal, family, having only some exclusions: for instance taxes and duty/customs, bank loans, managing enterprise, creation or activities of NGOs.

88 *"Law on access to free legal aid granted by the state for natural persons" (Ustawa o dostępie do nieodpłatnej pomocy prawnej przyznawanej przez państwo osobom fizycznym*); RM 10—39—05, 23 March 2005; see www.ms.gov.pl.

The LAOs would be a new path for the provision of legal aid, without altering other laws and existing procedures (throughout administrative, civil, and criminal procedure, the existing old method of providing *ex officio* legal aid would continue). They would begin and then gradually take over the other systems to finally build a comprehensive one.

LAOs would employ law clerks (law graduates) and legal advisors (members of the Legal Advisors Corporation) — these two groups would work as basic legal aid providers. For trial representation LAOs would appoint advocates and legal advisors on a case-by-case bases (from the lists provided by Profession of those members who committed themselves to this work and specified their specialization). LAOs would also host internship and voluntary work for law students and law graduates.

According to the proposed criteria, legal aid would be available for those whose monthly income is lower than the so called "minimum of existence" determined by law, approximately €115 for a single person living alone and approximately €80 *per capita* for families ("minimum of existence" means that theoretically somebody below it should not survive; the so called "social minimum" is around twice this much).

The procedure of receiving legal aid would be quite formal (even for simple legal information) — written application followed by a means test and a formal administrative decision (to grant or not) with the possibility to challenge negative decisions in Regional Administrative Courts and then in Chief Administrative Courts. There was foreseen an "emergency procedure" — immediate legal aid in special circumstances.

The Draft law obliged all institutions created to cooperate with civil society and NGOs working in the field. For instance, in the Legal Aid Coordination Board, consisting of 10 members, 4 seats would be taken by representatives of NGOs working in the field.

The proposed structure was hierarchical — the system was managed by the National LAO, the Legal Aid Coordination Board would have rights to analyze and evaluate, critique the work of the system and propose changes, recommend new solutions, etc.

Finally, the authors of the draft law already foresaw a detailed structure of LAOs — each office would employ 48 persons (around half of them would be legal aid providers: 10 Legal Advisors, 10 law graduates and half of them administrative support staff). Each LAO should have 42 rooms (that is 800 square meters office).

The draft law divided advocates and legal advisors. It was seen as a good opportunity for legal advisors, as the majority of new posts in the system of LAOs would be taken by them. At the same time, it was seen as an unnecessary and very expensive bureaucratic structure by the advocates.

The Parliamentary Commission on Judiciary and Human Rights started to work on the project on April 21st, 2005, but discussion ceased after one day. There were two main reasons — the project was found to be very controversial and there was even a motion to vote on discontinuance of the work (did not find majority), but additionally the term of the last Parliamentary session was already known and it was unrealistic to assume that there was enough time for passing such a controversial project.

After the parliamentary election in the fall 2005, the new government decided to withdraw the draft law from Parliament and promised to prepare a new one. To date, there has been no announcement of work being undertaken.

Access to the legal profession

Finally, the amendments to the law regarding access to the legal profession need special attention. The works in Parliament (initiated not by the Government but by the opposition) lasted for almost two years and consisted of many battles between supporters of changes and a strong lobby of opponents, organized mainly by legal professionals and supported by the Government. Finally, in July 2005, Parliament adopted amendments to the law on Bar, Legal Advisors and Public Notaries, creating a new admittance procedure. It establishes a state exam for apprenticeship and a state final bar exam giving the right to practice professionally. The adopted law also creates new opportunities for entering the profession without apprenticeship and by just passing a final state bar exam for those who have other similar training or practice. This new law may initiate a huge step forward in significantly increasing the number of lawyers and therefore widening access to legal services, including legal aid.

Right to deliver legal services

Additionally one more significant change was introduced in the above-mentioned amendments. For years it was presumed (and had some legal foundation) that professions of Advocate and Legal Advisor have a monopoly for providing legal services, not only in court, but also out of court, a monopoly for providing any kind of legal advice. This situation has initially changed due to the verdict of the Constitutional Tribunal, which decided that the interpretation of the provision of the criminal code, which would allow criminal punishment for the delivery of legal services by law graduates (who and not members of the bar), is unconstitutional. This approach was taken also by the Parliament and a new law enables law graduates to deliver legal advice out of court. Thanks to these changes a number of new "law offices" are being opened right now in Poland employing law graduates and using

the services of the advocates and legal advisors only for trial work.[89] This would significantly widen access to legal services for people, as the prices of these new law offices are often much lower than the cost of an advocate or legal advisor.

Conclusions

Within the past five years, there has still been no systemic change in Poland. Laws on access to legal aid were not adopted. The system of Legal Aid Offices, together with a National Legal Aid Office and a Legal Aid Board, were never created. Practically speaking, the circumstances of particular persons in need, have not change. A majority of the problems we found when doing surveys have not changed after all these years. Some amendments to the laws mentioned above, have in fact weakened the position of vulnerable parties. Strategic approaches to the issue are still missing. The work of different governmental bodies is fragmentary and inconsistent.

But we have to sustain our optimism. During the last several years, many good things have also happened. Two of them deserve special attention: opening access to the legal profession and the ministerial draft law on access to legal aid. These are huge steps forward. Even though the draft law was not adopted, it will still be a strong argument in the future.

HFHR hopes that a new parliamentary coalition will put the *access to legal aid issue* on its agenda and start serious reform (there are signs that it might happen). We also expect the new Ombudsperson will continue to support civil society and advocate for change, and that the new Government will not only use the draft law on *access to legal aid* but will improve it. There are many important elements of the draft law on access to legal aid prepared by the Ministry that have to be changed. Financial limits, being set up as “existence minimums” considerably limit access to legal aid for those in need. Highly bureaucratic structures should be replaced with client friendly networks of offices. Internal office structures and numbers of administrative staff should be reconsidered. Formal application procedures and granting decisions should be simplified. Legal Advisors working in the LAOs should also conduct trial representation and not just deliver basic legal advice. These, along with many other recommendations formulated in the last several years, should be taken into consideration by today’s decision makers.

We hope Legal Professionals will also be more cooperative. For instance, the Bar (so far) shows no will of reform, no positive attitude. The Bar itself did nothing but criticize all ideas and projects proposed by other bodies.

Nevertheless, civil society is continuing it’s job — not only continuing to deliver legal aid to those in need, but also advocating for change and putting

89 See for instance website of the network of this kind law offices: www.krislex.pl.

constant pressure on decision makers. NGOs are also starting new projects, in order to work out strategic solutions, to develop standards of cooperation between civil society organizations and legal professionals, to standardize quality and clarity of legal guidebooks, to push for reform by strategic litigation of cases related to access to legal aid, to convince the academia and scientific circles that they should conduct research in the legal aid field, etc. This kind of work is being planned or conducted by the Stefan Batory Foundation, the new edition of “Citizen and Law” project run by the Polish-American Freedom Foundation, The Institute of Public Affairs, Union of Citizen Advice Bureaux, University Legal Clinics, Helsinki Foundation for Human Rights and others. These joint efforts of all interested stakeholders, finally, will have to make a difference.

The Practice of Rendition of Free Legal Counseling in the Area of Environmental Protection

Markéta Višinková, Environmental Law Service, Brno, Czech Republic

Activities of the Environmental Law Service

The Environmental Law Service (ELS) is a non-governmental, non-profit organization of lawyers who use law to further the public interest. Our aim is to eliminate cases of unlawful and improper decision-making by state offices in matters of the environment and human rights, to help people gain access to the courts, to build the knowledge and skills of non-profit organization staffs, to expand the ranks of public-interest lawyers, and to help bring about a high-quality legal code.[90]

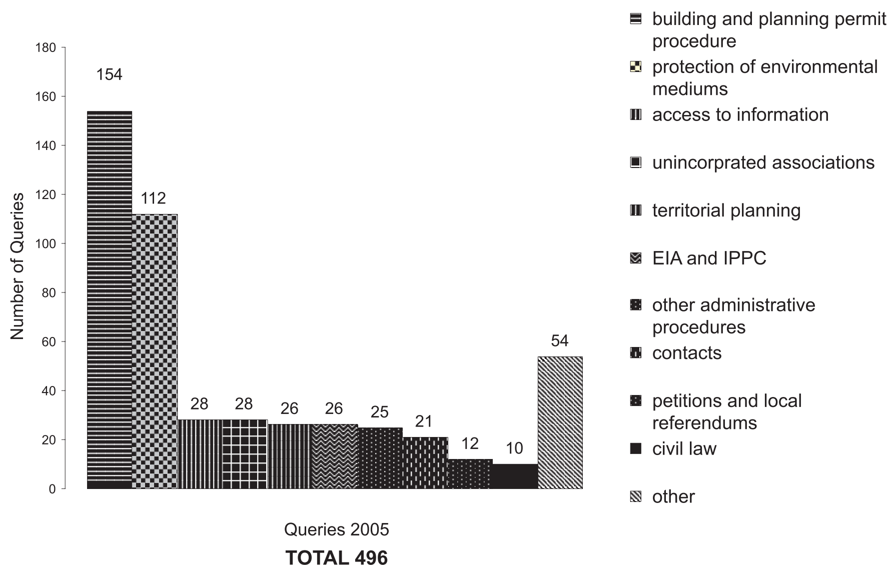
ELS was founded in 1995 as a volunteer organization by students at the law school of Masaryk University in Brno. Since 1997, it has run on a professional basis. We have organized our activities into several programs: the Right to a Cleaner Environment Program, the GARDE Program (Global Alliance for Responsibility, Democracy and Equity), the Legislation Program, the Development of the Public Interest Law Sector Program, the Education Program and finally the Environmental Counseling Center.

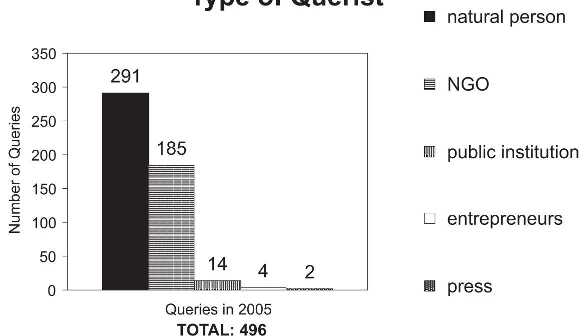
Since our conception, free legal counseling rendition has been a core activity. We render free legal counseling throughout all our programs. There are 13 lawyers working with ELS, most of them somehow involved in free legal counseling rendition. There are 16 volunteers chosen from among law students helping, under supervision, with the answering of queries.

Practice of Rendition of Free Legal Advice in the Environmental Counseling Center

Currently, the Environmental Counseling Center is the program handling most queries. Within the Counseling Center we give basic legal advice in cases where the environment is aggrieved or endangered. Our help is time and range limited. It consists of giving basic information on legal regulation, offering patterns of various submissions, check-up of submissions, analyses of legal problems and procedural guidance. We spend a maximum 5 hours working on one case. Within the Counseling Center we do not give advice and help with actions.

90 Extensive information on EPS's activities and more can be found at http://www.eps.cz. For more information on EPS activities and cases, see http://www.sedlakjan.cz, http://www.pilaw.cz and www.justiceandenvironment.org.





In 2004 we dealt with 219 queries. Last year (2005) it rose to 490 queries.[91] Most queries fall in the area of Administrative Law and closely connected areas like building law, protection of nature or access to information.

91 Counseling Centre became an independent program in june 2005, that is why the capacity became larger.

Reasons for the Existence of the Counseling Center

As the graphs above show, there is high demand for free legal aid, the main reasons include the following:

First, legal regulation is very complicated. In most cases laymen do not understand their rights and duties and what options they have in defending their interests. It is not rare to meet a person with a university law education in the Counseling Centre. Since 1st January 2006 there is a new Administrative Code in force. Although it says that the administrative authority is obliged to give "adequate instruction (…) if needed, considering the character of act and personal situation of affected person"[92] people are still (or even more due to the fact that this Administrative Code is much more complicated than the previous one) confused and helpless. Second, there are few solicitors willing to engage (as a paid service) in this area of legal representation — there is little money involved and (therefore) they don't have experience. The last reason is that many people cannot afford a solicitor.

Problems We Are Facing

There are also problems linked to our activities. In the first place, we stand on the edge of the Act on the Bar (no. 85/1996 Coll.). Article 2 of the act says that nobody else aside, from a solicitor, is entitled to give "legal service". According to published expert opinion[93], legal service means "represent a client in a court and in front of other authorities, defend in criminal matters, give legal advice, draw up deeds, compile legal analysis and other forms of legal aid (…)". Since our services are limited and free of charge, we do not feel that our activities are in breach of this provision. The expert opinion supports our view: "(…) in case they are rendered systematically and for a payment only a solicitor who is a member of the Bar can render these services". Nevertheless, a special act concerning state guaranteed legal aid would make things more distinct.

There is also question of responsibility for our services. Although we are not paid, we can still be held responsible. Unfortunately, insurance cannot be provided for what we do. Paid solicitors have to be insured. The placing of a disclaimer on our web site and every written consultation would quite possibly discredit our name and, in any event, is not an absolute defense. However, there have been no complaints as yet, which encourages our continuance in the rendition of free legal aid.

Another problem is the fact that we give advice to anybody (provided it is within the frame mentioned above). That might create a situation where those who

92 Art. 4, paragraph 2, Administrative Code no. 500/2004 Coll.

93 ASPI legal system, internal no. 25720.

can provide some help with their own means are "taking the place" of those who really need it and cannot afford it as paid service. We do not have capacity nor authorization to examine our clients' assets.

The last, but not least, is the money. Firstly, it is not easy to raise funds to operate the Counseling Center. There is no direct financial support from the state, who is the guarantor of equal access to justice for everyone, for organizations rendering free legal aid. Further, in the event we decide to represent clients in court, we would have to find resources for court fees, etc., since many people neglect to bring cases to court because it is beyond their means.

Conclusion

Although there is no compact legislation referring to rendition of free legal aid in the Czech Republic, there are organizations offering counseling services, Environmental Law Service being one of them. These organizations originated as a product within a developed civil society, to fill a grey area. Referring to their large number, we can assume that special legislation is not essential for their existence. Still, as I mentioned above, many things like financing (or the legal framework itself) would be easier and more apparent, provided a special legislation governing this subject.